**"Regulatory Institutions and Practices" (draft report)**
**Submission**
**by**
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## Introduction

1. I am one who has, on a lot of occasions in the past addressed the issues you have debated. I have also had first-hand knowledge of the practical approaches to resolving the issues that have been raised during my time as foundation Director of Research at the Administrative Review Council in Canberra.

2. I will not go over this ground again. I simply refer you to chapters 1, 3 and 4 of the 3rd edition of my "Judicial Review: A New Zealand Perspective" published on 8 April this year. I suggest that these 42 printed pages be reviewed and compared with the parts of chapter 10 on the scope and nature of judicial review and the comparison of them with appeal rights.

3. The approach adopted in chapter 10 of the Draft Report is, I suggest too simplistic. Thus, the reference to merits review being about correctness of decision-making fails to address two matters.

4. First, most administrative decisions, particularly regulatory ones outside disciplinary areas are not subject to there being a "correct" decision or action but involve a range of appropriate decisions or actions, one of which can be identified as "preferable". The formula of "correct or preferable" decisions or actions was carefully adhered to by Justice Gerard Brennan, the first President of the Commonwealth Administrative Appeals Tribunal and later Chief Justice of Australia. Secondly, where there is in fact a "correct" decision or action, then to make an "incorrect" decision or action is normally an error of law and subject to judicial review: see *Edwards v Bairstow* [1956] AC 14 (HL) at 35-36 (Lord Radcliffe) adopted by the Supreme Court of New Zealand in *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at paragraphs [25]-[26] and the subject of a helpful variation of wording in *Vodafone NZ Ltd v Telecom NZ Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [51]–[53]. In these situations the Court is able to substitute the "correct" decision for the "incorrect" one, but not so where the matter involves the "preferable" decision, though even there there may be occasions when the court on judicial review can substitute the lawful for an unlawful decision. Thirdly, one needs to distinguish between the task of correcting error and making a normative decision. Simply to correct someone's decision tends not to improve primary decision-making or acting unless there is in place a process within the primary authority for drawing out of the corrections, the threads that can, if implemented, improve the primary authority's actions. A merits appeal or review that tries to make normative decisions itself identifies those threads that will improve primary decision-making, and they are binding on the primary authority. Fourthly, the appropriate membership, procedure, and scope of decision-making for a correcting authority will differ from those for a normative authority. Fifthly, the Supreme Court decision in *Austin, Nichols and Co Inc v Stichtung Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 emphasises that in an appeal by

way of rehearing, it is for the appellate court to make up its own mind on what should be accepted as fact, deferring to the primary court only on matters such as credibility.

5. It is within these five matters that both the successes and the disappointments of the administrative review tribunals can be found. I will come back to this later in my submission.

**Understanding the Australian Merits Review System**

6. This topic is addressed at this point because it was the Commonwealth of Australia which has the longest experience with merits review by a single authority. The system established by the Administrative Appeals Tribunal Act 1975 (Cth) was part of a comprehensive system encompassing judicial review (the Administrative Decisions (Judicial Review) Act 1977) and the Commonwealth Ombudsman (Ombudsman Act 1982). Its origin and early days are reviewed in my article, "The New Administrative Law" (1977) 51 Australian Law Journal 804.

7. It is also reviewed at this point because the particular factors that influenced the structure and processes of the AAT stem from the Commonwealth of Australian Constitution (Constitution Act 1901). They do not apply in New Zealand. While they do not apply to the Australian States which have adopted the single tribunal merits review approach, the factors causing the key features of the Commonwealth system have influenced the States. They need not influence New Zealand. The experience in Australia can, it is considered, be viewed as a "clinical trial" (as it were) from which New Zealand can learn lessons and adopt or reject aspects that have been relatively successful or relatively unsuccessful after discounting the specifically Australian features.

8. The doctrine of separation of powers is integral to all common law countries, but its content varies from country to country. It is notorious that until this century the Lord Chancellor in the United Kingdom was at once the head of the judiciary and often sat in hearings, the head of the government department for courts, and a cabinet minister. He (there has never been a female Lord Chancellor) thus was a member of all three branches of government. In Australia, the separation of powers is provided for expressly in the Federal Constitution, Constitution Act 1900 by providing for each of the Parliament, the Executive Government and the Judicature in separate chapters (I, 11 and III respectively) of the Constitution. The High Court of Australia held early in the history of federation that only judicial powers may be conferred on a federal Court: *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54. Three years later arbitral power was distinguished from judicial power: *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434. Although such strict separation does not apply directly to States, the constitutional power to invest federal judicial power in State courts was held to mean that States could not provide for its courts to exercise a non-judicial power if that court could also be invested with federal judicial power: *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. The vesting of federal judicial power in all State ordinary courts,

then, effectively applies the federal doctrine of separation of powers to all State courts as well.

