Australian civil and administrative tribunals: challenges and opportunities

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For over two decades, Australia has witnessed a steady but inexorable trend towards the amalgamation of a multitude of smaller tribunals into larger 'super tribunals'. Such 'super tribunals' can now be seen at the Commonwealth level (in the Australian Administrative Tribunal (AAT)); in each of the states except Tasmania[1] (the Victorian Civil and Administrative Tribunal (VCAT), the Western Australian State Administrative Tribunal (SAT), the Queensland Civil and Administrative Tribunal (QCAT), the New South Wales Civil and Administrative Tribunal (NCAT), and the South Australian Civil and Administrative Tribunal (SACAT)); and in the territories (the Australian Capital Territory Civil and Administrative Tribunal (ACAT) and the Northern Territory Civil and Administrative Tribunal (NTCAT)). Outside the federal sphere, this trend has seen the amalgamation of tribunals with a diverse range of functions: merits review, guardianship and mental health, vocational and occupational regulation, and the resolution of *inter partes* civil disputes.

The emergence of these civil and administrative tribunals (CATs) at the state and territory level has given rise to questions, challenges and opportunities. CATs can no longer be viewed as existing on the periphery of Australia's justice system. They are 'considered significant elements of the adjudicative architecture, are accorded equivalent status to the courts, and are now often included in the "basket of funds" governments allocate for adjudication'.[2] CATs provide an alternative avenue to the courts for the delivery of civil and administrative justice. Yet the conferral of jurisdiction on them largely appears to have occurred on an ad hoc basis. And despite having their origins in merits review, the raison d'être for these CATs now extends far beyond that role.

It is an opportune time to reflect on our understanding of the role of CATs in the justice system, and to consider how CATs might better deliver justice in the future. In this article, I consider three areas of the emerging challenges and opportunities for CATs in Australia:

i. Purpose and philosophy;

ii. Composition and culture;

iii. Use of technology.

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1 A TasCAT is to be introduced in 2020. A 2015 Tasmanian report recommended the amalgamation of a number of tribunals into a single tribunal: Tasmanian Department of Justice, *A Single Tribunal for Tasmania* (Discussion Paper, September 2015), ch 6.

2 Robin Creyke, 'Australian Tribunals: Impact of Amalgamation' (2020) 26 *Australian Journal of Administrative Law* 206, 228.

Purpose and philosophy

In a paper published earlier this year,[3] Emeritus Professor Creyke reported on her findings from a significant piece of primary research: a survey she administered to the AAT, VCAT, NCAT, QCAT, SAT, SACAT, ACAT and NTCAT (Creyke survey). Responses to the Creyke survey identified a number of advantages of amalgamation. These included greater public knowledge of tribunals as avenues for dispute resolution; heightened government awareness of tribunals and a greater status for tribunals in the adjudicative structure; an increased ability to handle disputes over a diversity of matters; more experts to deal with a variety of matters; a higher calibre of members; an enhanced ability to meet digital challenges; cross-pollination of ideas; increased administrative efficiencies and improved consistency and quality of decision-making; enhanced scope for adopting best practices and use of alternative dispute resolution (ADR) and facilitative dispute resolution (FDR); and opportunities for developing best practice in delivering administrative justice to the public.[4] On the other hand, a number of disadvantages of amalgamation were also identified. These included inadequate resourcing, especially in the event of increases in jurisdiction which are not properly funded; physical difficulties in accessing one central location (especially in the central business districts of capital cities); the loss of speciality tribunal members; and procedural differences mandated by legislation.[5]

One issue tackled by each of the CATs has been the development of cohesive procedures and culture across their disparate areas of jurisdiction. The inquisitorial role undertaken by a CAT in considering an application for guardianship and administration orders is vastly different from its adjudication of the *inter partes* adversarial contest involved in a vocational regulatory matter, or in an application to resolve a dispute over allegedly defective building works, or in an application by a party for the review of a decision made by a government decision-maker. Finding common ground among such different areas of jurisdiction has not been free of difficulty. Pearson described this challenge as:

> [T]he need to ensure that at the same time as preserving necessarily different processes for different types of matters, what emerges is more than simply a collection of effectively distinct components sharing central leadership and governance.[6]

Developing a cohesive approach to the various aspects of a CAT's jurisdiction starts with identifying the central purpose, or raison d'être, of CATs within Australia's justice system. As Professor Creyke has put it, 'it is time for tribunals "to carve out a philosophy of their own existence"'.[7] That statement presupposes that CATs in this country share a common philosophical foundation. In my view, there is sufficient similarity in their history, in the time

3 Ibid.
4 Ibid 228.
5 Ibid 229–30.
6 Linda Pearson, 'The Vision Splendid: Australian Tribunals in the 21st Century' in Daniel Stewart and Anthony Connolly (eds), *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (The Federation Press, 2015) 196.
7 Robin Creyke, 'Tribunals — "Carving out the philosophy of their existence": The Challenge for the 21st Century' (2012) 71 *AIAL Forum* 19, 30, citing John McMillan, 'Merit Review and the AAT: A Concept Develops' in J McMillan (ed), *The AAT — Twenty Years Forward* (Australian Institute of Administrative Law, 1998) 33.

frame in which the CATs were established, and in the areas of jurisdiction conferred on the CATs, to support that conclusion.

Why is it necessary to identify an underlying philosophy for the existence of CATs (philosophical foundation)? Identifying their philosophical foundation provides a touchstone to guide decisions about every aspect of a CAT's operation. It may also provide a basis for governments and stakeholders to assess whether further amalgamation of tribunals should be undertaken, especially in those areas where, to date, it has been resisted, such as in relation to industrial commissions, or workers' compensation commissions, and to identify whether additional civil jurisdiction should be conferred on CATs.

