THE BOUNDS OF FLEXIBILITY IN TRIBUNALS

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The rule of law is the bedrock of civilised society. It is the assumption upon which even the Constitution is based.[1] It represents the supremacy of law over naked power and unbridled discretion. It is as binding upon judges as administrators.

In 1983 a security training exercise arranged by the Australian Secret Intelligence Service went awry. Four ASIS agents were meant to rescue one of their number who was playing the role of hostage from his imagined 'captors' in a hotel room. They did so by breaking down the door of a room at the Sheraton Hotel. Unfortunately the hotel manager had not been warned about the exercise. When he went to investigate, the participants, wearing disguises and carrying firearms left hurriedly and somewhat sheepishly.

The Chief Commissioner of Police for Victoria began to investigate the commission of criminal offences in relation to this incident. At his request the State government asked the Commonwealth to reveal the names of the participants so that the police enquiries could proceed. The participants moved the High Court for an injunction to restrain the Commonwealth from revealing their names on the basis that it was a breach of a term in their contracts of employment to disclose their identity. A major constitutional case ensued and you will find it reported under the name *A & Ors v Hayden (No 2)*[2].

Given the unusual facts it is hardly surprising that Mason J opened his judgment by suggesting that there was an air of unreality about the case. He said:[3]

> It has the appearance of a law school moot based on an episode taken from the adventures of Maxwell Smart.

This notwithstanding, the judgments in the High Court, which culminated in the refusal of the injunctions sought by the agents, contain a ringing endorsement of the rule of law and its application to the Executive government even in matters of national security.

The idea that law is superior to arbitrary power has an ancient lineage. But it is much more than a philosophical proposition. In the 17th century much blood was shed, including that of a king, to vindicate the principle. And when Charles I's successors still missed the point, the Stuart line was deposed in the Glorious Revolution. It is therefore unsurprising that courts sometimes hark back to these brutal facts of history when wishing to lecture the executive arm of government. Thus, when Windeyer J once referred to the Act of Settlement as expressing the principle that all officers and ministers ought to serve the Crown according to the laws, he added:[4]

> It may be desirable that sometimes people be reminded of this and of the fate of James II….

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Tribunals help ensure the effective and just delivery of government programs. The remarkable growth of tribunals as a permanent arm of Executive government is witness to the fact that 'good government' often depends upon informed and fair decision-making. Without elementary fairness, the Executive does not have the right to expect that spirit of compliance that is even more essential than an effective police force. Tribunals, like mercy, bless both those that give and those that receive the fruits of government.

The qualities of tribunals have been identified as openness, fairness, impartiality, efficiency, expedition and economy.[5]

The growth of tribunals has not occurred without opposition. Sometimes the higher echelons of government resent the public accountability, delay and cost of a tribunal doing that which would formerly have been achieved by a faceless public servant. For one thing, tribunals that sit in public and give reasons expose governmental decision-making to the winds of judicial review more effectively than the silent stamp of an unidentified official in a dossier.

Courts have also shown surprising hostility to the expansion of tribunals. I say surprising, because most tribunals do not involve themselves in the adjudicative tasks traditionally performed by the courts. Judges should hardly complain if Parliament sees fit to take certain categories of dispute out of the judicial context, so long as the court's jurisdiction to supervise legality is maintained; all the more so if the transfer came about because of **unnecessary** inefficiencies in the judicial process or the excesses of the adversary process.

On 13 February 2003 the High Court handed down its decision in *Plaintiff S157/2002 v Commonwealth of Australia*.[6] The case involves the scope and validity of privative clauses affecting decisions of the Refugee Review Tribunal. Much of the discussion relates to federal constitutional law. There are however, points of general application which are relevant to my topic this evening. These concern the explanation of the differences between judicial and executive power, including the executive power exercised through tribunals.

Gleeson CJ quoted Denning LJ with approval when he said:[7]

> If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.

This might seem a little heavy-handed, but it is within the legal tradition I have already spoken about.

My point in starting at this heavy end is to offer a framework for understanding why there are and must be bounds to flexibility in tribunal procedures.

Obviously a tribunal must obey its jurisdictional signposts, doing everything it is set up to do but not a jot more. That is a given and it stems from the rule of law principles already adverted to. My topic tonight concerns matters procedural, although rule of law principles intrude here as well. They explain why flexibility has its bounds. Obviously some of these bounds are to be found in mandatory procedural stipulations in legislation. Others derive from fundamental principles of the common law touching administrative law, most notably the rules of natural justice.