9. As might be expected, efforts to reduce the strictness of the High Court's doctrine of separation of powers have been made. An administrative power can be conferred on a federal Judge as "persona designate" as distinct from as a Judge: *Hilton v Wells* (1985) 157 CLR 57. This enables federal Judges to be appointed to undertake commissions of inquiry. It does not, however, allow a federal Judge to be appointed to a body (e.g., a tribunal with generic jurisdiction) if it has jurisdiction to exercise administrative powers.

10. The Commonwealth Administrative Appeals Tribunal, established by the Administrative Appeals Tribunal Act 1975 (Cth), to which FG Brennan QC was appointed as foundation President and appointed at the same time a Federal Court of Australia Judge, had to wrestle with this problem. This was first, before its start, by the procedural and jurisdictional provisions in the Act and the conferral of its initial jurisdiction, and, secondly, in its early days as it settled its procedures and approach to decision-making. While I had no involvement in the first of these, I was intimately involved for three years from June 1977 to October 2000 in the second.

11. The characteristics of the AAT dictated by the constitutional separation of powers were:
    (1) Jurisdiction over rights not interests.
    (2) Issues to be justiciable.
    (3) Issues to be of fact and law, plus discretion if limited by applicable general principles (not open-ended).
    (4) Procedures analogous to courts.
    (5) It exercises a full de novo review, so authorising members to find and apply the law to make the correct or preferable decision in a judicial and not an administrative context and process.

12. The early jurisdiction of the AAT was in the areas of some aspects of customs and excise, business licensing, subsidies ("bounties"), immigration (deportation for criminal offending), superannuation, trade marks, rating valuation, and disability and death payments for members of the armed forces. All were appellate jurisdictions. A great many additional jurisdictions have been vested since then.

13. Brennan J had the acknowledged legal standing to establish the AAT very firmly. The separation of powers meant that the AAT worked as a "normative" tribunal as much, or more, than as a simple dispute resolver. It actively developed principles and standards for primary decision-makers to follow. In the time that I was associated with it, the aim was always so to act as to improve the quality of primary decision-making.

14. Because of the *Kable* case, these characteristics have flowed to a significant extent into the State equivalents:
    (1) Victorian Civil and Administrative Tribunal (VCAT) established under the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic).

(2) New South Wales Civil and Administrative Tribunal (NCAT) established by the Civil and Administrative Tribunal Act 2013 (NSW) superseding the Administrastive Decisions Tribunal..
(3) Queensland Civil and Administrative Tribunal (QCAT) established by the Queensland Civil and Administrative Tribunal Act 2009.
(4) Western Australia State Administrative Tribunal (WASAT) established by the State Administrative Tribunal Act 2004.
(5) Australian Capital Territory Civil and Administrative Tribunal (ACAT) established by the ACT Civil and Administrative Tribunal Act 2008.

15. The Victorian Civil and Administrative Tribunal (VCAT) sits in three divisions:

- A civil division dealing with consumer matters, domestic building works, legal services, owners corporation matters, residential and retail tenancies disputes, sale and ownership of real property, and use or flow of water between properties.
- An administrative division dealing with local council land valuations and planning permits, Transport Accident Commission findings, State taxation, business licences and professional registrations, Freedom of Information applications, WorkSafe assessments, and disciplinary proceedings across a range of professions and industries.
- A human rights division dealing with guardianship and administration, discrimination, racial and religious vilification, health and information privacy, Mental Health Review Board decisions, and matters pursuant to the *Disability Act* 2006.

16. The New South Wales Civil and Administrative Tribunal (NCAT) sits in four divisions:

- A consumer and commercial division dealing with estate and other agents' commissions and fees, conveyancing costs, tenancies including boarding houses, social housing, retirement villages, and residential and long-term caravan parks, fencing disputes, home building and motor vehicle disputes, consumer disputes, pawn broking and second-hand dealer disputes, unit title, and Travel Compensation Fund disputes.
- An administrative/equal opportunity division dealing with access to information held by government, use of and access to personal information held by government, firearms licences, guardianship and financial management, decisions made in the community services sector, and State taxation decisions.
- An occupational division dealing with transport and occupational licensing and discipline.
- A guardianship division dealing with guardianship and financial management orders, enduring power of attorney and enduring guardianship orders, consent to treatment, and approval of clinical trials so that disabled people can take part in them.

