THE EMERGENCE OF ADMINISTRATIVE TRIBUNALS IN VICTORIA

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On 1 July 2003, the Victorian Civil and Administrative Tribunal (VCAT) had its fifth birthday. It now seems that it has been around forever. Yet, when it was created in 1998, it was a new experiment; and the reforms were hailed as the most far-reaching of any jurisdiction in Australia. Thus it is a fitting time to cast an eye to the history and the future of administrative law in Victoria, and the role of administrative tribunals. Such an examination should provide insight, not only into where we have been, but also into where we are going.

At a little over five months into my appointment, it is also an appropriate time to reflect on the progress that was achieved under my predecessor, Justice Murray Kellam - to whose hard work so many of VCAT's successes of the last five years are due.

These five years have, on balance, reflected well on the intentions and aspirations of those behind the establishment of the tribunal.

It is noteworthy that the *Victorian Civil and Administrative Act 1988* enjoyed bipartisan political support, and that support continues to be enjoyed today. This has done much to cement the future of the tribunal, to protect the independence of decision-making and to bolster support amongst the people of Victoria for the tribunal, and the tribunal's role in the Victorian justice system.

VCAT houses under one roof all or part of 14 former boards and tribunals. They are now assigned to one of three divisions - Civil, Administrative, and Human Rights. Each division is headed by a County Court judge. Deputy presidents then head the various lists within those divisions.

Through this structure, VCAT processes close to 90,000 applications a year, with an operating budget, in 2002-03, of $23,000,000. On these figures, a description of VCAT as a 'super tribunal' is well earned.

I have been invited to speak on past and current perspectives of the operation of VCAT and the importance of VCAT in the administrative law framework in Victoria. Such a topic offers a rich selection of insights, not only into administrative law, but also into the changing relationship between the State and the individual.

This is not surprising, given the function of administrative law as a mechanism through which the power of the State is mediated. In other words, administrative law creates the framework

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through which individual rights are protected from the misuse of State power. In this sense, VCAT is not only central to the administrative law framework, but also to the justice system in general.

The emergence of administrative law

The earliest system of administrative law as we know it possibly began in pre-Tudor England, where justices of the peace were mainly responsible for the administration of executive decisions. The executive, at that time substantially unconstrained by Parliament, also supervised the judges of the assize, who in turn oversaw the justices of the peace.

This system was centralised under the authority of the Privy Council during the Tudors. The Star Chamber, an offshoot of the Council, was used by the executive to pressure the courts, while the Council was used to bypass the increasing power of the Parliament. With so much power still residing in the executive, Sir William Wade has said 'it was on the constitutional rather than on the administrative plane... that the issues between the Crown and its subjects were fought out'[1]. This included the decidedly non-legal device of civil war.

It was after the powers of the Star Chamber and Privy Council were broken, in 1641 and 1688, respectively, that the judiciary was able to assert authority over the executive. The Court of King's Bench stepped into the power vacuum, making available the writs of mandamus, certiorari and prohibition, as well as damages to those aggrieved by the conduct of a justice of the peace or other authority. This period in English history marks the emergence of responsible government and the separation of powers.

In the nineteenth and early twentieth centuries, particularly in England, the common law developed new concepts and remedies to meet changing social circumstances. Indeed, it was the common law, rather than statute law, which often provided the dynamic needed to keep the law relevant. These remedies proved sufficient to keep up with the expanding powers of governments. But, as the modern state emerged in the twentieth century, the courts increasingly fell behind.

Administrative law after World War 2

Following the Second World War, Western governments were forced to come to terms with increasingly strident calls for State intervention beyond the traditional boundaries of State responsibility. The welfare State emerged, as the State began to take responsibility for health, education and welfare schemes.

The State also began to regulate previously unfettered areas, previously dominated by private, rather than public, interests. The statute books exploded with an array of new laws. We saw new law regulating trade practices, the environment, and discrimination. And, although town planning had been around since the 1920s, it was only given legislative teeth in the 1950s.

It was recognised at an early stage in this period that, with increased state powers, mechanisms would be needed to hold governments accountable for their decision-making. The accountability mechanisms of the time were not suited to control this explosion of executive discretion. Judicial review was limited by the courts' refusal to review decisions on the merits. While some decisions fuddled the law/fact distinction in order to provide relief and avoid injustice, by and large the complexity, the length, and the expense of hearings meant that the courts could not plug the accountability gap created by the dramatic increase in governmental responsibilities.

