RECENT DEVELOPMENTS CONCERNING TRIBUNALS IN AUSTRALIA

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The primary problem in attempting a resumé of recent developments concerning tribunals in Australia is one of classification and proliferation. What constitutes a "tribunal" is a much debated and fuzzy conceptual issue.[1] Even if one settles on an acceptable definition, the problem remains of the vast variety of bodies throughout Australia that would require survey. Although this paper addresses some recent legislative proposals concerning particular tribunals, both at State and Commonwealth levels, it concentrates on conceptual developments about certain kinds of tribunals. It is concerned with the underlying pressures and intentions that are driving such proposals. It also takes into account the legal environment, namely specific judicial and executive decisions, which are shaping them.

The starting point for this analysis is the pronouncement by the High Court in *Craig v South Australia*.[2] In addressing the issue of whether the prerogative writ of *certiorari* ran to correct error by the District Court of that State, the High Court stated:

> In considering what constitutes "jurisdictional error", it is necessary to distinguish between, on the one hand, the inferior courts which are amenable to certiorari and, on the other, those other tribunals exercising governmental powers which are also amenable to the writ. Putting to one side some anomalous exceptions, the inferior courts of this country are constituted by persons with either formal legal qualifications or practical legal training. They exercise jurisdiction as part of a hierarchical legal system entrusted with the administration of justice under the Commonwealth and State constitutions. In contrast, the tribunals other than courts which are amenable to certiorari are commonly constituted, wholly or partly, by persons without formal legal qualifications or legal training. While normally subject to administrative review procedures and prima facie bound to observe the requirements of procedural fairness, they are not part of the ordinary hierarchical judicial structure. In what follows, the anomalous courts or tribunals which fall outside the above broad descriptions can be ignored.[3]

The statement usefully captures the distinctiveness of the two major agencies of adjudicative review in Australia, courts and tribunals. It identifies the polar extremes of the spectrum between them in terms, firstly, of whether or not they are administered by judges or legal professionals, and secondly, whether they are located in a court hierarchy.

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1 R Handley, "Research Note: Collecting Information about Tribunals" (1995) 6 *AIAL Forum* 37 at 38.

2 (1995) 184 CLR 163.

3 Ibid at 176-177.

The point about this statement is not that the Court regards tribunals as children of some lesser divinity. It is rather that the Court has pointed to certain defining characteristics which distinguish one kind of tribunal from another. Some prominence is given to the kind of tribunal that we expect to operate with greater sensitivity to legality and the requirements of procedural fairness, as against tribunals that are more functionally and subject-matter oriented.[4] This distinction can inform a theoretical analysis of current proposals regarding reform. Where do particular tribunals fit in the spectrum from quasi-curial institutions to functionally oriented lay or professional boards? What implications flow from the way a tribunal is constituted or the purpose or task for which it is created?

INTRODUCTION

The state of play: general review tribunals

The first part of this paper looks at recent proposals to make review bodies with large-scale jurisdiction available both at the Commonwealth and State level. In that regard the following may be noted. Firstly, at the Commonwealth level, the publication last year by the Administrative Review Council (ARC) of its report *Better Decisions: review of Commonwealth Merits Review Tribunals*[5] foreshadows an advance beyond the Commonwealth's existing review agencies, the Administrative Appeals Tribunal (AAT) and others such as the Immigration Review Tribunal (IRT), towards a single super tribunal, the Administrative Review Tribunal.

At the State level the New South Wales Government has indicated that it is considering establishing an Administrative Appeals Tribunal. Announced in April 1996 by the Attorney-General Jeff Shaw QC,[6] there has not as yet been any clear statement as to what its constitution will be and what matters will fall within its jurisdiction. On the other hand, in Western Australia, after a notable lack of action on earlier proposals for reform,[7] including a call for the establishment of a State Administrative Appeals Tribunal by the Royal Commission on Government Activities, the Commission on Government (COG)[8] has now, in its Fourth Report, produced a blue-print for a Western Australian Administrative Review Tribunal. The New South Wales and Western Australian initiatives, if implemented, would mark a spreading acceptance of general review tribunals throughout the States and Territories, joining the Administrative Appeals Tribunals in Victoria and the Australian Capital Territory.

However, prospects for the early establishment in Queensland of a Queensland Independent Commission for Administrative Review (QICAR), originally proposed by

4 C Finn, Case Note "Jurisdictional Error: *Craig v South Australia*" (1996) 3 *A J Admin L* 177 at 179-80. See also J McMillan, below at 374-377.

5 Report No 39, 1995.

6 Address to Australian Institute of Administrative Law (AIAL) Forum, Sydney, 11 April 1996.

7 These are discussed in R D Nicholson, "Judicial and Administrative Review in Western Australia: Blueprints for Development" in S Argument (ed), *Administrative Law: Are the States Overtaking the Commonwealth?* (1996) at 69.

8 Established pursuant to the Commission on Government Act 1994 (WA).

that State's Electoral and Administrative Review Commission (EARC),[9] seem to have receded as there appears to be no current action to implement the proposal. Similarly, moves to set up an administrative review body in the Northern Territory appear to have stalled. In Tasmania, though the Labor Opposition has proposed the adoption of an AAT, it seems more likely the Government favours administrative review through the Magistrates' Court system along the South Australian lines discussed below.

Speculatively, in about three years, the landscape may well be as follows. There could be an even more all-embracing and unified system of Commonwealth review. Presumably the existing AATs in Victoria[10] and the Australian Capital Territory, with their long track records, will have been consolidated. New South Wales and Western Australia may have joined the fold with general review tribunals, with the Northern Territory and (perhaps) Queensland as distant possibilities. There would appear, however, to be no initiative along these lines likely to bear early fruit in Tasmania. On the other hand, there are innovative movements of another kind being pursued in South Australia and mooted in Western Australia.

Against the tide

South Australia has, since 1994, made provision for an Administrative and Disciplinary Division of its District Court. By s 8(3) of the District Court Act 1991 (SA),[11] the Court may exercise in that division any jurisdiction conferred on it by statute. At this stage, Acts conferring such a jurisdiction may provide that the Court be constituted by a magistrate, or that it may sit with assessors.[12] At this time the Court has appeal jurisdiction over a range of matters as diverse as discipline of conveyancers under the Conveyancers Act 1994 (SA), destruction orders under the Dog and Cat Management Act 1995 (SA) and appeals from the Guardianship Board under the Guardianship Act 1993 (SA). A major focus at this stage appears to be disciplinary appeals affecting various groups of occupational agents (land agents and valuers, plumbers, second-hand vehicle dealers and investigation agents). The Court's Administrative Appeals Rules[13] contemplate appeals in a number of additional matters such as accreditation under the Meat Hygiene Act 1994 (SA), the Local Government Act 1934 (SA), the Residential Tenancies Act 1978 (SA) and, importantly, the Freedom of Information Act 1991 (SA). Under s 52 of the District Court Act 1991 (SA), the Court is not bound in such matters by the rules of evidence and is required to act according to equity and the substantial merits of the case without regard to technicalities and legal forms. What, therefore, emerges is review within the traditional court setting but modified to a degree by the addition of assessors and the relaxation of formalities. As yet, the Court has had little chance to establish a track record.

