
Amalgamating Tribunals: *A recipe for optimal reform*

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ABSTRACT

The last decade has seen numerous proposals to reform existing tribunal systems in jurisdictions throughout the common law world. Across the board, there have been proposals to adopt generalist tribunal models in preference to smaller, specialist tribunal systems, and to achieve these changes through the process of amalgamation.

The most significant recent developments to occur in Australia have taken place in Victoria and NSW during the past five years. Legislators in these States have chosen to amalgamate a number of smaller, specialist tribunals into larger, generalist bodies. In 1997 the NSW Parliament passed legislation amalgamating a number of specialist tribunals to create the Administrative Decisions Tribunal (ADT); comparable legislation was passed in Victoria in 1998 to create the Victorian Civil and Administrative Tribunal (VCAT).

There were concurrent attempts to implement similar reforms at federal level. In 1998 the Commonwealth government announced its intention to amalgamate four Commonwealth merits review tribunals to form one ‘super Tribunal’ — the Administrative Review Tribunal (ART). The Bills containing these proposals were ultimately defeated in the Senate, however the Australian Government remains convinced of the benefits of amalgamation at federal level. Similar reforms have been proposed in Western Australia, Tasmania and the United Kingdom.

This thesis argues that these reforms are taking place in the absence of data about their likely implications, and without a thorough understanding of the objectives that generalist versus specialist tribunal systems can realistically achieve. This ill-considered or ‘over-hasty’ trend towards amalgamation raises a number of questions which have not previously been addressed in academic or policy-making circles. An obvious question is whether or not an amalgamated tribunal model is more effective than a series of smaller, specialised tribunals in delivering administrative justice, in other words, whether there is any net gain to be had from a government’s decision to amalgamate.

The less explored, but equally important, question addressed in this thesis is how the process of amalgamation should be approached in order to realise the maximum potential benefits that an amalgamated tribunal can bring. That is, to ask what are the ingredients of an *optimal* amalgamation. This is not a question about whether government decisions to pursue amalgamation are intrinsically worthwhile or beneficial for stakeholders. Rather, it is about how government decisions to amalgamate should best be implemented.

This thesis proposes a way of differentiating between good and bad amalgamations, that is grounded in theory and informed by experience to date. The proposed approach is to assess the effectiveness of amalgamation processes using relevant measures drawn from an analysis of organisational theory literature:

- *Legislation* — the legislation establishing an amalgamated tribunal needs to ensure the tribunal will have appropriate independence, powers, processes, membership and structure.
- *Political commitment* — those responsible for proposing and planning an amalgamation need to provide appropriate funding and support for the process and for the establishment of an autonomous, self-directed tribunal.

- *Organisational structure* — the structures put in place need to be appropriate, integrated and flexible, and should promote cohesion and interaction.
- *Process and procedure* — the processes and procedures adopted in an amalgamated tribunal need to capitalise upon the opportunities provided by amalgamation, as well as being appropriate, efficient and able to balance the needs of a range of stakeholders.
- *Organisational culture* — an organisational culture which counters natural tendencies towards disjunction will assist members and staff to identify with a newly amalgamated tribunal and to implement initiatives that will improve its performance.
- *Leadership* — effective leadership plays an important role in ensuring a smooth transition from specialist to amalgamated tribunal, and engendering commitment from members and staff.

Broadly speaking, these factors fall into the four categories of law, context, organisation and people. It is argued that attention must be paid to all four of these ingredients in order to achieve optimal tribunal reform. The thesis tests this proposition by examining the three most advanced tribunal amalgamations so far, namely, the Commonwealth ART, the NSW ADT and VCAT in Victoria.

It is argued that the fate of the Commonwealth ART proposal proves the importance of a solid, generally endorsed legislative foundation in creating a viable amalgamated tribunal.

The importance of context, organisation and people is borne out by qualitative research into the amalgamation experiences in NSW and Victoria. The fact that the NSW and Victorian governments decided to pursue policies of amalgamation at the same time provided a unique opportunity to compare the success or otherwise of two concurrent attempts at amalgamation in different jurisdictions.

This thesis finds that the unfavourable political context in NSW prevented the ADT from realising its potential. In contrast, the VCAT experience highlights the benefits of paying careful attention to the wide range of factors that can contribute to a successful amalgamation. Of most relevance are the initial scale of an amalgamation, the political ‘will’ behind its implementation, the appointment of a core of full-time members, and the creation of an open institutional culture which facilitates the sharing of information.

In short, the thesis concludes that the successful construction and consolidation of a tribunal post-amalgamation requires that the necessary ingredients of optimal tribunal reform — legislation, context, organisation and people — are thoughtfully addressed.

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LIST OF ABBREVIATIONS

Unless otherwise indicated, the following abbreviations or terms are used throughout this thesis:

AAT	Administrative Appeals Tribunal
AAT Act	<i>Administrative Appeals Tribunal Act 1975 (Cth)</i>
ADR	Alternative dispute resolution
ADT	Administrative Decisions Tribunal of NSW
ALRC	Australian Law Reform Commission
ANAO	Australian National Audit Office
ARC	Administrative Review Council
ART	Administrative Review Tribunal
ART Bill	<i>Administrative Review Tribunal Bill 2000 (Cth)</i>
CEO	Chief Executive Officer
Cth	Commonwealth
CTP Bill	<i>Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000 (Cth)</i>
CTTT	Consumer, Trader and Tenancy Tribunal of NSW
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
Federal government	The federal government of Australia, otherwise known as the Commonwealth government or Australian government
IRD	Immigration and Refugee Division of the ART
KPI	Key performance indicator
MRT	Migration Review Tribunal
NGO	Non-government organisation
NSW	New South Wales
QAT	Administrative Tribunal of Quebec
RRT	Refugee Review Tribunal
SAT	State Administrative Tribunal of WA

SSAT	Social Security Appeals Tribunal
VCAT	Victorian Civil and Administrative Tribunal
VRB	Veterans' Review Board

INTRODUCTION

Western systems of government have become increasingly complex over the past century as the range of human activity subject to government regulation has expanded exponentially. It could be said that one of the corollaries of increased government regulation is greater reliance upon official means of settling disputes. In a growing number of instances, society's demand for accessible and efficient dispute resolution mechanisms is being met by tribunals. As such, tribunals are playing an increasingly important role in modern systems of government. In common law jurisdictions they are arguably overtaking the role of courts as a primary means of resolving disagreements.

At the same time, there is growing recognition of the role of tribunals in giving content to terms such as 'participative democracy' and the 'rule of law'. In the absence of comprehensive constitutional protection of individual rights, mechanisms that help ensure proper process is followed take on an added significance.¹ For most citizens, tribunals will be the principal means of redressing unfair treatment at the hands of the bureaucracy. As one author put it:

... tribunals ... are in concept uniquely democratic in that they afford a large number of people the right to challenge an official decision and in doing so give them the opportunity to participate personally in the ultimate decision-making processes relating to their cases; moreover doing this not as claimants applying for benefit to an official behind a desk but as citizens engaged in constitutional procedures.²

For all these reasons tribunals have become an essential element of the common law legal system, and there is every indication that society's reliance upon them will continue.³ In

¹ Robertson, Alan, "Judicial review and the protection of individual rights" in McMillan, John (ed), *Administrative law: does the public benefit?*, proceedings of the 1992 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1992, 37-44, at 37 and 42; Bradley, A. W., "Administrative justice and judicial review: taking tribunals seriously" (1992) *Public Law* 185-191, at 191; O'Connor, Justice Deidre, speaking at *Seminar: administrative law in transition — the proposed Administrative Review Tribunal*, Australia, Senate Legal and Constitutional Legislation Committee, 25 October 2000, *Hansard*, at L&C 9; McClelland, Robert, Shadow Commonwealth Attorney-General, *ibid.*, at L&C 37.

² Swain, Phillip, *Challenging the dominant paradigm: the contribution of the welfare member to administrative review tribunals in Australia*, 1998, unpublished, at 11, quoting Bell, Kathleen, "Social security tribunals — a general perspective" (1982) 32(2) *Northern Ireland Law Quarterly* 132-147, at 146.