This led to the development of administrative tribunals – slowly at first, then as a flood – to meet community demands to moderate the growing power of the bureaucracy. Merits review tribunals began to appear in the Australian legal landscape, with Victorian tribunals and boards being established on a needs-basis, and specialist bodies instituted in response to discrete subject matters as they arose. Tribunals also emerged as an alternative to the courts. Examples of tribunals include the Fair Rents Board, the Town Planning Appeals Tribunal, the Drainage Tribunal and the Land Valuation Board of Review.

Among the advantages claimed for these tribunals were lower costs to litigants, greater accessibility, a faster decision-making process, informality and simplicity of procedure, specialised knowledge, and a sidelining of legal technicalities.

Importantly, in the decades after World War 2 there was little political support for an overall solution to quasi-judicial merits review of administrative decisions. In 1967-68, the Statute Law Revision Committee produced the *Report upon Appeals from Administrative Tribunals and a Proposal for an Ombudsman*[2], recommending a consolidation of Victoria's boards and tribunals. The report was ignored for 15 years, despite being closely considered in the Kerr Report that led to the Commonwealth Administrative Appeals Tribunal.

Instead, the focus was on other areas of reform. Victoria passed the *Ombudsman Act* in 1973, the *Administrative Law Act* in 1978, and the *Freedom of Information Act* in 1982. There was, however, a substantial reform with the creation of the Planning Appeals Board (PAB), in 1981, which consolidated a number of planning, environment, local government and drainage tribunals.

A 1982 Victorian Law Foundation report[3] estimated the number of tribunals in Victoria at that time to be between two and three hundred. The report acknowledged the PAB reforms, but commented that 'there has yet to be any sustained focus upon administrative tribunals in this State'.

As the number of tribunals expanded, incorporating more and more administrative decisions within the framework of administrative review, the costs of an uncoordinated tribunal system began to mount. The increasing impact of government decision-making on individuals created pressure for a coherent, systematic approach to quasi-judicial institutions. Nevertheless, looking back, this phase, broadly extending from the post-war period to 1980, can be seen as the origins of strong, independent, administrative tribunals in Victoria.

Development

The years 1981 to 1998 can be seen as a period of development for quasi-judicial tribunals in Victoria. Following the establishment of the PAB in 1981, the parliament created the Administrative Appeals Tribunal of Victoria in 1984. This was closely modelled on the Commonwealth AAT, but had much more limited jurisdiction. As of 1986, the tribunal exercised jurisdiction under a paltry 18 Acts, and there were fewer than half a dozen (effective) full-time members.

The role of the Victorian AAT was subsequently identified by Attorney-General Jim Kennan as follows:

> In establishing the AAT, the Government sought to provide citizens with an independent and high quality forum in which appeals against decisions by ordinary administrative tribunals and statutory decision makers could be heard in a speedy and relatively informal setting.[4]

In 1987, when Jim Kennan was both the Minister for Planning and the Attorney-General and was thus able to insist on consultation between the two departments, he deftly incorporated

the PAB into the AAT, with virtually no actual consultation. It was rather a case of the tail wagging the dog – the PAB was then substantially larger than the AAT – but over time the unified tribunal demonstrated the advantages of consolidation.

The establishment of the PAB and the AAT, and the subsequent consolidation of these jurisdictions in the AAT, is the link between the disconnected, ad hoc tribunal system of the post-war period and today's VCAT. It represented recognition of the shortcomings of the previous approach, in its duplication of costs, lack of independence from government, different procedural rules, and inconsistency in approaches to administrative review; and it paved the way for a further consolidation of tribunal functions.

The AAT was designed as an independent body with powers to review a wide range of administrative decisions upon their merits. The centralised structure of the AAT was targeted at halting the proliferation of administrative review bodies, reducing the duplication of costs and providing for more consistent decision-making.

With the passage of the AAT Act, administrative law in Victoria emerged from its childhood. With the AAT, the perceived and actual advantages of an informal tribunal system over the court system were consolidated. Promoting flexibility in approach, with informal and expeditious procedures, accessible to a wide-range of affected persons, we can see an early impression of the modern VCAT. The AAT was said to represent the 'fourth pillar' of the new administrative law, pioneered by the Commonwealth. Along with the Ombudsman, a legislative reform of judicial review principles and the introduction of freedom of information legislation, an increasingly sophisticated administrative law framework began to emerge.

Over the following decade, the AAT's jurisdiction was expanded, eventually receiving jurisdiction from over 100 Acts. But many more Acts were not placed within the AAT umbrella. And, worse still, the growth of new tribunals, particularly civil tribunals, continued.[5] The AAT had failed to address the systemic issues that arose from administrative review's poorly planned, unstructured upbringing.