In Western Australia an approach which differs from that proposed by the COG has been put forward in the *Thirty-Sixth Report of the Legislative Council Committee on Government Agencies*, published in April 1994. This envisages a system linking both law-making review and administrative review, exercised through the judicial agency of

9 Discussed by M Wilson, QC, "Review of Administrative Decisions in Queensland", in S Argument, above n 7 at 37. The recommendations of the EARC were modified in accordance with recommendations of a Queensland Parliamentary Committee.

10 Assuming there is no move in the meantime to relocate the tribunal in a court.

11 Amended by Act No 9 of 1994, Schedule 3.

12 District Court Act 1991 (SA), s 20(1) and (2).

13 Gazetted on 7 September 1995.

the District Court, with a supplementation of independent agency review officers. A draft Bill annexed to the Report contemplates that proceedings may be brought against a state instrumentality to ascertain or enforce a person's rights. Those proceedings would be heard by a "decider" appointed by the Governor, or a review committee of deciders.[14] Though barely elaborated in the Report, it would appear that the function of a decider would be akin to an administrative law judge (originally called a "hearing examiner")[15] in the United States system of agency review, that is, an independent adjudicator who can investigate grievances and make remedial directives. This system, if adopted, would run counter to both the court-centred and the tribunal model of administrative review.

PROPOSALS CONCERNING FURTHER GENERAL REVIEW BODIES

Better decisions

Because it advocates the most advanced and sophisticated system of administrative review to date, the ARC report, *Better Decisions*,[16] has over-arching significance not only for the Commonwealth Government but also for those States which have, or are about to embrace, an administrative appeals or review system.

At the outset, the Report makes clear that it is based on the assumption that review tribunals are different from courts.[17] Commonwealth review tribunals should have the statutory objective of providing review that is fair, just, economical, informal and quick.[18] The overall goal of the merits review system should be to ensure that all administrative decisions are correct and preferable.[19] Other recommendations include enhancing the accessibility to applicants of review tribunals and their processes, emphasising the need for simplicity of application,[20] enabling applicants to appear on their own behalf whenever possible, providing ready access to government-held information relevant to the decision,[21] promoting the resolution of cases through alternative dispute resolution,[22] and ensuring that reasons for decisions are capable of being easily understood by the people for whom they are prepared.[23]

A further set of concerns revolve around the way in which the tribunals may be constituted and provision made for their maintenance. To safeguard the independence of review tribunals from government agencies, decisions should be free from undue influence while at the same time guaranteeing that members have the requisite expertise to attract credibility to their decisions. Recommendations are made that

14 *Thirty-Sixth Report of the Legislative Council Committee on Government Agencies*, Appendix at 9 and 13.

15 B Schwartz, "American Administrative Law: An Overview" [1996] *Admin Rev* 14 at 19.

16 Administrative Review Council (ARC), *Better Decisions: review of Commonwealth Merits Review Tribunals* (Report No 39, 1995).

17 Ibid at vvi. This is a proposition questioned by R D Nicholson in "*Better Decisions*: Commonwealth Administrative Review at the Crossroads", paper presented at the conference *The AAT - Twenty Years Forward*, Canberra, 1-2 July 1996.

18 ARC, above n 16, recommendation 3.

19 Ibid, recommendation 55.

20 Ibid.

21 Ibid, recommendation 10.

22 Ibid, recommendation 20.

23 Ibid, recommendation 28.

tribunals should be comprised of members with a wide range of skills and experience,[24] that prospective members should be assessed against publicly-available selection criteria based on the tribunal's functions and objectives,[25] and selection of members should be from among a pool of people considered to be suitable for appointment.[26]

Better Decisions also addresses the *normative* function of Commonwealth tribunals, particularly as they inter-react with government policy. It accepts the role of tribunals as commentators on such policy, indicating that tribunal decisions can improve the quality of future agency decision-making. The focus then shifts to the corresponding reaction of government agencies to tribunal decisions. The ARC recommends that agencies acknowledge the normative benefits to be derived from review tribunal decisions[27] and that they develop structures and processes to project the maximum benefit from decisions with potentially normative effect,[28] including, where appropriate, speedy amendment of policies and guidelines, on the one hand, or seeking further review of, or appeal against, the decision on the other.[29]

More fundamentally, the ARC in *Better Decisions* suggests the merits review system can be improved by restructuring the existing tribunal system to create "a whole that is greater than the sum of its constituent parts".[30] Thus, in Chapter 8, the Council recommends the establishment of a new tribunal, the Administrative Review Tribunal (ART) to replace the AAT and other Commonwealth tribunals such as the Social Security Appeals Tribunal (SSAT), Veterans' Review Board (VRB), the Immigration Review Tribunal (IRT), the Refugee Review Tribunal (RRT) and the Security Appeals Tribunal. Combining these into a single body should give potential applicants fair, quick and efficient access to review by a simpler and more widely known process.

A key feature of the system would be that the ART would normally be expected to make the "correct and preferable decision *at the first opportunity*".[31] Although there would be provision for a second level of external merits review by way of appeal to Review Panels specially constituted for the appropriate matter, no guaranteed access to that second level should be provided.[32] The requirement for what is effectively leave to proceed to that second level would avoid unwarranted duplication of external merits review. By having in place the Review Panel process, there would be a means provided to correct clear errors made at the first level as well as ensuring a close scrutiny of decisions that in principle have wide application, thus discharging the normative function. The ART would be an umbrella merits review body which would integrate existing specialist review bodies, internalising their separate jurisdictions as divisions within the mega-tribunal, yet retaining the potential for a higher degree of review when justified.

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24 Ibid, recommendation 32.
25 Ibid, recommendation 33.
26 Ibid, recommendations 35 and 36.
27 Ibid, recommendation 71.
28 Ibid, recommendation 72.
29 Ibid, recommendation 73.
30 ARC Discussion Paper, *Review of Commonwealth Merits Review Tribunals* (1994) at 5.
31 Ibid (emphasis added).
32 ARC, above n 16, recommendation 97.

Already there has been considerable discussion of the merits of the proposal. Professor Disney[33] has recognised the virtues of the *Better Decisions* Report, but also has made some telling criticisms of the proposal. Consistent with the ARC's proposition that tribunals may differ in their processes from those of a traditional courts, Disney notes that it is envisaged that tribunals may undertake quite active investigation on their own motion rather than simply relying on the materials and arguments put forward by the parties, even to the extent of proceeding without either party being present. In this way, *Better Decisions* opens up a debate that is also currently the subject of investigation and proposal by the Australian Law Reform Commission.[34] Disney sees, however, a possible problem if the Commonwealth ART were to adopt active investigation techniques, since it would need to give weight to the role that public rules and guidelines play in the Commonwealth decision-making process.