The question, then, is how to identify the philosophical foundation of the CATs. Each of them is a creature of statute — of their constituting Acts and their enabling Acts. The existence of each CAT is the product of a policy decision by the executive government, which was implemented in legislation. The jurisdiction they have is the product of dozens, if not hundreds, of such policy decisions and legislative actions over many years. If a philosophical foundation for CATs is to be discerned, the starting point must be to ascertain why governments pursued the amalgamation of disparate tribunals, to identify the themes which emerge from the stated objects of the amalgamated tribunals, and to identify common areas of jurisdiction now exercised by CATs following these amalgamations.

History of amalgamation

The genesis for the concept of amalgamating tribunals in Australia lies in the *Report of the Administrative Review Committee* (Kerr Report) almost 50 years ago. The Administrative Review Committee (Committee) favoured the adoption of a general policy of providing for a review of administrative decisions, which should be undertaken by one tribunal, rather than by a multitude of specialist tribunals as had previously been the case.[8] While the Committee did not recommend abandoning the conferral of merits review jurisdiction on specialist tribunals, it nevertheless proposed that merits review jurisdiction be conferred on an administrative review tribunal whenever a general merits review was thought to be suitable.[9] The Committee also suggested that consideration be given to whether the jurisdiction of existing adjudicative review tribunals should be transferred to the proposed Administrative Review Tribunal.[10] That approach set a new direction for administrative tribunals in Australia, which has had profound and far-reaching effects.

In discussing the jurisdiction of tribunals, the Committee referred only to tribunals with jurisdiction to review the merits of decisions made by government decision-makers. No doubt that reflected the fact that it was not then common for jurisdictions to determine *inter partes* disputes to be conferred on tribunals. That began to change by the early 1970s, with the creation of small claims tribunals.[11]

8 Commonwealth Administrative Review Committee, *Report of the Commonwealth Administrative Review Committee* (Parliamentary Paper No 144, August 1971) (Kerr Report) [279]–[280].
9 Ibid [292].
10 Ibid [311].
11 See, for example, *Small Claims Tribunals Act 1973* (Vic) and *Small Claims Tribunals Act 1974* (WA).

The amalgamation of civil tribunals with administrative review tribunals was first pursued in Victoria. A 1996 discussion paper which examined whether the jurisdiction of civil tribunals should be transferred to the Victorian Administrative Appeals Tribunal (Discussion Paper) noted that 'Victorian tribunals have been established as specialist bodies to deal with a variety of issues as particular needs have arisen. Compared to the courts, they are intended to be informal speedy and inexpensive'.[12] The Discussion Paper identified the issues determined by tribunals in Victoria at that time as falling into two broad categories: administrative disputes (that is, merits review) and *inter partes* disputes, such as those determined by the Small Claims Tribunal, the Residential Tenancies Tribunal, the Domestic Buildings Tribunal, the Credit Tribunal and the Anti-Discrimination Tribunal.[13]

The Discussion Paper noted that 'there are no formal criteria by which to assess the appropriateness of conferring a particular type of jurisdiction on a tribunal. In reviewing whether a particular jurisdiction should be conferred on a tribunal, it should not be assumed automatically that the courts have a first call on all adjudicative or merits review functions. Rather, in each case a number of factors should be considered in order to achieve a consistent and rational allocation of jurisdiction between courts and tribunals'.[14] Those factors were:[15]

- The extent of the jurisdiction in monetary terms: cases of modest value were thought more appropriate for tribunals because in those cases where 'larger interests are at stake, the inevitable substantive and procedural compromises involved in an *inter partes* tribunal as compared to a court are more difficult to justify';[16]
- Volume of cases: high-volume jurisdictions were thought to indicate the need for a tribunal to achieve the expeditious disposition of those cases;
- Need for informality: in some jurisdictions informality was not only considered desirable to deal with cases quickly and cheaply, but was more suitable, given the nature of the jurisdiction (in the case of anti-discrimination and guardianship matters); and
- Need for specialist expertise to deal with particular classes of cases.

Consequently, two categories of matters were seen as appropriate for amalgamation: reviews of government decisions, and civil or *inter partes* disputes which involved small claims and were of a high volume and a specialised nature, in which an informal and expeditious procedure would promote cost savings without compromising the provision of justice.[17] The objectives of the amalgamation of those tribunals were seen to be the rationalisation of procedures, the simplification of litigation, and a reduction in costs, while at the same time preserving the flexibility to ensure that, in appropriate cases, members with specialist knowledge relevant to the matter could constitute the tribunal.

12 Hon Jan Wade MP, *Tribunals in the Department of Justice: A Principled Approach* (Attorney-General's Department (Vic), October 1996) 3.
13 Ibid.
14 Ibid 8.
15 Ibid 8–9.
16 Ibid 8.
17 See, for example, Justice S Morris, 'The Emergence of Administrative Tribunals in Victoria' (2004) 41 *AIAL Forum* 16, 19–20.

Professor Creyke discerned similar themes from more recent ministerial statements about the proposed amalgamation of various tribunals into the ACAT and SAT, namely:[18]

> [A] consolidated tribunal was to be more accessible, more efficient and cost-effective, should operate with fair, flexible and streamlined procedures, and produce speedier outcomes … Other objectives include that the amalgamated framework would result in more consistent, higher quality decisions, a more coherent legislative framework, provide a broader range of work and an enhanced career pathway to attract high-quality members, produce a better skilled tribunal workforce with an increased range of expertise, and lead to improved decision-making within public administration.