³ Swain, above n 2, at 13.

light of the importance of tribunals, it is arguable that they constitute a *de facto* fourth arm of government, alongside parliament, the executive and the judiciary.

A lack of academic engagement

Despite this, there is a remarkable lack of understanding of the concept of ‘tribunal’, the distinctive features that characterise different tribunal models, and the requisite elements of an effective tribunal system. The absence of theoretical engagement with such questions is particularly surprising given the prominence of tribunals in so many areas of practice.⁴ As articulated by Robin Creyke:

There has been a proliferation in the growth and use of non-curial tribunals — developments which have made tribunals the modern equivalent of the courts — but comparatively little attention has been given to their operation and effect. This lack of empirical research has been commented upon adversely in a number of quarters.⁵

The fact that tribunals come in a variety of shapes and sizes and undertake a range of roles may partly explain the lack of analysis of the overarching concept of ‘tribunal’. Tribunals operating in the Australian federal sphere alone include bodies as diverse as the Human Rights and Equal Opportunities Commission, the National Native Title Tribunal, the Industrial Relations Commission, professional services review tribunals, the Superannuation Complaints Tribunal, the Remuneration Tribunal, the Australian Broadcasting Authority, the Australian Securities and Investments Commission, the Veterans’ Review Board, the Migration Review Tribunal, the Refugee Review Tribunal, the Social Security Appeals Tribunal, and the Administrative Appeals Tribunal.⁶

⁴ Sayers, Michael and Webb, Adrian, “Franks revisited: a model of the ideal tribunal” (1990) 8 *Civil Justice Quarterly* 36-50, at 49 and 50.

⁵ Creyke, Robin, *The procedure of the federal specialist tribunals*, Centre for Public and International Law, Canberra, 1994, at 1. See also Creyke, Robin and McMillan, John, “Executive perceptions of administrative law — an empirical study” (2002) 9(4) *Australian Journal of Administrative Law* 163-190, at 164; McNaughton, Bronwyn, “Cost of justice: a great deal of inquiring” (1990) 15 *Legal Services Bulletin* 266-267; Skehill, Stephen, “The hidden dimension of administrative law” (1989) 58 *Canberra Bulletin of Public Administration* 137-140; Kerr, Duncan, Commonwealth Minister for Justice, “Address to the Annual General Meeting of the Australian Institute of Administrative Law” (1993) 15 *Australian Institute of Administrative Law Newsletter* 13.

⁶ See Administrative Review Council, *Better decisions: a review of Commonwealth merits review tribunals*, AGPS, Canberra, 1995, at 5.

As discussed in Chapter 1, some tribunals have a professional discipline jurisdiction, while others undertake administrative review of government decisions. While Commonwealth tribunals in Australia are constitutionally prevented from exercising judicial power, tribunals operating in other jurisdictions also perform what can be described as ‘court-substitute’ functions.⁷ The implications of these divergent functions for the arguments put forward in this thesis are addressed below.

Despite this variety of roles, it would arguably be possible to list the individual bodies that can be classified as performing the functions of a tribunal. It may even be possible to list the qualities that an effective tribunal system should exhibit, in spite of the limited literature on this subject. However, the problem remains that there has been no comprehensive attempt to translate these various functions and qualities into a coherent theoretical framework that can be applied in constructing and evaluating optimal tribunal models. This means that, rather than being able to guarantee or even predict the success of various reforms, government attempts to establish and improve tribunal systems have been somewhat ‘hit and miss’.

Significant tribunal reforms

As Chapters 2 and 3 demonstrate, changes to tribunal systems have not been put on hold pending the development of methodologies and theories that will better ensure their success. On the contrary, major reforms have been taking place in jurisdictions throughout the common law world. The last five years have seen a marked increase in the number of jurisdictions that have endorsed or implemented proposals to amalgamate specialist tribunals to form larger, generalist tribunals with shared structures and administrations.

In Australia, these are the most significant developments to have occurred since the implementation of the ‘new administrative law’ reforms in the 1970s. In keeping with its

⁷ Farmer, J. A., *Tribunals and government*, Sweet and Maxwell, London, 1974, at 3 and 183; Harlow, Carol and Rawlings, Richard, *Law and administration*, Butterworths, London, 1997, at 462.

reputation for being at the forefront of administrative law reform,⁸ Australia is in the vanguard of the trend to amalgamate tribunals. For instance, in February 1998, the federal Government announced its intention to amalgamate four Commonwealth administrative tribunals to form what may be termed a ‘super-Tribunal’ called the Administrative Review Tribunal (ART). Those four tribunals were the Refugee Review Tribunal (RRT), the Migration Review Tribunal (MRT),⁹ the Social Security Appeals Tribunal (SSAT) and the Administrative Appeals Tribunal (AAT). The Government had intended the ART to commence operations on 1 July 2001,¹⁰ and Bills giving effect to the proposal were introduced into Parliament in June and October 2000.¹¹ While these Bills were ultimately blocked in the Senate, tribunal amalgamation remains official government policy.

Meanwhile, in NSW the Government established an Administrative Decisions Tribunal (ADT) in 1998.¹² The ADT is the product of the amalgamation of a number of smaller, specialist tribunals and bodies which operated in a range of jurisdictions including community services, legal professional discipline, and equal opportunity. Significantly, a number of NSW tribunals were not included in the amalgamation, and other tribunal reforms have since taken place separately to the establishment and operation of the ADT.

In Victoria the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) created a new ‘super-Tribunal’ called the Victorian Civil and Administrative Tribunal (VCAT), which

⁸ Creyke, Robin and McMillan, John (eds), *The Kerr vision of Australian administrative law — at the twenty-five year mark*, Centre for International and Public Law, Canberra, 1998, at iii.

⁹ When the Government first announced its intention to create an ART, the predecessor to the MRT — the Immigration Review Tribunal or IRT — was still in existence. The IRT was replaced by the MRT on 1 June 1999 by the *Migration Legislation Amendment Act 1998* (Cth), the significant change being the amalgamation of Migration Internal Review Officers (MIROs), from the Department of Immigration and Multicultural and Indigenous Affairs, with the IRT. As this did not substantially alter the structure or procedures of the IRT/MRT as set out in Part 6 of the *Migration Act 1958* (Cth), this paper will refer to the MRT as including the IRT, unless otherwise stated.

¹⁰ The originally contemplated start date of 1 February 2001 was put back until 1 July 2001 — Williams, Daryl, Commonwealth Attorney-General, *News release: biggest Consequential Bill to establish new merits tribunal*, 12 October 2000. See also Williams, Daryl, Commonwealth Attorney-General, *News release: establishment of the Administrative Review Tribunal*, 9 May 2000; Cummins, Kath, “Family Court shares pain of cuts”, *Australian Financial Review*, 12 May 2000, at 30.

¹¹ Specifically, the *Administrative Review Tribunal Bill 2000* was introduced into the House of Representatives by the Attorney-General on 28 June 2000. The *Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000* was introduced by the Attorney-General on 12 October 2000.

¹² Administrative Decisions Tribunal, *Annual report 1999–2000*, ADT, Sydney, 2000, at 4.

commenced operations on 1 July 1998. VCAT is an amalgamation of the Victorian Administrative Appeals Tribunal and several smaller, separate tribunals which operated in jurisdictions such as anti-discrimination, credit, domestic building, guardianship, property, land valuation, occupation and business regulation, and taxation.¹³ Almost all significant tribunals operating in Victoria were included in the amalgamation, unlike in NSW.

In other jurisdictions, amalgamation proposals are being actively pursued. In March 2001 the Western Australian Attorney-General established a taskforce to develop a model of a generalist civil and administrative review tribunal for consideration by government. The Taskforce produced a report in May 2002 — which the Government has since adopted — recommending the creation of a State Administrative Tribunal (SAT) through the amalgamation of a number of existing tribunals and bodies operating in WA. The tribunal envisaged by the Taskforce is similar in design to VCAT.¹⁴

Similar developments are proposed in Tasmania, and are currently taking place in the United Kingdom. In 2001 the Leggatt Report into the tribunal system in the United Kingdom recommended that “the 70 or so tribunals in England and Wales be brought together into a single and separate system”.¹⁵ Specifically, like tribunals would be grouped together in nine divisions, all of which would be serviced by a unified Tribunals Service (or Registry).¹⁶

The clear pattern to emerge from an overview of recent developments is the extent to which amalgamation has been pursued by governments throughout the common law world.