While he acknowledges the emphasis on alternative dispute resolution by way of mediation, Disney regards the Report as superficial in not giving recognition to the problems posed by the mediation process. These arise, firstly, from the point of view of the applicant whose position (at least without assistance) would be unequal to that of the government respondent, and secondly, from the danger of mediation producing an immediate outcome that does not resolve important issues of general law or policy.[35]

Another matter Disney notes is whether there should be cross-reference and comment between the members involved in a hearing with other tribunal members, perhaps with appropriate expertise, who are not. He sees this as an opportunity to stimulate creative discussion and experiment.[36] This aspect of collegiality is one which, in my opinion, warrants more discussion. The orthodox tribunal position to date before the Commonwealth AAT has been that when novel and important issues are at stake the pace should be set by the President, or at least a judicial member,[37] rather than through a collegiate process. Arguably collegiate inter-reaction is a way of discharging the normative functions of a super tribunal in appropriate cases, since the results of the process could be fed into the regular communication and explanation which occurs between the tribunal and senior officials in government departments and agencies. In this regard further remarks are made below concerning the guidance provided by the French *Conseil d'Etat*.

Disney commends the ARC for not accepting the proposal that Commonwealth tribunals should be able to prohibit forms of representation by lawyers notwithstanding that lawyers themselves sometimes cause hostility by not appreciating the differences between advocacy before traditional courts and tribunals.[38]

He is correct, in my view, in drawing attention to the potential for erosion of the tribunal's credibility if its decision-making is predominantly made by one, or two,

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33 J Disney, "The ARC's *Better Decisions* Report: For Better or for Worse, For Richer or for Poorer", paper presented at the conference *The AAT - Twenty Years Forward* Canberra, 1-2 July 1996.

34 Australian Law Reform Commission, *Review of the Adversarial System of Litigation*, Terms of Reference, 29 November 1995.

35 J Disney, above n 33 at 5 and 6.

36 Ibid at 7.

37 Deputy President R K Todd in *Re Ganchov and Comcare* (1990) 19 ALD 541 at 542, para 41.

38 J Disney, above n 33 at 9.

rather than three, tribunal members, particularly if only a legally qualified member constitutes the tribunal. Though the text of *Better Decisions* emphasises the use of multi-member tribunals, Disney sees the recommendations in the Report as insufficiently projecting its stance. This leaves open the possibility, arguably much in evidence during the last year, that due to financial and political pressures, single, usually legal, member tribunals will be the norm, thus emphasising the legalism which has been the subject of AAT criticism in the past.[39] Arguably, one of the glories of the Commonwealth system is that it gives scope for significant input in the shaping of decisions by the non-legal members of tribunals. Unlike assessors attached to a court who tend to defer to the presiding judge, AAT and other Commonwealth tribunal members who sit on a full three-person tribunal generally participate fully in the proceedings and the decision. Where the goal is better public administration and more rational decision-making, such inputs are of considerable significance. Recent budgetary constraints thus raise the prospect that economic considerations may limit future development of the Commonwealth tribunal system and, if this occurred, it would represent a curtailing of what is the mode of operation which should be its ideal.

I also believe there is force in Disney's reluctance to endorse the wholesale implementation of the restructuring proposed by *Better Decisions*. The proposal is for the uniting of the ART, IRT, RRT, SSAT and VRB into a new tribunal which would be reconstituted in seven divisions (welfare rights, veterans' payments, migration, commercial and major taxation, small taxation claims, security, and general) with provision for referral or appeal from these separate divisions, with the leave of the ART President, to a Review Panel constituted by the President in particular cases. Disney's concerns are couched in the following questions. Could the potential benefits of the Review Panel system not be obtained by establishing analogous appeals from the specialist tribunals to review panels within the existing AAT?[40] Will setting up review panels within a super tribunal really attract a greater degree of authority to such decisions than exists under the present AAT system? A reason Disney gives for retaining the existing specialist tribunal system is that the maintenance of three member panels in bodies like the SSAT is more likely if the specialist tribunals are separate from a super tribunal than if they were subsumed within it, when the financial and political pressures for rationalisation and economy might predominate.[41]

Another issue of prime importance, not just for the Commonwealth system but for all tribunals, is the extent to which legal expertise on tribunals should be seen to be desirable. Disney questions whether the ARC has given sufficient recognition to this matter.[42] In summary, his concerns are that the loss of separate identity by the specialist tribunals may produce a more formal, legalistic and inaccessible Commonwealth tribunal system, which would be quite contrary to the overall intentions of the ARC.[43] This could lead to greater expense, through perceived need to

39 For example, Walter de Maria, "The Administrative Appeals Tribunal in review: on remaining seated during the standing ovation" in J McMillan (ed), *Administrative Law: Does the Public Benefit?* (1992) 96.

40 J Disney, above n 33 at 19.

41 Ibid at 21.

42 Ibid.

43 Ibid at 23.

obtain legal representation, as well as delay, for example, in the prompt handling of social security appeals as at present.[44]

Another matter not specifically taken up by the ARC, but which featured in the earlier CROSROMD[45] report on immigration tribunals, is the suggestion that there should be regular six-monthly meetings between the tribunal head, relevant agency heads, and the President of the ARC to sort out major problems arising from tribunal decisions. Such a device would go some way to satisfying the need for closer inter-relation between government and administrative tribunals without compromising the independence of the tribunal.

These criticisms squarely raise the issue of whether the Commonwealth's evolutionary momentum towards a single, unified and general review tribunal should be resisted and attention given instead to improving the existing model by enhancing the interaction and co-operation between the present tribunals, perhaps with the amalgamation of tribunals discharging a similar function. This rationalisation would include, for example, the merger of the two immigration and refugee tribunals, and possibly the incorporation of the VRB into the SSAT, just as the functions of the Student Assistance Review Tribunal were earlier taken over by the SSAT.

Overall, the analysis by the ARC in *Better Decisions*, supplemented by the insights of commentators such as Professor Disney,[46] provides the most comprehensive exploration to date of the conceptual and practical aspects of tribunal review. Its recommendations not only assist in articulating the different functions performed by tribunals, as against courts, in enhancing government accountability in a representative democracy,[47] but they also give proper emphasis to the objective of ensuring fairness and justice for individuals affected by governmental decisions. Thus *Better Decisions*, although it deals with a more sophisticated Commonwealth system, also provides strong guidance and standards by which the performance of existing State tribunals, and proposals for the establishment of general tribunals in other States, can be assessed.

The COG Report: An ART for Western Australia

The second major recent report recommending the establishment of a general review tribunal is that of the Commission on Government in Western Australia. The COG has proposed the establishment of an Administrative Review Tribunal (ART) as a single tribunal consisting of a general division and two specialist divisions (State tax, and environment and planning control), instead of the "plethora of specialist tribunals that currently exist in Western Australia".[48] It sees as important the obtaining of the correct and preferable decision at the first external review and, therefore, does not propose a

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44 Ibid at 24.