17. The Queensland Civil and Administrative Tribunal (QCAT) does not sit in divisions but has jurisdiction in the following areas:

- Review of government administrative decisions.
- Anti-discrimination matters.

- Administration and guardianship for disabled adults; adoption, child protection, and education disputes.
- Building disputes.
- Minor civil (including consumer) and certain types of other civil disputes (trees, body corporate and community management scheme disputes, financial losses caused by motor and property agents, integrated resort development matters, legal cost agreement claims, manufactured home park disputes, retirement village disputes and Sanctuary Cove Resort disputes).
- Residential tenancy disputes.
- Occupational regulation and discipline.

18. The Western Australia State Administrative Tribunal sits in four "streams":
    - The human rights stream deals with guardianship, administration and discrimination, and reviews decisions of the Mental Health Review Board.
    - The commercial and civil stream deals with unit title disputes, retirement village disputes, commercial tenancy reviews, credit reviews, taxation decisions, Commissioner of State Revenue decisions and other commercial and personal matters.
    - The development and resources stream deals with decisions made by Government regarding planning, development and resources, and hears matters relating to land valuation and compensation.
    - The vocational regulation stream deals with complaints concerning occupational misconduct and reviews decisions concerning vocational licensing.

19. A Bill was introduced in the South Australian Parliament on 25 July 2013 for Civil and Administrative Tribunal.

**Principles and Practices Common to Australian General Tribunals**

20. The State, as distinct from the Commonwealth Tribunals deal with minor civil disputes as well as regulatory appeals. This may be because of completeness as each State with an operative Tribunal broadly "covers the field" previously occupied by ad hoc tribunals. It might explain the lateness of a South Australian Tribunal that it has been the District and Local Courts that have been exercising these jurisdictions.

21. All operative Tribunals are presided over by a Supreme Court (the AAT by a Federal Court judge) which are equivalent to our High Court judges. In the States, the deputy presidents are drawn from the junior general court (e.g., the District Court in New Zealand). The South Australian Bill as introduced provided for either a Supreme Court or District Court judge. The Council of Australasian Tribunals submitted against this strongly, arguing that it is essential for the President to be a Supreme Court judge, as is the case in the Commonwealth in order to give the Tribunal the status that enables its decisions to be normative not just dispute resolving.

22. All, again with the exception of South Australia, provide for the President to be full-time at the Tribunal. The Council of Australasian Tribunals also submitted against a part-time President on the ground that a commitment to the success of the project is required.

23. The choice between having divisions or streams and having a single pool of members may be able to be related to the size of the Tribunal's jurisdiction. If the workload in an area becomes so great that a very large number of members is required, their availability to sit in other areas often enough to build up expertise disappears and organisation of the area needs to be devolved for practical reasons.

24. While the Commonwealth Administrative Appeals Tribunal has accreted jurisdiction over time, the States have tended to undertake a comprehensive review of their tribunals and brought them all into the State Tribunal jurisdiction at the start. The Commonwealth position was dictated very largely by its being a ground-breaking venture in which Brennan J's concern was to show that a better standard and more efficient justice would be found if jurisdiction were conferred.

25. In three respects, the Commonwealth experience has involved a different solution from that of the States.

26. First, some areas of jurisdiction are too vast for the AAT to be the review authority. The major example of this is social security, where the Administrative Review Council recommended and the Government accepted that the existing, separate Social Security Appeal Tribunals in each State be retained, but their role enhanced by creating an internal review officer structure. The AAT became the "peak" tribunal in this area, taking a normative role in developing and settling the principles that were to be applied. The area of student allowances was treated the same way, but for a rather different reason. This was that the nature of the issues arising were both too routine and seldom giving rise to issues that warranted the formality and seniority of AAT determination.

27. Secondly, the area of war pensions was kept separate. The first reason here was that the "repatriation" (as it is called in Australia) tribunals operated a strong onus on government to show beyond reasonable doubt that a veteran was not entitled to what he or she sought. This was seen not to lie easily with the AAT model. The second was that it was considered most appropriate for veterans that as informal a process as possible should apply. This too was seen not to lie easily with the AAT model. The area was also a very high volume one.