It is thus clear that the amalgamation of civil and administrative tribunals was primarily driven by the anticipated practical and process benefits for government and for litigants. The anticipated benefits for litigants included accessibility; fairness, flexibility and simplicity of procedures; cost-effective and speedier outcomes; and better quality decisions. The primary anticipated benefits for government lay in greater efficiency and cost-effectiveness in the CAT's operations. Only in respect of merits review did amalgamation have any explicit normative objective, namely to improve decision-making in public administration.

Objects of CAT constituting legislation

I turn, next, to consider the objects sections of the constituting legislation of the CATs, which in large part reflect these objectives.[19] By way of example, s 3 of the *Civil and Administrative Tribunal Act 2013* (NSW) sets out a variety of objects, including to enable the NCAT to make decisions as a primary decision-maker, to review decisions, to determine appeals and to exercise such other functions conferred on it, to ensure that the Tribunal is accessible and responsive to the needs of all of its users, to enable the Tribunal to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible, and to ensure that the decisions of the Tribunal are timely, fair, consistent and of a high quality.

Similarly, the objects set out in s 3 of the *Civil and Administrative Tribunal Act 2009* (Qld) include to establish an independent tribunal to deal with the matters it is empowered to deal with under that Act or an enabling Act, to have the Tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick, and to promote the quality and consistency of Tribunal decisions.

The objects in s 8 of the *Civil and Administrative Tribunal Act 2013* (SA) are similar, and also include ensuring that applications are processed and resolved as quickly as possible while achieving a just outcome, including by resolving disputes through high-quality processes and the use of mediation and alternative dispute resolution procedures wherever appropriate.

The objectives of the SAT, as set out in s 9 of the *State Administrative Tribunal Act 2004* (WA) are to achieve the resolution of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case; to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to parties; and to make appropriate use of the knowledge and experience of Tribunal members.

18 Creyke, above n 2, 210.
19 Ibid.

The objects of set out in s 10 of the *Civil and Administrative Tribunal Act 2014* (NT) and s 6 of the *Civil and Administrative Tribunal Act 2008* (ACT) are similar, as is s 98 of the *Civil and Administrative Tribunal Act 1998* (Vic).

Although there are occasional references to improved public administration, the overriding focus of the objects sections of the constituting legislation of each of the CATs is on their processes and their approach to decision-making. The common, key themes are accessible, fair, informal, flexible, cost effective procedures, and quick outcomes.

The diverse jurisdiction conferred on CATs

Academic discussion of the significance of CATs in Australia has tended to focus largely on their role in merits review. That is no doubt because of the influence and significance of the AAT. However, that focus tends to obscure the fact that the significance of the CATs in the Australian justice system extends far beyond their role in merits review, in two respects. First, the CATs, and especially the largest CATs — VCAT, NCAT and QCAT — deal with an enormous volume of work each year. Secondly, a very significant proportion of the work done by every CAT (and in some cases, a very large majority of the work of the CAT) lies in the determination of civil disputes. It is convenient to illustrate the point by reference to the statistics from the VCAT, NCAT and QCAT.

According to VCAT's annual report for 2018–19, 85,850 cases were lodged in that year. 52,412 (or 61 per cent) of those were in the Residential Tenancies Division. A total of 15,031 cases (or 17.5 per cent of total cases) were lodged in the Civil Division (comprising building and property, civil claims and owners' corporations (strata) claims). In summary, 78.5 per cent of cases lodged in VCAT during the 2018–19 year were *inter partes* civil disputes. Of the remaining cases lodged in VCAT during that year, 14,076 cases (or 16 per cent) were in the guardianship jurisdiction. Only 3,752 cases (or 4 per cent) were lodged in the 'planning and environment' and 'review and regulation' lists of the VCAT.[20] The latter lists include applications for the review of administrative decisions made by government decision-makers, but not exclusively so. The review and regulation list, for example, also deals with disciplinary inquiries in relation to the conduct of various professionals.[21] The figures for the 2017–18 and 2016–17 financial years were broadly consistent with those for 2018–19.[22]

The picture from the NCAT is similar. According to its annual report for 2018–19, 68,388 applications were lodged in NCAT. Of those, 54,976 (80.4 per cent of total applications) fell within the Consumer and Commercial Division of the NCAT. The Consumer and Commercial Division of the NCAT deals with a range of disputes including those concerning residential tenancies, retail leases, home building, strata schemes, and consumer disputes under the *Fair Trading Act 1987* (NSW).[23] There were 11,716 (17.1 per cent) applications to NCAT in the guardianship jurisdiction. Only 777 (1.1 per cent) fell within the Administrative

20 Victorian Civil and Administrative Tribunal, *VCAT annual report 2018–2019* (Report, 2019) 9.
21 Ibid 58.
22 Ibid 9.
23 NSW Civil and Administrative Tribunal, *NCAT annual report 2018–2019* (Report, 2019) 35.

and Equal Opportunity Division.[24] Of these, only 678 applications were made in the various lists in the Administrative and Equal Opportunity Division which deal with merits review.[25] NCAT's top 10 matters by volume in descending order for 2018–19 were residential tenancy and social housing; guardianship; consumer claims; home building matters; strata and community title, retirement village and similar matters; motor vehicle disputes; other commercial matters, including retail leases; administrative reviews of government decisions; professional disciplinary matters; and anti-discrimination matters.[26] The figures for the 2017–18 financial year were broadly consistent with these.[27]