Flexibility, informality and despatch

Section 73 of the Administrative Decisions Tribunal Act 1997 (NSW) ('ADT Act') encourages flexibility, informality and despatch. It has its counterparts in other State and federal enactments dealing with tribunals. Its detailed template should encourage innovation and discourage heavy-handed judicial review. Tribunals are not courts. What is more, they are

not intended to act as if they are courts. If tribunals slide into the legalistic, adversarial, judicial model they will be thanked by neither courts nor government.

Section 73 does not merely authorise flexibility, informality and despatch. It mandates these qualities, although in terms that sometimes suggest their outer limits. Thus the Administrative Decisions Tribunal is required to act as quickly as is practicable (s 73(5)(a)) and with as little formality as the circumstances of the case permit, according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms (s 73(3)). These are duties, although obviously qualified by the scope of other duties.

In aid of these goals, the legislature has conferred broad procedural powers that are not necessarily part of the judicial armoury or, if they are, are not spelt out so explicitly. Thus, the Tribunal has express and undoubted powers:

- to require evidence or argument to be presented in writing (s 73(5)(c))

- to set time limits for the presentation of the respective cases of the parties if limits are determined reasonably necessary for the fair and adequate presentation of the cases (s 73(5)(d)

- to dismiss at any stage proceedings considered frivolous or vexatious or otherwise misconceived or lacking in substance (s 73(5)(h))

- to hold directions hearings (s 73(6)) and preliminary conferences (s 74).

The Tribunal's statutory authority to determine its own procedure (subject to the Act and Rules) is a further express indication that flexibility and innovation are encouraged. This is not just innovation vis á vis courts, but innovation within the Tribunal's own docket of work. What is right for one type of inquiry may not be suitable for another.

Sometimes, only sometimes, it may be better to work through a matter issue by issue, at least with respect to hearing evidence or submissions. Except where findings on one issue will dispose of the whole case, you should beware of issuing interim or piecemeal findings. There is the risk that the position you adopt (say on credibility) at one stage may need to be revisited later.

There might be circumstances where expert witnesses should be directed to consult with one another first so that their evidence can concentrate upon genuine points of difference. In this regard you might pick up some good ideas from the recent amendments to the Federal Court and Supreme Court Rules. Perhaps your Rule Committee might like to look at this.

If the Tribunal is required to reconstitute itself due to the unavailablility (for whatever reason) of a member, s 79 allows the reconstituted Tribunal to have regard to evidence previously taken in the proceedings. Recent appellate decisions have emphasised the width of this power and the authority it confers to dispense with the recalling of evidence or the repetition of argument.[8]

Limited application of the rules of evidence

Section 73(2) of the ADT Act provides:

> The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.

The law of evidence started off as judicial common sense practised in context. But by the mid-twentieth century it had hardened and atrophied. Its rules had become traps for the unwary rather than guideposts to facilitate the orderly gathering and testing of relevant information.

The Evidence Act 1995 is a much more flexible and task-oriented tool than the corpus of black and white technical rules found in Phipson's Law of Evidence. That is not to say that the Evidence Act is free from complexity and arcana. Nevertheless, it arrived on the scene too late to stem a major shift from courts to tribunals. There are many good and understandable reasons why this shift occurred. However, one reason was that the courts were too slow in adapting the rules formulated for criminal trial by jury to the quite different context of civil disputes tried by judge alone.

Section 73(2) has many counterparts in other jurisdictions and there is a body of jurisprudence that discusses its scope and limits. I would commend Professor Enid Campbell's article on 'Principles of Evidence and Administrative Tribunals'[9] for a general exposition.

Section 73(2) has the effect that, except in proceedings involving legal professional misconduct in the Legal Services Division,[10] the Administrative Decisions Tribunal is entitled to have regard to sworn and unsworn evidence as well as information as to fact or opinion to be found in reports or published works. I repeat that all this is subject to the principles of natural justice. But within those limits, in the words of Hill J, the provision:[11]

> means what it says. The fact that material may be inadmissible in accordance with the law of evidence does not mean that it cannot be admitted into evidence by the Tribunal or taken into account by it. The criterion for admissibility of material in the Tribunal is not to be found within the interstices of the rules of evidence but within the limits of relevance.

