The First 10 Years of the Administrative Decisions Tribunal of New South Wales

(A paper delivered by Mark A Robinson, Barrister, to the Annual Members' Conference of the Administrative Decisions Tribunal of New South Wales, titled "ADT: Tenth Anniversary" held in Sydney, on 14 November 2008)

Introduction

2008 is a year to celebrate — the Administrative Decisions Tribunal of New South Wales (ADT) turns 10 this year.

It celebrates the same birthday as the release by Mozilla in 1998 of the code base for the popular internet browser software know as the "*Netscape Communicator*" suite under an open source license. The web browser later became know as "*Firefox*" and "*Thurderbird*". Mozilla was described this year by its CEO, lawyer Winifred Mitchell Baker on her weblog as:

> "an open source project of astonishing scope and diversity. A portion of the Internet that is more open and participatory than almost anyone imagined. It is characterised by openness, transparency and broad participation. A strong voice for what the Internet can be. That's 10 amazing years".

This accolade can, mutatis mutandis, be ascribed to the ADT.

This Tribunal has seen great accomplishments all through its first decade, and we should celebrate these as well.

The Tribunal was established by section 11 of the *Administrative Decisions Tribunal Act 1997* (NSW). The Act was assented to on 10 July 1997 and was proclaimed to commence in part on 6 October 1998 and then proclaimed in full in stages.

It is today the leading external merits tribunal in New South Wales and a leading civil or private disputes quasi-judicial tribunal.

In the past 10 years it has become accepted as a necessary and respected fixture of the State's courts and tribunal system. It has achieved that status by good quality appointments and constant hard work that is of a consistently high standard both in terms of legal standards developed and applied but also in terms of good public administration.

That it has achieved this position at all with just two full time tribunal appointments and 110 part-time appointments is remarkable. That is has done all this with resources that resemble the string of a shoe is a tribute to the leadership of the Tribunal and all of its hardworking staff.

It might be suggested, of course, that I am not an unbiased observer. I practice in administrative law. In my capacity as the founding treasurer and then secretary of the

New South Wales Chapter of the Australian Institute of Administrative Law, in the 1990s I argued publicly for the establishment of a quality external independent merits review tribunal for New South Wales, modelled along the lines of the Commonwealth Administrative Appeals Tribunal. That tribunal had been successful in producing quality, fairness, balance and consistency in many areas of federal executive decision-making.

When the then Attorney General for NSW came up with a first rough draft of the proposed ADT Bill, I was privileged to be invited to work as part of a small group of lawyers to review the Bill. We met a number of times with the Attorney's people over some months in 1997. We made some substantive amendments and improvements to the draft Bill. That committee included David Bowen (now, General Manager of the Motor Accidents Authority of NSW); Professor Mark Aronson, Professor Margaret Allars, Ms Kay Ransome and John Griffiths SC. The Attorney's brief, as it were, was to come up with a workable tribunal that:

- had wide powers;
- was flexible;
- could operate both as a modern external independent merits review tribunal (what we called "*reviewable decisions*" in section 7 of the Act) and, at the same time,
- be quasi-judicial tribunal of first instance that resolved private or civil disputes in a fair and efficient manner (what we called "*original decisions*" in section 7 of the Act).

This was no easy task.

The solution was to build into the provisions of the Bill necessary structures and sufficient and flexible powers so as to permit the tribunal to act in the best fashion necessary to suit the particular jurisdiction it was charged to deal with.

The Bill struck the right balance in my view and, even before the ADT was first proclaimed to commence, the Victorians had modelled their external review tribunal legislation on the ADT Act and had it fully operational on 1 July 1998 (the *Victorian Civil and Administrative Tribunal Act 1998* (Vic)). All this before the ADT took its first breath.

As a Committee reviewing the Bill, we were especially pleased to include our input into the objects of the ADT Act. Apart from establishing the Tribunal in section 3(a) to review or make certain decisions, it was, by section 3(b) to (g):

> (b) to ensure that the Tribunal is accessible, its proceedings are efficient and effective and its decisions are fair,
> (c) to enable proceedings before the Tribunal to be determined in an informal and expeditious manner,
> (d) to provide a preliminary process for the internal review of reviewable decisions before the review of such decisions by the Tribunal,
> (e) to require administrators making reviewable decisions to notify persons of decisions affecting them and of any review rights they might have and to provide reasons for their decisions on request,

(f) to foster an atmosphere in which administrative review is viewed positively as a means of enhancing the delivery of services and programs,

(g) to promote and effect compliance by administrators with legislation enacted by Parliament for the benefit of the citizens of New South Wales.

During the period of these Committee drafting sessions in 1997, I recall saying to the NSW Attorney that I would feel sorry for the first tribunal members appointed to administer the Act since although the final form of the Bill contained significant structures, power and flexibility, there was very little practical guidance to members as to exactly how to utilise those structures to best effect and how to exercise those formidable powers. Those words came back to haunt me as I was later honoured to be appointed a founding part time Judicial Member in March 1999 for three years in the General Division. I then had to come to grips with these issues myself. I was reappointed in 2002 for a further three years. After my term had ended, I then spent many months finishing up hearings I had already commenced (pursuant to clause 8A of Schedule 3 of the ADT Act (former member whose term expires may complete unfinished matters)).