The QCAT received a total of 31,592 applications in the 2018–19 year. Of these, 17,090 applications (54 per cent) were received in the Civil Division of the QCAT. Within the Civil Division, the very large majority of applications (16,246 or 51 per cent of total applications in the QCAT) concerned minor civil disputes, 352 applications were for building disputes and 188 were for retail shop lease disputes.[28] The minor civil disputes jurisdiction covers civil disputes including residential tenancy disputes, minor debts, consumer and trader disputes, motor vehicle property damage disputes and dividing fence disputes, where the claims are for a value of less than $25,000.[29] The balance of the Civil Division encompasses disputes such as domestic building disputes (where no monetary limit applies), community living matters (community title schemes, retirement villages and manufactured home parks), retail shop lease disputes with a value of up to $750,000, and tree disputes.[30] The next most significant jurisdiction by volume was the guardianship jurisdiction, in which 12,805 applications (or 40.5 per cent of total applications) were received. Only 837 applications (2.6 per cent) fell within the workload of the Administrative and Disciplinary Division, of which 469 applications (1.5 per cent of total applications in the QCAT) were for general administrative (merits) review[31] and the balance were for occupational regulation matters.[32] The figures for the 2017–18 year were very similar.[33]

The distribution of work — as between civil disputes, guardianship applications, and merits review applications — appears to be broadly similar in the other CATs, albeit with

24 Ibid 7.

25 The lists in which merits review is undertaken are the Administrative Review List (which deals with the review of decisions made by government decision-makers in areas such as access to information, breach of privacy, reviews of decisions made by the New South Wales Trustee and Guardian), the Community Services List (which includes the review of decisions such as whether a person should be permitted to work with children) and the Revenue List (which covers the review of state government tax decisions): NSW Civil and Administrative Tribunal, above n 23, 31.

26 Ibid 5; NSW Civil and Administrative Tribunal, *NCAT annual report 2017–2018* (Report, 2018), 5.

27 Ibid 8.

28 Queensland Civil and Administrative Tribunal (QCAT), *Queensland Civil and Administrative Tribunal annual report 2018–19* (Report, 2019), 13.

29 Ibid 23.

30 Ibid 21.

31 Some merits review applications in relation to child protection matters fall within the workload of the Human Rights Stream; 413 such applications were received in the 2018–19 year. If these are combined with the general merits review applications received in the Administrative and Disciplinary Division, a total of 882 applications for merits review (2.8 per cent of total applications) were received in the QCAT in the 2018–19 year.

32 Queensland Civil and Administrative Tribunal, above n 28, 13.

33 Ibid.

some variations.[34] For example, the SAT has jurisdiction to deal with civil disputes, such as those arising under the *Strata Titles Act 1995* (WA), but does not have jurisdiction to deal with residential tenancy disputes under the *Residential Tenancies Act 1987* (WA). The SAT received 6,855 applications in the 2018–19 year. Of these, 2,321 were received in the Commercial and Civil List. The bulk of these were for commercial lease amendments, for building disputes, and for strata titles disputes and other commercial matters. The majority of applications to the SAT (3,938 applications) were received in its guardianship and administration jurisdiction. Only a very small proportion of applications overall were for merits review.

A number of insights into the reasons for the existence of the CATs can be discerned from these statistics. First, while tribunals had their origins as vehicles for merits review, it is apparent that the raison d'être of CATs can no longer be said to lie in, or primarily in, merits review, or in improving public administration through merits review. Judged by reference to the volume of applications, a large majority of the work undertaken by the CATs is concerned with the resolution of *inter partes* civil disputes. (In that sense, the jurisdiction of the CATs 'reaches into the heartland of the courts by including civil and commercial jurisdictions — and in many instances removes those jurisdictions from the spheres of the courts'.[35]) The next most significant aspect of the CATs' jurisdiction lies in their guardianship jurisdiction. The merits review jurisdiction is comparatively small by volume. While merits review remains an important part of the role of the CATs, the fact is that the CATs are now primarily concerned with the resolution of civil disputes and the determination of guardianship applications.

Secondly, it cannot be said that the philosophical foundation for CATs lies in the fact that they are not courts and do not exercise judicial power. While the CATs clearly exercise power which is not judicial power (for example, in appointing guardians[36]), their jurisdiction to determine *inter partes* civil disputes does involve the exercise of judicial power.[37] Furthermore, QCAT is a court of record,[38] and it has been held that QCAT is a 'court of a State' for the purposes of s 77(iii) of the Commonwealth *Constitution*.[39] On the other hand, those CATs which are not constituted as courts cannot be regarded as providing a complete alternative to courts for the resolution of civil disputes, because they cannot exercise jurisdiction in federal matters described in s 75 and s 76 of the Commonwealth *Constitution*.[40] Alternative arrangements need to be available to ensure that those matters can be determined by courts.[41]

Thirdly, it also cannot be said that the philosophical foundation for CATs is concerned with the resolution of minor or small claims. While much of the work of the CATs, and especially

34 ACAT: administrative review, guardianship, and civil disputes. NTCAT: civil disputes and small claims, residential tenancies, guardianship.

35 Bertus De Villiers, 'Accessibility to the Law — The Contribution of Super-Tribunals to Fairness and Simplicity in the Australian Legal Landscape' (2015) 39(2) *University of Western Australia Law Review* 239, 245.

36 See, for example, *GS v MS* [2019] WASC 255.

37 See, for example, *Zistis v Zistis* [2018] NSWSC 722 [57]–[67] (Latham J); *Raschke v Firinauskas* [2018] SACAT 19 [90] (President Hughes); *Sharma v Carlino* (2019) 96 SR (WA) 198 [40] (Senior Member Aitken); *Shuttleworth v Pearson* [2018] WASAT 112 [38] (Senior Member Aitken).

