JUDICIAL REVIEW OF THE WORK OF ADMINISTRATIVE TRIBUNALS—HOW MUCH IS TOO MUCH?

John McMillan*

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Why is this an issue?

The executive government can control most aspects of our lives – the tax to be paid, the conditions of work, the opportunity to enter or exit the country, receipt of social support benefits, the location of public parks, shop trading hours, standards of schooling – the list is endless. It is axiomatic that the exercise of those powers, usually discretionary in nature, should be subject to a means of control other than the good sense and judgment of the decision-maker. The traditional underpinnings of civilised government – representative democracy, separation of powers, and the rule of law – have their part to play, but more often by way of comfort and reassurance rather than as a practical and accessible constraint.

In an age of administrative justice the legal system has turned ever more to other techniques of independent control of executive power. One such technique, administrative tribunals, now play a central role in reviewing both the legality and the merits of executive decision-making. In Australia, for example, just five tribunals – the Administrative Appeals Tribunal, the Migration Review Tribunal, the Refugee Review Tribunal, the Social Security Appeals Tribunal and the Veterans' Review Board – together review upward of 40,000 federal decisions in some years. The caseload of tribunals grows ever larger if we add other federal and State administrative review bodies – not all of them called 'tribunals', but fitting the description nonetheless – which review government decisions in areas as diverse as town planning, guardianship, conservation, professional discipline, business regulation, superannuation complaints, and personnel promotion.

Administrative tribunals thus play a pivotal role in our system of law and accountability, but their life has not been trouble free. From one side, they face pressure from the executive branch of government (of which they are part) to adjudicate in a fashion that comports with the realities of executive government. For example, it is generally expected that tribunals will operate efficiently and informally within resource and budgetary constraints; that they will heed the same breadth of factual and policy considerations as the executive decision-maker; that they will apply common sense, and not be obdurate and doctrinaire in evaluating executive action; and that individual tribunal members will strive for consistency of approach and outcome, notwithstanding their individual qualms.

In short, in the context of tribunal adjudication, justice and fairness are decidedly relative concepts. While tribunals are meant to bring an independent mind to the review of government decisions, the notion of independence cannot be taken to extremes. If it is, then,

* *Commonwealth Ombudsman.*

as history has demonstrated time and again, the effectiveness of the tribunal or its memberswill be short-lived. The tribunal may be restructured; its budget may be reduced; the tenure of tribunal members will be progressively reduced; members deemed unacceptable to government will not be reappointed; or new members thought to be more compliant will be appointed. This is not the place to argue the propriety of those methods of executive control: it is enough to note that they are an ever-present reality of government.

From the other side, tribunals face pressures of a different kind from the judicial arm of government. Tribunals are ordinarily subject to curial scrutiny, either by appeal for error of law or by judicial review of executive action. As noted below, the criteria of administrative law are not precise, yet they cannot be ignored by tribunals. A tribunal must be ever-mindful that its proceedings and decision are appeal proof – or, as tribunal members more commonly see it, 'judge proof'. For practical purposes, that usually means that the tribunal must be cognisant of how a lawyer, a judge, would appraise what the tribunal has done. Taken too far, either the judicial standards or the tribunal's estimation of what those standards might be, will translate into the tribunal simulating the adversarial method as closely as possible.

Another consideration that magnifies the difficulty confronting a tribunal is that there is no prototypical procedure to guide a tribunal in how to approach each case. The differences can be as marked within tribunals as between tribunals. Much will depend on the nature of the tribunal, the issue in dispute, the way the tribunal is constituted (eg, 1 or 3 members), whether lawyers constitute the tribunal or appear before it, and the time-frame for adjudication. While there is variation also in judicial proceedings, it is not as marked: generally we have a much better picture of what to expect when we walk into a courtroom or pick up a court judgment.

The impact of judicial scrutiny on tribunal adjudication

The purpose of that brief sketch is to introduce the proposition that administrative tribunals must be given room to move within their statutory framework, and to develop a system of adjudication that is adapted and responsive to the work of the tribunal and its experience. That is not to say that the tribunal can be above the law, but that the law must be restrained in finding legal error in the proceedings of an administrative tribunal. My argument, in summary, is that the view sometimes espoused explicitly by judges, but more often implicitly, that 'a special vigilance is required' in reviewing the decisions of 'non-court repositories of functions, powers and discretions'[2], is an inappropriate approach to judicial review.