The very first General Division Tribunal decision to be published was *Bourke v New South Wales Commissioner of Police* [1998] ADT, 17 December 1998, an *ex tempore* decision of the President, Judge O'Connor. In it, the President made a ruling on a point of law in relation to five applicants then before the Tribunal. Each were applicants for a licence to work as security guards and their application had been refused by the NSW Police Commissioner. NSW Parliament had recently enacted the *Security Industry Act 1997* (NSW) in a desperate effort to clean up (and be seen to clean up) the security guard industry which had apparently become riddled with criminals and failed police officers. In dismissing all their applications, the President explained to the applicants:

- insurmountable mandatory statutory requirements stood in the way of their merits appeal;

- there was no scope for the exercise of any discretion by the Tribunal (notwithstanding that section 63 of the ADT Act gave the Tribunal power to make "*the correct and preferable decision*");

- the new security industry legislation operated retrospectively (as to consideration of past crimes, even minor crimes), so that former security guards now re-applying for their licences were caught;

- the new legislation was "*clearly quite draconian in relation to circumstances where people have had quite minor past convictions*"; and

- while he appreciated the public policy considerations that led Parliament to take the tough approach it did - he firmly recommended a reconsideration of the structure of the legislative scheme to make it fair.

This was an impressive decision and it brought home to the security industry the tough new world that it now faced and it graphically highlighted the potential unfairness of legislation that once seemed to Parliament to be a good idea.

As to the new Freedom of Information review jurisdiction in the Tribunal, the early period of the Tribunal's work was very interesting.

Long before that, in 1990, I was fortunate to have assisted in the preparation and running of the very first FOI case to be heard in New South Wales in the District Court. Then, I was the research officer for Keith Mason QC, the then Solicitor General, who appeared against Michael Joseph (now SC) before Judge Smyth in the District Court in *Wilson v Department of Education*, NSW District Court, unreported, 21 December 1989. It was an epic battle. The applicant was seeking documents relating to the closure of the Castle Cove Infant School in Sydney. The public's interest was enlivened by the timely leaking of some exempt documents by someone in the Department. Tempers on both sides were red hot during the Court hearing. Many grounds of exemption were relied upon by the Solicitor General. The Court used the wisdom of Solomon to finally determine to give some further documents to the applicant and to hold some documents back as exempt. As to the public interest and the exemption based on Schedule 1, Clause 9 of the FOI Act 1989 (NSW) as to internal working documents, the Court made the surprisingly frank determination that "*… the obligation on the court is to consider each such document to make a value judgment as to whether that particular document is one which would be against the public interest to disclose…*".

Nine years later, I was pleased to deliver the very first determination of the new Tribunal under the *Freedom of Information Act 1989* (NSW). It was *Taylor v Chief Inspector, RSPCA* [1999] NSWADT 23 (19 April 1999). It proved to be a difficult matter where the respondent disputed it was an "*agency*" under the FOI Act and the reasoning supporting the decision under review was threadbare. It also involved the confidential informer immunity (regarding reports of cruelty to animals). It took 29 paragraphs of reasons for me to articulate why the respondent was a person in "*public office*" under the FOI Act.

In the next seven years, FOI and, later, privacy work for me at the Tribunal never got easier or less technical. However, it was always gratifying. I was pleased to be working in a collegiate atmosphere where professionalism was evident as was the maintenance of high standards of the conduct of hearings and quality written determinations.

History of Reform Proposals

It is useful to recall that as at 1997 when the Bill was introduced, New South Wales had already had a long history of proposals for some form of merits review tribunal. These included the following:

- In December 1972, the New South Wales Law Reform Commission published its *Report on Appeals in Administration*, LRC 16, which provided for, and enclosed a draft bill in respect of, a Public Administration Tribunal.

- The Commission Reviewing New South Wales Government Administration, which made two reports, one in 1977 and one in 1982. A preference for the adoption of a model based upon the Commonwealth AAT was expressed there.

- The New South Wales Tax Task Force reported in 1988. It recommended a general taxation appellate body in the area of taxation in respect of State matters.

- In 1989 the New South Wales Attorney General's Department issued a discussion paper on civil procedure. That discussion paper made a number of favourable comments towards the establishment of a general administrative appeals tribunal type of body in New South Wales.

- In March 1995 the Carr Labor Government came to power in NSW on a stated policy of the then Shadow Attorney-General, of establishing an independent Administrative Appeals Tribunal to review government decisions.

As to other general merits review tribunals in other Australian jurisdictions as at 1997, in 1975 the Commonwealth Parliament enacted the *Administrative Appeals Tribunal Act* 1975 (Cth). The AAT commenced operation on 1 July 1976. In 1989, the Australian Capital Territory enacted AAT legislation modelled expressly on the Commonwealth AAT.

The NSW tribunal therefore, had been a long time coming in this State.

In its passage through the NSW Parliament in 1997, the ADT Bill (and the cognate Bill) was supported by all major political parties in NSW.

Reviews of the ADT

In the past ten years, the Tribunal has been the subject of formal scrutiny or review a number of times.

In November 2002, the *Report on the Jurisdiction and Operation of the Administrative Decisions Tribunal* was published by the NSW Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission. It recommended, *inter alia*, further merging of State tribunals into the ADT and a significant expansion of the Tribunal's then jurisdiction. It also called for the establishment of an Administrative Review Advisory Council (an "**ARAC**") to provide advice and to further develop and oversight the administrative law system in New South Wales (modelled on the Commonwealth's Administrative Review Council – the ARC).

