Tribunals Explained Along with their Strengths & Weaknesses.

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Definition

It is not easy to obtain an accurate definition of a tribunal nor is it easy for a semantic point of view to capture the essence of that which is considered to be a tribunal. A number of definitions and opinions on point are thus proffered to provide some insight into what could be regarded as being the key differences between a court or other jurisprudential or quasi jurisprudential dispute resolution theatres.

"Administrative tribunals, as arbiters or adjudicators of individual rights, tend to operate in some hazy air alongside the system of justice administered by traditional courts and the wider system of public administration that supports executive government."[1]

A Tribunal has been described as "A person or body (who or which is not a court of law but may be presided over by a judge) who (or which), in arriving at the decision in question, is expressly or indirectly required by law to act in a judicial manner to the extent of observing one or more of the rules of natural justice".[2]

Another definition of tribunal is "A board appointed to adjudicate in some matter, esp. one appointed by the Government to investigate a matter of public concern".[3]

The Honourable Justice Michael Barker provided additional insights into the machinations and the evolution of boards and tribunals, and it is noteworthy that he opines that tribunals have not by and large been fashioned by any "pre conceived grand design. It is generally agreed that boards and tribunals flourished in an ad hoc fashion to deal with particular needs and demands. Once their advantages had been demonstrated in one area of public decision-making, their suitability in many others seems to have been assumed. Thus, the growth of boards and tribunals appears not to have occurred according to any great theory of public administration. Rather, what Professor de Smith said in the second edition of his famous treatise on administrative law in Britain in 1968, is probably true not only of the position in Britain at that time, but also in countries like Australia and New Zealand that followed the British tradition at that time and later:

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[1] The Honourable Justice Michael Barker, '*The Emergence of the Generalist Administrative Tribunal in Australia and New Zealand',* Paper presented at the Australian Institute of Judicial Administration Incorporated 8th Annual AIJA Tribunal's Conference, Sydney, 9-10 June 2005, p. 1.
[2] Butterworths Australian Legal Dictionary p.1192.
[3] The Oxford Encyclopedic English Dictionary, p.1540.

- "Tribunals have not been established in accordance with any preconceived grand design. They have been set up ad hoc to deal with particular classes of issues which it has been thought undesirable to confide either to the ordinary courts of law or to the organs of central or local government. A tribunal may be preferred to an ordinary court because its members will have (or will soon acquire) specialised knowledge of the subject-matter, because it will be more informal in its trappings and procedure, because it may be better at finding facts, applying flexible standards and exercising discretionary powers, and because it may be cheaper, more accessible and more expeditious than the High Court. Occasionally dissatisfaction with the over-technical and allegedly unsympathetic approach of the courts towards social welfare legislation has led to a transfer of their functions to special tribunals … though the superior courts retain an ultimate supervisory jurisdiction".[4]

Professor Wade, in the fourth edition of his well-known text "Administrative Law" published in 1977, highlighted as an important advantage of a special administrative tribunal its ability to deal with questions of commercial policy rather than of law, which were unsuitable for the ordinary courts. However, he provided additional reasons for the creation of tribunals in these terms:

- "But the social legislation of the 20th century demanded tribunals for purely administrative reasons: they could offer speedier, cheaper and more accessible procedure, essential for the administration of welfare schemes involving large numbers of small claims. The process of the courts of law is elaborate, slow and costly. Its defects are those of its merits, for the object is to provide the highest standard of justice; generally speaking, the public wants the best possible article, and is prepared to pay for it. But in administrating social services the aim is different. The aim is not the best article at any price, but the best article that is consistent with efficient administration. Disputes must be disposed of quickly and cheaply, for the benefit of the public purse as well as for that of the claimant. The whole system is based on compromise, and it is from the dilemma of weighing quality against convenience that many of its problems arise."[5]

A useful explanation of the differences between the two institutions is found in a publication of the University of London in a chapter titled "Common Law Reasoning and Institutions". It states that "it is not easy to distinguish between a "court" and a tribunal that is established by an Act of Parliament in the manner of a court to hear particular grievances or specialist matters of dispute. Common disputes are those between individuals and a government department, for example an individual claiming a social security benefit and a Department of Social Security denying that he or she is entitled to it. *"…While some other tribunals are established to deal with disputes of a specialist nature where the government is not normally going to be a party, for example industrial*

[4] The Honourable Justice Michael Barker, *'The Emergence of the Generalist Administrative Tribunal in Australia and New Zealand'* (Paper presented at the Australian Institute of Judicial Administration Incorporated 8th Annual AIJA Tribunal's Conference, Sydney, 9-10 June 2005), p. 6
[5] Wade, H.W.R, 1977, *'Administrative Law',* Clarendon Press, Oxford.

tribunals…in Attorney General v British Broadcasting Corporation[6]*, The House of Lords stated that the essential difference between a tribunal and a court is that a tribunal does not administer any part of the "judicial power of the state". It has a specific jurisdiction as allocated by Parliament and does not enjoy a broad jurisdiction defined in general terms"*[7]

An insightful synopsis of the differences between tribunals and courts is to be found on the NSW Consumer, Trader & Tenancy Tribunal website.

"One of the differences between a court and a tribunal is that a court is more formal, with more elaborate rules about how a case must be run. A tribunal in most cases offers a straightforward, quicker and cheaper way of trying to resolve a dispute. Tribunals can save time by using lawyers less and asking people involved in a case to represent themselves.

- Tribunals, like courts, are independent. They are separated from the executive and legislative branches of government
- Tribunals and courts are open to the public
- Tribunal and courts have a duty to be transparent by providing reasons for their decisions
- Parties have the right to appeal against decisions of courts and tribunals.