28. Thirdly, immigration in Australia has been a highly controversial area which governments have preferred to keep away from a tribunal with the authority to "second guess" its decisions. The AAT originally had jurisdiction over deportations of persons convicted of criminal offences. The Full Federal Court of Australia (*Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577) held that the AAT had jurisdiction to consider the "propriety" of government policy and not just apply it. When the AAT in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 applied the Full Court's decision, it said at 645 that:

> When the Tribunal is reviewing the exercise of a discretionary power reposed in a Minister, and the Minister has adopted a general policy to guide him in the exercise of the power, the Tribunal will ordinarily apply that policy in reviewing the decision, unless the policy is unlawful or unless its application tends to produce an unjust decision in the circumstances of the particular case. ... The general practice will require the Tribunal to determine whether the policy is lawful, not in order to supervise the exercise by the Minister of his discretion, but in order to determine whether the policy is appropriate for application by the Tribunal in making its own decision on review.

Subsequent governments appear to have regarded such a role as inappropriate in the sensitive area of immigration, although they have lived with its application in many other areas.

**Translating the Australian Experience to New Zealand: Issues to be addressed**

29. The first issue for the Commission and, subsequently, Government to consider is whether it wants to have a review on the merits of whatever jurisdiction is being considered by a tribunal with the enhanced normative influence of the AAT. This will dictate the status of a merits review tribunal as well as its jurisdiction. For instance, whether in high volume areas it should have jurisdiction over all decisions or act as a "peak" tribunal. If the former, it will be looking for a body that can act by a quasi-administrative process as distinct from a potentially informal but judicial fashion. Such a tribunal would appropriately be placed beneath the District Court in its status and personnel. It would not recruit members from lawyers with substantial experience. Its processes would be designed to "churn out" sound but fast decisions. If the latter, it would have different procedures, but still with flexibility from formal to informal processes. Its president would be a High Court Judge. Like the AAT, appeals would go either to the Court of Appeal or the High Court, or (this is not in the AAT Act) even to the District Court, depending on whether the decision was made by a High Court Judge, a District Court Judge or equivalent, or a less senior member. This in turn requires a membership of tiered titles so that appeal rights depend not on the individual matter but on the tier from which the decision-making members are drawn as a matter of the provisions of the jurisdictional enactment. As a "peak" tribunal, there would remain other review bodies, but these are likely to be within the primary decision-making structure, such as the current "Benefits Review Committee". My submission is that the latter is the appropriate course. The AAT in particular has made substantial contributions to the quality of primary decision-making because of its normative role. Regulatory efficiency and quality are, in my opinion, both enhanced by this.

30. The second issue is whether a general review tribunal is to be involved in civil disputes or only regulatory ones. A closer look at the actual operation of the Australian State Tribunals may show that the Disputes Tribunal and Tenancy Tribunal can readily be included. Given the role of the Commission, I make only one comment on the inclusion of civil disputes. The District Court has jurisdiction up to $200,000 and there have been suggestions of raising this to $300,000. Disputes with this much involved almost inevitably require procedural formality similar to the High Court, but the much more common debt collecting role that the District Court

still has requires a simpler procedure. Inclusion of civil disputes with a jurisdictional limit appropriate to the simpler procedure might well have advantages both in the efficiency of delivering civil justice and its cost. The Australian State Tribunals include issues dealt with by the Family Court in New Zealand. Since I have no experience of that jurisdiction, I say nothing on this aspect of the second issue.

31. Thirdly, there is the question of ACC reviews. This was originally vested in a tribunal, the Accident Compensation Appeal Authority but more recently the jurisdiction was transferred to the District Court at a time when the philosophy was to place administrative appeals in the ordinary courts. There is therefore an issue of the desirability of moving the appeals again, this time to a general merits review tribunal. Apart from that particular issue, there does not appear to be any reason why the general tribunal could not have accident compensation in its jurisdiction. It is an appellate jurisdiction and is an appeal from a government agency decision. The issues are not such as to make it inappropriate for a tribunal as distinct from a court.

32. Fourthly, all the Australian Tribunals other than the AAT (most such matters within the Federal jurisdiction arise in the Australian Capital Territory and come within the ACAT) include occupational regulation decisions in their jurisdiction. The AAT does, however, include business licensing within its jurisdiction. Occupational regulation is a "half way house" between government regulatory functions and private organisation functions. It is another area where a primary decision about coverage of a merits review system is needed. In New Zealand, most professions and many traditional occupations are governed by statute which provides for disciplinary and regulatory bodies. So, in a sense, the choice has already been made. Further, the grouping of all medical and associated professional discipline (but not other aspects of regulation) into the Health Practitioners Disciplinary Tribunal provides a successful pilot for a general merits review tribunal.