38 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164(1).

39 *Owen v Menzies* [2012] QCA 170 [55] (McMurdo P).

40 *Burns v Corbett* (2018) 265 CLR 304; [2018] HCA 15; *Meringnage v Interstate Enterprises Pty Ltd t/as Tecside Group and Ors* [2020] VSCA 30.

41 See, for example, Pt 3A of the *Civil and Administrative Tribunal Act 2013* (NSW).

VCAT, NCAT and QCAT, is concerned with simple civil disputes of a small value, their jurisdiction to resolve civil disputes also encompasses claims involving factual or legal complexity, and/or high value. By way of example, VCAT's 2018–19 annual report indicates that the cases it deals with in its Civil Claims List predominantly comprise disputes about the supply of goods and services under the *Australian Consumer Law and Fair Trading Act 2012* (Vic).[42] There is no limit on the amount that may be claimed in these claims. While the vast majority of these claims were for minor amounts (less than $10,000), 1,907 of these claims were for amounts exceeding $10,000 and 131 were for amounts in excess of $100,000. These consumer law disputes range from 'everyday consumer transactions' to more complex cases such as disputes concerning the sale of businesses, professional negligence claims against accountants and other service providers, contractual disputes for software development, disputes under insurance policies, and disputes between franchisors and franchisees.[43] In its Building and Property List, VCAT deals with a range of disputes including domestic building disputes, retail tenancies, commercial building works and leases, and the sale or division of co-owned land and goods. Building disputes, in particular, are becoming more complex, increasingly concerning defects in high-rise apartments and multi-unit developments.[44] Finally, while its Residential Tenancies List is 'a high-volume, efficient throughput list' which aims to resolve most matters within four weeks of the original application,[45] that list also includes a small number of 'complex high-value compensation claims between landlords and tenants'.[46]

Fourthly, there has not been a consistent approach across the CATs to the conferral of civil jurisdiction on CATs rather than courts. As noted above, the SAT does not have jurisdiction to deal with residential tenancy disputes under the *Residential Tenancies Act 1987* (WA). Those disputes are dealt with by the Magistrates Court. On the other hand, the SAT deals with disputes under the *Strata Titles Act 1995* (WA). Recent amendments to that Act resulted in the conferral on SAT of jurisdiction to deal with applications which previously fell within the jurisdiction of the District Court of Western Australia.[47] There does not appear to be any consistent rationale for why some CATs have jurisdiction over particular kinds of civil disputes and others have not been conferred with that jurisdiction.[48] Nevertheless, these recent examples serve to illustrate that CATs constitute an alternative vehicle for the adjudication of civil disputes and, in that respect, determine disputes that would otherwise require determination by courts.

The philosophical foundation for CATs in Australia

How, then, might the philosophical foundation of the CATs be encapsulated in a statement? Taking into account the matters already discussed, a starting point might be as follows:

42 Victorian Civil and Administrative Tribunal, above n 20, 43.
43 Ibid 42.
44 Ibid 40.
45 Ibid 56.
46 Ibid 56.
47 See, for example, s 31 of the *Strata Titles Amendment Act 2018* (WA) conferring jurisdiction on SAT to deal with applications to vary strata schemes on damage or destruction of the building.
48 De Villiers, above n 35, 246–7.

> CATs exist to act as independent decision-makers in any of a wide variety of roles which may be conferred on them by statute: to conduct merits reviews, to act as an original decision-maker, or in adjudicative or inquisitorial roles. The legal, or other specialist, expertise of their members, and their flexible and informal processes, enable CATs to focus on achieving a just outcome, and on making decisions of the highest quality, as efficiently, simply, speedily and cost-effectively as is possible, having regard to the circumstances of each case.

It will immediately be noticed that this statement focuses on how CATs operate, rather than what they decide. That is precisely the point. The diversity of jurisdiction which, over time, has come to be conferred on CATs means that their philosophical foundation cannot be exclusively tied to a particular jurisdictional anchor.[49]

However, to state this philosophical foundation in terms concerned, fundamentally, with process, does not preclude reference to the objectives of a CAT's jurisdiction being added to, or overlaid on, this philosophical foundation. So, for example, the philosophy underlying a CAT's merits review jurisdiction might be to promote the best principles of public administration by identifying the correct and/or preferable decision at the time of the review.[50] The philosophy underlying a CAT's small civil claims jurisdiction might be to resolve disputes using resources and time proportionate to the quantum and complexity of those disputes. In vocational regulation, the philosophy might be to promote the observance of professional standards of conduct, for the protection of the community. In guardianship and administration, a CAT's philosophy might be to adopt an inquisitorial role to ensure that those who require the protection of the legislation receive it, so far as their best interests require. Different CATs may have different views about how to encapsulate the underlying objectives of particular aspects of their jurisdiction.

Identifying the philosophical foundation for CATs permits a principled approach to decisions about the procedures adopted by a CAT in the exercise of its diverse jurisdiction, and may also inform other decisions, such as those concerning its membership and composition, or the role and emphasis on ADR or FDR across all areas of its jurisdiction, or the extent to which technology can and should be used to resolve disputes. Furthermore, keeping that philosophical foundation steadily in focus acts as a reminder that CATs exist because they are able to offer an approach to the delivery of justice which is different from the approach taken in the courts. If the manner in which CATs operate does not continue to manifest that difference, the purpose for their existence may be called into question.