Some examples of the differences between courts and tribunals include:

- Tribunals have a more relaxed approach to the rules of evidence than the courts.
- Tribunals encourage and often require parties to speak on their own behalf. Lawyers are only permitted in certain circumstances.
- Tribunals often specialise in resolving dispute in a particular area. Courts generally have the power to hear a much broader range of cases.
- It is usually much cheaper to resolve a dispute at a tribunal rather than to have it litigated at a court."[8]

The above synopsis is insightful although it could also be classified as an advertisement of sorts for tribunals, as it states that tribunals are generally cheaper, more straightforward and faster than the courts. The author`s view is that tribunals in his and his colleagues' experience are neither necessarily cheaper nor are they necessarily faster. The observation is also made that the statement that tribunals are faster and cheaper tends to be made by advocates and protagonists of tribunals, but the same protagonists are fairly parsimonious when it comes round to providing empirical evidence that supports the proposition. The author`s view which is more fully

[6] [1980] 3 All ER 61
[7] University of London, '*University of London External Programme', Common Law Reasoning and Institutions,* University of London, London, p. 72.
[8] NSW Government, '*NSW consumer, Trader Tenancy Tribunal'*< *http://www.cttt.nsw.gov.au/Resources/Students/Courts_vs_tribunals.html*> viewed on 12 October 2012.

articulated throughout this book is that the real cost of dispute resolution does not lie in institutional machinery, be it tribunal or court, it is in the cost of advocacy.

Another useful explanation of a tribunal is found in Wikipedia. Although this definition would not in all likelihood be utilised as a definition in a court of law, it nevertheless provides a reasonably articulate portrait. "A tribunal in the general sense is any person or institution with the authority to judge, adjudicate on, or determine claims or disputes - whether or not it is called a tribunal in its title. For example, an advocate appearing before a court on which a single judge was sitting could describe the judge as their tribunal. Many governmental bodies that are titled "tribunals" are so described to emphasise the fact that they are not courts of normal jurisdiction. For example the International Criminal Tribunal for Rwanda is a body specifically constituted under international law; in Great Britain, Employment Tribunals are bodies set up to hear specific employment disputes. Private judicial bodies are often styled 'tribunals'. The word tribunal is not conclusive of a body`s function. For example in Great Britain, the Employment Appeal Tribunal is a superior court of record".[9]

For fear of being simplistic Tribunals are not always called tribunals whereas courts of law are always called courts of law. Sometimes tribunals are referred to as Boards but a Court of Law would never be referred to as a Board. The Oxford Dictionary definition for instance states that a tribunal is a "Board"[10] appointed to adjudicate or to investigate a matter of public concern. Note the use of the word adjudicator in that definition, in recent times in the building industry the term adjudicator has assumed a very specific meaning i.e. the adjudication of building disputes that come within the jurisdiction of security for payment Acts of Parliament. Such adjudicators are required to have training in adjudication and moreover are certainly not regarded as being decision makers that preside over tribunals.

Furthermore in continuing with this definition there are indeed some Boards that investigate matters of public concern, but a great many of these bodies are not called tribunals, rather they are called Boards in both the Acts of Parliament that augment the given boards and within the jurisdictionally specific parlance.

A great many tribunals however are not investigative bodies, far from it; they are far more akin to courts in that they control the litigation process from the initiation of legal proceedings to the handing down of a decision. Because of the significant differences between non investigatory tribunals and review tribunals, or tribunals that are far more akin to courts, the intricacies and machinations of statutory boards are dealt with in a separate chapter.

This chapter concentrates on and case studies tribunals that firstly are called Tribunals in the promulgating Acts of Parliament and moreover operate in terms of interlocutory processes in a manner that is very much reminiscent of the courts. To this extent the contents of this chapter are more akin to the above Butterworth's definition of tribunals.

[9] Wikipedia, '*Tribunal',* 2012, < http://en.wikipedia.org/wiki/Tribunal> viewed on 12 October 12.
[10] The Oxford Encyclopaedic English Dictionary, p.1540.

Definitions aside there is little doubt that tribunals and Boards traverse a huge quasi-judicial terrain. Commonwealth Ombudsman Professor John McMillan in an address to the Commonwealth Law Conference[11] provided some useful insight into the scope of work traversed by tribunals in Australia and the pivotal role that they play in Australia.

Professor McMillan stated that "in Australia for example, just five tribunals - the Administrative Appeals Tribunal, the Refugee Review Tribunal, the Social Security Appeals Tribunal and the Veterans Review Board-together review upwards of 40,000 federal decisions in some years. The case load of tribunals grows ever larger if we add other federal and state administrative review bodies not all of them tribunals, but fitting the description nonetheless – which review government decisions in areas as diverse as town planning, guardianship, conservation, professional discipline, business regulation…[12]

The said Ombudsman added that tribunals "play a pivotal role in our system of law and accountability"[13]

As tribunals come in a very diverse variety of manifestations it is very difficult to identify universal features and characteristics. Even within a given tribunal the lists or divisions can differ radically in terms of the length it takes to get a matter to hearing, the length of a hearing and the interlocutory steps that have to be complied with to assist with the disputes passage to hearing. Such is the diversity; the book will concentrate on some case studied jurisdictions to provide a synopsis of how they operate with the view to generating comparisons with other dispute resolution theatres.

Tribunals have been burgeoning in many jurisdictions and they cover a very wide gamete of jurisdictions. Some tribunals like the Victorian Civil and Administrative Tribunal ("VCAT") in Australia cover jurisdictions that are often found in the Courts. NZ established a tribunal to resolve water proofing disputes and for many years the international community has convened and established international tribunals to assume jurisdiction over crimes against humanity and matters that involved the repudiation of universal moral imperatives.

<u>"Broad Church"/Multi-Jurisdictional Tribunals</u>

Some multi-jurisdictional tribunals traverse a number of spheres and differing jurisdictions. In Victoria for instance planning disputes are resolved in the VCAT. The VCAT is often referred to as a super tribunal in light of its size and breadth of decision making terrain and the planning list or division is just one part of the VCAT`S jurisdiction. In NSW planning disputes are resolved in the Land and Environment Court.

[11] Commonwealth Ombudsman McMillan, J *'Judicial Review of the Work of Administrative Tribunals - How Much Is Too Much'* (address to the Commonwealth Law Conference14th of April 1993.
[12] Commonwealth Ombudsman McMillan, J *'Judicial Review of the Work of Administrative Tribunals - How Much Is Too Much'* (address to the Commonwealth Law Conference14th of April 1993. p 1.
[13] *Id*.

Domestic building disputes prior to the assumption by the VCAT of this jurisdiction used to be resolved by arbitration or the courts.