There can no doubting that judicial review has a valuable role to play in ensuring that tribunals keep within their statutory mandate and deliver justice to the parties appearing before the tribunal. But that is only part of the picture. Judicial overreach can be equally damaging to the pursuit of administrative justice, and can result in a worse rather than a better system of administrative law and justice. There are many examples of that occurring in Australia, of which I will give two.

The first example relates to the Administrative Appeals Tribunal, which from its early days became mired in a debate about whether it was too adversarial and formal. This was a complex issue, but a prominent concern at the time was that the Federal Court in its appellate role maintained an active oversight of the Tribunal's development, often requiring it to follow procedures or to apply standards that predestined the Tribunal to conform more closely to orthodox legal stereotypes than it might otherwise have chosen to do. Though the stature of the AAT is still high, arguably it never fulfilled its potential; the subsequent phase of tribunal development in Australia has been marked by government attempts to move away from an AAT-model.

The second example is more contemporary and relates to the troubled fortunes of the Migration and Refugee Review Tribunals. It is important to recall that both Tribunals were established in 1989 and 1993 at the initiative of the Government and Parliament, to guarantee a measure of fair process in a sensitive and highly complex area of executive decision-making. Yet the life of both Tribunals has been studded by judicial review and legal controversy, that has had less to do with the Tribunals' comprehension of migration and refugee law, and mostly to do with their procedure and methods in adjudicating cases. One product of this disputation has been that migration and refugee determination has become encumbered by protracted and costly litigation, which the legislature has acted in turn to combat. Among the resulting legislative changes were the abolition in 1999 of a preliminary tier in the migration review process (the Migration Internal Review Office); the introduction in 1994 of a restricted scheme of judicial review; and its replacement in 2001 by an even more restricted scheme built around a privative clause. It is hard to deny that the system that has resulted is worse in many respects than the system that Parliament first established.

Legal and political controversy is not the only downside of inapt judicial review. Two other examples I shall give illustrate the diversity of problems that can result. First, there can be an implicit pressure on governments to appoint only lawyers to tribunals, because of the importance attached to legal procedure and the preparation of reasons (often lengthy) that will withstand judicial scrutiny. There are some advantages to be had from this trend, but overall the utility of merit review by administrative tribunals will be hampered if too much emphasis is given to legal skills. The very notion of merit review, of gauging what is the correct and preferable decision, presupposes that a broad range of disciplinary skills can be called upon and contribute to the prudent development of principles for good decision-making.

Another shortcoming is that a tribunal can become excessively concerned with the possibility of judicial review, and orient (even sanitise) its proceedings accordingly. This is noticeable at times in tribunal reasons statements that have been prepared on the assumption that the primary audience for the reasons is an appellate court rather than the parties before the tribunal. A result is that the reasons may take an inordinately long time to prepare and obscure rather than illuminate the tribunal's chain of reasoning.

Some problem areas

I will turn now to consider whether judicial review of administrative tribunals should be undertaken differently. There are two aspects to this issue: identifying the main problem areas, that is, the features of tribunal adjudication that are commonly targeted in judicial review; and considering whether a different model for control of tribunals is needed. I shall consider those two aspects in turn.

The categories of legal error are not closed, and for that reason there is an endless variety of substantive and procedural legal errors that can be committed by tribunals and that warrant judicial correction. However, intrusive and demanding judicial review is usually manifested in one of four ways.

First, the statutory codes applying to tribunals are often not given their plain and natural meaning. Tribunal statutes commonly declare that 'the procedure of the tribunal is within the discretion of the tribunal' and that 'proceedings shall be conducted with as little formality and technicality, and with as much expedition' as circumstances warrant (eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 33). The import of that direction, which has not been fully respected, is that a tribunal is to have a large measure of control in deciding the rules to be followed on a great range of general and specific procedural issues – including the adaptation of natural justice requirements to the tribunal, the format of reasons statements, the reliance on translators, the adjournment of proceedings, examination and cross-

examination of witnesses, and the format of notices. A common pattern in most tribunals is that issues of that kind are regarded as legal questions on which a review court can over time provide detailed instruction to the tribunal.