¹³ Pizer, Jason, “The VCAT - a practical overview”, a paper presented at *Administrative Law Session W*, conference by the Law Institute of Victoria, Melbourne, 11 September 1998, at 2.

¹⁴ Administrative Review Tribunal Taskforce, *Western Australian Civil and Administrative Review Tribunal Taskforce report on the establishment of the State Administrative Tribunal*, Perth, May 2002, at 63 to 64.

¹⁵ Creyke, Robin, “Tribunals and access to justice” (2002) 2(1) *Queensland University of Technology Law and Justice Journal* 64-82, at 69.

¹⁶ Leggatt, Sir Andrew, *Tribunals for users: one system, one service*, the Stationery Office, London, 2001.

Objectives of this thesis

Despite the trend towards tribunal amalgamation and calls for further research in this area,¹⁷ there remains a distinct lack of information about the advantages and disadvantages of going down this path. An underlying premise of this thesis is that government decisions about tribunal reform should be a product of rigorous analysis and debate. Ideally, proposals for reform should be informed by ideas that emerge from an interplay between academic, judicial, political and public policy commentary. While political and practical considerations are relevant, it is argued that policies developed on the basis of empirical research will be more relevant and enduring.¹⁸

The difficulty is that, as well as an absence of empirical data on the consequences of amalgamation, there are no generally accepted theoretical frameworks or models that can be used to evaluate or test different approaches to tribunal amalgamation. As argued by Sayers and Webb:

Tribunals can make an important contribution to keeping the wheels of justice and administration turning as swiftly and as smoothly as possible. To make that contribution, the tribunal system needs a model, or models, against which it can be assessed and appraised.¹⁹

The research presented in this thesis suggests the absence of applicable frameworks or models has led to an ill-considered approach to amalgamation.

To help fill this gap, a central objective of this thesis is to develop a methodology for measuring the effectiveness of amalgamations. A further objective is to apply this methodology in evaluating the success or failure of attempts to amalgamate tribunals in several jurisdictions throughout Australia. These tasks raise the difficult question of how to measure effectiveness — a question which, for the purposes of this thesis, has been explored in some depth by those working in the field of organisational theory. This literature is reviewed in Chapter 4.

¹⁷ A number of speakers at *Administrative law: the essentials*, conference by the Australian Institute of Administrative Law, Canberra, July 2001, called for further research in this area.

¹⁸ Harris, Michael, "There's a new tribunal now: review of the merits and the general administrative appeal tribunal model" in Harris, Michael and Waye, Vicki (eds), *Australian studies in law: administrative law*, Federation Press, Sydney, 1991, 188-220, at 191; Partington, Martin, "Lessons from tribunals" (1990) May, *Legal Action* 9.

As will be demonstrated by examining the commonalities that recur throughout attempts by organisational theorists to develop measures of effectiveness, several factors suggest themselves as the key elements of a successful amalgamation. These are:

- legislation;
- political commitment;
- organisational structure;
- process and procedure;
- organisational culture; and
- leadership.

These elements fall into the four categories of law, context, organisation and people. As argued in Chapter 4, these are the four *ingredients* of optimal tribunal reform. This hypothesis serves as the foundation for analysing the Commonwealth, NSW and Victorian amalgamation experiences that took place in Australia at a similar time.

The importance of law

The Australian Government's²⁰ proposal to establish an ART at Commonwealth level was announced in 1998. While this proposal was ultimately defeated, a detailed analysis of the ART legislation and associated commentary is undertaken in Chapters 2 and 6 with a view to pinpointing those aspects of a founding statute which assist or undermine the creation of an amalgamated tribunal. The comparison in Chapter 6 between the ART package of Bills and the statutes establishing the NSW ADT and VCAT establishes the importance of a solid legislative foundation in achieving an optimal amalgamation.

The remainder of the thesis presents and analyses the results of qualitative research undertaken into the amalgamation experiences in NSW and Victoria. The methodology used was to gather data from members and staff of the ADT and VCAT. While the

¹⁹ Sayers and Webb, above n 4, at 50.

²⁰ Note that Australia has a federal government structure. The federal or Commonwealth government of Australia has power to make laws with respect to the subjects listed in s 51 of the *Commonwealth of Australia Constitution Act 1900* (the Constitution). In addition, the governments of Australia's six States have a general power to make laws to the extent that these are not inconsistent with Commonwealth laws. Australia's two Territories have also been given powers to make laws in their respective jurisdictions — see s 122 of the Constitution.

collection of data from stakeholders such as tribunal users and government was beyond the scope of this thesis, the information gathered provides valuable insight into the experience of an amalgamation process from an ‘insider’ perspective.²¹

The importance of context, organisation and people

The picture to emerge from this research is of two amalgamation processes that had distinctly different outcomes, despite substantial similarities in the legislation creating each Tribunal. The compelling conclusion is that differences in the way each amalgamation process was approached resulted in divergent perceptions of the success of the Tribunals created. Whereas the ADT was perceived to be little more than a sum of its parts, VCAT was seen to emerge as a cohesive, integrated organisation with a strong institutional culture. This is important, as it is by examining and comparing the differences between the amalgamation experiences in each State that reasons can be found to explain them, and thereby gain insight into the factors that must be present if an amalgamation process is to succeed.

The analysis in Chapters 6 to 11 confirms the hypothesis advanced in Chapter 4 — in essence, that the essential ingredients of a successful amalgamation are sound law, a supportive context, the establishment of a cohesive organisation, and people with an ability to actively manage the transition from specialist to generalist tribunal. In particular, this research highlights the importance of political commitment to establishing a viable amalgamated tribunal, and of paying attention to a range of matters from physical layout of office space to the proportion of part-time to full-time membership. Another theme to emerge strongly from the fieldwork is the value of positively engineering the organisational culture which develops within a newly-amalgamated tribunal. The evidence suggests that active involvement by management in disseminating new initiatives and facilitating the sharing of ideas hastens the consolidation of a cohesive organisation with a shared vision and culture.

²¹ Peay, Jill, *Tribunals on trial*, Clarendon Press, Oxford, 1989, at 25; Perkins, Elizabeth, *Decision-making in mental health review tribunals*, Policy Studies Institute, London, 2002, at 14.

Underlying assumptions

It is argued that the research undertaken for this thesis provides useful lessons in how to ensure that an amalgamation process results in optimal tribunal reform. This research, and the conclusions that are drawn, have been informed by a number of assumptions.

Firstly, it is assumed that the role of tribunals is to provide an accessible, efficient forum for the resolution of grievances. In making this assumption it is acknowledged that different tribunals perform different functions. Administrative review tribunals perform a decision-making role akin to that of the bureaucracy in determining whether an applicant is entitled to receive a particular statutory benefit. In contrast, ‘court-substitute’ and professional discipline tribunals perform a role similar to that of courts in resolving disputes between citizens, or in determining whether the rules of a particular profession have been breached.

In relation to administrative tribunals, their primary role is assumed to be the correction of individual government decisions (in other words, achieving individualised administrative justice).²² This is seen as slightly more important than their role in improving executive accountability and the standards of primary decision-makers more generally (the ‘normative effect’).²³ The primary objective of court-substitute and professional discipline tribunals is seen as providing a quicker, more cost-effective alternative to courts. In keeping with these assumptions, this thesis proposes that tribunal reform will result in improvements if it increases a tribunal’s accessibility and efficiency, and its ability to deliver just or correct outcomes that are arrived at via appropriate, integrated processes.