The VCAT also covers discrimination cases, leasing disputes, small claims and civil matters. Both the Administrative Decisions Tribunal NSW ("ADT") and the VCAT preside over solicitor misconduct yet in the case of building practitioner misconduct the Building Practitioners Board of Victoria presides over practitioner misconduct matters and the ADT presides over like matters in NSW.

Finite and limited purpose tribunals

There are limited purpose and finite task tribunals like the above mentioned tribunals that are created to assume jurisdiction over particular scenarios such as war tribunals or the Weathertight Homes Tribunal. These tribunals are brought into being to deal with a specific judicial task, such as investigation and the trying of criminals in a particular war or country. In the case of the WHT the tribunal was established to address a specific construction industry problem, "leaky homes".

These sole purpose tribunals often disband once the judicial task is completed. The task may take 3 or 4 years or in some cases even longer, furthermore sometimes the tribunals "metamorphose" into hybrids or expand to assume different jurisdictions.

The reason for the rapid expansion of tribunal jurisdiction per se over the last couple of decades is not altogether clear. Furthermore there is nothing to suggest that the momentum will abate. There are those that say that governments have seen them as being ostensibly cheaper and faster than the courts and attended by less formality. In an article in the Australian on the 26th of August 2011, the NSW Attorney General discussed the possibility of establishing a NSW super tribunal.[14] The benefits he identified were considered: "…a super tribunal would more efficiently administer justice than many of the state's smaller tribunals… it would run better, fairer, more professionally with less inbred tendencies, less quangoism, cronyism and laziness, the club atmosphere"

"The Law Commissioners in New Zealand in their report "Delivering Justice of All", having reviewed tribunal developments in Australia and New Zealand concluded that the benefits of "clustering tribunals" are no longer seriously debated. The Commissioners considered… that the approach should be to create fewer and stronger tribunals by amalgamating all groups and existing tribunals according to their functions. Indeed the Commissioners were attracted to the VCAT model, which they considered "both desirable and achievable in New Zealand"... The Commissioners considered that earlier risks suggested in unifying tribunals, namely, achieving formal but no real unity,

[14] *Bercovic,* N, *'NSW super-tribunal is on the cards'* The Australia, Sydney, 26th of August 2011.

or forcing tribunals into one "inhospitable mould", no longer seemed so acute".[15] The NZ law commissioners seemed to have pre-empted some of the views of the NSW Attorney General. Furthermore said commissioners likewise provided an endorsement of the VCAT.

The author does not quite know what smaller tribunals the AG is referring to, it is surmised that these so called smaller tribunals may well be statutory Boards as the smaller tribunals tend to be Boards. The observations by the AG are nevertheless quite strident. Whether or not a super tribunal would run better than a smaller tribunal or Board would one surmises depend upon whether such super tribunal, if created, would live up to those aspirations, because large institutions are not necessarily the answer. Furthermore when one considers the broad judicial terrain of courts such as the NZ and NSW District/County Courts that are already established as "super courts", it begs the question why not further expand such existing jurisdictions and provide more judges and more specialist divisions?

Presiding members of "smaller Tribunals" would in all likelihood not agree with the Attorney General's observations that they are imbred, lazy and so forth. The author for one would be disinclined to engage in such strident criticism as he appears before such bodies and it is unlikely this sort of unflattering hyperbole would endear him to the decision makers. There are some Boards that do outstanding service but there are others where the experience may engender disappointment.

The author's reservations about some statutory boards that are fully aired in later chapters are not about "inbreeding, quangoism or cronyism", rather the concerns are about the fact that a great many Boards or "smaller tribunals" comprise a board membership that is predominately lay, i.e. not legally qualified and it is this factor that makes one fairly nervous.

The same *Australian* Newspaper article referenced a quote from Australian Catholic University Vice Chancellor Greg Craven who was intent on extolling the virtues of a super tribunal that had already been established. Professor Craven opined that the "Victorian Civil and Administrative Tribunal was almost universally regarded as a success".[16]

Professor Craven`s ringing endorsement is not shared by all consumers of the VCAT. Indeed the feature article in the Age newspaper quoted below has a couple of less than kind quotes about the VCAT and one can glean from the below passage that there are those that would not regard themselves as being members of that "particular universe".

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[15] (The Honourable Justice Michael Barker, *'The Emergence of the Generalist Administrative Tribunal in Australia and New Zealand'* (Paper presented at the Australian Institute of Judicial Administration Incorporated 8th Annual AIJA Tribunal's Conference, Sydney, 9-10 June 2005), p. 21.

[16] *Bercovic,* N, *'NSW super-tribunal is on the cards'* The Australia, Sydney, 26th of August 2011.

There are also those that volunteer that if all matters remained the preserve of the courts, the courts would turn into a huge juggernaut, unwieldy and cumbersome to operate. Whether this is the case or not is the subject of much conjecture but it is difficult to establish a prima facie case for such proliferation.

Whether it is arbitration, adjudication or the administration of dispute resolution through tribunals, each theatre is set up with noble aims. The common chord is invariably to achieve lower cost, to speed things up and to make matters more informal, whatever the means employed. This seems to be the aspiration of the NSW Attorney General. Yet over time noble aims have a tendency to wane and become diluted as the bureaucracies grow and the respective theatres become institutions.

There are some people quoted in this chapter, users or consumers of the tribunal system that express views that are clearly at odds with Professor Craven in that they attest through personal experience that they had found the tribunal experience very costly and protracted.

The author armed with a very strong background in state, territory and federal law reform and microeconomic reform (and co-author of "Managing Micro Economic Reform" which was a collaboration with the Business Council of Australia and the Federalism Research Centre based in Canberra)[17] is of the opinion that before policy makers embark upon law reform or micro economic reform that is designed to reshape the system then that impetus for reform must be grounded on hard and irrefutable data.

Case Study the Victorian Civil and Administrative Tribunal (VCAT) – The Domestic Building List

The VCAT warrants particular mention not because of any "Victoria centric" views of the author rather because it is held up as being a model "Super Tribunal" by a number of prominent people quoted in this book. Like many tribunals the VCAT was established to provide a cost effective, swift and informal theatre for resolving building and planning disputes.