Composition and culture

I have already discussed the wide range of jurisdiction conferred on CATs and the challenges experienced by CATs in seeking to develop cohesive procedures and culture. The SAT's experience suggests that a cohesive approach can be adopted across all jurisdictions (other than the guardianship and administration jurisdiction). While retaining the flexibility to tailor its procedure to the needs of an individual case, the typical approach following the filing of an application in the SAT is to hold an initial directions hearing, at which the issue for resolution

49 Cf Bernard McCabe, 'Perspectives on Economy and Efficiency in Tribunal Decision-Making' (2016) 85 *AIAL Forum* 40, 44.

50 *State Administrative Tribunal Act 2004* (WA) s 9; *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8(a); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 10(a).

will be identified and the most expeditious means to resolve it will be explored. Orders will usually be made to require a brief responsive document to be filed, and the parties will then be required to attend a mediation or compulsory conference. If the proceeding does not resolve at the mediation then a second directions hearing will be held, at which point orders will, if appropriate, be made for the filing of statements of issues, facts and contentions, or statements of agreed facts, for the filing of witness statements, and for the listing of the final hearing. In more complex matters, the process may be more protracted in that the parties may require longer to prepare documents, or may seek to adduce expert evidence. However, broadly speaking, the process remains the same.

That brings me to an additional challenge for those CATs with a large civil jurisdiction, and especially one which includes more complex or high-value cases. That challenge lies in combating the resistance of some lawyers to dealing with cases quickly, using streamlined processes. Attempts to impose short time frames at each stage of a proceeding may be met with consent orders by the parties to extend time. Statements of issues, facts and contentions, or summaries of cases, can start to look like pleadings. In such cases, it is particularly important for CATs to keep steadily in mind their philosophical foundation, and to continue to press the parties to narrow the dispute to what is really in issue, to endeavour to resolve the case by compromise through ADR or FDR and, failing that, to proceed to a hearing as quickly as possible.

A continuing question for CATs concerns the qualification of members and, in particular, whether only legally qualified members should be appointed. It cannot be disputed that in many areas of the civil and merits review jurisdiction conferred on CATs, it is essential that members have legal training and experience. That is so in high volume areas of jurisdiction, as much as it is in cases involving factual or legal complexity, or in merits review, in which statutory construction may be involved. The attraction in appointing only lawyers to tribunals lies in their potential to undertake a wide variety of work. That thinking clearly underlined the recommendation of the Callinan Review[51] that all persons appointed as members of the AAT in the future should be lawyers.[52]

CATs need legally qualified members with a range of abilities and competencies. Some will be suited to specialisation in specific areas of work, such as guardianship applications. Some will be suited to dealing extremely efficiently with large numbers of small civil disputes. Others will have interpersonal skills which will be invaluable in avenues of ADR or FDR. The recruitment of members with skills in mediation is especially important if CATs are to resolve matters efficiently, speedily and cheaply.

The philosophical foundation for CATs means that there is an important role for members who are not legally trained, but who have specialist knowledge and expertise in fields of endeavour related to the work of the CATs. In some areas of jurisdiction — such as vocational regulation — the involvement of specialist decision-makers is mandated by legislation.[53] In other areas, such as in merits review of planning decisions, or in building disputes, the

51 Hon Ian Callinan AC QC, *Review: Section 4 of the Tribunals Amalgamation Act 2015* (Cth) (Report, 2018).
52 Ibid 9 (measure 6), 125.
53 See, for example, *State Administrative Tribunal Act 2004* (WA) s 11(4); *Legal Profession Act 2008* (WA) s 437.

expertise of specialists from a relevant field is essential to the efficient conduct of a CAT's work. The assistance able to be provided by non-legally trained members is also especially valuable in the mediation of disputes involving technical or professional standards, where the presence of a specialist member can assist the parties to more quickly come to understand the potential strengths and weaknesses of their case, and that of their opponent. Finally, in other areas of a CAT's decision-making roles, the value of the different perspectives offered by members who have expertise outside the law, and who are experienced decision-makers, should not be underestimated. The opportunity for collaboration between legally trained members and members with other specialist qualifications is also an important feature of CATs which facilitates the efficient resolution of disputes. When the philosophical foundation for CATs is borne in mind, it is apparent that a CAT will be best placed to deal with the diverse jurisdiction conferred on it if it has members with a range of qualifications and expertise, who are able to deal with cases individually or collaboratively, to enable the tribunal to quickly and efficiently deal with the issues in a case.

Use of technology

I turn, finally, to consider an increasingly important issue in relation to the operations of CATs, namely the use of technology, which itself presents a number of challenges and opportunities.[54] It is fair to say that the upheaval produced by the COVID-19 pandemic over the past six months, and the enormous challenges this has posed for courts and tribunals around the country to continue to deliver justice while ordinary operations have been interrupted, has increased the speed at which the use of technology has been embraced, but has also starkly highlighted the challenges associated with its use. The following observations are based on my own reflections on the benefits and challenges associated with the use of technology, informed by SAT's recent experience.

There are two areas in which the use of technology will be essential if a CAT is to be able to operate in accordance with its philosophical foundation in the future: the use of e-lodgment and e-filing systems; and the use of telephone and videoconferencing technology (VCT) in the conduct of both mediations and hearings.

E-lodgment and e-filing systems

E-lodgment systems permit documents to be filed — that is, lodged with a CAT registry online — and to be filed in the CAT file for the proceeding in question. E-filing systems permit CATs to move to a paperless filing system, whereby all members and staff of a CAT will be able to access the digital file for a proceeding, to undertake file management tasks, and to use the digital file for hearings, as they would a paper file. E-filing systems also permit parties to proceedings to access the e-file online, subject to any rules governing that access, just as they would be able to inspect a paper file at a CAT registry.