45 Committee for Review of Migration Decisions, *Non-Adversarial Review of Migration Decisions* (1992).

46 R D Nicholson, above n 17, points out that courts are becoming increasingly less formal and more flexible in their procedures, particularly where unrepresented parties are involved, so that the marked distinctions between courts and tribunals is substantially diminished. Whether the independence of courts may be compromised by engaging in administrative review remains, however, a reason for maintaining the distinction.

47 P Finn, "A Sovereign People, A Public Trust" in P Finn (ed), *Essays on Law and Governmen* (1995) 1 at 9-14.

48 Commission on Government (COG), (Report No 4, 1995) at para 7.1.4.

second tier of merits review. Potentially significant decisions which involve either matters of general principle or which could lead to improved future decision-making are to be considered by the President of the proposed ART and any two members of the divisions sitting as the full Tribunal.

The COG rejects the argument favouring merits review within the existing court system or for a new and separate administrative court. It sees the courts as inappropriate because of the nature of the decisions under review, the possible confusion of merits review with review for error of law, and because of the inappropriateness of a court culture that is formal and adversarial. The proposed ART would be seen as part of the executive, though its members would be independent. It would operate as a tribunal separate from the court hierarchy in a way that reinforces the principle of the separation of powers while endorsing the importance of administrative justice and the necessity to achieve the correct and preferable decision.[49] As such, the ART would enhance the accountability of the executive in a democratic context and thereby increase the confidence of the people in the system of government. Besides providing in this way for external review, the COG also proposes that effective internal review processes be implemented.

To ensure that the ART would operate fairly, informally, flexibly, cheaply and quickly, the COG proposes that it should have control of its own procedures and participate "actively in the decision-making process".[50] As with the Commonwealth AAT, determinations of the ART would have the same effect as a decision of the original decision-maker. The tribunal would not be bound by the rules of evidence, it would inform itself in such manner as it sees fit,[51] and it would have a discretion to allow legal representation at any stage of its proceedings. All parties to the review would bear their own costs save for a discretion in the tribunal to award costs where an application is frivolous or vexatious.

Regarding standing, any person whose interests are affected by an administrative decision would be entitled to apply to the proposed ART for review.[52] Its jurisdiction would encompass every public sector administrative decision affecting an individual with the exception of decisions involving the commencement of civil or criminal proceedings, personnel disputes in the public sector, industrial disputes, financial management of the public sector, and any other matters that Parliament may determine.[53] Existing tribunals reviewing public sector decisions affecting individuals would be abolished as their functions become incorporated into the proposed tribunal. Where questions of legal interpretation arise during review, an appeal to the Supreme Court on a question of law would lie from the decisions of the tribunal or the tribunal itself may refer a question of law to the Supreme Court for determination.[54]

Importantly, the COG envisages that the Commissioner for Public Sector Standards would act as a bridge between the ART and the rest of the sector when assessing the decisions of the tribunal and their importance for decision-making. This role is to assist

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49 Ibid at para 7.4.4. Concerning the separation of powers aspect, see Sir R Wilson, Address to Legal Aid Conference, Perth, 16 August 1996.

50 COG, above n 48 at para 7.2.1.4.

51 Ibid at para 7.2.1.5.3 at 162.

52 Ibid at para 6.2.2.5.

53 Ibid at recommendation 209. The wisdom of this recommendation is questioned below.

54 Ibid at recommendation 208.

in the flow-on across government of principles articulated by the ART.[55] So far as policy is concerned, the COG recommends that the ART should take relevant policy statements into account when reviewing a decision.[56]

The COG's recommendations notably diverge from the pattern already established in Victoria, the Australian Capital Territory and at the Commonwealth in that:

- the scope is diminished for legal input, either through the membership of, or legal representation before, the tribunal;
- the method of enquiry and fact-finding is potentially more inquisitorial;
- communication through the public officer having oversight of the public sector is the means proposed for ensuring the ART's decisions are understood and implemented by the executive arm of government;
- the head of the ART need not be a judge;
- there is no provision for two-tiered review;
- the discretion to exclude legal representation is conferred generally in relation to administrative decisions affecting persons;
- the use of multi-member tribunals would appear to be exceptional.

In most other respects, however, the recommendations largely adopt the Commonwealth model. Regrettably, however, though the Report was available, the COG does not appear to have reviewed its proposals in the light of the comprehensive analysis offered by *Better Decisions*.

The main criticism of the COG proposals is that the conferral of such broad jurisdiction at the outset over an unspecified range of administrative decisions poses an almost impossible task for the ART. The proposals also fail to address adequately whether there may be special reasons for retaining tribunals such as those involved in town planning or equal opportunity adjudication. These deficiencies have the potential to cause problems not only in terms of the volume of work for the tribunal but also because it is difficult to determine whether particular kinds of decisions qualify. Are university exam results, for example, covered? Are interim or trivial decisions within jurisdiction? Will the possibility of an award of vexatious costs be an effective deterrent? In matters like these the COG seems not to have given sufficient thought to the realistic implementation of its proposed scheme.

CHILDREN OF *BRANDY*

Effect of *Brandy* on certain Commonwealth tribunals

Another major influence in restructuring Commonwealth tribunals and quasi-tribunals has been the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission* (HREOC).[57] The effect of *Brandy* is that Chapter III of the Commonwealth

55 Ibid at 6.1.5.

56 Ibid at para 6.2.2.5. Regarding establishing the ART as the sole tribunal for Western Australia and abolishing all others, see paragraph 6.2.3.5. Regarding the kinds of decisions to be reviewed, see page 142 and para 6.3.5.

57 (1995) 183 CLR 245. As to the limitation imposed by Chapter III of the Constitution on use of federal judges for inquiries, see also *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 70 ALJR 743.

Constitution prevents the Commonwealth Parliament from providing that a decision of a Commonwealth tribunal can be made judicially enforceable by the simple device of registering the decision with the Federal Court and giving it legal force provided the respondent has not sought review of the decision within a specified time. Post-*Brandy*, the enforcement of HREOC decisions requires the fresh scrutiny of an administrative finding and the considered endorsement by a judicial officer authorised under Chapter III to exercise the judicial power of the Commonwealth.

The most immediate impact of the decision has been with respect to the HREOC itself. The device adopted in the pre-*Brandy* system of lodging a HREOC determination with the Federal Court has been abandoned. Currently the prior and arguably unsatisfactory legal provisions for enforcement have been resurrected. Recent litigation before the Federal Court has demonstrated the weakness of the HREOC in seeking to make an interim determination where a respondent is opposed to a negotiated settlement.[58] However, for reasons mentioned below, the current scheme is likely to be only a temporary expedient.