The VCAT is a multi-jurisdictional tribunal with many separate divisions or lists. It has exclusive jurisdiction to preside over residential building disputes. The VCAT also resolves planning, leasing, discrimination and solicitor misconduct matters. The VCAT also has a general civil list that hears matters that in earlier times would have been resolved in small claims tribunals.

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[17] Galligan, B, Lovegrove K, Lim, B 1993, *'Managing Micro-economic Reform'*, Australia Federalism Research Centre, Australia.

The author and his colleagues' experience in the VCAT are primarily limited to the domestic building, planning and solicitor misconduct lists and as there are a couple of very good books that have been written about the VCAT, this book will not traverse the well-travelled terrain of the dedicated VCAT publications. A study of the domestic building list will nevertheless ensue as it provides very good comparative material and the author and his colleagues are intimately familiar with its machinations, so are well qualified to provide first hand insights.

On the question of whether the VCAT Domestic Building List has achieved its mandated aims of providing swift and cost effective dispute resolution, Mr Cotton a partner of Lovegrove Solicitors when speaking of the Domestic Building List of this tribunal said "this has not necessarily occurred" and he adds that this is possibly because the tribunal, somewhat ironically, in its determination to compel settlements of building disputes through ADR has been known to slow down the progress of dispute outcomes. This tends to occur says Mr Cotton when orders are made for multiple compulsory conferences and mediations. Well and good if a matter settles, but if it does not, the thwarted attempts to settle the case through ADR will escalate the cost of dispute resolution by a very significant factor and will add months to the length of proceedings.

There are some consumer critics who have voiced their dissatisfaction about the VCAT with respect to the cost and timeliness of justice. In the Victorian newspaper the AGE, the June 15, 2011 edition had a front page feature and an editorial dealing with the perceived inadequacies of the residential insurance and residential dispute resolution process.[18]

One Anne Paten took her residential building dispute to the VCAT and was quoted as saying that she gave up the case "because it would have gone on for years and it would have cost us a fortune...The VCAT experience was really a disaster.....it was meant to be a place where people could go without solicitors, that was cheap, quick, efficient and of course provided justice". She added "It proved to provide absolutely none of these things".[19]

In an editorial piece in the same edition the chief executive officer of the Housing Industry Association, Mr Gill King, said that a "quick, simple, cheap, independent mechanism" was required to resolve domestic building disputes.[20]The editorial went on to add that The Victorian Small Claims Tribunal and Consumer Affairs do not offer adequate and affordable redress. "Last year VCAT heard 878 disputes between owners and builders and 86 appeals against insurers' decisions, but the tribunal would not reveal the results-which hardly promote transparency."

VCAT Domestic Building List Procedures

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18 The Age, *'Victorians fleeced on insurance'* June 15, 2011, p 6.

19 *Id.*

20 *Id.*

The decision makers are called members rather than judges but they typically have to be experienced and qualified lawyers. The interlocutory processes are very much reminiscent of the courts and have become pretty much entrenched in the VCAT subject to a couple of key differences.

- Mediation at an early stage is compulsory;

- Compulsory conferences as a last ditch effort to avoid trial by and large occur close to trial;

- It is rare for interrogatories to be ordered;

Tribunal interlocutory procedures – Case Study One - Victorian Civil and Administrative Tribunal (VCAT) – The Domestic Building List

The below procedure applies to the civil or domestic building lists. There are a number of other lists in the VCAT so the below interlocutory process "road map" should not be used as a guide or template for the other lists.

- An application is filed with the relevant list of the VCAT;

- A directions hearing will ordinarily be convened for the handing down of the interlocutory timetable and the making of orders that are ostensibly designed to expedite;

- The tribunal member may find that the originating application lacks detail or fails to properly particularise the matter in which case the member will request that a statement of claim be forthcoming;

- A statement of defence will be filed and in circumstances where there is a counterclaim the counterclaim will be filed with the statement of defence;

- The plaintiff will be ordered to file a defence to the counterclaim.

Once the statement of claim has been lodged and the statement of defence has been filed the tribunal will normally order that the matter be referred to mediation. The tribunal then appoints a mediator at no cost to the parties to preside over mediation. Mediations can take up to a day to resolve. If the mediation fails the matter goes back to one of the tribunal members for the formulation of further orders for the progression of the matter.

Either party is at liberty to ask for further and better particulars if the interlocutory pleadings lack detail or poignancy.

An order for discovery will be forthcoming and both parties will be ordered to draft and file an affidavit or list of documents comprising all documentation relating to the contract and the dispute. Both parties will be afforded the opportunity to inspect the other party's documents.

Normally the parties will be desirous of retaining expert witnesses to provide a specialist opinion on matters that make up the ingredients of the dispute. Expert witness statements then have to be prepared, served and filed.

There may be an order that the matter is referred out to mediation, although this is optional.

There will be further orders providing that the parties will be required to attend further directions hearings to ensure that the time frames for submitting and filing interlocutory pleadings are indeed filed by the due date.

Once matters have been progressed to the extent that relevant pleadings have been files and served, discovery has been completed and expert witness statements filed, the matter will be set down for hearing.

Before a matter goes to hearing a compulsory conference ("CC") is normally convened. The CC is presided over by a tribunal member ie one of the lawyers in the full time employ of the tribunal that is appointed to preside over the hearings.

A CC differs to mediation. In mediation the mediator is not allowed to give an opinion on who would be likely to win the case on the facts at hand. The CC convener can and indeed does give an indication of the respective merits and shortcomings of the respective cases and may volunteer that if he or she was handling the case, then the likely finding would be that the plaintiff would get over the line or conversely the defendant.

A good CC is in some respects like a mini trial in that the advocates prepare a case synopsis and present the synopsis to the convener. An advantage that a CC has over mediation is that the parties often like to know what the leaning of a decision maker may be. Who better to provide an inkling than someone who hears cases on point? Needless to say the member who presides over a CC cannot hear the case if it proceeds to full hearing.

If the CC fails the matter will be set down for trial.

Virtues

The VCAT Domestic Building List is very well established and a Victorian Act of Parliament called the *Domestic Building Contracts Act 1995* dictates that the VCAT has exclusive jurisdiction to resolve domestic building disputes. Prior to the proclamation of this Act of Parliament, domestic building disputes were ordinarily resolved by arbitration. Reason being most of the building contracts that were signed up by owners and builders had arbitration clauses.