Secondly, it is assumed that, while differences in function no doubt necessitate differences in procedure and approach, such differences do not make comparisons between different types of tribunals untenable. This is because tribunals performing

²² Harris, above n 18, at 199 and 210; Partington, Martin, “Taking administrative justice seriously: reflections on the Australian Administrative Appeals Tribunal” in McMillan, John (ed), *The AAT — twenty years forward*, Australian Institute of Administrative Law, Canberra, 1998, 134-153, at 137.

²³ Creyke and McMillan, above n 5, at 167; Partington, above n 22, at 136; Bayne, Peter, *Tribunals in the system of government: papers on Parliament, no. 10*, Senate Publishing Unit, Canberra, 1990, at 4.

different functions nonetheless share common objectives, such as accessibility, efficiency, consistency and the delivery of just or correct outcomes in the context of individual cases. In addition, differences in function are less significant in the context of this thesis, where the focus is upon the effectiveness of amalgamation processes rather than the effectiveness of tribunal decision-making *per se*.

In this regard, it is important to note that, while the material presented in this thesis provides some insight into the advantages and disadvantages of amalgamated tribunals, this is not the primary objective. Rather than seeking to evaluate different tribunal models or engage in debate about the merits of amalgamation *per se*, this thesis focuses on how best to implement government decisions to pursue amalgamation once they have been made. Moreover, it is assumed that an amalgamation process continues after the formal commencement date, and that tribunal management has a role to play in the latter stages of the transition from specialist to amalgamated tribunal.

Inevitably, the outcomes of an amalgamation process are taken into account when evaluating the success of the process itself. In doing so, value judgements are made about what constitutes an effective amalgamated tribunal. As stated by one commentator: “Consideration of such matters cannot be value free”.²⁴ In the context of this thesis, judgements about amalgamated tribunals are informed by the analysis of the objectives of tribunals set out above.

Finally, it is assumed that tribunal reform in the form of amalgamation can result either in improvements, or a loss of quality in tribunal decision-making. One of the most significant potential benefits of amalgamation is the opportunity it provides to develop new initiatives and make improvements to existing tribunal systems. Whether this opportunity is seized and improvements do, in fact, result, will depend on the presence or absence of the ingredients outlined above, and the extent to which these are understood by policy-makers. As such, this thesis has a practical, policy-oriented dimension which is

²⁴ O’Neil, Pamela, “Evaluating the success of an administrative review process: commentary” in Argument, Stephen (ed), *Administrative law and public administration: happily married or living apart under the same roof?*, proceedings of the 1993 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1993, 191-196, at 192.

informed by the qualitative data gathered and the theoretical framework within which these data are analysed.

CHAPTER 1: DEFINING TRIBUNALS

One of the central arguments put throughout this thesis is that tribunal systems are being reformed before sufficient research has been undertaken to develop a sound understanding of the concept of ‘tribunal’. As a result, policy-makers are ill-equipped to predict whether particular tribunal models will succeed in a given set of circumstances. Before considering this problem — and its solutions — in detail, it is appropriate to examine the historical evolution of tribunals and the typical elements that characterise the bodies we label ‘tribunals’. This analysis provides an historical and theoretical backdrop to the hypothesis developed in subsequent Chapters: that law, context, organisation and people are the key ingredients of successful tribunal reform.

As noted above, tribunals have become increasingly relied upon as a means of resolving disputes between governments and citizens, and between citizens themselves. Yet there remains a surprising degree of uncertainty over what a tribunal should look like and how it should function. This, in turn, results in failure to understand what makes a tribunal function well, why certain tribunals perform better than others, and how to ensure that tribunal reform delivers optimal results.

The proposition underlying Chapter 1 is that the ability of policy-makers to predict and control the consequences of tribunal reform would be enhanced by an increased understanding of the role and function of tribunals, and the historical context within which they have developed. It is argued that an increased understanding begins with an awareness of the difficulties associated with defining tribunals. This, in turn, facilitates appreciation of how such ill-definition might be addressed.

This Chapter therefore begins by exploring the historical evolution of tribunals and demonstrates the way in which their unsystematic development has contributed to their ill-definition. It looks at the evolution of tribunals in the United Kingdom and Australia, and at significant influences such as the rise of the welfare state. Of particular interest is the haphazard, unplanned way in which tribunals have been established in each jurisdiction. While this situates the subsequent discussion of tribunal amalgamation

within a conceptual/historical framework, the consensus to emerge from the range of academic opinion canvassed is that there is no consistent conception of what a tribunal is or how one should operate.

Such ill-definition highlights the need for further research and debate about the role and nature of tribunals. This need is particularly pressing given the widespread reliance upon tribunals in modern society, and our inability to measure the effectiveness of ongoing tribunal reform.

The second part of this Chapter examines the characteristics that may be used to describe or define tribunals and to consider, in turn, how these might contribute to an overarching definition of ‘tribunal’. One of the characteristics examined is the place of tribunals within a common law system of government, and the distinctions between tribunals, courts and the executive. There are numerous challenges involved in finding a space for tribunals within either branch of government — a task which is further complicated in Australia by the separation of powers doctrine enshrined in the federal Constitution. Nonetheless, it is argued that this examination contributes to an enhanced understanding of the role and nature of tribunals generally.

Chapter 1 goes on to explore the functions performed by tribunals, and the language and concepts commonly associated with their operation. Generally speaking, tribunals are defined as having either court-substitute, professional discipline or administrative review functions. In terms of their operation, tribunals are often described as ‘informal’,¹ accessible, quick, efficient, and ‘inquisitorial’ rather than adversarial.² That is, unlike

¹ The term ‘informality’ is used in this thesis to differentiate between the non-curial processes used by tribunals, and the more formal, adversarial rules and procedures adopted by courts. While acknowledging the degree of formality that is inevitably present in tribunal proceedings, it is argued that tribunal processes are generally more user-friendly than those adopted by courts. Cf Partington, Martin, “Taking administrative justice seriously: reflections on the Australian Administrative Appeals Tribunal” in McMillan, John (ed), *The AAT — twenty years forward*, Australian Institute of Administrative Law, Canberra, 1998, 134-153, at 147.

² See, for example, Swain, Phillip, *Challenging the dominant paradigm: the contribution of the welfare member to administrative review tribunals in Australia*, 1998, unpublished, at 22. In this thesis, as in an essay by Harris, the “distinguishing mark of an inquisitorial, as opposed to an adversarial process, is [taken to be] ‘the decision-maker’s power to determine the course of the decision-making process and to elicit information’” — Harris, Michael, “There’s a new tribunal now: review of the merits and the general administrative appeal tribunal model” in Harris, Michael and Waye, Vicki (eds), *Australian studies in law: administrative law*, Federation Press, Sydney, 1991, 188-220, at 212.

courts, many tribunals are charged with the task of actively investigating and gathering evidence relevant to the matters before them, rather than relying solely on evidence presented by the parties.

Other associated qualities include independence, transparency, accountability, visibility, fairness and justice, and specialist expertise.³ In contrast to courts, tribunals are associated with the language of efficiency and informality rather than justice and rights. The fact that different kinds of tribunals share certain characteristics indicates that the concept of ‘tribunal’ may be defined by reference to those characteristics.

This process of exploring the function of tribunals and their position within government demonstrates that most tribunals share similar origins and goals, and experience common difficulties. The resulting discussion suggests there is something inherent or common in the nature of all tribunals which can be pinpointed and articulated. If true, this would alleviate the need to define tribunals merely as ‘non-courts’ or ‘non-executive bodies’, and help create a defined space for them within the legal/political landscape.

More importantly, it is argued that there is enough consensus about the features and functions of tribunals to be able to speak holistically about ‘tribunals’ as a subject of amalgamation. By extension, this means it is possible to distill ‘criteria’ that can be used to compare and evaluate the effectiveness of amalgamation processes. This challenge is undertaken in Chapter 4. As demonstrated in subsequent Chapters, the lessons learned from this process can be applied by policy-makers in planning amalgamations, and in developing tribunal models that are best suited to the performance of particular functions.