In June 2007 the NSW Attorney General's Department brought down a paper titled "*Review of the Administrative Decisions Tribunal Act 1997*". It was tabled in the NSW Parliament (Legislative Assembly) on Tuesday, 3 June 2008. In undertaking the review, the Department had invited government agencies, key stakeholders and the general public to make submissions about the objects and terms of the ADT Act and the functioning of the Tribunal. Significantly, no submissions queried the

objectives of the Act, although a number of submissions proposed minor amendments to the terms of the Act and the Tribunal's practice and procedure to better support the stated objectives. Some submissions supported expansion of the jurisdiction of the Tribunal and clarification of the content of its jurisdiction. Submissions also proposed measures to improve the efficiency, accessibility and operations of the Tribunal.

The AGs review ultimately determined that the policy objectives of the Act remained "*valid*" and the terms of the Act remained "*in substance, appropriate to secure those objectives*". That was the understatement of the year.

Significantly, the review found that the Tribunal was "*an effective administrative review body that has demonstrated a capacity to assimilate new jurisdictions while continuing to deliver accessible justice*". The review recommended some legislative and operational improvements that were ultimately included in the *Administrative Decisions Tribunal Amendment Act 2008* (NSW) (Act No 77). The AG's review is plainly extrinsic material in that the NSW Attorney General referred to it as such in the second reading speech for the 2008 Bill (Hansard, Legislative Assembly, 24 September 2008 at page 9875). Therefore, to the extent necessary, the AG's review can be used in interpreting the new provisions of the ADT Act (see section 34 of the *Interpretation Act 1987* (NSW) as to the use of "extrinsic material").

Some Case-Law Turning Points Affecting the ADT

I have been asked to address some of the NSW Supreme Court and Court of Appeal turning points in decided cases affecting the Tribunal over the years.

While I can only convey my own impressions, I am pleased to observe that, overall, given the enormous number of matters that came before the Tribunal in its varied Divisions and jurisdictions over the past ten years, court appeals and judicial review applications were relatively few in number and they were far between.

Most of them turned on their particular facts and do not warrant wider attention. If remitted according to law, the Tribunal simply dealt with those matters again in the ordinary course.

Some decisions related to wider issues of principle and I will outline only some of them in this paper.

The first Court of Appeal decision I recall was in March 1999 in *Lloyd v Veterinary Surgeons Investigating Committee* [1999] NSWCA 68 (Mason P; Priestley & Stein JJA). The Court held that in relation to appeal to the Appeal Panel of the Tribunal from "*original decisions*" parties could appeal interlocutory decisions and not only final decisions. This was against long-standing Federal Court authority that had not been raised in argument before it - *Director-General of Social Services v Chaney* (1980) 31 ALR 571 at 104-105; (1980) 47 FLR 80 at 594 (per Deane J) cf: *Boral Gas (NSW) Pty Ltd v Magill* (1993) 32 NSWLR 501 (Kirby P, Mahoney JA, Sheller JA).

That threw a spanner in the works from early times.

Justice Priestly remarked (at [23]) that "*This construction may have the result that a great many interlocutory decisions fall within s 113, which could conceivably cause inconvenience to the Tribunal when constituted by an Appeal Panel*."

The Tribunal did manage to deal with the situation until 2004 when amending legislation brought in the requirement of an appellant first obtaining "leave" before appeals on interlocutory Tribunal decisions could go ahead.

The ADT – a Court or a Tribunal?

A fascinating series of cases dealt with the question of the nature of the Tribunal itself.

The Tribunal was established as a state tribunal only. However, it was plainly granted and it exercises some judicial power, most obviously so in the civil/private law divisions where it acts like a court, determining civil disputes and awarding binding determinations of damages and costs.

Indeed, its many members were styled "*(presidential or non-presidential) judicial members*" in the ADT Act for some good reason.

Accordingly, for some purposes, the tribunal must be regarded as being a "court" as well as a "tribunal".

In *O'Sullivan v Central Sydney Area Health Service (No 2)* [2005] NSWADT 136, the Equal Opportunities Division of the Tribunal held that the NSW Governor was not a compellable witness to give evidence for a medical practitioner, a party to an Anti-Discrimination complaint. Although her evidence would have been relevant to the issues (arising from a time earlier to her appointment when she was a medical practitioner working with that party), the Tribunal was held to be a "NSW Court" within the meaning of section 15 of the *Evidence Act 1995* (NSW) and she was therefore regarded as "*not compellable*" to give evidence. Alternatively, it was held that sovereign immunity applied under the common law while she held her appointment as Governor.

In *Trust Company of Australia Ltd (Stockland Property Management Ltd) v Skiwing Pty Ltd trading as Café Tiffany's* [2005] NSWADTAP 9, the Appeal Panel of the Tribunal held (at [89]) that the Tribunal was a "court" in the exercise of its retail leases jurisdiction under section 86(2) of the *Trade Practices Act 1975* (Cth) and it could award damages. The Panel applied reasoning in *Hamilton v Consumer Claims Tribunal* [1999] NSWSC 847 at [2], where the Supreme Court of NSW (Davies AJ) held that the Consumer Claims Tribunal was an inferior court, not an administrative tribunal. The constitutional difficulties of the Commonwealth (described in, eg: *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245) did not apply to state bodies.

On appeal, in *Trust Company of Australia Limited (trading as Stockland Property Management) v Skiwing Pty Ltd (trading as Café Tiffany's)* (2006) 66 NSWLR 77 ([2006] NSWCA 185) (Spigelman CJ, Hodgson & Bryson JJA), the Court of Appeal held that the Tribunal was <u>not</u> a "court of a State" for the purposes of determining

matters under the *Trade Practices Act 1974* (Cth) as it was not predominantly composed of judges (at [65]). That remains the last word as a special leave to appeal to the High Court was refused on 17 September 2007 ([2007] HCATrans 488 – Gummow and Heydon JJ). However, leave was refused specifically because of "*the nature of the appeal to the New South Wales Court of Appeal and the holding by that court in paragraph 60 of its reasons that it had been open to the Appeal Panel to overturn a critical finding of fact by the Tribunal...*". The "tribunal vs court" issue was not addressed at all.

