The ART and Values II

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I decided that I would focus on the values issue associated with this tribunal. I am looking backward as well as forward. Obviously, my role in oversighting the gestation of this tribunal derives from the work that we at the Australian Law Reform Commission did in the *Managing Justice* report. That was work looking at the federal-civil justice system. It was not just looking at the AAT and the other major review tribunals but also at the Federal Court and the Family Court. That vantage point is a very useful one for actually having some sort of intimation about what works and what does not work in our federal justice system. I will certainly draw on it today for some observations about the proposed tribunal.

When we were looking at the ART we began with what is the incontrovertible assumption that you must bring to looking at the federal tribunal system, and that is that our Constitution mandates that these are administrative processes rather than judicial processes and that, although adjudicators in tribunals, in common with judges, do much of the processing associated with fact finding, with making judgments and with forming opinions as to legal rights and obligations, they are also, without any doubt, different. I will not go into the range of differences, including obviously the inability to exercise judicial power, but in the *Managing Justice* report we tried to look in terms of practice and procedure and see what it is that tribunals do that is different, whether that is a matter that should be emphasised and enhanced, and how that might be done.

This is a model that, although it is there and is clearly part of our constitutional arrangements, we have never really given full debate to. One of the useful sidelights of this proposed new tribunal is that it does allow us an opportunity to say: what is an administrative process as opposed to a judicial process? In this model we focused on the investigative powers of the tribunal, which must be different from a judicial process if, at the end of the day, you are trying to make the correct decision rather than a decision that derives from the presentations given to you by the parties.

We also focused on informality. Certainly, informality is something more than just sitting around a table without a dais. In our view, informality must encompass other ways of communicating about cases with the sorts of parties that tribunals have. We also looked at issues of flexibility.

Although you can see in your civil judicial model that we are now moving towards something approximating a discontinuous trial that you see in the civil code countries, we assumed there must be some greater flexibility in the sorts of arrangements that you can have in an administrative tribunal system as opposed to a judicial court system. We also looked at the human dimensions that are associated with tribunals, which are very different from courts, and these derive from a number of different factors. First of all, they come from the fact that tribunals have part-time members with all of the managerial issues that arise in terms of training and skilling-up people who are not necessarily closely and continually associated with the working of the tribunal. Tribunal members also have much more varied backgrounds than one would find in your judicial system. Regarding the types of applicants that tribunals deal with, particularly the AAT, there is as varied a client base as you might have in the Federal Court but with a preponderance of an underskilled applicant class. Notionally, the working presumption about having tribunals is that courts are not necessarily good at dealing with those underskilled applicants and the tribunals ought to be better.

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We also looked at issues of representation and how you factor that into tribunals.

We found across each of the entities we were looking at—the AAT, the Federal Court and the Family Court—that, notwithstanding what I think is a fairly significant public and government bias that has always been against lawyers in particular but perhaps representation in general, having a representative did help. Particularly in the AAT it was shown to help. The major way in which it helps is that it assists in reaching a compromise. While not all of the matters that go through our review systems are matters that can be easily or appropriately compromised, there are certain ones where that focus is very much part of the working system.

In our view, if you are looking for a compromise, you simply will not get it unless you have some skilling-up of the parties to deal with negotiation and to broker a settlement within that interlocutory process.

We also looked at the other feature of tribunals that I think is often overlooked, including by government. That is that government is the consistent player. In our system, happily, we have mandated that it is a consistent model player. That ought to make a significant difference to the way that our federal tribunals can work. We made a whole series of recommendations associated with what a new tribunal system should look like and a number of those have been taken up in the bill, which is very nice. I am not sure that everyone will agree with us—certainly in the way in which they are cast in the bill—but we were of the view that there should be provisions that enhance the investigation power of tribunals in order to be able to deal with what is a problem in some of the jurisdictions in the AAT—that is, discredited, repeat, partisan experts. Certainly, the provisions about being much more flexible in the way that you get expert evidence are a very good feature of the bill—that you have much more flexibility in obtaining information, including by piggybacking on the department's investigative power, and more control over hearing processes. This is something that you also find in the court system.

One of the notes of caution that I would sound is that we should be looking not just at what is done in the bill but how it is done. If I have a real concern about the arrangements it is in connection with what I see as a very rule based system of modelling the tribunal. The rule based system has a number of features. When we were looking across our federal justice system there was no doubt that we had a clear recognition that all of the rules of the justice system are extraordinarily closely interconnected.

So if you alter one bit you may find another part does not work as well. Provisions in the bill, such as where you have to get members to think about having a hearing, while notionally they may look good, may lengthen the processes. It may end up having a rather more elongated tail to it than was intended.

The other thing about rules is that we need to look at why we have them and the types that we craft because, although we focused on these procedural matters as being features of the administrative process, when governments underscore the fact that these tribunals are administrative, they are talking about it more in terms of a model where you are seeking to constrain eccentric decisions, where you are seeking to limit discretion, where you are seeking to make sure that the decision makers attend to policy. What they are looking for is a model where you have much of a control over a substantive outcome rather than necessarily only these procedural arrangements of how you get there. The rule based arrangement in the bill, I think, is a cause for concern. Apart from everything, there are a lot of rules. There are practice directions coming from ministers, the President and executive members. All with a varying array of bite.

When we began looking at the Family Court and the Federal Court we also saw lessons that could be learned about using rule based systems because the Family Court had a very prescriptive, undifferentiated case management system which was loudly and consistently howled down as being inappropriate in that court. In the Federal Court judges sit easily and in a rather more tailored fashion on top of their rules. We were very clear in our report about saying two things about rules. The first was that you should guard against prescriptive rules because everything in this system is different. It is not just making a tailored rule for a class. There are different cultures in different types of case systems. There are different cultures in different cities. Advocates work in quite different ways, agency lawyers work in different ways, in different cities.

Comment is made consistently in reports on courts and tribunals overseas that rules of courts and tribunals should be guidelines and not trip-wires. Unfortunately, I can see that a lot of the rules that we have here are trip-wires. They are trip-wires not just for the members—although a number of them are directed at members—but for applicants in particular. We want to guard very carefully against setting consequences for a failure to honour a rule that are both adverse and generally operative so you end up having your rules not only catching those who are perhaps scamming the system—in all review systems there will be some of those, and migration has a high sensitivity to the existence of scammers in its review system—but also the unwary. When there are rules that say, 'Unless you comply with directions, you haven't made a proper application and the tribunal can't review it'—particularly where the review tribunal, as in the migration ones, cannot extend a time limit for lodging—not only those people who are seeking to extend their stay inappropriately in Australia, but also the large numbers of people who are in these tribunals who are simply underskilled about dealing with bureaucracy will be caught.

Finally, I want to take up a point that Justice O'Connor made. I think all of the overseas research about courts and tribunals that we are looking at is saying something terribly important about the people who go to them. First of all, they have some very clear expectations about what they will meet, and we have to take account of their expectations. The research also shows that people who have had experience of courts and tribunals can distinguish very clearly between an unhappiness at securing a substantive outcome and their feelings about how they were dealt with in the process. Although there is a lot in the bill about the objectives and the rubrics that talk about giving people a meaningful, fair and impartial process, we should not forget that that is absolutely critical to the system. Chief Justice Gleeson said recently that the only criterion for judging courts and tribunals is the measure of success they have in ensuring public confidence in their independence, integrity and impartiality. If there are too many rules that operate to trip the unwary in the system, people will go away with a profound sense of injustice that somehow, because of their lack of skills and ability, their lack of knowledge of what are complicated legislative arrangements, they were cheated of a right to have a hearing and a reconsideration of a first instance decision.