ILL-DEFINITION AND THE AD HOC PROLIFERATION OF TRIBUNALS

This section of the Chapter will show that the erratic development of tribunals throughout the 19th and 20th centuries has resulted in an absence of definition and theoretical underpinning to our concept of ‘tribunal’. This is demonstrated by reviewing the history of tribunals and their haphazard development. In particular, the following discussion highlights the absence of any overarching, theoretical framework that could have been

used to guide the creation and development of individual tribunals. While this has not prevented the establishment of functioning tribunal systems, it is argued that better outcomes would have been achieved had regard been had to such a framework.

The origin of tribunals lies primarily in the development of the welfare state.⁴ While bodies that could be labelled tribunals existed during the 19th century,⁵ it is generally accepted that the growth of tribunals as we know them today occurred largely after the Second World War. According to Wade and Forsyth:

... the social legislation of the twentieth century demanded tribunals for purely administrative reasons: they could offer speedier, cheaper and more accessible justice, essential for the administration of welfare schemes involving large numbers of small claims.⁶

In other words, as the role of government and bureaucracy in the lives of its citizens increased dramatically in the 20th century, so did the need for a cost-effective and efficient forum in which resulting grievances could be resolved. As stated by Sir Gerard Brennan:

In earlier days when the subjects of most litigation were more simple than the subjects of litigation today and when access to the courts was more easily available, the courts and their work were familiar to the community. ... In recent times the pattern of litigation has changed. ... Cases increasingly involve the government and the corporate interests of commerce, industry and labour.⁷

Often the solution to these challenges was to establish new tribunals in order to meet specific demands. For instance, Wraith and Hutchesson trace the origins of the modern tribunal back to 1911 when the British Government was looking for a way to administer the *National Insurance Act 1911* without resorting to the courts in the event of disputes between workers and employers. The Government's solution was to adopt a German

³ Harlow, Carol and Rawlings, Richard, *Law and administration*, Butterworths, London, 1997, at 422.

⁴ Wraith, R. E. and Hutchesson, P. G., *Administrative tribunals*, Allen & Unwin for the Royal Institute of Public Administration, London, 1973, at 17; Wilhelm, Ernst, *Commonwealth administrative tribunals*, Canberra, 1969, unpublished, at 1; Robbins, Adrian, *Administrative tribunals in Victoria*, Victorian Law Foundation, Melbourne, 1982, at 1.

⁵ Arthurs, Harry, "Rethinking administrative law: a slightly Dicey business" (1979) 17(1) *Osgoode Hall Law Journal* 1-45, at 12 to 13.

⁶ Wade, William and Forsyth, Christopher, *Administrative law*, Clarendon Press, Oxford, 1994, at 906.

⁷ Brennan, Sir Gerard, "Foreword" in Creyke, Robin (ed), *Administrative tribunals: taking stock*, Centre for International and Public Law, Canberra, 1992, i-ii, at i.

method of settling disputes, whereby an employee dissatisfied with a primary decision could require a matter to be referred to a court of referees. This court of referees was, in effect, a lay style of tribunal which employed specialist members, and which operated in a non-adversarial, informal manner.⁸ This model was increasingly adapted on a random basis by governments looking to relieve the pressures created by the “unheralded encroachment of administrative decision-making on the rights of the individual”.⁹

Thus, the 20th century saw the phenomenon of ‘tribunalisation’ — the *ad hoc* proliferation of bodies whose task was to resolve disputes between citizens and government, or citizens and citizens, in an informal and efficient manner.¹⁰ Until the Franks Committee reported in 1957, little planning or thought was given in the United Kingdom to the way in which administrative tribunals should be created, or how they should operate. Bodies were formed to cope with specific legislative developments in areas such as public health, welfare, education, workers’ compensation, traffic, taxation and housing. In describing the development of tribunals in the United Kingdom, Harlow and Rawlings have said that “the ‘system’ is, and always had been, notably unsystematic!”¹¹

By 1929 there was intensifying criticism in the United Kingdom of the seemingly uncontrolled growth of tribunals. The British Government first sought to address this by establishing the Donoughmore Committee in 1932. However, while the Committee’s report confirmed the existence of the tribunalisation phenomenon, it did little to rationalise the ever-increasing number of tribunals that were being established.¹²

In recognition of the ongoing ill-definition and haphazard development of tribunals, the Franks Committee was formed in 1957 with a reference to “examine statutory tribunals

⁸ Wraith and Hutchesson, above note 4, at 33 to 35.

⁹ Robbins, above note 4, at 2.

¹⁰ Committee on Administrative Tribunals and Enquiries, *Report of the Committee on administrative tribunals and enquiries*, HMSO, London, 1957 (the Franks Committee report); Farmer, J. A., *Tribunals and government*, Sweet and Maxwell, London, 1974, at Foreword; Harlow and Rawlings, above n 3, at 456.

¹¹ Harlow and Rawlings, above n 3, at 458. See also Woolf, Sir Harry, “A hotchpotch of tribunals — the need for a blender” (1988) January, *Civil Justice Quarterly* 44-52.

¹² Harlow and Rawlings, above n 3, at 458.

and administrative processes involving inquiry procedures”.¹³ Its report formally acknowledged tribunals as part of the official machinery of government. To redress the phenomenon of *ad hoc* tribunalisation, the Committee recommended the creation of a Council of Tribunals to oversee the development of new and existing tribunals. Its recommendations led to the enactment of the *Tribunal and Inquiries Act 1958*. Forty years on, the Franks Report is still regarded as the “‘watershed’ for tribunal development in modern times.”¹⁴ Yet even following the implementation of its recommendations, administrative bodies continued to be created haphazardly, whenever the need arose.¹⁵ As Nick Wikeley has commented:

All too often, appeal rights are dealt with in haste as an afterthought during the passage of the legislation through Parliament, with decisions driven by pragmatism rather than principle.¹⁶

These developments have been mirrored in Australia, albeit to a lesser extent.¹⁷ Many tribunals have been created in response to legislative developments, political pressures or public demand, and the powers and functions given to individual tribunals were often intended to serve a specific purpose at a specific time. There has certainly been no attempt by policy-makers to conform to some theoretical model of ‘tribunal’ or some comprehensive plan of how a tribunal system should be structured. This type of erratic development meant that the concept of what a tribunal was and how it should function has also evolved in an *ad hoc* manner, without regard to an overarching conceptual framework.

By the late 1960s, there was growing acknowledgement that the existing system of administrative decision-making in Australia was unsatisfactory and in need of reform. It

¹³ *Ibid.*, at 460.

¹⁴ *Id.* See also Sayers, Michael and Webb, Adrian, “Franks revisited: a model of the ideal tribunal” (1990) 8 *Civil Justice Quarterly* 36-50, at 37.

¹⁵ In relation to the United Kingdom, Hazel Genn has noted that “new tribunals are being created all the time”, and that there are some 2000 tribunals currently operating in that country — Genn, Hazel, “Tribunals and informal justice” (1993) 56 *Modern Law Review* 393-411, at 393 and 394. See also Partington, Martin, “The future of tribunals” (1993) May, *Legal Action* 9; Partington, above n 1, at 144.

¹⁶ Wikeley, Nick, “The new tax credits and appeals” 12(1) (2004) *Benefits* 21-25, at 24.

¹⁷ Teague, Justice Bernard, “Tribunals and the judicial arm of government”, in Creyke, Robin (ed), *Administrative tribunals: taking stock*, Centre for International and Public Law, Canberra, 1992, 21-31; Starke, Justice H., “Victorian Supreme Court’s concern over development of specialist tribunals” (1989) 64(7) *Australian Law Journal* 379-387.

was considered that Australia had adopted the British approach of creating *ad hoc* tribunals whenever the need arose, yet without properly assessing the procedures of these bodies or creating a supervisory Council to oversee developments.¹⁸ In response to these concerns, the Commonwealth Government set up three committees during the early 1970s — the Kerr, Ellicott and Bland Committees. Their tasks included to investigate and report on the system of administrative review in Australia, the institutions and bodies involved in reviewing decisions, and the processes and procedures they used. The final reports of the Kerr and Bland Committees are most relevant in the context of this thesis.