A second major consequence of the *Brandy* decision is the likely reform of operations of the National Native Title Tribunal (NNTT). A Bill was introduced to the Federal Parliament by the Keating Government which was aimed at reconstituting the activities of the tribunal to avoid some of the problems that decision posed to the NNTT. Amendments have since been drafted by the Coalition Government (the Minchin proposals) that would have the same effect in overcoming the *Brandy* issue. Though there were distinctions between the kind of determinations made by the HREOC which were the subject of the decision in *Brandy* and those of the NNTT, the original procedure for the registration with the Federal Court of orders of the NNTT, reached by agreement as to the existence or otherwise of native title, was similar to registration of determinations made by the HREOC. Though *Brandy* did not address determinations made by consent or without opposition, logically they could be regarded as entailing an exercise by the tribunal of the judicial power of the Commonwealth and may, therefore, be of doubtful validity.[59]

By way of precaution the NNTT has adopted a procedure which administratively would appear to avoid infringing the separation of powers principle highlighted by *Brandy*. The administrative measures are confined to proceedings under s 61 of the Native Title Act 1994 (Cth), which result in agreed or unopposed determinations concerning native title and compensation. In the normal course of events such determinations could come under ss 71 or 73 of the Act, which relate to agreements reached "as to the terms of a determination by the tribunal". In the event of disagreement, an application must be referred to the Court under s 74. Under the administrative strategy an agreement that is reached may be framed as an agreement "as to the terms of a determination *by the Court*". While the terms of the agreement may be consensual, the tribunal itself will not make a determination and the Registrar would be required to refer the application to the Court under s 74. Upon an application

58 *Michael v The State Housing Commission of WA*, (Federal Court of Australia, Carr J, 19 July 1996, unreported).

59 *Discussion Paper on Proposed Changes to Native Title Act 1993* by R S French, President of NNTT, 14 March 1995 at 3-4 (NNTT Discussion Paper). See also his paper "Native Title - Promise, Pain and Progress" at the conference *Doing Business with Aboriginal Communities*, Darwin, 27-29 February 1996 at 7-9.

being lodged in that Court, the parties can file a consent order for determination in accordance with the agreement and, under s 87, a Federal Court judge may make an order accordingly if satisfied that the order is within the power of the Court and if it appears appropriate to do so.[60]

However, independently of those adjustments necessary to accommodate *Brandy*, there has been a continuing call for reform of the operations of the tribunal, not least of all by its President, Justice French. In his 1995 Discussion Paper, he has drawn attention to functional reasons for reforming the operations of that tribunal.[61] The fact that judges are appointed to the tribunal has led some to the belief that it is a kind of court, capable of giving determinative decisions about the existence of native title. This has led in turn to confusion about the mediation role of the tribunal, particularly if judges or senior lawyers are involved. Many of the procedures of the tribunal have given rise to litigation about its powers. This has been particularly true in regard to whether the tribunal is obliged to receive applications, however poorly formulated or insubstantial they may be. The effect of the High Court's decision in *Re North Ganalanja Corporation; Ex parte Queensland*[62] has meant that the tribunal has little scope to act as a filter deflecting claims patently misconceived or lacking merit, especially where individuals unrelated to any particular aboriginal group or representative body are applicants.

To resolve the conflict of functions, the President has proposed that the tribunal be reconstituted as a mediation service and that its inquiry functions in respect of particular determinations be transferred to the Federal Court.[63] The result would be that while the mediation service could be involved in assisting parties to formulate an application, the application itself would be lodged in the Federal Court but would then be referred back to the tribunal to attend to administrative matters relating to notification and identification of all relevant parties. At that stage the service could refer any unopposed applications back to the Court to decide whether the application was supported by a *prima facie* case and was just and equitable in the circumstances. The inquiry function would be entrusted to judicial registrars of the Federal Court. The NNTT would retain its mediation role to assist the reaching of agreements, where possible. If an agreement is reached, the matter would return to the Federal Court for the making of any orders. If agreement is not reached, the matter would also be referred back to the Court to continue as a contested proceeding. The tribunal's title would be changed to that of a mediation service to mark the change of emphasis in its role.

The advantage of clearly delineating the role of the Federal Court and the tribunal would be that the latter would retain its separate identity while providing assistance, liaison and mediation. To avoid problems of perception it would be appropriate that no serving judges be involved in its on-going work. Overall this should produce a situation where litigation and appeals to the Federal Court would be avoided while the core function of the tribunal in facilitating the reaching of agreement, where possible through negotiations, would remain essentially unchanged. In summary, the role of the tribunal as mediator would be made more effective and its process simplified, while a degree of flexibility was retained.

60 NNTT Discussion Paper, above n 59, Appendix 4.
61 Ibid, Appendix 4 at 5-6.
62 (1996) 70 ALJR 344.
63 NNTT Discussion Paper, above n 59 at 10-15.

The Parliamentary Joint Committee on Native Title, in its Fourth Feport,[64] has largely accepted the wisdom of the President's arguments. In its second recommendation it proposes that:

> consistent with Justice French's proposals in March 1995, the National Native Title Tribunal no longer have determinative functions in relation to the acceptance of applications, decisions as to who can or cannot be a party, and decisions to make or not make determinations; that the Act be amended accordingly.[65]

Arguably the reforms envisaged are based on rational, practical and functional concerns rather than being merely the legacy of constitutional distinctions acknowledged in *Brandy*. They also may provide a model for solving some of the problems faced by other Commonwealth tribunals.[66]

Broader basis for reform

A more comprehensive rationale for reform of decision-making bodies like the HREOC and NNTT undergirds a proposal recently enunciated by the Federal Attorney-General, the Honourable Daryl Williams. The proposal would more clearly delimit the function of federal courts and federal tribunals. In a press statement,[67] the Attorney-General outlined a blueprint for reform which, in the case of the HREOC, would see its determinative functions discharged within a Human Rights Division of the Federal Court, with judicial registrars performing many of the hearing functions now undertaken by that Commission, but always subject to judicial control. This would be paralleled by a similar regime dealing with native title matters.

However, as Sir Ronald Wilson, President of the HREOC, has recently warned,[68] transference of these functions may have the negative effect that, where less advantaged persons are concerned, the cost and forbidding nature of judicial proceedings may deter many worthwhile applications. The rationale for providing tribunals and hearing bodies which are quick, simple, inexpensive and user-friendly, would therefore be compromised.

Delimiting the boundaries between state judicial and executive decisions

In similar mode, State proposals such as those of the EARC and COG, though not restricted by the same kind of constitutional considerations as the Commonwealth,[69] have nevertheless been enunciated in the light of the practical wisdom that lies behind the demarcation of roles that is entailed in separation of powers. Conceptually the

64 Parliamentary Joint Committee on Native Title (Report No 4, July 1996).

65 Ibid at 25.

66 For an analysis of how the AAT is structured to avoid Chapter III problems, see A Hall, "The Judicial Power, The Duality of Functions and the Administrative Appeals Tribunal" (1994) 22 *F L Rev* 13.