Arbitration became incredibly unpopular in the residential sector with consumers in the early nineties and when the DBCA was proclaimed it made it illegal for residential building contracts to contain arbitration clauses. There was a perception by consumer lobbyists that arbitrators were pro-builders. In fact in the late 1980s an organisation called the Victims of Builders Society was established with a mandate of outlawing arbitration. The author can recall the fervour of this body and its relentlessness in its campaign to get rid of the arbitration system. Although this body was not the prime driver behind the proclamation of the DBCA, it reflected the consumer animosity to arbitration and its views were taken into account by the reforming legislature. Shortly after the demise of arbitration the lobby group lost its raison d`etre and disbanded.

Once resort to arbitration in residential building disputes was ousted in Victoria and NSW by their respective Acts of Parliament, tribunals in both jurisdictions stepped into the vacated space.

The VCAT although not perfect, would nevertheless be regarded as a superior forum for the resolution of building disputes to its predecessor. This would be for two main reasons. Firstly consumers are more comfortable with the fact that the members that preside over residential disputes are lawyers, most of whom have experience in construction law. As they are full time members and not employed in the building sector, there is perception that they are more independent than arbitrators. It was a fact that many of the arbitrators were retired builders and in some instances practicing builders, hence the perception of partiality.

Secondly and probably more compelling is that one does not have to pay for a member as the member is an employee of the Crown. Many residential building disputants are hamstrung by limited financial resources because of mortgages and a finite purse. An additional impost of an arbitrators fee, that has to be paid in advance tended to make arbitration too expensive for “Main Street”. Regardless of whether one is positively or negatively disposed to the VCAT it would be very difficult for a sceptic not to concede that in not having to pay for a member one is far better off. This is self-evident.

Shortcomings

The shortcomings have been aired above and can best be summarised by observing through experience that in so far as the VCAT has endeavoured to generate faster and more cost effective dispute outcomes than other theatres, save for the removal of the cost of an arbitrator (and venue hire) there is no evidence to suggest that this aspiration has materialised. In our experience building disputes in the VCAT are not resolved any

faster than the courts and the system is not cheaper than a court alternative; for as pointed out earlier it is the cost of advocacy, rather than the institution`s administrative and interlocutory machinery that is the real cost impost. In this regard the cost of advocacy does not discriminate between a court of law, a Tribunal or arbitration for that matter.
Although the VCAT may cost government less in light of significantly lower remuneration for tribunal members than their counterparts at the Bench, that would be the only clear manifestation of a lower cost paradigm.

Case Study Two – New Zealand Weathertight Homes Tribunal

The Weathertight Homes Tribunal ("WHT") was established when a need for a tribunal to combat the ongoing dilemma of leaky homes in New Zealand was identified. The Weathertight Homes Resolution Services Act was passed in 2006[21] and the WHT commenced on 1 April 2007. The WHT unlike the VCAT is not a multijurisdictional tribunal; it was established to deal with the terrible impacts of the leaky building crisis in New Zealand. The crisis emanated from thousands of homes being afflicted by water penetration. Suspect homes had been constructed with a pine that with the passage of time proved susceptible to water penetration and swelling. The effect of this defective construction epidemic has been diabolical for many New Zealanders.

The lifespan of the WHT was first intended for a certain period, however as the problem has continued so has the life of the tribunal. Currently on average approximately 130 claims are filed each year.

At the time of writing this book a financial assistance package had been introduced to the New Zealand Parliament, however it had not been approved. The package will allow home owners to avoid the court or tribunal process by dividing the agreed repair costs. Home owners would be responsible for 50% of repairs, the local council who originally approved the construction work would be responsible for 25% of repairs and the government would be responsible for the remaining 25%. If this proposal is passed time will tell as to its effects on the WHT.

The WHT is promoted as being cost effective in the respect that it is quicker than if one was to go through the courts. Anecdotally the author has heard that NZ High Court cases dealing with the same claims can take two to three years to be heard. Matters going through the WHT take on average four to six months for a decision to be made. There have been cases where all parties involved in the dispute have agreed to change the forum from court to the WHT due to the perceived benefits.

Anecdotally we have heard of some complaints against mediators occurring, however little information and statistics can be found as to the details and outcomes of these complaints.

[21] *Weathertight Homes Resolution Services Act 2006* (NZ)

Procedures

*"*All claims relating to leaky homes involve a two-stage process: assessment and resolution. The Department of Building and Housing (DBH) deals with the assessment stage and the Weathertight Homes Tribunal handles the resolution stage"[22]*.*

"The Tribunal is made up of a chairperson and several members who act as adjudicators of leaky home disputes. They are all legally qualified and have extensive experience in adjudication, mediation and dispute arbitration". [23]

It is noteworthy that all of the members are legally qualified. This is akin to the VCAT but differs to arbitrators and adjudicators where the arbiters can have a variety of qualifications.

Like the VCAT in Victoria there is a filing fee to commence an action in the WHT, being $489. Every matter is sent to mediation and no cost is charged for the mediation venue or use of a mediator. Ms Annabelle Joy, Jurisdiction Manager from the WHT, stated in an interview with the author that approximately 80% of cases settle at the mediation stage. Of those that do not settle, under section 89 of the Act their case must be heard and a decision made within 35 days of the unsuccessful mediation.

There is again a theme that is consistent with the VCAT where mediation is enshrined and woven into the tribunal "dispute resolution fabric" and is designed to have a very high settlement strike rate. Increasingly however it must be said that the courts are making mediation compulsory.

Ms Joy from the WHT advised that approximately 70% of parties using the WHT are legally represented. Anecdotally we have heard that these legal costs have been of some difficulty to various parties, in these circumstances parties have opted to self-represent. Given the complexity of issues involved self-representation may allow a gross power imbalance to occur when one party is legally represented and the other is not.