In a later incarnation of the case, in *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 68 NSWLR 366 ([2006] NSWCA 387) (Handley & Basten JJA and McDougall J), the Court of Appeal held that the Appeal Panel of the tribunal possessed the relevant characteristics so as to constitute a "court" for the purposes of the *Suitors' Fund Act 1951* (NSW) (at [74]) and the costs of the appeal.

In *Attorney General v 2UE Sydney Pty Ltd* (2006) 236 ALR 385; 97 ALD 426; [2006] NSWCA 349 (Spigelman CJ, Hodgson and Ipp JJA), the NSW Court of Appeal held that in considering the "*applicable written or unwritten law*" in s115(1)(b) (re: appeals to the Appeal Panel extended to the merits) of the *Administrative Decisions Tribunal Act 1997* and s31(1) of the *Interpretation Act 1987* the Tribunal may have regard to any relevant constitutional limits in construing legislation. The Tribunal is competent to consider a Commonwealth constitutional immunity for political speech and interpret the relevant section so as to conform. It cannot, however, definitively determine a federal constitutional question (*ibid*, at [30], [31], [32], [37], [98], [100], [104] & [105]). In that case, the Appeal Panel was considering a constitutional argument in the context of alleged vilification in breach of s49ZT(1) of the *Anti-Discrimination Act* 1997. For the purposes of that Act, the Tribunal's decision could be "registered" as an enforceable judgment in the Supreme Court of NSW. The Court of Appeal held that a State Parliament cannot invest a court or tribunal with Federal jurisdiction (at [54]-[55]). Further, applying *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, it held that a State tribunal was in the same position as a Commonwealth tribunal, namely, while it may validly consider issues arising under the Commonwealth Constitution, the presence of a scheme which gives judicial force to a tribunal decision upon mere "registration", converts the tribunal's otherwise permissible actions into an impermissible exercise of Federal jurisdiction (*2UE Sydney* at [70], [71], [75], [76], [80]).

In the reasons for decision, the Court of Appeal referred to the Tribunal and the Appeal Panel variously as "*administrative bodies with statutory powers the exercise of which have legal consequences*" (at [29]), as a "*quasi-judicial tribunal*" (at [52]) and as an "*administrative tribunal*" (at [57]) which did not possess any Federal judicial power such that it could determine Federal constitutional issues. It made a declaration that the Appeal Panel of the Tribunal had no jurisdiction to determine whether s49ZT of the *Anti-Discrimination Act* 1977 (NSW), should be read down so as not to infringe the constitutional implication of freedom of communication about government or political matters.

In the *2UE Sydney Pty Ltd* case, Court of Appeal positively invited an Appeal Panel of the tribunal to refer a difficult question of Commonwealth constitutional

interpretation to the Supreme Court pursuant to section 118 (references of questions of law to Supreme Court) (at [90], [102] and [116]).

This mode of resolving disputed and difficult issues might be in further use in the coming years.

Given all these cases, it plain that the question of the ADT as a "court" or a "tribunal" is far from settled in the Tribunal and in the NSW Courts.

Supreme Court's Discretion on Dealing with Applications for Review - Section 123 ADT Act

Section 123 of the ADT Act provides that the Supreme Court may decline to deal with application for review from Tribunal decisions that do not first go through an Appeal Panel (or "*alternative review*" as defined in section 123(3)). This largely reflects the common law's discretion in judicial review matters to refuse to deal with a matter if there is an alternative and suitable remedy – most recently discussed by the High Court in *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32.

In *NSW Breeding & Racing v Administrative Decisions Tribunal* (2001) 53 NSWLR 559 ([2001] NSWSC 494), Barrett J delivered a detailed decision considering each element of section 123 of the ADT Act. The case before the Tribunal was an Anti-Discrimination matter. The plaintiff sought judicial review at common law and the question was whether the Court should refuse judicial review because an Act made adequate provision for alternative review. Of the ADT Act as a whole, the Court said, at [13]:

> "The whole tenor of the *ADT Act*, as well as that of the various provisions such as s.118 of the *Anti-Discrimination Act* which feed into Part 1 of Chapter 7, seems to me to be that, in the ordinary course of events, someone dissatisfied with a decision of the Tribunal will, in the first instance, seek redress through appeal to an Appeal Panel. A decision at Appeal Panel level will, in ordinary circumstances, be a prerequisite to further review by way of appeal to the Court or referral of a question of law to the Court. The fact that there is an appeal to the Appeal Panel as of right on any question of law means that the Appeal Panel, like the Court, has jurisdiction in relation to error of law. But the two jurisdictions are by no means the same and, to the extent that the matters with which they are concerned overlap, they must be considered in the light of s.123 of the *ADT Act* which regulates, according to the circumstances of a particular case, the priority to be afforded to one jurisdiction over the other."