67 *Australian Financial Review*, 2 August 1996.

68 Address to Legal Aid Conference, Perth, 16 August 1996.

69 The States are not subject to such a doctrine: *JD & WG Nicholas v Western Australia* [1972] WAR 168; *Gilbertson v South Australia* (1976) 15 SASR 66 at 85; affd [1978] AC 772 at 783; (1977) 14 ALR 429; *Grace Bible Church v Reedman* (1984) 54 ALR 571; *Collingwood v Victoria (No 2)* [1994] 1 VR 652. Arguments about a more confined core of necessary judicial independence underpinning the State Supreme Courts have been advanced and rejected: *S (A Child) v The Queen* (1995) 12 WAR 405. See also *Kable v Director of Public Prosecutions* (1996) 138 ALR 577.

debate raises the question of where tribunals reviewing government decisions lie on the constitutional spectrum. Reports like that of the COG have emphasised that tribunals find their place within the executive part of government. What drives this debate are concerns about the independence of tribunals and the interrelationship between them and the government itself. These are addressed below.[70]

OTHER TRIBUNALS

The review bodies considered earlier, namely, existing or proposed general tribunals or courts exercising administrative review, as well as special tribunals such as the NNTT and the HREOC, normally involve judges or legally qualified persons in a presiding capacity, even when they function in an informal, flexible and simple way. The result is that they operate subject to a degree of constraint and control induced by legal sensibilities. This may be for good or ill and is itself a matter of debate.

What the analysis of these bodies fails to do, however, is to take into account and give credit for the many administrative tribunals, in which the involvement of legal personnel is less evident or non-existent. These tribunals include bodies at the other end of the *Craig* spectrum such as the IRT and the RRT at the Commonwealth level, and many more at the State level.[71] At the end of the twentieth century, is there a continuing role for them? Should the general trend noted earlier continue, namely, that increasingly they should be subsumed by more expert and general review bodies? Or should they be given distinct status and retained, perhaps with administrative appeals to more general tribunals? Are they sufficiently supervised by way of judicial review?

Of course the existence of many rights of appeal does not necessarily mean that those rights are exercised. Arguably, if rarely pursued and highly specialised, such appeals may well be relocated in a general appeal body. The Commonwealth AAT is an example of a tribunal which has been given review rights over numerous matters, but only in its major jurisdictions (social security, tax, veterans' affairs and compensation) is there substantial engagement of the tribunal. However, at the State level there continues to be a number of special tribunals and review boards that do have significant and well exercised jurisdictions. What justifications can be advanced for their retention?

This question can be posed in respect of three matters. In the first place, there are tribunals established with long political, social and cultural traditions dealing with discrete areas. In this category are equal opportunity and anti-discrimination tribunals, and town planning and environmental courts and tribunals. Natural inertia and client familiarity, if no greater justification, militate in favour of their continuance. A second category of tribunals and boards which might justify continuance are those which deal with particularly sensitive subjects that do not readily lend themselves to the formality of quasi-judicial proceedings. To what extent can, for instance, guardianship boards claim to mark out their own regime and process of review? Finally, there are instances of administrative appeal rights that are largely committed to peer professional review either for political or professional reasons, where the major constraints on decisions are by way of judicial review.

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70 See below at 341-342.

71 *Craig v South Australia* (1995) 184 CLR 163.

Dealing with the first category, it may be noted that the COG recommended that an environmental and planning jurisdiction be included as a division of the proposed ART (WA). This proposal is directly contrary to the recent passage in that State of the Planning Legislation Amendment Act 1996 (WA), which further entrenches the existing system of environment appeals in Western Australia.[72] The move underlines the difficulty in displacing well-entrenched tribunals. In respect of the second category, as Robert Smith has plausibly argued,[73] guardianship is one of those high volume areas where the nature of the persons affected is not appropriate to court proceedings; rather it calls for flexible investigative techniques and adjudication by boards with diverse specialties. Provided they are accountable through a tiered system of external merits review and provision is made to ensure that legal questions are finally determinable by a superior court (as they are in Victoria where merits review is available through the Victorian AAT, and legal review through the Supreme Court), criticisms made in the past about informality and lack of concern about legalities (arguably with scant justification) have little substance.

In similar vein, as Suzanne Tongue, Principal Member, has demonstrated,[74] the processes of the Immigration Review Tribunal can be seen as appropriately adapted to its high volume pressures and the difficulties of dealing with a clientele composed of persons with little familiarity of Australian legal process, compounded often by language difficulties. She makes a strong case for retaining a separate and distinctive approach, based on largely inquisitorial methods, unaided (or unobstructed) by legal representation. Not only does this warrant a departure from the adversarial methods of courts, it also suggests the maintenance of its identity separate from bodies like the Commonwealth AAT.[75] To accommodate the criticism that some second tier review is desirable for normative reasons in relation to determinations of major principle or legal interpretation, she points to the existing linkage under the Migration Act 1958 (Cth), which enables the Principal Member of the IRT to refer questions to a specially constituted hearing by the AAT (including the President of the latter and herself). This device implemented a CROSROMD recommendation in 1994. Use of such a mechanism offers an alternative to incorporating the IRT in an ART along the lines advocated in *Better Decisions*.[76] Both the IRT and the guardianship boards represent tribunals which are located towards the non-curial end of the *Craig*[77] spectrum and exemplify the classic case for maintaining a distinctness from the court system.

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72 A Gardner, "The Planning Legislation Amendment Bill 1994 (WA)" (1995) 12 *Environmental and Planning Law Jo* 10. There is a proposal that Commonwealth environmental decisions be reviewable by the AAT (ARC *Environmental Decisions and the Administrative Appeals Tribunal*, (Report No 36, 1994); see also N Pain, "Environmental Decision-Making Processes" in K Cole (ed), *Administrative Law and Public Administration—Form v Substance* (1996) 140 at 147). The writer of this present paper is of the view that the ARC's recommendations are based on a misunderstanding of the complex polycentric nature of environmental decision-making and should be read with caution.

73 R Smith, "Australian Guardianship and Financial Management Boards and Tribunals: Are They Fully Accountable in their Decision-Making?" (1995) *A J Admin L* 23.

74 "Administrative Review By Other Commonwealth Tribunals" — paper presented at the Conference, "*The AAT—Twenty Years Forward* Canberra, 1-2 July 1996.

75 Ibid at 4 and 6.

76 Ibid at 7-8.

77 *Craig v South Australia* (1995) 184 CLR 163.