The website for New Zealand Ministry of Justice, Weathertight Homes Tribunal states in its 'About the Tribunal' section -

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[22] New Zealand Ministry of Justice*, Weathertight Homes Tribunal,* Weathertight Homes Tribunal <*http://www.justice.govt.nz/tribunals/wht*> *at 27 June 2011*

[23] New Zealand Ministry of Justice*, About the Tribunal,* Weathertight Homes Tribunal <*http://www.justice.govt.nz/tribunals/wht/about-the-tribunal*> *at 27 June 2011.*

"Claims over $20,000: If a home owner's claim is found to be eligible and the repairs needed are assessed at over $20,000, or the repairs made cost over $20,000, the claimant may apply to the Tribunal for adjudication.

Claims under $20,000: Claims for $20,000 or less follow a more streamlined process within the Department, but if a settlement is not reached this way the claimant may apply to the Tribunal for adjudication".[24]

The VCAT has something akin to lower quantum delineation. In the VCAT Domestic Building List if a matter is for less than $10,000.00 the parties are not allowed to retain lawyers. This bears testimony to cost benefit analyses, there is little mileage in a lower dollar value dispute being swamped by disproportionately high legal fees.

The below synopses comprises useful quotes published by the New Zealand Ministry of Justice.

"The Weathertight Homes Tribunal was established in 2007 under the Weathertight Homes Resolution Services Act 2006.[25]

The Tribunal is supported by Ministry of Justice staff that provides registration, case management and other administrative services.

The Tribunal was set up after government recognized the difficulties with resolving leaky home claims under the previous Weathertight Homes Resolution Services Act 2002. The 2006 Act provided for enhanced services, including setting up the Tribunal and giving it greater powers to resolve disputes faster".[26]

"The purpose of the Weathertight Homes Tribunal is to provide speedy, cost-effective and independent adjudication for leaky home claims brought under the Weathertight Homes Resolution Services Act 2006". [27]

Other explanatory information

Section 3 outlines the purpose of the Weathertight Homes Resolution Services Act 2006 –

[24] New Zealand Ministry of Justice, Weathertight Homes Tribunal, Weathertight Homes Tribunal <http://www.justice.govt.nz/tribunals/wht> at 27 June 2011.

[25] *Weathertight Homes Resolution Services Act 2006* (NZ)

[26] New Zealand Ministry of Justice, About the Tribunal, Weathertight Homes Tribunal <http://www.justice.govt.nz/tribunals/wht/about-the-tribunal> at 27 June 2011.

[27] New Zealand Ministry of Justice, Weathertight Homes Tribunal, Weathertight Homes Tribunal <http://www.justice.govt.nz/tribunals/wht> at 27 June 2011

"The purpose of this Act is to provide owners of dwelling houses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for assessment and resolution of claims relating to those buildings".[28]

Case Study Three: The Practitioner Misconduct Jurisdiction of the Administrative Decisions Tribunal NSW

One of the areas that the ADT presides over is that of misconduct hearings concerning accredited certifiers in NSW. Accredited certifiers are building officials that regulate the statutory building approval regime in NSW.

These certifiers are also commonly known as building surveyors. The reason that this particular misconduct jurisdiction of the ADT is case studied is that the same jurisdiction in the state of Victoria is presided over by the Building Practitioners Board and the Building Appeal Board of the Building Commission has appellate jurisdiction.

If a certifier is referred to the ADT by the Building Professionals Board the ADT is charged with determining whether the respondent can be found guilty of either unsatisfactory conduct or professional misconduct. The prosecuting body is the BPB. The BPB itself has powers to generate an adverse finding against a certifier and the certifier can appeal such finding in the ADT ordinarily. In circumstances where the BPB considers that a matter is more severe it files an application in the ADT for the matter to be heard.

The ADT can convict respondents and can hand down penalties, fines, compensation orders and in worst case scenarios remove a professional's registration or suspend it. The Independent Commission against Corruption (ICAC) has a parallel jurisdiction to investigate certifiers who may have engaged in corrupt acts.

Procedures

The application is filed in the ADT, and it comprises allegations of misconduct.

Once the allegations are filed they have to be served on the respondent.

The applicant will ordinarily provide the respondent with a brief of evidence comprising the material that the prosecutor relies upon to prosecute the case.

The respondent can ask for further and better particulars.

A directions hearing is ordinarily held, often by phone and the matter will be set down for hearing.

[28] *Weathertight Homes Resolution Services Act 2006* (NZ)

When the matter gets to hearing it is always presided over by a judicial member i.e. a legally qualified member. The member has the ability to invite a technically qualified expert to assist to ensure that technical matters can be deal with capably.

The hearings are usually concluded within three days, but are often heard within one day. Lawyers are typically retained along with expert witnesses to appear before the members.
A judge, the President of the ADT presides over most of the hearings.

Virtues

It is tremendous that a Judge hears most of the matters, because the area of misconduct law is a very serious domain. The decision maker has to ponder issues of public safety and deterrent considerations, but also has to balance the fact that any adverse professional misconduct finding can have a very deleterious effect on a professional`s name and reputation. This jurisdiction is a penalty jurisdiction.

Mindful of the quasi criminal nature of the jurisdiction the decision makers, like their equivalents in the Building Practitioners Board in Victoria are presiding over life defining matters. This being the case it is in the author`s view preferable that the decision makers are highly experienced decision making lawyers whose sole occupation or profession is to preside over and hear matters.

Given the decision makers enjoy full time, rather than part time office has some compelling virtues. There are no competing or demanding distractions from the office of decision making. As the decision makers hear a great many cases they become highly experienced in the one virtue i.e. the virtue of decision making. They also have ample time to craft decisions. This is an enabler for eloquent and robust judicial script.

The author and colleague Justin Cotton have appeared cross jurisdictionally in misconduct appearances on behalf of clients. It is their view that the tribunal forum typified in the ADT is a preferable forum to a lay member decision making forum for the hearing of professional misconduct matters. The reservations the author has about lay member forums are comprehensively canvassed in the chapter dealing with statutory boards.

Perhaps the most compelling virtue of the ADT is that the decisions are very much like court made decisions. They strictly apply the sound decision making tenets of the higher authorities that enunciate decision making judicial protocols. This has definitely been the experience of said lawyers with respect to their dealings with the ADT. It follows that there is a lesser risk of denial of natural justice or procedural unfairness or procedural irregularity. One corollary is that that there is a correspondingly low risk of miscarriage of justice.