Of section 123, The Court stated, at [14] and [15]:

> "Section 123 grants an express permission for the Court to decline to adjudicate in exercise of its original jurisdiction where circumstances stated in the section exist, thus stating (or confirming) that the judicial review jurisdiction is discretionary in those circumstances. The circumstances are related to the availability and adequacy of some other avenue of review

> provided by the ADT Act itself. In the present case, the only avenue of review that could possibly be relevant is the Appeal Panel process under Part 1 of Chapter 7 viewed, of course, in the light of the way in which appeal under that process may lead under Part 2 to further appeal to the Court.
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> Recognising the way in which exercise of the Court's original jurisdiction is thus made or confirmed to be discretionary (but also remembering that the discretion is controlled by the terms of s. 123), it is useful to look at general principles as to the discretionary nature of administrative law jurisdiction in circumstances where an alternative review or appeal mechanism is available. Guidance area is provided by the judgment of Kirby P in *Boral Gas (NSW) Pty Ltd v Magill* (1993) 32 NSWLR 501 and the decision of the Full Court of the Supreme Court of South Australia in *Weinel v Judge Parsons* (1994) 62 SASR 501."

The Court considered that section 123 should be considered against the background of a number judicial review discretionary principles (set out at [16] to [19]) and that these should be used by way of guidance in making a decision under the section (at [20]).

The Court referred to a number of cases where applications direct to the Supreme Court from the Tribunal had been permitted by the Court (*Mishra v University of Technology, Sydney* [1999] NSWSC 1324 and *Sullivan v Administrative Decisions Tribunal* [2000] NSWSC 386) but distinguished them from the present case, saying that the plaintiffs there were under some "*misapprehension*" and both sides may not have been legally represented (at [28]).

Importantly, the Court considered that the powers vested in the Appeal Panel (in sections 114, 115 & 118 of the ADT Act) granted the Appeal Panel jurisdiction that is "*more flexible and potentially more creative in the interests of effective dispute resolution than the Court's essentially negative jurisdiction upon judicial review*." (at [42]).

Appeal Panel Leave to Appeal on Merits

The right to appeal to the Appeal Panel of the ADT is governed by s 113 of the ADT Act which allows (under ss 113(2)(a) and (b)) an appeal "*on any question of law*" and, "*with leave of the Appeal Panel*", an appeal which "*extend(s) to a review of the merits of the appealable decision*". In numerous decisions, the Tribunal had interpreted the extension of an appeal to the merits of the case as one requiring a party to at least establish an arguable question of law.

In 2005, the Court of Appeal settled the question by determining that there was no need for an appellant or applicant to first establish an actual or arguable question of law or error of law in order to "enliven" the right to have the matter extend to constitute a merits based appeal.

In *Lloyd v Veterinary Surgeons Investigating Committee* (2005) 65 NSWLR 245 ([2005] NSWCA 456), the NSW Court of Appeal held that the provisions in section 113(2)(a) and (b) of the ADT Act were not cumulative and were quite distinct

sources of power empowering an Appeal Panel to deal with the merits of any appeal (at [57]-[59]) (see also *Skiwing Pty Ltd v Trust Company of Australia* [2006] NSWCA 276 (9 October 2006) at [48]).

This decision had a profound effect on the work of the Appeal Panel.

The FOI "Override Discretion" – NSW ADT

In *University of New South Wales v McGuirk* [2006] NSWSC 1362 (Nicholas J) the Supreme Court held that there existed what had come to be known as a public interest "*override discretion*" in freedom of information matters. It is also called the "*residual discretion*" that exists once a finding is made that a document is an "Exempt Document" under Schedule 1 of the FOI Act (NSW).

The Appeal Panel had held that the discretion did not exist and that the tribunal could not hand over documents it had declared to be "exempt" (it arose from a construction of s 55 of the *Freedom of Information Act 1989* (NSW) (FOI Act) and s 124 of the ADT Act.

The Supreme Court held (at [103]) that this residual discretion did exist and the Tribunal did possess discretion to release the contested subject documents. The decision had enormous implications for the future release of otherwise sensitive State government held documents. This is particularly so after NSW Court of Appeal's decision in *General Manager, WorkCover Authority of NSW v Law Society of NSW* (2006) 65 NSWLR 502 (Handley, Hodgson and McColl JJA) on the "internal working documents" exemption in FOI. The Court there gave the FOI exemption a relatively restricted operation and gave some encouragement to future FOI applicants.

FOI – Sufficiency of Search

In another decision this year, the NSW Court of Appeal lightened the load of the ADT considerably. As a routine part of FOI matters, the Tribunal had held that it would consider and determine the question whether the agency had properly or sufficiently looked for the subject documents. It had followed some long-standing federal AAT precedents in this regard.

Sadly, it was the fact that the agencies sometimes did not properly or fully search for documents on receipt of an FOI request. It sometimes took the gentle application by the Tribunal of a cattle prod to get the agency moving and in the right direction.

In *Administrative Decisions Tribunal Appeal Panel v Director-General, Department of Commerce* [2008] NSWCA 140 (Beazley JA at 1; Giles JA at 78; Basten JA at 79) the Court held that the jurisdiction of the ADT is relevantly limited to determinations under s 24 of the FOI Act 1989. The formation of an opinion that an agency does not hold a document is not a determination for the purposes of s 24 and the jurisdiction of the Tribunal (conferred by s 53 of the FOI Act) did not extend to review of the adequacy of searches undertaken by the agency.

The Rules of Evidence and Tribunal Proceedings – s 73(2) ADT Act

While the Tribunal is not normally strictly bound by the rules of evidence (the Legal Services Division is the exception), they are still kept in mind and the tribunal is often guided by them because they are useful in making proper and lawful factual determinations in any event. In *University of New South Wales v PC (GD)* [2008] NSWADTAP 26 at [38] (O'Connor K - DCJ (President)) it was held the tribunal "should always adopt a practical and persuasive approach if it proceeds to find a fact without supporting evidence". In that case, the Tribunal applied the common law approach to judicial notice of matters of fact while having regard to the modern formulation of that in section 144 of the *Evidence Act 1995* (NSW).