Once again, there are examples concerning the Migration and Refugee Review Tribunals which illustrate how statutory language can be inappropriately applied. One such example was a controversial phase in which the Federal Court was divided over whether the statutory direction to the Tribunals to 'act according to substantial justice' was exhortatory in nature or instead imposed on each Tribunal a raft of substantive obligations concerning the observance of natural justice, the preparation of reasons statements, and the evidentiary processes of the Tribunal[3]. Another example has been a series of decisions by the High Court holding that the statutory decision-making code that was explicitly and comprehensively set out in the *Migration Act* was not an exhaustive statement and did not displace the less distinct common law standards of natural justice[4].

The **second** problem area is a matter to which I have just adverted – the application of natural justices principles to tribunals. The doctrine of natural justice is rightly a cherished feature of common law heritage, but taken too far and applied inappropriately the doctrine can be a cloak for invalidation of administrative decisions for minor procedural shortcomings that have little to do with either the merits or the fairness of the administrative process.

My general observation is that it is often harder nowadays for administrative decision-makers and tribunals to comply with natural justice than it is for courts – a curious result, by any standard. The reason is that courts can adequately discharge their natural justice obligations by holding a hearing at which the parties are given an opportunity to present their evidence and submissions. But it is otherwise with administrative decision-makers and tribunals. The natural justice spotlight now follows every stage of the decision-making process, looking in particular at internal agency and tribunal processes, the correspondence passing between the tribunal and the parties, and the shape and content of internal agency documents. A study of the case law will reveal that in nearly every case in the last decade or more in which there was a finding of breach of natural justice, a full hearing had in fact been given by the decision-maker or tribunal, yet the finding of breach attached to some other step or document in the decisional process.

The **third** problem area is judicial rigour in scrutinising the reasons for decision of administrative tribunals. One empirical analysis I undertook a couple of years back showed that the formulation of the reasons was the principal target of challenge in nearly 50% of legal challenges to migration and refugee tribunal decisions. Over the years, reasons statements have become lengthier and more elaborate, but not necessarily less defective when viewed through the prism of court decisions. The reason is not hard to see. When put to the test, it is very difficult for any decision-maker, even the most skilled wordsmith, to explain convincingly on paper why, in a confused factual setting, a particular decision is preferable to the alternatives. Nor, often times, is it easy to explain, beyond the level of conclusion or assertion, why the credibility of a person was doubted, or why an uncontradicted but self-serving statement by a person was regarded as implausible. And yet it is a beguilingly simple exercise for a court, wishing to overturn a decision with which it disagrees, to find fault with a reasons statement by condemning the logic or rationality of a tribunal's reasoning.

The **fourth** problem area has been the introduction of opaque standards for judicial review that can magnify questions of fact into questions of law. Legal standards for judicial review are, in their nature, succinct but adaptable. The concepts of 'error of law' and 'no evidence' are accustomed examples. However, the greater problem in Australian administrative law has been the subtle role played by legal standards that have never been explicitly sanctioned by a superior court, yet lie behind much of the controversy as to whether the

legal goalposts are located in shifting sand. The three most common examples are the obligation on a decision-maker to give proper, genuine and realistic consideration to the merits of the case; the duty to conduct an adequate inquiry into matters that are in dispute; and the rule that an adverse finding of fact must be supported by rationally probative evidence.

As I say, there is no unequivocal endorsement by a superior court of any of those principles, and yet their subtle influence and periodic re-emergence in administrative law doctrine is easy to discern. They pose an inherent danger of disguised merits review, whereby the rigour and intensity of judicial scrutiny, and thereby the propensity for legal error to be detected, is conditioned principally by a court's own evaluation of the harshness and justice of the decision under challenge. As the Full Federal Court recently observed of one of those standards, it 'creates a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any … decision can be scrutinised'[5].

Changing the relationship

If there is a need for a restrained approach to judicial scrutiny of administrative tribunals, how should that approach be manifested?

The formal model for judicial scrutiny is, in many ways, the less important issue. Whether, for example, there is appeal for 'error of law', whether there is some other variant of judicial review principles, or whether tribunal proceedings are protected by a privative clause, the issues described in this paper are likely to arise. In short, restraint and moderation are a question of outlook and approach as much as a question of doctrine or principle. Yet outlook and approach are frequently conditioned by other attitudinal factors, and it is to three that I now turn.