There are obvious and very significant advantages for the efficient operations of CATs in transitioning to e-lodgment and e-filing. E-lodgment and e-filing is convenient, at least for those with the capacity and skills to access it. It is fast — documents can be lodged instantaneously. It minimises delay in litigation because CAT staff and parties to proceedings

54 Creyke, above n 2, 214, 216.

can quickly access documents on an e-file wherever they are, at will, provided they have an internet connection. An e-lodgment and e-filing system is cost-effective, once established, because paper files no longer need to be maintained and stored. If properly designed, an e-filing system can make file management and use of filed documents simpler and easier for members and staff of a CAT. And an e-filing system permits easy access to CAT files for staff members working remotely.

On the other hand, there are a number of obvious challenges for CATs in transitioning to elodgment and e-filing systems. The first is adequate resourcing. Little more needs to be said about this, save in one respect, which concerns the hidden cost of converting large numbers of legacy paper files to digital format. This is a particular issue in the guardianship and administration jurisdiction, where represented persons may be the subject of applications to a CAT, including for mandatory reviews of existing orders, over many years, and for which documents filed in earlier applications (such as medical reports which confirm that a represented person suffers from a permanent disability) may continue to be relevant many years later.

There are three additional challenges for CATs in moving to e-lodgment and e-filing systems. First, depending on the application process adopted by the CAT, e-lodgment systems for CATs may be more complex than those used for courts. By way of example, a large number of enabling Acts confer jurisdiction on the SAT. While the same style of application form is used (other than in relation to guardianship and administration applications) the SAT has a discrete form for each kind of application able to be brought under each enabling Act. While that approach has the major advantage that it identifies, from the outset, the nature and source of the jurisdiction that an applicant relies on in applying to the SAT, the consequence for the development of SAT's e-lodgment system is that the system needs to accept over 850 different documents for lodgment. Most of these are application forms. The very small remaining number of documents (about 70) comprise other documents used in SAT proceedings, such as statements of issues, facts and contentions; witness statements; witness summonses and so on.

Secondly, if SAT's experience is any guide, developers responsible for designing e lodgment and e-filing systems may not readily appreciate that CATs have different procedures which may require the development of bespoke e lodgment and e-filing systems, rather than the implementation, with minor adjustments, of e lodgment and e-filing systems used for courts. SAT's procedures in respect of guardianship and administration applications are very different from the procedures which generally apply across the balance of its operations,[55] and it has been essential in the development of its e-filing system to accommodate that difference.

Thirdly, and most significantly, while the use of e-lodgment and e-filing systems is convenient for many, for those without access to the internet, or who experience difficulty in using online technology, e-lodgment and e-filing can be an impediment to access to justice. CATs need to ensure that their processes are sufficiently flexible to permit other forms of lodgment of documents, and to provide assistance to those who require it, when lodging documents.

55 See, for example, s 112 of the *Guardianship and Administration Act 1990* (WA) for the unique confidentiality requirements and application required for guardianship and administration matters in the SAT.

The e-lodgment system being developed for the SAT guides applicants through a series of questions to identify the source of jurisdiction on which their application relies. Other assistance will continue to be available once the e-lodgment system is rolled out, especially in the form of a telephone help line, through which a SAT staff member will be able to guide a user through the online lodgment process. And for the foreseeable future, lodgment of documents by means other than via the e-lodgment system will remain possible.

Use of VCT

Maintaining CAT operations while observing the social distancing restrictions in response to COVID-19 has undoubtedly brought about a swifter embrace of VCT than would otherwise have occurred. In doing so, the challenges and benefits of the use of such technology have been brought into sharp relief.

Turning first to the challenges, I will not dwell on those that are attributable to inadequate hardware, software or bandwidth, or to a lack of hearing rooms equipped to conduct hearings using VCT, or to the steep learning curve for all involved in learning how to use VCT software in mediations and hearings. Let me instead highlight seven lessons about the difficulties in using VCT for mediations and hearings, drawn from the SAT's experience over the past six months.

First, identifying videoconferencing software which is suitable for SAT mediations and hearings has posed some challenges. Many proceedings in SAT involve multiple parties. Videoconferencing software does not necessarily, or effectively, accommodate multi-party hearings. There are often limits on the number of parties who can be seen on screen at any given time, and the greater the number of participants the more difficult it is to see them clearly. This has been a particular impediment in large mediations where eye contact and visual cues can be an important means to reach understanding and compromise. It is to be hoped that improvements to VCT software in future will result in the development of products which are more suitable to court and tribunal hearings.

Secondly, and counterintuitively, mediations and hearings conducted using VCT frequently take longer than those conducted in person, because of a loss of connection or poor-quality connections for any of the participants.

Thirdly, there are practical difficulties for all involved in a telephone or VCT hearing, over and above the use of the technology itself. Conducting proceedings in this way results in increased levels of fatigue, and requires reserves of patience, for all involved. Conducting a proceeding by telephone or VCT when an interpreter is required is especially difficult. The difficulties experienced by parties who are from culturally and linguistically diverse backgrounds, or who are elderly, or who live with disabilities, which make participating in a proceeding difficult at the best of times, may be exacerbated by not being in the same hearing room as the tribunal member or other parties. Merely using VCT software is an additional stressor for those representing themselves in a hearing.