In *Howell v Macquarie University* [2008] NSWCA 26 at [98] (per Campbell JA with Spigelman CJ and Bell JA agreeing) the NSW Court of Appeal described the tribunal's evidence regime under s 73 of the ADT Act as a "*loosened procedural and evidentiary regime*". The Court specifically considered the applicability of the evidence "rule" of finding inferences of fact derived from *Jones v Dunkel* (1959) 101 CLR 298. The Court said (at [98]) *Jones v Dunkel* permits but does not compel the drawing of inferences by the tribunal when a witness is not called by a party and that whether inferences are actually drawn is part of the tribunal's task of weighing the evidence. The Court held (at [97]) that if a witness is not called two different types of result might follow. The ***first*** is that the tribunal might infer that the evidence of the absent witness, if called, would not have assisted the party who failed to call that witness. The ***second*** is that the tribunal might draw with greater confidence any inference unfavourable to the party who failed to call the witness, if that witness seems to be in a position to cast light on whether that inference should properly be drawn. Whether the tribunal then goes on to draw any inference at all it is entirely a matter for the tribunal as the finder of facts.

"Shi" May be the Beauty or the Beast

In *Shi v Migration Agents Registration Authority* (2008) 82 ALJR 1147; 248 ALR 390; [2008] HCA 31 the High Court of Australia discussed the nature and function of the Commonwealth AAT in the context of section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) upon which section 63 of the NSW ADT Act was plainly modelled. See the useful general discussions by Kirby P, on the nature of the AAT (at [30] to [32]), the function of the Tribunal (at [33] to [38] and the purpose of the AAT Act (at [39] to [42]); Hayne and Heydon JJ on the tribunal's task at [96] to [100]; and Kiefel J (at [133] to [145]).

As we all know, as to the Commonwealth AAT, Australia is most fortunate to have had the benefit of a long established independent external merits review tribunal of no small stature in the federal scheme of things. It was established by the *Administrative Appeals Tribunal Act 1975* (Cth) ("AAT Act") and was part of what is styled the administrative law "*package*" designed and proposed in a number of Commonwealth reports in the early 1970s (see: the Kerr, Bland and Ellicott Committee Reports as reproduced in *The Making of Commonwealth Administrative Law* compiled by Robin Creyke and John McMillan in 1996 and published by the Centre for International and Public Law, Law Faculty Australian National University).

Few administrative law lawyers would have imagined that about 30 years after its establishment, the High Court of Australia would be deliberating as to fundamental aspects of the nature and scope of the Tribunal's jurisdiction.

Most of what is said in *Shi's case* is also directly applicable to the NSW ADT.

The nature of merits review in the Tribunal was discussed at length by the Court in *Shi's case* At [140]-[141], Kiefel J stated (with Crennan J agreeing (at [117]):

> "The term "*merits review*" does not appear in the AAT Act, although it is often used to explain that the function of the Tribunal extends beyond a review for legal error, to a consideration of the facts and circumstances relevant to the decision. The object of the review undertaken by the Tribunal has been said to be to determine what is the "correct or preferable decision" . "Preferable" is apt to refer to a decision which involves discretionary considerations . A "correct" decision, in the context of review, might be taken to be one rightly made, in the proper sense . It is, inevitably, a decision by the original decision-maker with which the Tribunal agrees. Smithers J, in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* ((1979) 24 ALR 307 at 335), said that ***it is for the Tribunal to determine whether the decision is acceptable, when tested against the requirements of good government. This is because the Tribunal, in essence, is an instrument of government administration. …***
>
> The reasons of the members of the Full Court of the Federal Court in *Drake v Minister for Immigration and Ethnic Affairs* ((1979) 24 ALR 577) confirm what is apparent from s 43(1), that the Tribunal reaches its conclusion, as to what is the correct decision, by conducting its own, independent, assessment and determination of the matters necessary to be addressed ((1979) 24 ALR 577 at 591 per Bowen CJ and Deane J, 599 per Smithers J; and see *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639 at 648 per Deane J.)." (my emphasis)

In *Shi's case* Hayne and Heydon JJ described the nature of the AAT's "task" in some detail (at [96] to [100]). Further, Kirby P discussed at length the nature of the tribunal (at [30] to [32]), the function of the Tribunal (at [33] to [38]) and the purpose of the AAT Act (at [39] to [42]). While the case arose in the context of the disciplinary provisions of the control of registered migration agents under the *Migration Act 1958* (Cth), these fundamental matters assumed primary significance.

The Court held that when the AAT was reviewing the decision of the migration agent's regulatory authority's finding that the migration agent was not a fit and proper person to be registered and that he was not a person of integrity – it did not involve a temporal element (as the Federal Court had held it did by majority in *Shi v Migration Agents Registration Authority* (2007) 158 FCR 525). The Court held that the Tribunal, in reviewing this decision, was <u>not</u> restricted to a consideration of the events up until the time the authority below had made its decision but it could consider later events. It held that the Tribunal may have regard to the state of affairs at the time of making its decision unless in the legislation empowering the decision-maker make the original decision under review, there is a statutory qualification that the making of the

decision should be restricted to the material before the original decision-maker. It held that there was no such statutory qualification in the *Migration Act* and therefore, the tribunal's review was relevantly unrestricted (as to temporal considerations).