There are however, some fundamental principles of law which masquerade as rules of judicial evidence but which cannot be overreached by a tribunal in the absence of the clearest statutory authority. These include client-legal privilege, public interest immunity and the privilege against self-incrimination. Indeed s 83(3) of the ADT Act goes further, stipulating that the Tribunal's powers in relation to witnesses do not enable it to compel a witness to answer a question if the witness has a '*reasonable excuse for refusing*'. A reasonable excuse is broader than a lawful excuse.[12]

Nor does s 73 excuse the Tribunal from the obligation to ensure that its findings and ultimate conclusions rest upon material having '*rational probative force*'. This qualification is explained with magisterial clarity by Brennan J in *Pochi v Minister for Immigration and Ethnic Affairs*.[13]

I would remind you that s 73(2) does not stipulate that the Tribunal must *ignore* the rules of evidence. Within those rules there may be principles reflecting the wisdom of the ages which, though not necessarily forming part of the concept of natural justice, are designed to aid the Tribunal in its endeavour to administer '*substantial justice*'.[14] One such principle, now written into the Evidence Act worthy of being borne in mind, is found within s 135 of that Act:

> 135 The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
>
> (a) be unfairly prejudicial to a party, or
> (b) be misleading or confusing, or
> (c) cause or result in undue waste of time.

In essence, you will often have a choice when faced with material that you are convinced is really marginal. You may decline to admit it, so long as you are not thereby refusing a fair

opportunity to present a case. Or you may decide to admit it, making it plain from the outset that its weight is slight because better evidence is available. The Administrative Decisions Tribunal Appeal Panel has approved the following remarks of Davies J when he was President of the Administrative Appeals Tribunal:[15]

> In informing itself on any matter in such manner as it thinks appropriate, the Tribunal endeavours to be fair to the parties. It endeavours not to put the parties to unnecessary expense and may admit into evidence evidentiary material of a logically probative nature notwithstanding that that material is not the best evidence of the matter which it tends to prove. But the Tribunal does not lightly receive into evidence challenged evidentiary material concerning a matter of importance of which there is or should be better evidence. And the requirement of a hearing and the provision of a right to appear and be represented carries with it an implication that, so far as is possible and consistent with the function of the Tribunal, a party should be given the opportunity of testing prejudicial evidentiary material tendered against him. It is generally appropriate that a party should have an opportunity to do more than give evidence to the contrary of the evidence adduced on behalf of the other party. He should be given an opportunity to test the evidence tendered against him provided that the testing of the evidence seems appropriate in the circumstances and does not conflict with the obligation laid upon the Tribunal to proceed with as little formality and technicality and with as much expedition as the matter before the Tribunal permits.

Another principle of evidence apt to be borne in mind are the rules in relation to opinion evidence. They reflect good sense and sound principle in excluding information that carries no probative weight. In this regard they may also save time and expense.[16]

The doctrine of 'official notice' means that a tribunal may draw upon the expertise and experience of its specialist members, as well as upon its accumulated institutional wisdom. The controlling factor remains that of procedural fairness. I agree with the following comment of Professor Smillie:[17]

> It is necessary to ensure that the parties to an administrative proceeding are given a fair opportunity to address submissions to all the crucial issues, and to produce all relevant material within their possession. The obvious solution is to permit administrative tribunals to rely for any purpose upon relevant material of any kind within the personal knowledge of their members *provided any such material which will play an important part in the final decision is disclosed to the parties in advance and they are given a fair opportunity for discussion and rebuttal*.

A tribunal is not restricted to acting only on expert opinion given on oath by a live witness. It may have regard to reports published by research bodies, subject always to procedural fairness.

Rules of natural justice

The need to ensure procedural fairness is fundamental. It qualifies everything I have already said about flexibility, informality and despatch and it is specifically flagged in s 73 of the ADT Act itself and its counterparts in other legislation.

As you know, the rules of natural justice or procedural fairness cluster around two broad principles expressed as maxims: *nemo debet esse judex in propria sua causa* and *audi alteram partem*.

The former maxim translates as *no one can be judge of his or her own cause*. The rules of bias and ostensible bias cover so many possible issues that it is impossible to expound them on this occasion.

Day to day problems are more likely to arise with the second maxim, which translates literally as *hear the other party*. The context of this rule is itself spelt out in s 73(4) which states:

> (4) The Tribunal is to take such measures as are reasonably practicable:

(a) to ensure that the parties to the proceedings before it understand the nature of the assertions made in the proceedings and the legal implications of those assertions, and

(b) if requested to do so – to explain to the parties any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceedings, and

(c) to ensure that the parties have the fullest opportunity practicable to be heard or otherwise have their submissions considered in the proceedings.