The Bland and Ellicott Committees were tasked with undertaking “a more detailed examination of administrative discretions and prerogative writ procedures”¹⁹ respectively. The Bland Committee offered a comprehensive analysis of the problems associated with the hitherto *ad hoc* proliferation of administrative tribunals.²⁰ Relevantly, the Committee expressed concern over what it described as the “burgeoning proliferation of tribunals each with a limited jurisdiction”.²¹ It described this trend as resource intensive, inefficient, and likely to cause public dissatisfaction.²²

The Kerr Committee’s terms of reference were to consider what jurisdiction to review administrative decisions, if any, should be exercised by courts; what procedures should be used when undertaking administrative review; what the substantive grounds of review should be; and the desirability of introducing legislation like the British *Tribunal and Inquiries Act 1958* in Australia.²³ In its 1971 report, the Committee recommended the creation of a generalist administrative review tribunal, with appropriate specialist

¹⁸ *Commonwealth Administrative Review Committee Report*, Parliamentary Paper No. 144 of 1971, CGPS, Canberra, 1971 (the Kerr Report), at 71. Concerns have also been expressed by various authors about the phenomenon of ‘tribunalisation’ and the “haemorrhaging of jurisdiction [of the courts]” — Swain, above n 2, at 13 citing Teague, above n 17, at 24.

¹⁹ Creyke, Robin and McMillan, John (eds), *The Kerr vision of Australian administrative law — at the twenty-five year mark*, Centre for International and Public Law, Canberra, 1998, at 3.

²⁰ *Final Report of the Committee on Administrative Discretions*, Parliamentary Paper No. 136 of 1973, CGPS, Canberra, 1973 (the Bland Report), at 1.

²¹ *Ibid.*, at 24.

²² McMillan, John and Todd, Robert, “The administrative tribunals system: where to from here?” in Argument, Stephen (ed), *Administrative law: are the States overtaking the Commonwealth?*, proceedings of the 1994 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1996, 116-130, at 117.

²³ *Commonwealth Administrative Review Committee Report* (the Kerr Report), above n 18.

members to deal with matters arising in specific jurisdictions. It considered that the creation of a single general review tribunal was preferable to the continuing proliferation of specialist tribunals monitored by a Council of Tribunals, as in the British system.²⁴

The discussion and ideas generated by these Committees culminated in the creation, at Commonwealth level, of a relatively cohesive system for the review of administrative decisions. The Commonwealth Administrative Appeals Tribunal (AAT) was established in 1975 as one element of a comprehensive administrative law framework.²⁵ Yet while the AAT's jurisdiction has expanded over time, specialist tribunals have continued to be created as different needs have arisen.²⁶

Although the Kerr and Bland Committees were focused on developments at federal level, there is little doubt their findings about an *ad hoc* proliferation of tribunals were applicable to developments at State level.²⁷ To give just one example, in the early 1980's in Victoria alone, Robbins estimated there were between two and three hundred administrative tribunals operating under the name 'tribunal', 'board' or 'committee'.²⁸ Concerns about inappropriate tribunalisation were certainly expressed prior to the adoption of amalgamation proposals in both NSW and Victoria,²⁹ and more recently in WA.³⁰

²⁴ *Ibid.*, at 104.

²⁵ *Administrative Appeals Tribunal Act 1975* (Cth). This framework also featured the creation of the Commonwealth Ombudsman in 1976 (*Ombudsman Act 1976* (Cth)), the Human Rights Commission in 1981 (*Human Rights Act 1981* (Cth)); see now the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)), and the enactment of the *Freedom of Information Act 1982* (Cth). At the same time, judicial review was simplified by the creation of the Federal Court in 1976 (*Federal Court of Australia Act 1976* (Cth)), the inclusion of s 39B in the *Judiciary Act 1903* (Cth), and the enactment of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act). Legal aid schemes which were set up between 1972 and 1975 facilitated the use of these new mechanisms of review.

²⁶ As noted above, tribunals created at federal level include the Human Rights and Equal Opportunities Commission, the National Native Title Tribunal, the Australian Industrial Relations Commission, professional services review tribunals, the Superannuation Complaints Tribunal, the Remuneration Tribunal, the Australian Broadcasting Authority, the Australian Securities and Investments Commission, the Veterans' Review Board, the MRT, the RRT, and the SSAT.

²⁷ Handley, Robin, "Research note: collecting information about tribunals" (1996) *AIAL Forum No 6*, 37-44, at 37; Kellam, Justice Murray, "Developments in administrative tribunals in the last two years" (2001) 29(3) *Federal Law Review* 427-436, at 427.

²⁸ Robbins, above n 4, at 1.

²⁹ Wade, Jan, Victorian Attorney-General, "Second Reading Speech for the *Victorian Civil and Administrative Tribunal Bill 1998*", Victoria, *Legislative Assembly Debates*, 9 April 1998, 972-975, at 974; Whelan, Paul, Minister for Police, "Second Reading Speech for the *Administrative Decisions Tribunal Bill 1997*", NSW,

Their haphazard development in the United Kingdom, and in Australia at State and federal levels, suggests that tribunals have been created without regard to any overarching, theoretical framework.³¹ On the contrary, tribunals have tended to ‘spring up’ wherever and whenever a need has arisen, with little thought being given to what model of tribunal would be appropriate in a given situation. The historical development of tribunals supports the assertion made in Chapter 4 below, that there has been an ill-considered approach by policy-makers to the establishment of tribunals and proposals for their reform.

Failure to pay attention to the conceptual framework within which individual tribunals are created has obscured the rationale behind their creation and the objectives they are intended to pursue. It has been argued that the way in which tribunals have tended to develop, combined with a lack of specificity and certainty in the goals and objectives of individual tribunals, have resulted in the creation of a layer of administrative machinery which is disparate, ill-defined and under-utilised.³² According to Farmer:

The very diversity and number of tribunals has tended to obscure the functions which they exercise and the purposes for which they are created.³³

This, in turn, hampers the ability of policy-makers to make informed decisions about how best to engage in tribunal reform and what model of tribunal to pursue.

The confusion that can otherwise result highlights the importance of understanding and taking measures to address the ill-definition of tribunals. The consequences of failing to do so are demonstrated by the following case study.

Legislative Assembly Debates, 29 May 1997, 9602-9606, at 9606, cited in Creyke, Robin, “Tribunals: divergence and loss” (2001) 29(3) *Federal Law Review* 403-425, at 409.

³⁰ Administrative Review Tribunal Taskforce, *Western Australian Civil and Administrative Review Tribunal Taskforce report on the establishment of the State Administrative Tribunal*, Perth, May 2002, at ii to iii and 23. More generally, in recognition of the continuing phenomenon of ‘tribunalisation’ in Australia, the Australian Institute of Administrative Law held a workshop in 1994 entitled “Towards a tribunal non-proliferation treaty” — see Williams, Daryl, Commonwealth Attorney-General, speaking at *Seminar: administrative law in transition — the proposed Administrative Review Tribunal*, Australia, Senate Legal and Constitutional Legislation Committee, 25 October 2000, *Hansard*, at L&C 2.

³¹ See Daley for a discussion of the implications of not giving sufficient thought to the establishment and abolition of specialist tribunals — Daley, John, “Abolishing a specialist tribunal” (1996) *Public Law Review* 7(2) 73-77.

³² Farmer, above n 10, at 142; Harlow and Rawlings, above n 3, at 459.

³³ Farmer, above n 10, at 3.

THE RRT: A CASE STUDY IN THE ILL-DEFINITION OF TRIBUNALS

The ongoing legacy of the historical ill-definition of tribunals is illustrated by examining the conflicting commentary surrounding the operation of the Refugee Review Tribunal (RRT). Tensions present in perceptions about the function of administrative tribunals are heightened in a politicised jurisdiction like refugee law. In particular, the Federal Court's review of RRT decisions under Part 8 of the *Migration Act 1958* (Cth)³⁴ highlights the confusion which arises from the fact that the precise nature and role of tribunals remain ill-defined. As will be demonstrated in Chapter 6, such ill-definition makes it harder to engage in constructive debate about the merits of particular tribunal amalgamation proposals.