The Court also considered the power of the tribunal to fix "conditions" in the determination of the review. The Tribunal had determined that the migration agent be cautioned but that the caution should be lifted at a specified time if certain conditions were satisfied (namely, that he be supervised as a migration agent for 3 years and that he not provide immigration assistance in relation to protection visa applicants during that period). The registration authority possessed statutory power to "*set one or more conditions for the lifting of a caution*" (s 304A of the *Migration Act*). The High Court determined (by majority) that this power to impose conditions was wide enough to enable the Tribunal to fashion or "mould" conditions to the particular circumstances of the case. The Court did not comment on their appropriateness in the present case, only on their legality (with the exception of Kirby J who, curiously, stated (at [70]) that the Tribunal had made an "*available and arguably sensible disciplinary decision*").

The Court also took the opportunity to endorse aspects of "*long established*" determinations as to the nature and scope of the Tribunal's task in external merits review in cases such as: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 (Bowen CJ, Deane and Smithers JJ); *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (New South Wales)* (1978) 1 ALD 167; and, in *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666.

It is interesting to observe in the *Shi case* that the High Court accepted the tribunal's significant review role, and its evident important place in the federal executive scheme of independent merits review and construed its powers widely in that broader context.

The same is also applicable as to the role and place of the ADT in NSW (minus about 20 years' of experience).

The *Shi case* has itself raised a number of questions left unanswered by the High Court and which would benefit from investigation or review by a body such as the Administrative Review Council. For example, the nature or function of the AAT as an "investigative" body or as an "adversarial" body is not explored.

This is even more important in NSW where there are significantly more structures, characters and options built into the ADT Act as compared with the AAT Act.

The manner by which the agency or executive decision-maker is to defend the decision in the tribunal or assist the tribunal is not settled in *Shi*. That is so particularly having regard to the recently inserted section 33(1AA) in the AAT Act that obliges the person who made the decision to use his or her best endeavours to assist the Tribunal to make its decision. What does this mean in practical terms? Do the model litigant rules apply?

More fundamentally, given the High Court's firm confirmation of the "standing in the shoes" merits review dogma, what role or significance remains for the primary

decision or the decision under review (a question raised but not wholly answered by Kirby J in *Shi* at [34] and [37]? Is the primary decision merely relegated to the status of a jurisdictional fact? Is it simply part of the material now before the tribunal (as Kirby J holds it is in *Shi* at [37])? Does it have significance in fixing or narrowing the issues before the Tribunal (as the delegate's decision limited the Refugee Review Tribunal in *SZBEL v Minister for Immigration* (2006) 228 CLR 152)? What scope is there in the tribunal for raising fresh issues or for "ambush" between the parties at tribunal hearings? What does it mean for the tribunal to "*review*" the original decision (as the enabling Act requires and as is provided for in section 25(4) of the AAT Act)? Kirby in *Shi* at [43] suggests that it merely "*makes it necessary in each case to identify the precise nature and incidents of the decision that is the subject of the review*".

These questions are all the more apposite when the decision-maker and/or the responsible agency possesses significant specialist expertise, corporate history and experience and knowledge (see, Kirby in *Shi* at [37] describing the issue by reference to *Re Control Investment Pty Ltd and Australian Broadcasting Tribunal (No 2)* (1981) 3 ALD 88 at 92-93 (Davies J)). Who is best equipped to deal with such difficult and complex issues and in what manner?

These questions lead to other difficult issues such as the best way to provide the tribunal with proper resources and expertise in these cases. That is certainly a most pressing issue for the NSW ADT.

As an aside, so much pondering on the implications of *Shi's case* led me to consider whether the timeless words of Charles Aznavour in that 1974 song "*She*" might also applicable to the Tribunal – you can make your own mind up based on the lyrics. In the first verse he sings:

> "*She ...*
> *May be the face I can't forget*
> *A trace of pleasure or regret*
> *May be my treasure or the price I have to pay*
> *She may be the song that summer sings*
> *May be the chill that autumn brings*
> *May be a hundred tearful things*
> *Within the measure of the day.*"

Natural Justice in Tribunal Hearings

In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 esp at [35], the Court unanimously determined that the federal Refugee Review Tribunal had a positive duty to inform a refugee applicant of what it considered to be real issues in the matter (if they were any different from the issues that emerged from the decision of the Minister's delegate below – the decision under review in the Tribunal).

The case concerned an Iranian national who was a seaman who jumped ship at Port Kembla. He claimed refugee status and sought a protection visa. He said he feared for his safety because the Captain of his ship knew he was interested in the Christian

religion. At the Minister's delegate level, only one significant issue was determined (namely the return of the applicant to his vessel on one day).

However, at the Tribunal level, the knowledge of the ship's Captain became the "key issue" that turned the Tribunal against the applicant's claims.

The High Court held (at [35]) that the Tribunal must ***first*** identify the key issues if they were any different from the delegate's identified issues below.

While the decision turned on the particular provisions of the *Migration Act*, the case holds important lessons for executive decision-makers more generally in that the High Court accepted (at [49]) there would exist cases where procedural fairness would require:

1 There is a positive duty to notify an applicant of any issue critical to the decision which is not apparent from the nature of the issue or the terms of the statute; and,

2 A decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material.

These two particular aspects of procedural fairness (among others) had been accepted to exist by the Full Court of the Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Limited* (1994) 49 FCR 576 at 591-592 (and cited in *SZBEL* at [29]). In *SZBEL*, the High Court expressly endorsed this view.