Fourthly, the challenges posed by the use of VCT have highlighted the need for education and training of judges and members in new skills for mediations and hearings conducted in this way. Perhaps because of the additional level of informality involved in VCT proceedings,

parties often do not behave with the same respect for the tribunal, or each other, as they would in an in-person hearing and, whether consciously or not, will often talk over each other during the proceeding. Judges and members conducting VCT hearings need the skills to convey expectations of behaviour to the parties, to maintain the decorum of the proceedings, and to respond effectively to departures from appropriate behaviour. Paradoxically, this may require the use of greater formality in a VCT hearing, to assist a member to maintain control of the proceedings.[56]

Fifthly, an effective VCT hearing requires advance preparation by litigants, over and above that which would ordinarily be required for a hearing. CATs will need to provide assistance to those self-represented litigants who do not have experience in participating in a hearing conducted using VCT. In order to do so, the SAT has prepared information sheets for parties in the SAT, which provide guidance on downloading relevant software and participating in a hearing conducted using VCT.

Sixthly, cases involving factual contests which turn on documentary evidence are not ideal for VCT hearings. The logistical difficulties involved are not insurmountable, but to avoid them requires considerable pre-planning (such as in the preparation of bundles of documents filed in advance of the hearing, and provided to witnesses if necessary).

Finally, it is important for CAT judges and members to conduct telephone and VCT hearings from hearing rooms, if it is possible to do so. Conducting a hearing from a hearing room assists to convey the serious nature of the proceedings, despite the informality inherent in conducting a VCT hearing. Furthermore, it is vitally important that justice is seen to be done in CATs. That means hearings need to take place in public. While it is possible to permit interested persons to observe VCT hearings by allowing them to connect to the VCT hearing itself, that poses additional logistical challenges, and usually comes at the cost of the loss of the anonymity to which observers of any court or tribunal proceedings are entitled. Social distancing requirements aside, if a CAT member conducts a VCT hearing from a hearing room, the public has the opportunity to see the CAT undertaking that hearing.

On the other hand, the use of VCT for SAT proceedings over the past few months has highlighted a number of unexpected benefits. First, as staff and parties have become more familiar with the use of VCT, there has been a marked improvement in the effectiveness of mediations and hearings conducted in this way. The informality of SAT proceedings has no doubt contributed to that outcome, perhaps because parties and counsel are more accommodating of different procedures than they might be in a more formal courtroom environment.

Secondly, the use of VCT software for conducting mediations involving small numbers of parties has been surprisingly successful, perhaps because visual contact can be maintained by all parties, and the close-up view which is possible when fewer participants are involved lends an increased intimacy to the exchange.

Thirdly, assuming that there is a good video connection to a witness, and that the witness is correctly positioned in front of the camera, the use of VCT can permit a tribunal member

56 McCabe, above n 49, 46.

to see a witness very clearly. To the extent that demeanour can be relied upon to assess the credibility of a witness, VCT hearings may be equally as effective for that purpose as in-person hearings.

Fourthly, for those parties who are represented by legal practitioners, VCT hearings can result in reduced costs. This is especially so in relation to directions hearings where multiple matters may be listed in a single sitting for procedural directions to be made. If legal practitioners can attend using VCT, the travel time and waiting time, for which their clients would otherwise be charged, can be avoided, and the costs involved can be limited to the duration of the hearing itself.

Fifthly, the use of VCT software presents an important means of providing access to a CAT for those in regional areas. In the Creyke survey, Professor Creyke noted that Australia's size and dispersed population posed challenges for the delivery of services, including for the conduct of hearings in places outside the capital cities,[57] and that 'servicing regional areas remains a challenge for all the tribunals, ACAT excepted'.[58] Professor Creyke noted that the use of telephone and videoconferencing was one way the impact of geographical spread could be minimised, but that the use of that technology had drawbacks.[59] In a sparsely populated state like Western Australia, providing access to SAT facilities for Western Australians in the regions has always posed particular difficulties. Unlike other states with very large regional centres, SAT does not maintain registries and permanent staff outside metropolitan Perth. Furthermore, the volume of work in regional centres often does not warrant regular circuits to regional centres. The ability to conduct proceedings using VCT will increase SAT's accessibility for those in regional Western Australia. There is, of course, a balance to be struck in evaluating the suitability of a VCT hearing, as opposed to an in-person hearing, in a given case, with a view to achieving a just outcome as efficiently, simply, speedily and cost-effectively as possible. But the existence of the option to conduct VCT mediations and hearings for those in the regions has been a very significant positive development for the SAT.

SAT's experience over the past six months has left no doubt that the ability to conduct proceedings using VCT software is an important element in SAT's toolkit of flexible procedures, which will be able to be deployed in appropriate cases. Having regard to SAT's experience, there is also no doubt that VCT hearings will, if used in appropriate cases, greatly assist the CATs to achieve just outcomes quickly and effectively.

Conclusion

The future for Australian CATs is positive. While the amalgamation of diverse tribunals to form the CATs has given rise to challenges, many opportunities have also been created to better deliver justice in the various decision-making roles those CATs perform. The philosophical foundation for CATs is as decision-makers whose composition and flexible procedures enable them to reach just outcomes in a manner different from that adopted by courts. The unique composition and flexible procedures of tribunals have been well suited

57 Creyke, above n 2, 213.
58 Ibid 231.
59 Ibid 214.

to merits review in the past, but CATS have proven to be equally suited to a wide variety of decision-making roles, including the resolution of civil disputes. The philosophical foundation for the existence of CATs provides a principled point of reference for navigating the challenges of organising the work of a CAT, for developing new procedures across its jurisdiction, and for determining whether, and in what ways, the jurisdiction of a CAT should be expanded. That philosophical foundation also provides a touchstone in identifying new approaches, techniques or technology which might be adopted by CATs to deliver justice more simply, quickly and cost-effectively in the future.