The author is at pains to emphasise the importance of decision making rigor and has devoted a chapter in this book to that topic. The reason for this is that democracy owes

it to the individual and the public to ensure that when life defining decisions are made the decision makers are of the highest calibre and operate within a vocational milieu that enables them fully to display that virtue. It would always be a concern if a given dispute resolution or conflict determination forum was not able to fully exhibit these democratic ideals.

Shortcomings

There are very few to speak of. The shortcomings in some respects camouflage the strengths. ADT decisions can take some time to be handed down. A decision will rarely be handed down within a month and may take 3 or 4 months. Compare this with decisions handed down by the Victorian Building Appeals Board or the Building Practitioners Board. These decisions are normally handed down within a couple of weeks. The Building Professionals Board of NSW has been known to hand down a decision of moment within 48 hours. As divulged in subsequent chapters however the decisions in respect of the latter bodies are very brief, do not always apply the higher tenets of decision making and are of more limited precedential value.

A Synopsis of the Virtues of Tribunals

In some jurisdictions like the VCAT and the NZ Watertight Homes Tribunal there are very well established systems designed to effect early settlement. The mediums of mediation and compulsory conferences lend themselves to settlement at an earlier juncture than the courts.

As mediations can be ordered in the likes of the VCAT within 6 weeks of the initiation of legal proceedings there is a good chance that a matter can be concluded at the relative outset of a litigated matter. Likewise in the case of the WHT, mediation occurs at an early stage and in similar vein to the Domestic Building list of the VCAT and the Planning List of the VCAT the parties are not charged for either room hire or the mediator. The state assumes these costs.

The Courts on the other hand often are not graced by mediation in the first 12 months of a proceeding. Many courts of higher jurisdiction in the Southern Hemisphere refer matters out to mediation and the mediators charge for their deployment. The same situation applies with arbitrated matters, but not adjudicated matters, as mediation is not part of the adjudication process.

If per chance the government of the day comprises economic rationalists the tribunal bench is significantly less expensive than intermediate or higher jurisdictions benches. District and County Court judges are paid well in excess of $250,000 per annum, in fact $300,000 or more is typical remuneration. When the judiciary retires there is the additional benefit of very attractive superannuation.

Judges also enjoy permanent tenure. In comparison, tribunal members earn significantly less and are often retained on 5 year contracts. There is nothing special about a tribunal member's superannuation package.

The fact that a tribunal member may not enjoy permanent tenure has its detractors, not the least of whom being the members themselves. If there is a member who is intent on being a career tribunal member, he or she will be at the whim of the government of the day. A judge on the other hand, short of doing something heinous, does not have to worry about any governmental whim.

One of the Australian Commonwealth Ombudsmen is Professor John McMillan. In an address to the Commonwealth Law Conference and in a paper dated the 14th of April 2003, in his concluding remarks he stated that there should be "longer term appointment of tribunal members, more generous conditions of service for members, more systematic training of tribunal members, a restoration of multi-member panels in more cases, and the creation of an appeal structure within tribunals (to obviate the need for regular judicial oversight). In short, there are problems with tribunals that need to be addressed, but not necessarily though the medium of judicial review".[29]

The above passage tends to reinforce the view that tribunal members are nowhere near as well remunerated as the judiciary. To reiterate, this augers well for the economic rationalists and those intent on cutting the cost of government but does not auger so well for those that have a particular fondness for the remuneration levels of tribunal members.

Tribunals can be established for specific purposes and upon conclusion of the task they can be wound up. The reason why War Crimes Tribunals and the WHT are case studied in this book is that these are such tribunals. Be it jurisdictionally specific matters such as war crimes in Rwanda or cross jurisdictional crimes against humanity like the Nuremburg Tribunal, the tribunals were established to administer universal concepts of justice over particular atrocities.

Cross-jurisdictional Tribunals can also deploy often by way of secondment the most venerated and preeminent minds to focus on higher tasks. The Nuremburg Tribunal for instance "captured" and enrolled some of the very finest minds and advocates for a significant period of time. These types of tribunals are endowed with considerable flexibility, a flexibility that would not ordinarily exist with the courts. The tribunal was presided over by 8 judges, the composition of which being cross jurisdictional.

Cross jurisdictional and multinational tribunals also have the advantage of not being subservient to sovereign rule of law. The rule of law will dictate that the local judiciary follow the local rule of law, even if the local rule of law is abhorrent when viewed within the context of universal humanitarian considerations. The notorious Nuremburg defence, which when interpreted meant "just following orders", would have been a

[29] Commonwealth Ombudsman McMillan, J *'Judicial Review of the Work of Administrative Tribunals - How Much Is Too Much'* (address to the Commonwealth Law Conference14th of April 1993, p. 7.

plausible defence within a sovereign context but not when applied within the context of universal humanitarian maxims.

Shortcomings of Tribunals

The said Commonwealth Ombudsman in his address to the Commonwealth law conference observed that one of the difficulties confronting a tribunal is that "there is no prototypical procedure to guide a tribunal on how to approach each case. The differences can be as marked within tribunals as between tribunals. Much will depend upon the nature of the tribunal, the issue in dispute, the way the tribunal is constituted (eg.1 or 3 members), whether lawyers constitute the tribunal or appear before it, and the time frame for adjudication. While there is variation also in judicial proceedings, it is not as marked; generally we have a much better picture of what to expect when we walk into a court room or pick up a court judgment." [30]

There has been a great deal of comment about the ad-hoc nature of tribunal establishment and there is an emerging momentum that is pointing towards the migration of splinter tribunals or qangos to larger and consolidated multi-jurisdictional tribunals. This is because there is a nervousness with respect to the idea that the smaller tribunals or boards may be closed shop and myopic. Smaller jurisdictions unlike the super tribunals like the VCAT are heavily populated by lay members also and as is canvassed elsewhere this has culminated in concern that decision makers devoid of qualification "are not up to the task".

The Ombudsman`s observation that there is more continuity with courts is poignant there is also more continuity with respect to expectation on the part of users of the courts. One never hears a court being referred to as a Kangaroo Court, nor are courts ever described as being perpetrators of "bush justice". The author has heard some occupational Licensing and disciplinary Boards being described as such.