In *SZBEL*, notwithstanding that the parties had accepted that procedural fairness relevantly applied to the issues before the High Court (in effect, at [29]) the High Court was moved to very strictly construe provisions of the *Migration Act* so that a the nature of a "review" of a delegate's decision by the Tribunal was held to be both partly de novo review and partly an acceptance of the issues as they were identified by the delegate below (because the Act styled it a "*review*" and the applicant was to give oral evidence on the "*issues in relation to the decision under review*" – see [33]). Accordingly, any deviation by the Tribunal from those issues as fixed below must first be flagged with the applicant.

The decision therefore set a higher standard for the RRT and identified a new and positive duty.

As for other decision-makers, the High Court has signalled that it is also prepared to contemplate the imposition of such positive duties when it is procedurally fair to do so. The NSW ADT should take note of this development and ascertain whether it might be applicable.

Futuris Developments?

I point out in passing that in relation to developments in judicial review more generally in *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32 the High Court again considered the concept of "jurisdictional error" in the

context of an assessment of income tax for a company (the Court discussed it at [5] and [55]-[56] (per Gummow, Hayne, Heydon & Crennan JJ)) and held that jurisdictional error could occur in respect of a "*failure of due administration*" (at [58]) which, in that case was specifically:

- an alleged misfeasance on public office; or,
- a deliberate failure to administer the law according to its terms (at [55]).

It also added that, irrespective of the availability of the federal constitutional writs, the remedy of an injunction would be "clearly" available for any fraud, bribery, dishonesty or other improper purpose (at [57]). Kirby J discussed his differing view of jurisdictional error in Australian law in some (most enlightening) detail and argued (at [128]-[130]) that the Court should develop a broader concept of "legal error" for constitutional writ / judicial review purposes. He also argued that the categories of jurisdictional error in Australia (which he set out) are not closed (at [134]).

I note also that the NSW answer to Justice Kirby can now be found in *Bros Bins Systems Pty Ltd v Industrial Relations Commission of New South Wales* [2008] NSWCA 292 (7 November 2008) (Spigelman CJ; Giles JA and Handley AJA) where the Court of Appeal again considered the concept of jurisdictional error and held that in Australian law the distinction between jurisdictional and non-jurisdictional error remains real, indeed fundamental (at [30], [39], [87] and [88]).

The Future of the Tribunal

In addition to new review and original decisions jurisdiction being given to the Tribunal in future, it remains possible that the Tribunal might one day be vested with jurisdiction to conduct itself judicial review of administrative decisions, perhaps as does the NSW Land and Environment Court does in its Class 4 jurisdiction.

Unlike its federal counterpart, the ADT is not constrained by constitutional limitations on the conferral of such a jurisdiction.

Such jurisdiction would be concurrent with the judicial review jurisdiction of the Supreme Court of NSW. In the second reading speech of the original ADT Bill (Hansard, NSW Legislative Assembly, 29 May 1997 at page 9605), the major benefits of this approach and of codification of the grounds of judicial review were said to include:

"● it allows the tribunal in judicial review proceedings to focus on the substance of an applicant's grievance free of technical issues as to the availability of common law remedies;

● it provides for an array of flexible remedial powers; and

● by prescribing the most important grounds of review in summary form and reasonably comprehensive language, it has educational and presentational advantages for administrators

> and citizens, as to the matters that would render an administrative decision contrary to the law."

It was also said:

> "It will also permit an additional option to provide that for certain matters not considered suitable for merit review to nevertheless be reviewable in the ADT as a cheaper and quicker review mechanism than going to the Supreme Court."

In light of the fact that the District Court of NSW has recently received judicial review type jurisdiction in some matters (for example, in appeals from decisions of the Consumer Trader and Tenancy Tribunal) it is timely to revisit that suggestion.

In my view, the ADT is significantly better equipped to deal with judicial review matters than the District Court, provided proper resources are allocated to it.

Both the November 2002 Parliamentary Committee's ADT Review and the June 2007 AG's ADT Review recommended that the Tribunal's jurisdiction generally be expanded.

I would prefer to see the Parliamentary Committee's recommendations in this regard implemented in full.

The AG's Review (at page 27) notes that expansion of the Tribunal's jurisdiction will continue to happen "as it is occurring now" and that it should be "*encouraged*".

That is insufficient.

In my view, the ADT's jurisdiction should be expanded in a structured and principled fashion as has the jurisdiction of the Commonwealth AAT. At the federal level, in the course of advising the Commonwealth Attorney-General on the classes of administrative decisions that should be subject to merits review, the Administrative Review Council has long ago developed and published firm and general principles to be applied to each class of federal decisions that may come up for merits review consideration. The ARC published these guidelines in July 1999 titled "*What Decisions Should be Subject to Merit Review?*".

NSW should adopt the same approach.

I would also like to see the NSW Parliamentary Committee's recommendations regarding the creation of an Administrative Review Advisory Council (ARAC) implemented. The AG's Review (at page 27) merely concluded:

> "It is not necessary to create an independent advisory body - such as the ARAC - to review the jurisdiction of the Tribunal. The NSW Attorney General's Department undertakes this role as part of its ongoing role to keep the legislation under review and to review legislative proposals brought forward by other Ministers. In considering whether an administrative decision is appropriate for review by the Tribunal, the Department has regard to

> modern administrative law policy, including the categories developed at the time the proposal to establish the Tribunal was considered."

In my view that is not sufficient.

It is merely reactive and not pro-active. The Tribunal and administrative review generally in NSW would be much assisted by the on-going work of a dedicated, funded and, in time, experienced ARAC as was proposed in 2002.

That said, the growth and development of the ADT over the past 10 years has seen some great accomplishments and we should rightly celebrate them today and with great expectations for the next 10 years.

Thank You