Consolidation

Despite the gains achieved under the 1984 legislation, the Victorian system of administrative review was still seen to suffer from several deficiencies. In 1996, the then Attorney-General, the Hon Jan Wade, described the system, possibly with some exaggeration, as 'a perplexing mosaic of jurisdiction, confusing to lawyers, lay people and public servants alike'.

The next round of reform was kicked off by the 1996 discussion paper entitled 'Tribunals in the Department of Justice - A Principled Approach'. The 1996 paper repeated, in many respects, criticisms of the pre-1980 system. This raises the observation that while the reforms of 1981 and 1984 had done much to rationalise the 'mish-mash' operation of the earlier, ad hoc arrangements, room remained for further improvement.

The Attorney-General set out the following issues that would guide the next stage of reform:

1 A unified tribunal

The establishment of the AAT, while a substantial improvement on the previous state of the world, did not wholly address the costs of a fractured tribunal system. These costs included the duplication of administrative infrastructure between tribunals, the exposure of discrete tribunals to 'capture' by particular interest groups, unnecessary and burdensome differences in procedure, an inconsistent approach to similar legal issues, overly narrow specialisation by tribunal members, and poor service delivery to rural Victorians.

A unified tribunal was set to remove cost duplication by allowing a unified registry to serve all jurisdictions, insulate jurisdictions from 'capture', unify procedure, promote consistency in decision-making and broaden experience of tribunal members. Cost savings and more-widely experienced decision-makers would allow the unified tribunal to significantly reduce the cost of hearings held in rural Victoria.

2 A rationalisation of jurisdiction

Two categories of disputes were seen as appropriate to quasi-judicial adjudication - firstly, administrative disputes, that is, disputes that arise between the Executive and the individual (the review jurisdiction), and secondly, civil, or *inter partes* disputes involving relatively small claims, of a high volume and specialised nature, where an informal, expeditious procedure could promote cost savings without sacrificing the provision of justice in Victoria.

3 Separation of adjudicatory functions from policy formulation or administration

The independence of an adjudicatory body is compromised by active involvement in policy formulation and by the administration of government policy. (In keeping with the maxim that 'not only must justice be done, it must be seen to be done', the community's regard for tribunal decisions would be increased by the separation of incompatible functions.)

4 An independent tribunal

To protect the unified tribunal from executive pressure, the new tribunal would be led by judicial appointments. Following the Commonwealth and Victorian AATs, it was seen that judicial members would be better suited to hear highly controversial decisions involving executive government interests.

5 A unified procedure

A unified tribunal would rationalise procedures, simplifying litigation and reducing costs. This would, in turn, promote the accessibility of the tribunal to the Victorian public.

6 The protection of specialist knowledge

A unified tribunal would allow the tribunal to be constituted by more than one member where a range of specialist knowledge is required. For example, a planning dispute involving planning and legal issues would be heard by a planning member and a legal member, so that important considerations were not sidelined on review.

7 Judicial review

Finally, the 1996 discussion paper emphasised the importance of retaining review by the courts on questions of law. This is an important mechanism of accountability for any tribunal system, and I do not intend to dwell on the importance of maintaining it.

This report, and the subsequent enactment of the *Victorian Civil and Administrative Tribunal Act* in 1998, marks the end of the adolescence of Victoria's tribunal system. With the establishment of the VCAT, the system entered its maturity.

Success of VCAT

I now turn to the key question I raised earlier - how successful has VCAT been in promoting the principles set out in the Attorney-General's 1996 discussion paper?

The VCAT is the primary provider of merits review adjudication in Victoria. With almost 200 members (including sessionals), and exercising jurisdictions conferred by over 150 Acts, VCAT represents the outcome of a process of consolidation that began almost two decades ago.

The size of the tribunal, and the fact that judicial officers head it, have done much to insulate the tribunal from government pressure. In my time at the helm, I can endorse Justice Kellam's comments that 'no political interference has been experienced in the appointment... or ... termination of members, and we do not anticipate that it will in the future'[6].

On the other hand, VCAT's size and importance in the justice system overcomes a problem experienced by smaller tribunals – participation in government decisions concerning judicial administration generally. It is important that the tribunal be able to communicate with the government to ensure that we continue to work towards the most effective system of justice we can achieve.

Judicial leadership has also improved the capacity of the tribunal to weather political controversy. With such a high profile in the community, it is inevitable, and indeed helpful, that VCAT receive community criticism. However, the presence of Supreme and County Court judges does much to facilitate the acceptance of VCAT decisions in the community.