I wish to draw attention to two aspects of subs (4), which in my view reflect the common law of natural justice or procedural fairness, but which at times are overlooked.

The opening portion of subs (4) speaks of a duty '*to take such measures as are reasonably practicable*' to ensure or do specified things. The principles of natural justice or procedural fairness must always be viewed in context and tested against the benchmark of what is reasonably practicable.

Procedural fairness does not make a tribunal the passive captive of the party who is too rich, too poor, too manipulative or too stupid to cooperate in the focussed search for truth in the matter at hand. Remember that s 73(5)(a) enjoins the Administrative Decisions Tribunal to act as quickly as is practicable; and that s 73(5)(h) enables it to dismiss at any stage any proceedings before it if it considers the proceedings to be frivolous or vexatious, otherwise misconceived or lacking in substance.

In *Gamester Pty Ltd v Lockhart*[18] the High Court was entertaining an application for judicial review in relation to the conduct of Lockhart J of the Federal Court. His Honour had dismissed proceedings before him because he was satisfied that they were vexatious and an abuse of process. The proceedings were being conducted by a litigant in person who had filed a great deal of material and was engaged in very lengthy cross-examination. Lockhart J stopped further cross-examination and sought to elucidate the subject matters about which the litigant wished to ask questions. It was very difficult to obtain any rational account of those matters. The forthcoming information did not show any matter that the Judge regarded as relevant to the proceeding. He concluded that the case had reached a point where he would not allow it to go on any longer, because to do so would be a serious erosion of the resources of the Court and the Commonwealth and a waste of everybody's time and money. (I would interpose that these considerations are equally relevant to the Administrative Decisions Tribunal, especially in view of its obligation '*to act as quickly as is practicable*' (s 73(5)(a)).)

Gaudron J had dismissed the application for prerogative relief directed to Lockhart J. A further appeal to the Full High Court was dismissed. In the course of the Court's reasons their Honours approved the remarks of Gaudron J when she said:

> It seems to me that there is no denial of natural justice involved in terminating an opportunity to be heard when the evidence appears not to support the relief claimed and requests to state the matters which are said to support the grant of relief fail to produce a statement of those matters.

Their Honours also said this about a submission which asserted in effect that Gaudron J was obliged to pore through a huge mass of undifferentiated written material. The submission was described as suggesting:

> … that a judge who has given a party a reasonable opportunity to state that party's claim for relief is under an obligation, without having the benefit of relevant and intelligible submissions, to extract from a mass of apparently non-supportive evidence any pieces of the evidence which could be regarded as supportive. The submission is misconceived. In court proceedings, a judge is bound to give a party a reasonable opportunity to state the party's claim for relief and to point to the evidence which supports it. But if the opportunity is not taken, the judge is not bound to set out in a search for supportive evidence to support a claim which the party has failed to articulate intelligibly.

This leads to my second point based upon the language of s 73(4)(c). Please note that it speaks of taking reasonably practicable measures to ensure that parties have '*the fullest* ***opportunity*** *practicable*' to be heard or otherwise have their submissions considered in the proceedings. The principles of natural justice are concerned with giving litigants a fair opportunity to make their case. The judicial officer or tribunal does not have an obligation to ensure that such opportunity is availed of to the nth degree. Very recently Kirby J, who is well known for his robust defence of the principles of natural justice, said:[19]

> Sometimes, through stubbornness, confusion, mis-understanding, fear or other emotions, a party may not take advantage of the opportunity to be heard, although such opportunity is provided. Affording the opportunity is all that the law and principle require.

Earlier, in *Sullivan v Department of Transport*, Deane J said that:[20]

> … it is important to remember that the relevant duty of the Tribunal is to ensure that a party is given a reasonable *opportunity* to present his case. Neither the Act nor the common law imposes upon the Tribunal the impossible task of ensuring that a party takes the best advantage of the opportunity to which he is entitled.