At perhaps the farthest end of the *Craig* spectrum are cases where regulatory bodies are constituted without legal membership, largely consisting of professional peers. For the sake of brevity this paper will confine its observations to one small, but nevertheless illustrative, class that has attracted judicial scrutiny in recent times. These are regulatory review committees under the Health Insurance Act 1973 (Cth) (HI Act). These have included bodies such as the Pathology Services Advisory Committee,[78] the Medical Benefits Advisory Committee,[79] the Medical Services Committees of Inquiry,[80] the Specialist Recognition Advisory and Appeal Committees[81] and the Medicare Participation Review Committee.[82]

Karen Wheelwright has noted that a study of similar bodies has disclosed the non-adversial emphasis in their regulatory supervision. Most did not see themselves as enforcement agencies, but preferred to exercise their functions through consultation and persuasion.[83] Because of their professional culture, bodies such as these may have difficulty in both interpreting and applying the HI Act, and in meeting the expectations of natural justice.[84] The question that arises is whether their decisions are adequately supervised by judicial review. For the most part the Federal Court, when legally defective decisions are quashed under the Administrative Decisions (Judicial Review) Act 1977 (Cth), has made orders remitting the matter to the relevant committee in which the committee's own cultural standards are likely to prevail. It is arguable that external merits review in these instances is desirable through a two-tiered system, as indeed is the case with some other matters under the HI Act.[85]

DISCUSSION

In surveying recent proposals for administrative review tribunals across the *Craig* spectrum, three major issues emerge. These issues epitomise the apparent tension between courts and court-like review bodies, and the more informal tribunals. They are:

- the scope for legal input, either through the membership of, or legal representation before, the tribunal;
- the method of inquiry and fact-finding;
- the relationship between the tribunal and the executive arm or agency of government whose decisions it scrutinises.

78 Health Insurance Act 1973 (Cth) (HI Act), s 79B (added in 1986).
79 Hl Act (Cth), s 66.
80 Hl Act (Cth), s 80.
81 Hl Act (Cth), ss 3D and 62.
82 Hl Act (Cth), s 124E.
83 K Wheelwright, "Controlling Pathology Expenditure under Medicare — A Failure of Regulation" (1994) 22 *F L Rev* 92 at 108.
84 *Queensland Medical Laboratory v Blewett* (1984) ALR 615; *Jayasuria v Vocational Registration Appeal Committee* (1994) 34 ALD 183; *Tan v VRAC* (1996) 41 ALD; *Minister for Human Services and Health v Haddad* (1995) 137 ALR 391; *Re Haddad and Medicare Participation Committee* (1996) 42 ALD 18.
85 Review by the Commonwealth AAT is, in some instances, available under the Hl Act (Cth) s 124R.

Constitution of tribunals and representation

The tension here is between the claims for accessibility, simplicity of procedure, speed of decision-making and finality as against the need to ensure, in the context of the rule of law, the legality of government action and the requirements of procedural fairness. Both the ARC in *Better Decisions* and the COG in its Fourth Report were concerned about these goals. Where the Commonwealth is involved there is also the underlying constraint of Chapter III of the Constitution as interpreted by the High Court. This has required that the final determination of legal issues under Commonwealth laws be made by federal courts even when they involve disputes between non-government parties.

It is difficult to contemplate the absence of legal membership on higher level tribunals when important rights are at stake and the law is complex.[86] Legal representation may also be required where a decision may have normative effects or involve difficult evidentiary interpretative matters, even though representation might provide a substantial barrier to seeking review. But a case remains for a different composition of a tribunal and the discretionary exclusion of legal representation in high volume, predominantly factual, jurisdictions, provided further external review mechanisms are in place. In those cases, properly trained non-lawyers are quite capable of carrying out the functions of issue analysis and marshalling of facts.

To alleviate the inequality flowing from applicants not being legally represented, a proposal advanced in the original Kerr Committee Report might be re-considered. The proposal is to establish a statutory office of government counsel, an independent officer who could assist tribunals.[87] The suggestion has particular merit for areas like welfare housing at State level and social security claims at the Commonwealth, especially if legal aid and community legal centre representation becomes less accessible.

There appears to be resistance to adapting institutions from a foreign legal culture,[88] but something akin to the French office of *Commissaire du Gouvernment* might well be contemplated. The *Commissaire* is a permanent, government-appointed officer attached to the *Conseil d'Etat* or administrative tribunals, usually for a period of years, whose function is to summarise the legal issues and advise the body of the better view. The *Commissaire*, despite appearance to the contrary, is independent and the views of these officials are given authoritative weight by the relevant tribunals.[89]

In like vein as an inexpensive first-tier review or adjunct to internal review there could well be merit in investigating the administrative law adjudicator system advocated in the Thirty-Sixth Report of the Government Agencies Parliamentary

86 M D Kirby, "Administrative Review Twenty Years Forward", paper presented at the conference, *The AAT — Twenty Years Forward* Canberra, 1-2 July 1996, citing R Todd, "The Structure of the Commonwealth Merits Review Tribunal System" (1995) 7 *AIAL Forum* 33, 35. See also R D Nicholson, above n 17 at 12-17.

87 *Commonwealth Administrative Review Committee Report* (Parliamentary Paper No 144, 1971), Chapter 15.

88 D Rowland "Getting the process right. Should it be adversarial, inquisitorial or something else? Lessons and foresights from the procedure of the *Conseil d' Etat* in France", paper given at *Administrative Law Forum 1996: Setting the Pace or Being Left Behind?* Sydney, 11-12 April 1996 at 4-10.

89 L N Brown and J Bell, *French Administrative Law* (4th ed, 1993) at 101-3; J Burchett, "Administrative Law — The French Comparison" (1995) 69 *ALJ* 977 at 989.

Committee.[90] That person could function something like an Authorised Review Officer in the Department of Social Security, but be located outside the Department. The main barrier to adopting any solution along these lines is cost.

Methods of inquiry

Allied to legal representation and tribunal composition is the manner of dealing with evidence and fact-finding. Here the debate has passed beyond the crude stage of treating "adversarial versus inquisitorial" methods as mutually exclusive alternatives.[91] The potentially contradictory elements in the different approaches are now more clearly appreciated with the debate focusing on the central issue of investigative initiative weighed against procedural fairness. Always subject to particular statutory dictates, there appears to be a relaxation of rigid attitudes to this dichotomy. While courts necessarily retain an adversarial, neutral–umpire stance, even greater flexibility for fact-finding initiatives and techniques is emerging, as in the case of the Administrative and Displinary Division of the South Australian District Court.[92] On the other hand, tribunals engaging in investigative exercises are, for the most part, aware of the requirements and constraints of the fair hearing rules which ensure that each party has a reasonable opportunity to be heard in an unbiased way.[93] In this respect supervising courts are now more relaxed about allowing tribunals leeway in going about their work[94] and less likely than they previously were to overrule a tribunal where it was not content to accept a case in the way the parties presented it.[95] Whether this should be taken further and a code developed for tribunal hearings continues to merit consideration.[96]

Are there circumstances in which a tribunal not only may resort to inquisitorial initiatives but is obliged to do so? There may be cases where the materials before it are inadequate to permit a safe conclusion. For example, in town planning appeals, where the appeal is essentially between a developer and an objector, a local government body may choose not to contest the appeal, but simply furnish to the tribunal the materials and reasons on which it made its decision.[97] Could the tribunal's decision be subject to judicial review on the ground that it failed to make adequate inquiry by not requiring further explanation? Authorities under the Administrative Decisions (Judicial Review)

90 *Thirty-Sixth Report of the Legislative Council Committee on Government Agencies.*

91 Contrast G Adams, "Towards a Mobilization of the Adversary Process" (1974) 12 *Osgoode Hall LJ* 569 with S Wexler, "Non-Judicial Decision-Making" (1975) 13 *Osgoode Hall LJ* 839.