The amalgamation of registry functions has produced significant cost savings. Procedures have been unified, simplifying access to the tribunal. The ability for members to gain experience across lists expands considerably the capacity of the tribunal to provide hearings in rural Victoria, as well as substantially reduce the cost of those hearings.

Many people were initially concerned that the creation of a single tribunal would result in a loss of specialist knowledge. However, it is VCAT's experience that this has not occurred. Rather, the ability to move members between lists can expand the pool of specialist members. This, in turn, adds significantly to our ability to constitute the tribunal, in an appropriate matter, with two or more members, each representing a specialised area of knowledge. This can improve both the quality, and the consistency of decision-making.

VCAT and merits review

I now turn to another question: is review on the merits, through VCAT, becoming the *central* pillar of administrative law in Victoria? Is VCAT gradually replacing judicial review, and for that matter the development of the common law, as the principal method of resolving issues between citizens and government?

Thirty years ago much of the focus of administrative law was on judicial review. Examinations of the laws governing judicial review were popular, culminating, in Victoria, with the passage of the *Administrative Law Act* 1978. But, as I mentioned earlier, judicial review is poorly positioned to provide an accountability mechanism over executive decision-making. The courts' reluctance to review decisions on the merits was an extension of a reluctance to engage in policy review. It was feared that such a function would reduce the independence of the courts and affect the authority with which the community received judicial determinations. Justice Brennan (as he then was) said:

> Some advocates of judicial intervention would encourage the courts to expand the scope and purpose of judicial review ... Such advocacy is misplaced. If the courts were to assume a jurisdiction to review administrative acts or decisions which are 'unfair' in the opinion of the court - not the product of procedural unfairness, but unfair on the merits - [they] would put [their] own legitimacy at risk.[7]

Quasi-judicial bodies thus arose to fill the vacuum left by the refusal of the courts to review issues beyond procedural and legal defects.

The essence of a review 'on the merits' is the ability of the tribunal to decide for itself, on the material before it, whether the decision appealed against was the 'correct or preferable' one.[8] This involves an objective assessment of the facts, the identification of the applicable law and the nature of any discretion involved and the application of any policy that may be relevant. The decision of the tribunal is then substituted for the original decision. A sound merits review system is inextricably linked to a sound, principled tribunal system. One would expect a fractured, ad hoc system with a large number of specific, separate bodies to be more costly, less rigorous, and less able to review government decisions in a principled and consistent manner, with full recourse to the necessary information and considerations.

In this light, the institutional history of merits review is, to a significant degree, commensurate with the growing relevance of merits review in administrative law. And, thus, the creation of the Victorian Civil and Administrative Tribunal in 1998 stands as a watershed moment in the history of administrative law in Victoria.

Expansion of jurisdiction

Although VCAT is a creature of statute, and does not have any inherent jurisdiction[9], it has a very extensive jurisdiction. It encompasses the vast majority of tenancy and building disputes, jurisdictions which were previously exercised by the courts. It includes not just small claims, but even significant claims under the *Fair Trading Act*. And if the facts in *Rylands v Fletcher*[10] were to recur today it would be initially decided at VCAT!

In the human rights area, not only does VCAT deal with guardianship and administration matters, but the field of anti-discrimination law is growing. A good example of this is the disputes that have arisen this year under the *Racial and Religious Tolerance Act* 2001.

Planning, environmental and licensing matters are also prominent as VCAT jurisdictions. What is perhaps less obvious, but still important, is the gradual increase in the number of Acts which permit merits review in VCAT's General Division. It is not necessary to be a practitioner of Chinese medicine, or to provide certain services to infertile adults to be affected by VCAT's jurisdiction (although these matters are so affected), it would be enough to be a professional person, whether a doctor, dentist, nurse or teacher, or to have a traffic accident, or to seek access to a public document or to pay a State tax, in order to be affected by a VCAT jurisdiction. Indeed, VCAT even has jurisdiction in relation to the licensing of certain persons who provide services to fertile adults!

It can now be said that VCAT touches more Victorians' lives, more often, than any court.

Legislation has overtaken the common law as the principal source of new laws. With the exception of native title, the most important legal developments in the last thirty years have been driven by statute. Guardianship statutes have essentially replaced the supervisory jurisdiction of the courts in respect of disabled persons.[11] The *Fair Trading Act* has overtaken many of the principles of common law contract. Compensation claims for injuries incurred in motor vehicles are now determined by reference to statutory provisions. Town planning statutes have increasingly reduced the scope of operation for common law nuisance actions. Equal opportunity and anti-discrimination laws have plugged perceived gaps in the common law; while freedom of information laws have negated the development of a common law right to information. Many of these legal developments have expanded the scope of merits review in Victoria.