I understand that tribunals are frequently presented with unrepresented litigants, often lined up against a well-represented governmental party. This almost invariably increases the difficulties and complexities involved in ensuring the right balance of fairness and passivity that is essential to natural justice. Section 73(4)(b) does not mean that the duty to explain matters is only enlivened by a request. Sometimes this will be necessary because the unrepresented party does not even know for what help to ask. For an excellent discussion of the general issues in this regard, one should consult the recent Full Federal Court decision in *Minogue v HREOC*[21]. The Court endorsed the following observation by Mahoney JA in an unreported decision[22]:

> Where a party appears in person, he will ordinarily be at a disadvantage. That does not mean that the court will give to the other party less than he is entitled to. Nor will it confer upon the party in person advantages which, if he were represented, he would not have. But the court will, I think, be careful to examine what is put to it by a party in person to ensure that he has not, because of the lack of legal skill, failed to claim rights or to put forward arguments which otherwise he might have done.

Conclusion

The principles I have discussed are held in uneasy tension. Your tolerant flexibility as tribunal members may be viewed as unbridled licence by your colleagues or, worse still, appellate panels or courts. Mistakes will be made in the process. None of us are immune. In our system, the only people who are incontrovertibly right in a particular dispute are the justices who form the majority in the High Court of Australia in the ultimate appeal.

To err is human. Sometimes we look back on what we have done or written and we say (as Baron Bramwell once did):[23]

> The matter does not appear to me now as it appears to have appeared to me then.

Lord Westbury once rebuffed a barrister's reliance upon an earlier opinion of his Lordship in the following terms:

> I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.

Sometimes, too, we will be troubled by having to go the extra procedural mile for an undeserving litigant or applicant. If, despite all injunctions about flexibility, despatch and the like, we are required to do so, we should remember Felix Frankfurter's remarks that:[24]

> … the safeguards of liberty have frequently been forged in controversies involving not very nice people.

Endnotes

1 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J. See also *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 77 ALJR 454, 195 ALR 24, [2003] HCA 2 at [103].
2 (1984) 156 CLR 532.
3 Ibid at 550.
4 *Cam & Sons Pty Ltd v Ramsay* (1960) 104 CLR 247 at 272.
5 De Smith, Woolf & Jowell, *Judicial Review of Administrative Action* 5th ed, 1-075.
6 (2003) 77 ALJR 454, 195 ALR 24, [2003] HCA 2.
7 *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574 at 586, quoted by Gleeson CJ at [8].
8 *Liu v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 541, *Lloyd v Veterinary Surgeons Investigating Committee* [2002] NSWCA 224.
9 Campbell and Waller eds, Well and Truly Tried: essays on evidence in honour of Sir Richard Eggleston (1982) p36.
10 Legal Profession Act 1987, s168.
11 *Casey v Repatriation Commission* (1995) 60 FCR 510 at 514 per Hill J. See also *Barbaro v Minister for Immigration and Ethnic Affairs* (1982) 44 ALR 690 at 694; *Shulver v Sherry* (1992) 28 ALD 570.
12 *Ganin v New South Wales Crime Commission* (1993) 32 NSWLR 423.
13 (1979) 36 FLR 482 at 492-3.
14 See the discussion in *Kevin v Minister for The Capital Territory* (1979) 37 FLR 1.
15 *Re Barbaro and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 1 at 5, approved in *United Bonded Fabrics Pty Ltd v Roseman* (2000) EOC 93-049, [2000] NSWADTAP 13 at [27].
16 See *Kevin*, above note 14, at 3-4.
17 J A Smillie, 'The Problem of Official Notice' [1975] PL 64 at 67 (emphasis added). See also TJH Jackson 'Administrative Tribunals and the Doctrine of Official Notice: "Wrestling with the Angel"' in Harris and Waye eds, *Administrative Law* (1991) p120. See also *R v Milk Board; ex parte Tomkins* [1944] VLR 187 at 197, *R v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 QB 456; *Boral Besser Masonry Ltd v Jabarkhill* (1999) 19 NSWCCR 227, [1999] NSWCA 476.
18 (1993) 67 ALJR 547.
19 *Allesch v Maunz* (2000) 74 ALJR 1206 at 1213.
20 (1978) 20 ALR 323 at 342. See also *Adams v Wendt* (1993) 30 ALD 877; *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 187 ALR 117, [2002] HCA 11 at [40].
21 (1999) 84 FCR 438 at 445-6.
22 *Rajski v Scitec Corp Pty Ltd* (NSWCA, 16 June 1986, unreported) at 27.
23 *Andrews v Styrap* 26 LTNS 704, 706.
24 *United States v Rabinowitz* 339 US 56 at 69 (1950).