## The Law Commission Proposal

33. The Law Commission's Report 85, "Delivering Justice For All: A Vision for New Zealand Courts and Tribunals" recommended, in summary:

- A unified tribunal framework, but that rationalisation of tribunals, their membership and processes should occur incrementally.
- Exclusion of the Waitangi Tribunal, Commerce and Securities Commission and Takeovers Panel, the Abortion Supervisory Committee, the Privacy Commissioner, the Parole Board, Disputes Tribunals and Tenancy Tribunal, the Employment Relations Authority, and the Mental Health Review Tribunal.
- A President drawn from one of the sub-High Court Courts and two legally qualified deputies plus other, potentially non-legally qualified members.
- Appeals to the President or a Deputy President plus a member of the jurisdiction appealed from who did not sit in the decision appealed, and another member from a different jurisdiction within the Tribunal. This appeal may be on fact or law only depending on the statute giving jurisdiction. A

further appeal on questions of law only to a Full High Court, i.e., two or more Judges.

- All tribunals to be brought within the general merits review tribunal should be brought in on its commencement, with the existing members and processes.

34. The Law Commission's paras 19-20 in Chapter 7 addressed the general issues in a unified structure thus:

> The VCAT model is both desirable and achievable in New Zealand. Most New Zealand tribunals should be integrated within a unified tribunals framework.
>
> With time, the risks identified by the LAC as inherent in unifying tribunals – achieving formal but no real unity, or forcing tribunals into one inhospitable mould – no longer seem so acute. These risks were inherent in the LAC's own proposal that three tribunals assume 20 separate jurisdictions. Whenever distinct jurisdictions are drawn together within a larger entity, there will be tension between coherence and specificity. How acute that will prove to be will not depend upon the size of the unifying structure. More important will be its philosophy, and how the different jurisdictions are organised.

Its recommendations, however, fall well short of this approach.

35. First, it excludes the Disputes Tribunals and Tenancy Tribunal, which are both within VCAT and the other State CATs. Secondly, it excludes mental health, again a matter within the Victoria and Western Australia CATs, though not the New South Wales and Queensland CATs. Thirdly, it does not give the jurisdictions within the new tribunal a fresh start, but seeks to impose a formal unity over continuing (historical) variance. Fourthly, it positions the tribunal firmly below High Court level (contrary to the position in Australia), so emphasising it as a dispute resolution not a normative tribunal, yet, at the same time proposes an appeal from the appellate jurisdiction (a District Court Judge and two legally qualified members) to a full High Court as if the appellate tribunal was substantially more senior.

36. Looking at these four points, the first has been addressed already in para 30 above. The Law Commission excluded them because they functioned satisfactorily as part of the ordinary courts. This, it is submitted, misses the point. If one is looking for tribunals whose performance is not really satisfactory, to fix their performance by abolition and merger, that is a very different enquiry. The real questions are whether the general tribunal is to have civil disputes within its jurisdiction and whether it is a "review", i.e., a second tier (appellate) decision-maker, or a primary decision-maker. If it is a second tier (appellate) tribunal then it will not include either of these Tribunals' jurisdictions, whether or not it is to have civil disputes within its purview.

37. The second involves a jurisdiction which, like the Family Court, is unfamiliar to me. However, if social security is within the general tribunal, but more particularly ACC, then the assessment of health would be a common issue in all three areas. What further is there to warrant continuance of a separate jurisdiction. Consideration of the exclusion of the Parole Board provides some insight. Parole is beyond any general merits review tribunal in Australia. The principle behind this may lie in the close relationship with sentencing in criminal courts and the nature of the issue in

release of risk to the public. However, if immigration is within the general tribunal, then the question of risk to the public would be an assessment familiar to the general tribunal in the deportation of residents area. There is seen to be another aspect that could justify treating parole and the MHRT jurisdictions the same way. This is the fact that both deal with compulsory detention. This is submitted to be unconvincing. First, the Parole Board is already a tribunal separate from the Court system. Whether it is "stand alone" or part of a general tribunal, it will still involve members who have the appropriate experience and skills. The same has to be true of mental health. The only element logically to set parole to one side is its close connection to sentencing. Whether or not this is sufficient should, it is submitted, be the key element to be considered by the Commission in making its report. This does not, however, apply to mental health.