The task of the RRT is to determine, upon an application for review of a decision by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), whether the applicant is a person to whom Australia owes protection obligations under the *1951 Convention Relating to the Status of Refugees*.³⁵ In conducting *de novo* review of DIMIA's decisions, the RRT must fulfil its obligation under s 420 of the *Migration Act 1958* (Cth) to operate in a manner which is fair, just, informal, economical and quick. These are the same statutory objectives that govern the operation of a range of Commonwealth and State tribunals.³⁶

A key difficulty with the RRT's role is that, in many circumstances, balancing the ideals of fairness, justice, economy, informality and quickness becomes a process of reconciling competing objectives. There are inherent tensions between the requirements to be fair

³⁴ On 27 September 2001 the Australian Parliament passed a number of Bills amending, among other statutes, the *Migration Act 1958* (Cth) (the Migration Amendment Package). Two of the Acts included in this package were the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) and the *Migration Legislation Amendment Act (No. 1) 2001* (Cth) which significantly altered the availability of judicial review of RRT decisions. Essentially, the effect of the reforms was to limit judicial review of protection visa decisions to applications to the Federal Court under s 39B of the *Judiciary Act 1903* (Cth) for writs of mandamus, prohibition or certiorari, or an injunction or declaration. (See s 477 of the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth).) Judicial review by the High Court under s 75(v) of the Constitution also remains available. The case law and associated issues discussed in this Chapter focus on the law as it was before the amendments in September 2001.

³⁵ Section 36(2) of the *Migration Act 1958* (Cth).

³⁶ These include the MRT, the SSAT, the ADT and VCAT.

and just on the one hand, and informal, economical and quick on the other.³⁷ Concepts of fairness and justice have developed within a structured framework of court-like rules and procedures which have traditionally been used to protect the interests of parties in an adversarial context. The fact that these principles are associated with an adversarial style of decision-making, and are viewed as formal and inefficient, means they are not always easily incorporated into an investigative, inquisitorial style of decision-making. This is particularly so in high-volume jurisdictions such as migration.

On the other hand, while a quick review process reduces cost and delay, the pressure to make decisions quickly can be difficult to reconcile with the Tribunal's obligation to carefully consider each aspect of an applicant's claims, to invite comments on all adverse material, and to thoroughly investigate an applicant's case.³⁸ Commentators have also pointed to tensions between "the appearance of independence, on the one hand, and, on the other, administrative convenience and expertise".³⁹

These fundamental tensions between the objectives that an inquisitorial tribunal like the RRT is expected to meet no doubt contribute to confusion about the role and function of tribunals generally. This has led, in the refugee jurisdiction, to a wide range of irreconcilable perceptions about its role, and to some virulent attacks on the Tribunal itself.

Another key difficulty with the RRT's decision-making process is that Tribunal members must act as both investigator and judge when assessing an applicant's claims. While courts have always tested the credibility of witnesses in order to determine the weight to be given to evidence, this process occurs within a tightly-regulated adversarial context; each party is usually legally represented, and the rules of evidence and natural justice

³⁷ Sayers and Webb, above n 14, at 38; O'Neil, Pamela, "Evaluating the success of an administrative review process: commentary" in Argument, Stephen (ed), *Administrative law and public administration: happily married or living apart under the same roof?*, proceedings of the 1993 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1993, 191-196, at 194.

³⁸ Bacon, Rachel; Buring, Kate; Haddad, Sobet; and McIllhatton, Sue, *Justice and fairness in an inquisitorial tribunal*, Sydney, 1999, unpublished.

³⁹ Goldring, John; Handley, Robin; Mohr, Richard; and Thynne, Iain, "Evaluating administrative tribunals" in Argument, Stephen (ed), *Administrative law and public administration: happily married or living apart under the*

apply. In contrast, RRT proceedings are held in private and are characterised by their non-adversarial, inquisitorial nature. The rules of evidence do not necessarily apply and there is an absence of legal representation — in fact, the Department is not represented at hearings before the Tribunal.

It is argued that these differences between tribunal and court procedure have contributed to expressions of uneasiness in Federal Court case law about the nature and role of the RRT. For example, in *Shafiq Mohammad v MIMA*,⁴⁰ a case concerning an application for judicial review of an RRT decision under Part 8 of the *Migration Act 1958* (Cth), Justice Einfeld commented that:

... it is difficult enough for duly constituted courts of experienced trial lawyers to determine the credibility of litigants when their first language is English and they have been subjected to skilled cross-examination. An inquisitorial non-legal Tribunal not assisted by such time-proven aids ought, in my opinion, to be exceedingly slow to make findings and determinations which may affect an applicant's life and personal safety on such bases. A second reason for desisting from rejecting claims on credibility is that there are ample powers within the existing legislation for the Court to reject such findings if appropriate. It is not likely that the Courts will stand idly by if the system prescribed by Parliament is subverted in a stereotyped or artificial way by Tribunals misconceiving their role in the statutory scheme.⁴¹

Thus, there are views held by some Federal Court judges that an inquisitorial tribunal, by its very nature, cannot guarantee fair and impartial findings on questions of fact. In particular, there is a concern that non-judicial tribunals cannot deliver justice because they lack the adversarial processes developed over many years in the curial system to safeguard the interests of parties.

In direct contrast to this view, the RRT has also been subject to criticism on the basis that it is too adversarial in its approach.⁴² For instance, Susan Kneebone has contended that:

... the Refugee Review Tribunal (RRT), which is often described as a “non-adversarial” body, is in many aspects too confrontational or adversarial. ...

same roof?, proceedings of the 1993 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1993, 160-190, at 177.

⁴⁰ Unreported, Federal Court of Australia, Einfeld J, 29 September 1998.

⁴¹ *Ibid.*, at 3. Similar comments were expressed by Justice Einfeld in *Meadows v MIMA*, unreported, Federal Court of Australia, Einfeld, von Doussa and Merkel JJ, 23 December 1998.

⁴² Kneebone, Susan, “The Refugee Review Tribunal and the assessment of credibility: an inquisitorial role?” (1998) 5 *Australian Journal of Administrative Law* 78-96.

It is argued that the RRT must take a more inquisitorial approach to review to satisfy the twin requirements of “substantial justice” in s 420 of the *Migration Act 1958* (Cth), and “good faith” implementation of treaty obligations.⁴³

This lack of consensus over the objectives tribunals should strive to achieve indicates there has been insufficient thought given to developing a coherent conception of ‘tribunal’ that can be used in evaluating individual tribunals as well as proposals for reform. As Chapter 4 will argue, this confusion has the potential to inhibit the effectiveness of amalgamation proposals and their implementation.

Evidence from qualitative research

Further examples of the divergent, at times conflicting, views of stakeholders regarding the operation of the RRT appeared throughout research conducted by the author in 2001.⁴⁴ This qualitative research was gathered from a sample of 15 subjects, comprising Federal Court judges, academics, migration agents and workers from non-government organisations (NGOs) operating in the refugee field.

There were very few issues about which interview subjects agreed. In a number of instances, the divergent views of subjects were particularly difficult to reconcile. For instance, the views expressed by Judge 5, that a specialist inquisitorial tribunal cannot be effective in the refugee jurisdiction, stood in contrast to Judge 3’s strong support for merits review by a specialist administrative tribunal. There was similar conflict between the views of Academic 1 and Academic 2 in relation to the benefits of merits review by a tribunal that is alive to the policy concerns of DIMIA. Migration Agent 1 expressed the strong view that the RRT should be abolished, whereas this view was not expressed by any other subject — on the contrary, several subjects expressly rejected this proposition.⁴⁵

⁴³ *Ibid.*, at 78.

⁴⁴ This research was conducted for the purpose of completing coursework requirements at the University of Sydney. The references to interview subjects correspond to the descriptions of subjects set out in Bacon, Rachel, *Perceiving the Refugee Review Tribunal: a politico-legal kaleidoscope*, Canberra, 2001, unpublished. Transcripts of each interview were prepared with numbered paragraphs.