Firstly, there are few decision-making processes that are flawless, and shortcomings in administrative method and fact-finding will often be apparent to a court undertaking judicial review. It is understandably hard for a court to ignore those shortcomings, especially when the potential adverse impact of a decision is apparent. And yet there is a need to do so, and for courts to focus more narrowly on their conventional task, of inquiring whether the tribunal was properly constituted, whether it correctly construed the legal standard it was applying, and such like. To do otherwise is to mistake the context and dynamics of executive decision-making and administrative review. Unavoidably, the quality of administrative decision-making is a context-relative exercise, in which procedural perfection is a castle in the air. The promise of higher standards in administrative decision-making must arise principally through other mechanisms and devices, such as member training, internal auditing of decision-making, and standard setting by the Ombudsman and public service commissions.

Secondly, judicial rigour is commonly justified nowadays by a judicial emphasis on human rights protection. The valuable role historically played by courts in safeguarding individual rights against executive wrongdoing is not in question, but problems start to emerge when 'human rights protection' is super-added to the task of judicial review. It is inappropriate for judicial review to be undertaken on the assumption that the human rights dimension has been given less emphasis at other points in the process. Indeed, the underlying premise of this paper is that the creation of tribunals and the conferral of rights of administrative review is a vital means of safeguarding human rights. But the cure will be worse than the disease if that framework for administrative review becomes unduly complex or discredited in an effort to improve it.

Thirdly, the common law and legal method subscribe to a principle of incrementalism, whereby legal doctrine is adapted and extended over time to align with contemporary

notions of fairness and governmental responsibility. Again, while there is a valuable side to that trend, there is an inherent danger of the judicialisation of public policy and the lawyerisation of dispute resolution. The contemporary trend in administrative law is that legal standards have been elevated in importance as a tool for measuring the propriety of executive and tribunal decision-making. Those legal standards have also become more demanding. Administrative action that, in an earlier age, would have been accepted as lawful is now more likely to be declared unlawful.

That trend would be uncontentious if the reason for it had been explained and justified. Generally speaking it has not been, and some objective indicators point to a contrary view. Executive decision-making is now more transparent than it used to be; decisions are better reasoned; consultation with those affected is commonplace; internal auditing of the quality of decision-making has been introduced; there is far more training of decision-makers; the standards for good decision-making have been better articulated; and there are considerably more avenues for non-curial scrutiny of decisions. It is not easy, in that context, to explain why administrative law standards have become more demanding or why there should be judicial leadership in defining the standards for public administration.

Conclusion

It is important, in conclusion, to note that this discussion of the judicial role is part only of the picture that needs to be painted. If there is to be judicial restraint in tribunal scrutiny, there is a correlative obligation on the legislative and executive branches of government to design and support a model for tribunal adjudication that promotes excellence and integrity, and not obeisance and submission to executive will. There is much to be concerned about on that score as well. This is not the place to explore those concerns in depth, but nor should they be ignored. They include the need for longer term appointment of tribunal members, diversity in the selection of tribunal members, more generous conditions of service for members, more systematic training of tribunal members, a restoration of multi-member panels in more cases, and the creation of an appeal structure within tribunals (to obviate the need for regular judicial oversight). In short, there are problems with tribunals that need to be addressed, but not necessarily through the medium of judicial review.

The establishment of a comprehensive system of administrative tribunals in Australia and elsewhere over the last twenty years ushered in a public law revolution. Until then, the historical focus of the law had been upon protection of private rights to property, employment and similar interests. The claims that people had against government – to social welfare support, information disclosure, heritage protection, customs classification, migrant entry – were of a different kind that had hitherto been regulated by unconfined discretionary action that was largely unreviewable. The creation of administrative tribunals was an important turning point in legal history, by acknowledging that those public law claims against the state should now be subjected to review on the merits by assiduous legal method in an independent forum. We should not forsake that triumph by undermining its effectiveness.

Endnotes

1 Before being appointed Commonwealth Ombudsman, John McMillan held the Alumni Chair in Administrative Law at the Australian National University. This paper draws from research conducted as an academic and not from his recent experience as Ombudsman – eg, see J McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 2 *Fed L Rev* 335; 'Federal Court v Minister for Immigration' (1999) 22 *AIAL Forum* 1.

2 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 174 ALR 585 at [85].

3 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

4 For example, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 179 ALR 238.

5 *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 192 ALR 256 at 271.