38. Unless some very clear principled basis exists to exclude an existing jurisdiction, the value of a general merits review tribunal will be lost. Thus, constitutionally, continuance of the Waitangi Tribunal can hardly be opposed. The very long-standing separate employment jurisdiction is common to developed countries. Its continuance, too, is again hard to resist. Nor would it be advantageous to split employment jurisdiction between the Employment Court and the general tribunal as an Employment Relations Authority replacement. The Abortion Supervisory Committee jurisdiction would bring an intensely political and emotive jurisdiction into the tribunal. It is also not a tribunal in any real sense. The Law Commission correctly, it is submitted, excluded the Privacy Commissioner because he is not a tribunal. That leaves the Commercial Commission, Financial Markets Authority, the Takeovers Panel, and (not mentioned by the Commission) the Overseas Investment Office. These administrative authorities which hold a significant extent of quasi-judicial function fall for decision, logically, according to the role seen for the general merits review tribunal.

39. The third, it is submitted, squanders the benefits of economy and, perhaps, efficiency as well. The Health Practitioners Disciplinary Tribunal (HPDT) illustrates the point. By retaining the historic memberships (now largely replaced by effluxion of time) the ability to sit in smaller numbers is, at least initially, lost. The HPDT sits as five members: the chairperson or a deputy, three persons from the health discipline concerned, and a layperson. This quorum is common in professional disciplinary matters, though some (the Lawyers and Conveyancers Disciplinary Tribunal is one) can sit in smaller numbers unless striking a practitioner off the roll is a possible order: Lawyers and Conveyancers Act 2006, s 236(4). The HPDT has, it is understood over 130 members to deal with 49 matters (2011 and 2013), 36 (2010) and 32 (2012). One of the points made by the Law Commission was that some tribunals do not meet often enough to build up expertise. Its proposal to bring in existing members appears to be out of line with its view about having a single general review tribunal. Similarly, if old procedures continue initially, as well as old members, it is probable, on my experience, that there will be resistance to the change in the tribunal necessary for it to achieve its aims. This is not to say that a clean sweep of membership is desirable, only that the degree of continuance proposed by the Law Commission is not desirable. Having members with previous experience is valuable, but a holus bolus grandfathering will, in my experience,

simply bring with it the inertia of familiarity and replication of previous attitudes and practices. Rather, it is submitted, (1) the governing legislation should state broad principles of procedure that direct the Tribunal to a general level of formality or balance of written and oral processes, leaving it to the tribunal itself to set detailed procedures within that general legislative direction which fit with the tribunal as a whole, and (2) at least half the membership of the general tribunal should be new in each jurisdictional area. That way the experience will be available but enough new blood reduces the likelihood of old patterns continuing.

40. The fourth point, positioning of the tribunal in the hierarchy, can be legislated with a degree of flexibility to match those sitting on a matter to the likely appropriateness of a normative or a dispute resolving role in each particular matter. Thus, in my experience, one would expect that in the first and most of the other early matters in a given jurisdiction, the normative function would predominate (as with the AAT) and the President sit with other members. Later, the dispute resolution role is likely to predominate, but the tribunal needs to have the judicial membership to make exercises of its normative role effective. The normal consequence of any tribunal decision is that it binds the primary decision-maker as to any principles it might state. So in every case there is a balance of normative and dispute resolving elements. The point is that when the normative function predominates in a matter, the membership of the tribunal sitting can be adjusted to give it appropriate weight. Again, in my experience, decisions of a normative character made by lower members of the tribunal will usually have less weight or reach than one involving a judicial (particularly a High Court), member. Further, the presence of such a senior member sitting on a matter will in practice give the decision greater circulation and so be more effective in the normative role than one made by ordinary members. It is likely to be noted in series like “The Capital Letter” and to be included in general law reports (e.g., the New Zealand Administrative Reports).

## A General Merits Review Tribunal as a Best Option

41. Essentially, there are four options:
    (a) the status quo,
    (b) grouping only those tribunals where the expert members’ expertise transfers directly to another tribunal (the Immigration and Protection Tribunal situation),
    (c) grouping tribunals by broad areas of subject matter (the Health Practitioners Disciplinary Tribunal situation),
    (d) a single general tribunal.

    Option (d) has further options within it. These are the issues in paragraphs 29-32 above. One of these options is to use a general court for some jurisdictions that are not included in the general tribunal.

42. The status quo carries with it all the anomalies, inconsistencies and inefficiencies of the scores of bespoke tribunals New Zealand has today. It has only the inherent comfort of existing experience to commend it.