Once could possibly conclude that in the case of tribunals one sees a disparity that ranges from the best to the worst. On the one hand the disregard for the apposite procedural fairness tenet that is evident with some boards, illustrates the worst. The preparedness for innovation that is evident in some jurisdictions like the VCAT with innovations like compulsory conferences or mediators at the outset illustrate the best. But the disparity and the lack of consistency regarding the qualifications and experience of members or the disparity of ability with regards to the application of the law is a cause for concern and is probably the factor that is moving governments close to a rationalisation or amalgamation of disparate jurisdictions.

The Ombudsman`s observations have also been echoed and amplified by none other than the New Zealand Law Commission. "In March 2004 the New Zealand Law Commission in its Report 85,"Delivering Justice For All: A Vision for New Zealand Courts and Tribunals", surveyed the state of New Zealand's tribunal system noting its

[30] Commonwealth Ombudsman McMillan, J *'Judicial Review of the Work of Administrative Tribunals - How Much Is Too Much'* (address to the Commonwealth Law Conference14th of April 1993, p. 7.

lack of coherency in terms redolent of those previously used in Australian reports, and suggesting a more unified approach was required. The Commissioners observed:

1. During the past fifty years a large number of Tribunals have been created, with a wide variety of powers. Many of these Tribunals were set up in response to specific needs, and lack any coherent framework or settled pattern. Reaction to a new statutory scheme, or the emergence of a particular kind of dispute, has often been the establishment of a new Tribunal.
2. The present diversity of Tribunals is much greater than it needs to be. The piecemeal way in which Tribunals have developed has led to an unnecessary 'jungle' of different jurisdictions, often with no clear entry point for the ordinary citizen, and wide variations in process for no principled reason.
3. While some Tribunals are well known, sit regularly and have experienced membership, others are little known, meeting infrequently and have occasional members who are not always well supported and have little opportunity to gain experience in their Tribunal role. This can raise concerns about standing, authority and confidence.
4. A number of Tribunals are housed and resourced by departments who are directly affected by their decisions. While historically this may be understandable, it throws their independence and neutrality into question. Tribunals, like courts, must both be independent, and be seen to be independent. The perception is as important as the reality."[31]

There is indeed a great diversity in tribunals and a theme that is emerging is that establishment can be ad-hoc; with this diversity comes a disparity in judicial and quasi-judicial rigour. In the case of some tribunals such as boards questions are raised with regards to the issue of independence and it is noted that there is a perception in the case of some tribunals/boards of there being a lack of sufficient detachment of decision makers.

It is little wonder that courts have established a tradition of more uniform rigour in the requirement for decision makers to have legal qualifications. The courts do not underestimate the paramouncy of the decision making task. In the same breath one has to ask why is it that some tribunals do not place any importance in there being a preponderance of legally trained decision makers? If a decision is appealable and it will ultimately be tried in an appeal court, where the decision makers are universally preeminent in the area of the law, then why is it that the decisions of first instance trivialise the importance of legal qualification? The author has sighted commentary to the effect that as long as there is an appeal right to an appeal court then the system has a safety net. This is true in theory, but access to the safety net, save for very well off parties, is illusory. If one is in the invidious postion of not being able to afford the cost of

[31] The Honourable Justice Michael Barker, 'The Emergence of the Generalist Administrative Tribunal in Australia and New Zealand' (Paper presented at the Australian Institute of Judicial Administration Incorporated 8th Annual AIJA Tribunal's Conference, Sydney, 9-10 June 2005), pp 18 - 19.

an appeal then one is bereft of the ability to access justice. It is thus critical that decision makers of first instance are of the highest calibre.

As the issue of disparate ability and competence has been identified as being one of the shortcomings and legacies of the ad-hoc proliferation of tribunals, the tribunal jurisdictions that insist upon members having a legal qualification should be regarded as benchmarks to be referred to in any uniformity initiative.

Cost Impacts

As with the courts, parties do not have to pay for the presiding member, but unlike the courts they also do not have to pay for mediators or conveners of compulsory conferences. In this regard the interlocutory machinery costs are considerably cheaper than either arbitration or adjudication. Again like the courts the process can be heavily dependent on expert advocacy and expert technical advice. In the main such deployment is not cheaper than the courts.

In tribunals such as VCAT, the ADT and the N.Z Weathertight Homes Tribunal rates and daily hearing costs will vary considerably depending on the quantum in dispute. Unlike the Courts of lower jurisdiction there is no monetary limit demarcation that determines where matters are best suited.

The monetary limit is often unlimited, save for small claims tribunals which can typically hear matters that range from $5,000 to well in excess of $50,000.00. As a general rule the larger the sum of money in dispute the higher the charge out rates; hence the rates could be analogous to the ranges that one finds in the courts and arbitration.

Time Impacts

If one case studies the VCAT as distinct from the Weathertight Homes Tribunal there are a variety of different lists or divisions, such as the Domestic Building List, the Solicitors Misconduct List, and the Anti-Discrimination List.

With respect to the Domestic Building List, from initiation of a dispute resolution process to its conclusion our experience is that the Domestic Building List will probably be faster than the courts, albeit marginally. This is because as mediation and compulsory conferences are very much part of the VCAT dispute resolution fabric there is a greater chance of an earlier outcome (albeit a compromised outcome).

A key difference between the courts is that some tribunals like VCAT and the WHT (in New Zealand) auger well for earlier dispute resolution as mediations are arranged relatively quickly after the filing of an application. It is common for a mediation to be convened within 6 months of the initiation of proceedings in these jurisdictions.

It is nevertheless difficult to generalise, but one can generalise to this extent, the larger the case, the more money at stake, and the more parties involved the longer the case.

As a slight aside prospective litigants when first briefing a law firm are often intent on suing multiple defendants. What they do not realise is that the adding of each defendant culminates in a defended matter, so for every defendant there will be in many respects a separate case as there is a separate cause of action.

This is a universal truth regardless of whether a matter is resolved in a court of law or a tribunal.

Commercial Impacts

The impacts are similar to the courts, because even negotiated outcomes at mediation rarely culminate in the maintenance of business rapport.