92 More generally, see R D Nicholson, "Getting the Process Right — Should it be Adversarial, Inquisitorial or Something Else?", *Administrative Law Forum 1996: Setting the Pace or Being Left Behind?*, Sydney 11-12 April 1996 and A O'Neill, "Setting the Pace or Being Left Behind — Inquisitorial, Adversarial or Something Else", commenting on this paper.

93 The problems are illustrated by *Australian Postal Commission v Hayes* (1989) 87 ALR 283.

94 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 136 ALR 481 and see J McMillan, below at 370-374.

95 *Sullivan v Minister of Transport* (1978) 20 ALR 323. At the other extreme, some legislative amendments now specifically exclude natural justice as a ground of review of tribunal decisions: Migration Act 1958 (Cth), s 476.

96 R Creyke, *The Procedure of the Federal Specialist Tribunals* (1994).

97 In *Aboriginal Hostels Ltd and Shire of Swan and Others* (WA Town Planning Appeal Tribunal 20 August 1980, unreported) the Tribunal awarded costs against the Shire because it had adopted an adversarial role in the appeal.

Act 1977 (Cth) suggest that the *Wednesbury* principle[98] (that a decision may be bad if manifestly unreasonable) could be invoked.[99] Further investigation, whether termed inquisition or not, may well be required.

Relationship of tribunals and governments

The other major issue that, in the opinion of the writer, warrants clearer articulation is the relationship between tribunals and the executive government. This is usually framed in terms of independence, or at least perceptions of the same. It is true in one sense to say, as has the COG,[100] that tribunals are part of the executive. That proposition is necessarily true in the case of the Commonwealth when tribunals engage in substitute decision-making as a result of Chapter III of the Constitution.[101] Unfortunately, perhaps, the High Court missed the opportunity early this century to recognise adjudicative bodies as a fourth arm of government.[102] Be that as it may, tribunals dealing with appeals against government decisions stand in a complicated relationship with the executive. The challenge is to maintain both the reality and appearance of independence and objectivity. This paper merely poses this issue: it does not debate the virtues of the variations about full and part-time membership, length of terms, re-newability and methods of removal and appointment. All these feature prominently in discussions in *Better Decisions* and the *COG Report (No 4).*

While independence and integrity are necessary to the acceptance of tribunals, however, the uneasy relationship between merit review bodies and government persists because of the split role of the former. A tribunal must satisfy the requirement of reaching a just and correct result in the particular circumstances before it, but must also articulate its reasons in a way that is explicable to Ministers and officials which have to implement the tribunal's decision. The tribunal's normative function, that is, to explain and set standards for general administration in like cases, will be most contentious where decisions involve a fair measure of discretion. With the onset of a culture of prescription where increasingly administrative discretions are limited or eliminated by legal formulae, perhaps there will be less scope for differences between government administrators and review agencies.

To a degree problems concerning discretion and policy implementation can be mitigated by the issue of guidelines. Tribunals have generally been able to develop their own sensitive ground-rules[103] even without the certification device suggested by the COG.[104] This will not always resolve tensions between tribunals and government, particularly when the guidelines are given statutory effect.[105]

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98 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

99 T McEvoy, "New Flesh on Old Bones: Recent Developments in Jurisprudence Relating to *Wednesbury* Unreasonableness" (1995) *A J Admin L* 36.

100 Above n 48 at para 7.2.2.4.

101 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

102 *NSW v The Commonwealth* (1915) 20 CLR 54 (the *Wheat* case), in which the Court denied enforcement powers to the Interstate Commission established under s 101 of the Commonwealth Constitution.

103 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 639.

104 Above n 48 at para 6.2.2.5.

105 *Minister for Health v Haddad* (1995) 137 CLR 391; *Smoker v Pharmacy Restructuring Authority* (1994) 53 FCR 287.

Other avenues might be pursued if super review tribunals, such as that recommended in *Better Decisions*, are created. One is the regular inter-head meeting process recommended by CROSROMD.[106] One can ask why a creative suggestion such as term appointments to tribunals of senior public servants on detachment from government cannot be made? Does this really compromise the independence of a general review body, particularly if other safeguards are put in place?[107] If this is too radical, the course adopted in the early years of the Commonwealth AAT of appointing a number of ex-public servants of first division status should be reinstituted. In this way Australian tribunals could take advantage of one of the strengths of the French *Conseil* system: engendering credibility and respect for important normative rulings by having someone "on the inside" who is aware of policy and other constraints on government. Another approach is that suggested by the COG, namely, giving the body which oversees the public sector responsibility for translating and disseminating significant tribunal decisions of general application to the rest of government.

Of course if corporatisation and privatisation of government services continue, much of the above may be of diminishing relevance. There is, on the other hand, a general communal distrust of market forces and of the remedies available at private law (usually enforcement of contracts through the courts) as adequate means to ensure the accountability of such semi-privatised corporations.[108] The challenge will be whether and how tribunals might be adapted to continue in the public interest an ethical scrutiny of such semi-privatised agencies.

CONCLUSION

Two trends are emerging in the future development of administrative review bodies. The first is the move towards large-scale general review tribunals as proposed in New South Wales and Western Australia. Those States will join the Commonwealth, the Australian Capital Territory and Victoria in having a generalist administrative review body. The second is a more court-based process which is being realised in South Australia and might be followed in Tasmania.

The adoption of court-based procedures for merits review can be justified on the grounds of cost and the economy of adapting institutions already in existence. Such moves, however, run counter to the principles of accessibility, simplicity and expedition. Even with provision for assessors, courts arguably lack the on-going administrative perspective on policy issues that specialist or expertly constituted tribunals may bring. Perhaps the final factor would be the impact on the courts themselves. Whether constitutionally mandated or simply a rule of practical wisdom, the separation of powers principle protects the judicial arm of government from compromise as much as it affords justice to the individual. Provided tribunals are constituted and operate in ways that satisfy the requirements of legality and natural justice, they need not be relegated to some lesser status as a fourth and seemingly illegitimate member of the government family.

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106 Above n 45

107 The basic requirement would be that such a person should not sit alone on a matter involving her last agency.

108 C Enright, "Regulation or Market?", at 2; and N Dixon, "Is there a Place for Administrative Law in Government Business Enterprises?" at 23-28; papers presented at the *Administrative Law Forum 1996: Setting the Pace or Being Left Behind?*, Sydney, 11-12 April.