43. Option (b) has the advantage of reducing costs of administration, accommodation, and members with no recognisable disadvantage. Although the IPT example is not

without faults, it has proved this option. The real question is how much further to go, if any further at all.

44. To go further, the example to be tested is the HPDT. It has been around long enough to determine, at least at a broad level, the benefits and detriments off option (c). As mentioned in paragraph 39, the continued rigid members to sit on a matter needs to be considered as a potential reduction in cost efficiency. At the same time, it needs to be remembered that powerful professional organisations, wedded to the 1:3:1 formula, will need to be convinced or at least be open to a more flexible quorum rules.

45. Option (d) will give cost and efficiencies benefits depending on a number of factors many of which are beyond my expertise and experience. I will comment here on those I can. One factor is the extent to which the general tribunal can be a first review stage or has to be a second review stage. A key factor in this is the ability to provide two things from within the tribunal. First, a range of seniority and expertise to have members that are appropriate to the difficulty and complexity of the issues arising ion the various jurisdictions. Secondly, a range of procedure models that can adjust to what is needed to determine matters at both basic, simple first stage review and second stage review. If there is also scope to refer a matter up to a higher member level when it turns out, often in the course of considering a matter, that more difficult or complex issues in fact arise, then effectiveness, efficiency, and cost-benefit all coalesce in a good model.

46. Extension from a review to an original decision-making role (see paragraph 30 above) adds a separate dimension and separate policy issues. In light of what has been said in paragraph 30, I will set to one side any original civil dispute jurisdiction. If these jurisdictions are set to one side, there is a question of whether a sub-District Court level court is needed, such as the Local Court in South Australia, or whether a general civil tribunal should be instituted. The necessary information on separating civil from review jurisdictions will be found in Australia.

**The Immigration and Protection Tribunal Example**

47. This is an application of the Law Commission's ideas limited, as the Government decided to grouping tribunals rather than having a single one. The IPT replaced the Refugee Status Appeals Authority, the Deportation Review Tribunal, the Removal Review Authority, and the Residents Review Board. Echoing the Law Commission Report it is presided over by a District Court Judge initially and currently a Maori Land Court Judge, a majority of members were taken over from the previous bodies, and the Immigration Act 2009 largely provided for the previous procedures to continue.

48. The IPT experience illustrates both the pluses and minuses in replacing an existing jurisdiction. The numbers of previous members enabled the IPT to maintain a good turnover of work. However, it started with a substantial backlog carried over from the previous authorities and met a much higher number of new appeals than had been

anticipated and catered for in appointments. The backlog therefore increased and more radical steps had to be taken to address this. The lessons here are not to bring forward large backlogs and to improve the basis for identifying likely incoming workflow. My suggested solution for the carry-over backlog is to place the onus to reduce the backlog on the predecessor authorities so that the new tribunal starts with a modest number of cases on its books. The solution to the issue of predicting numbers of new cases goes beyond my competence, but is essential to address.

49. The numbers of matters carried over into the new tribunal also influences the way in which new members are brought up to effective and efficient membership. In the IPT, the terms of the Act and the high number of cases carried over from the predecessor authorities would appear to have dictated training days plus peer review rather than new members working with experienced ones in all areas of the IPT's jurisdiction. The latter (with training days) was able to be done in the deportation of residents and refugee jurisdictions because the 1987 Act and its multiple member provisions continued to apply to appeals lodged before the IPT commenced, but in other areas the requirement of determination by a single member, coupled with the high backlog, effectively forced the IPT into comparatively brief training and then relying on peer review to complete the task of bringing new members "up to speed". A peer review process, if properly restricted in scope to avoid any possibility of illegal decision-making by having a person other than the legally allocated member or members in effect determining the matter, is a valuable adjunct to sound decision-making. The inability to use an experienced with a new member to work through initial cases together was, it is considered, a real negative for the IPT as events turned out. The solutions to this issue are (1) to avoid starting with a large backlog, (2) to have legislation that allows flexibility in allocation of members so far as numbers allocated are concerned, so that (3) a combination of old and new members can determine matters together when there is a new appointee.

50. Even in areas where there has been a substantial accumulation of principles, as in the IPT, there remains, it is considered, need for a wider range of levels of membership for the matters that do require normative decisions to be decided by members of the appropriate level. Of course, there are cases where a particular approach might have been taken to a type of situation that is identified as requiring a normative decision because new members have brought new eyes to the situation. The legislation needs to be flexible enough for such a case to be remitted to a high level membership where the inertia of the past pattern of decision-making cannot hold sway.