The question of privacy is topical. Two recent developments can be mentioned. First, in 2000 the Victorian Parliament enacted the *Information Privacy Act*. The main purposes of the Act were to establish a regime for the responsible collection and handling of personal information in the Victorian public sector and provide individuals with rights in relation to the way information is handled. The Act established a number of information privacy principles and a regime for the making of complaints. Importantly the Act vested in VCAT the right to hear certain complaints and to make a range of orders where the complaint is made out. These orders do not just include injunctive orders, but extend to mandatory orders and awards of compensation not exceeding $100,000.

Second, on 16 October 2003 the House of Lords of the United Kingdom decided that there was no common law right to privacy. The decision of the House of Lords, in *Wainwright v Home Office*[12] followed a judicial history where English courts were reluctant to extend other tortious principles to a general right to privacy. In rejecting the invitation that there was a tort known as *invasion of privacy*, Lord Hoffmann stated:

> Furthermore, the coming into force of the Human Rights Act 1998 weakens the argument for saying that a general tort of invasion of privacy is needed to fill gaps in the existing remedies. Sections 6 and 7 of the Act are in themselves substantial gap fillers; if it is indeed the case that a person's rights under Article 8 have been infringed by a public authority, he will have a statutory remedy.[13]

Thus the existence of a statutory solution was an influence in constraining the development of the common law. This pattern is not atypical. Not only is more and more law statute based, but also this fact acts as a constraint upon the extension of the common law into areas addressed by parliaments. Thus, it is increasingly the task of administrative tribunals to determine disputes under statute, usually on the basis of merits review.

As this trend continues, VCAT's position at the centre of Victoria's administrative law system is becoming entrenched through the conferral of new jurisdictions on the tribunal. Over the last four years, for example, VCAT has assumed jurisdiction under the *Chinese Medicine Registration Act* 2000, the *Dairy Act* 2000, the *Dental Practice Act* 1999, the *Electoral Act* 2002, the *Fair Trading Act* 1999, the *First Home Owner Grant Act* 2000, the *Health Records Act* 2001, the *Information Privacy Act* 2000, the *Psychologists Registration Act* 2000, the *Seafood Safety Act* 2003, the *Victorian Institute of Teaching Act* 2001, and the *Victorian Qualification Authority Act* 2000. An important new jurisdiction that VCAT expects to receive in 2005 will be to hear disciplinary charges against lawyers and determine lawyer-client disputes.

It is important that new jurisdictions appropriate to VCAT's dispute resolution framework be allocated to the tribunal. It would be a step back if we revisited the previous trend of creating specialist tribunals to deal with new jurisdictions. Many of the reasons for the creation of VCAT would be undermined by such a move. As we claim in our 2002-03 Annual Report, 'our ability to accept and integrate new jurisdictions at a relatively low cost to Government and VCAT users represents one of our greatest strengths'[14].

The fact that we have not returned to the 'bad ol' days' is indicative of the achievements at VCAT over the last five years. It is evidence that VCAT has successfully realised the principles set out in the 1996 discussion paper. This should not by any means be taken to mean that our job is done at the tribunal. If VCAT is to maintain its position in the justice system, we must build on the last five years. We must remain vigilant. To paraphrase a famous quote, 'the price of a successful justice system is eternal vigilance'.

But the success of the VCAT, and its emergence as the preferred method of resolving disputes between citizens and governments, positions the tribunal at the forefront of the administration of justice in Victoria.

Endnotes

1 *Administrative Law* (6th ed.), 1988, Clarendon Press, Oxford, at 16.
2 Parl Paper D-No. 6-1941/68.
3 Robbins, Adrian, *Administrative Tribunals in Victoria*, (1982), Victoria Law Foundation, Melbourne.
4 See the second reading speech of the Hon Jim Kennan in relation to the *Planning Appeals (Amendment) Act* 1987.
5 For example, the Domestic Building Tribunal was established in 1995.
6 The Hon Justice Murray Kellam, 'Developments in Administrative Tribunals in the Last Two Years' (2001) 29 *Fed L Rev* 427 at 431.
7 See *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 37-38.
8 See *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577.
9 *Body Corporate Strata Plan No 334479D v Scolaro's Concrete Constructions Pty Ltd* [2000] VCAT 45; *R v Perkins* [2002] VSCA 132 at [16].
10 *Rylands v Fletcher* (1868) LR 3 HL 330.
11 See *Gardner; re BWV* [2003] SCV 173.
12 [2003] 4 All ER 969.
13 At 980.
14 Victorian Civil and Administrative Tribunal, *2002-03 Annual Report* at 9.