51. The experience of the IPT does not shed significant light on the major question of whether to have a general merits review tribunal because the four preceding authorities and the IPT have all been working with a single coherent jurisdiction where they differed only in particular classes of decision. The close relationship of jurisdictions made adjustment to members deciding matters in several jurisdictional areas. It is in the important but practical areas where its experience is valuable.

## The United Kingdom Tribunal

52. The United Kingdom Parliament established a general administrative tribunal in the Tribunals, Courts and Enforcement Act 2007. The size of the population and numbes of decisions that might come to the tribunal dictated a very different solution which is, in my opinion, too far distant from New Zealand's situation to shed significant light on the Commission's report. Canada has not pursued the general review tribunal course.

## Making a General Review Tribunal Work

53. The structure and shape of a general merits review tribunal and the legislative provisions to make it work. This section is therefore dependent on the four basic issues covered in paras 29-32 and the related 35-40, 45 and 46 above. I will state, effectively by way of conclusion, a series of matters to be provided if a successful general review tribunal is to be established. I am happy to enlarge orally on the following propositions, if required.

Membership

54. First, provide for a wide range of membership, with different titles, to fit with the jurisdiction conferred, so that appeal and referral up (or down) decisions can be made by reference to general factors rather than specific people.

55. Secondly, a good tribunal member does not necessarily have to have particular specialised expertise in the matter before him or her: many professions have the learning, understanding and experience to be effective in a range of areas around a member's particular expertise. This enables reduced numbers of members coupled with more intensive experience for each member (the HPDT example of 130+ members for about 30-40 cases per year may be a warning here).

56. Thirdly, the president should be a High Court judge, either a current one seconded to the tribunal, or a new judge working as president. There should be at least one and probably two or three District Court judges as deputy presidents. Since it is necessary for every quorum to include a barrister or solicitor of the High Court, a range of experience is needed in appointments, but those with two or three years' experience should not be ruled out for the simple or less complex matters. At least one or two should have the seniority to enable them to chair quorums in difficult or complex matters that do not warrant the President sitting and where one of the District Court judges is not available, i.e., persons of a calibre that could readily be appointed District Court or High Court judges.

57. Fourthly, part-time membership should not be excluded, but, in my experience as a part-time member of two tribunals, at least 40% and preferably 50% of time needs to be devoted to the tribunal to get the best results.

Procedure

58. Fifthly, one of the criticisms of the AAT was that the procedure was "too judicial" for determining the simple cases and lacked needed flexibility. There is, in my opinion, something to be said for this criticism, but it is not inherent in the AAT or CAT model.

59. Sixthly, procedural provisions in jurisdiction-conferring enactments need to be kept flexible. Provisions in enactments directing
    - particular configurations of members (in number, expertise, or seniority in the tribunal) or
    - in procedure to be used

    should be stated as no more than a general principle expressly leaving it to the tribunal to adjust these to the matter in hand.

60. Seventhly, hearing rooms need to be configured flexibly to adjust to the appropriate configuration to fit the case.

Size

61. Eighthly, there is an issue of manageability in a general review tribunal. Beyond a certain number of members, which I cannot specify even generally, a separation into (semi-permeable) streams or divisions becomes necessary, bringing with it increased bureaucracy, loss of collegiality and acquaintanceship among members, and exchange of information, advice and wisdom.

62. Ninthly, the size issue will to some extent determine how general the tribunal is to be. To maintain the best size, it may be necessary to have, e.g., a separate occupational registration and discipline tribunal.

Location

63. Tenthly, the further towards first review of simple matters the jurisdiction goes, the more important it will be to bring the tribunal to smaller centres where matters involve an oral hearing. The obvious location is with District Courts where there is unused space. However, it may in some places be necessary to accommodate hearings elsewhere. In choosing these other venues, the perception of independence needs to be maintained. Local government offices will sometimes be seen as independent, but taking space ad hoc in most non-court venues will have a cost of hiring, provision of furniture and recording equipment, and so on. The decision to sit outside of a court or dedicated tribunal location should therefore be a matter for direction by the tribunal which will be best placed to balance the need to go to a particular centre with the budgetary consequences.

64. Eleventhly, any legislative provision on this topic needs therefore to be phrased in terms of broad flexibility.

**GDS Taylor**
**22 May 2014**

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