⁴⁵ See, for instance, Community Worker 2 at paragraphs 58 to 60; NGO representative 1 at paragraphs 58 to 59; Judge 3 at paragraph 10.

There was a strong disparity of views regarding the benefits of the RRT being a specialist body. Judge 5 was strongly against this, while NGO representative 3 considered specialisation to be essential. Similarly strong views were expressed about the merits of the inquisitorial approach — Judges 2, 4 and 5 expressed negative views, while Judge 3, Community Worker 2 and Barrister 1 were strongly in favour of such an approach. Strong yet opposing views on this issue were expressed by each subject in the NGO representative group.

There were also issues on which opinion was relatively evenly divided, both between and within stakeholder groups. For instance, there was a relatively even division of views about whether the function of the RRT would be better performed by a court. Perhaps unsurprisingly, all but one subject in the Federal Court stakeholder group agreed with this proposition. There was an even division of views between legal practitioners and academics, while one NGO representative out of three expressed strong views in favour of a more curial-style system. There was a similar division of opinion about whether the RRT's performance would be enhanced by the use of multi-member panels.⁴⁶

In relation to informality, judges and legal practitioners disagreed over whether this was a worthwhile objective. Views were also split over whether procedural safeguards in the *Migration Act 1958* (Cth), such as s 424A,⁴⁷ assisted the RRT to perform effectively. Some subjects thought legislative safeguards were useful, while others considered them counter-productive. The degree of disagreement between and within stakeholder groups can be summarised by noting that there were only three out of 13 issues canvassed about which subjects generally agreed.

A manifestation of ill-definition

The consistent theme running throughout these often divergent criticisms of the RRT is an underlying mistrust of the tribunal process, and a lack of understanding or consensus

⁴⁶ A majority of judges disagreed with this proposition, whereas both academics supported it. The views of NGO representatives and legal practitioners were relatively evenly split.

⁴⁷ This section provides that an applicant must be given an opportunity to comment on adverse information that would be part of the Tribunal's reason for affirming the decision under review.

regarding the function of tribunals. In relation to the RRT, this uneasiness manifests itself in divergent views about the extent to which that Tribunal should use inquisitorial versus adversarial methods in conducting reviews. Specifically, it has been argued that the difficulties with the RRT stem from confusion over the proper mode of operation of an inquisitorial merits review tribunal. In an unpublished paper entitled *Justice and fairness in an inquisitorial tribunal*, the authors wrote:

Although the concept of an inquisitorial merits review tribunal is generally valued in theory, there is not always consensus over how best to address the difficulties which arise in practice. There are concerns that the flexibility and variable nature of the RRT's mode of operation do not always safeguard the interests of applicants. While some criticise the Tribunal for being too court-like, many commentators attempt to address their concerns by advocating the use of adversarial procedures. Yet while the adversarial model contains rules and procedures that are designed to ensure fairness, they are not always appropriate, or easily translated into the inquisitorial process.⁴⁸

It is argued that this confusion over adversarial and inquisitorial decision-making processes, and the role of tribunals as distinct from courts, stems from an ill-definition of the concept of 'tribunal' generally.

Consistent with the results of this case study, there is consensus among academics that the role and function of tribunals are ill-defined. According to Robbins, both judicial and scholarly attempts to define the concept of 'tribunal' have been unsatisfactory. He points out that unlike the word 'court', there is no clear meaning of the word 'tribunal' in British law.⁴⁹

In Australia, it has been acknowledged that the word 'tribunal' is imprecise.⁵⁰ While there have been judicial attempts to distinguish tribunals from other bodies, particularly courts, such attempts have tended to define tribunals by what they are not, rather than

⁴⁸ Bacon, Buring, Haddad and McIlhatton, above n 38, at 19. Note also suggestions from British commentators indicating that the British Department of Social Security "has had no clear idea of what it wants from appeal tribunals" — Adler, Michael, "Lay tribunal members and administrative justice" (1999) *Public Law* 616-625, at 624, cited in Wikeley, Nick, "Two's company, three's a crowd: chairmen's views on the composition of appeal tribunals" (2000) 7 *Journal of Social Security Law* 88-116, at 88.

⁴⁹ Robbins, above n 4, at 6. See also Fry LJ in *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* (1892) 1 QB 431.

⁵⁰ Creyke, Robin, "Tribunals and access to justice" (2002) 2(1) *Queensland University of Technology Law and Justice Journal* 64-82, at 73.

what they are.⁵¹ For instance, in *Craig v South Australia*,⁵² the High Court sought to explain the role and function of tribunals by pointing to the features that distinguished them from courts, such as their lack of power to authoritatively determine questions of law, or to make orders or decisions otherwise than in accordance with law.⁵³

It has been suggested that the ill-definition of ‘tribunal’ both causes and is compounded by Parliament’s failure to clarify the objectives, nature and function of the tribunals it establishes.⁵⁴ In the United Kingdom, Farmer pointed to rent tribunals as “epitomising all that is wrong with British tribunals generally”.⁵⁵ He criticised their failure to give cogent reasons for decisions, to make known the guidelines and principles by which decisions are reached, and to allow for adequate representation. Ultimately, he posited that the difficulty faced by such tribunals is “a lack of specific statutory directions as to how they are to operate”.⁵⁶ He argued that:

The machinery by which capitalist society is regulated is extremely complex, and it is unable to encompass goals which are far-reaching and vague. ... Regulatory agencies therefore need specific and unambiguous objectives.⁵⁷

Some authors consider it is in the nature of tribunals to be “illogical and exasperating”, and that tribunals challenge our instinct to classify or define, because the most we can do is endlessly rearrange them in different orders.⁵⁸ The argument is that it is ultimately impossible to define the essence of ‘tribunal’, and that the term is simply an umbrella for any number of bodies with varying procedures, objectives and structures.⁵⁹ There are even concerns that attempts to define the concept of ‘tribunal’ more precisely would leave us with a simplified, inflexible notion which would “exclude many bodies which

⁵¹ See, for instance, *Shell Company of Australia v Federal Commissioner of Taxation* [1931] AC 275; *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254; *Craig v South Australia* (1995) 184 CLR 163.

⁵² (1995) 184 CLR 163.

⁵³ *Craig v South Australia* (1995) 184 CLR 163 at 179.

⁵⁴ Robbins, above n 4, at 8 to 9.

⁵⁵ Farmer, above n 10, at 141.

⁵⁶ *Id.*

⁵⁷ *Ibid.*, at 42.

⁵⁸ Wraith and Hutchesson, above n 4, at 14.

⁵⁹ *Id.*

merit attention”.⁶⁰ Farmer’s concern was that “the search for the generic always leads to the fading of the concept into obscurity and ambiguity”.⁶¹

Despite these concerns, there are sound reasons to persist in redressing the ill-definition of the concept of ‘tribunal’. On a theoretical level, the absence of a shared understanding of what tribunals are and how they should operate leads to difficulties in considering the types of tribunal models that are most suited to performing particular functions. On a practical level, the ability of policy-makers to control and predict the outcome of reforms will continue to be hindered unless steps are taken to redress the ongoing confusion surrounding the role and function of tribunals. Finally, attempts to measure the effectiveness of tribunal amalgamations are likely to be frustrated in circumstances where there is not even an agreed set of criteria that can be used to assess the performance of individual tribunals.

The question, then, is whether it is possible to construct a theoretical framework or definition of ‘tribunal’ so that the role and function of existing tribunals is better understood, and which would enable past and future developments regarding tribunals to be evaluated and improved upon.

This question is important in the context of this thesis, as one of the central objectives is to propose a methodology for predicting and measuring the effectiveness of amalgamations that can be applied to contemporary amalgamation processes. The hypothesis that there are four key ingredients of optimal tribunal reform (law, context, organisation and people) is premised on the proposition that tribunals are bodies that can be defined, modelled and improved.

HOW MIGHT ‘TRIBUNAL’ BE DEFINED?

The remainder of this Chapter explores the characteristics of various bodies called ‘tribunals’ in an attempt to formulate a working definition of what a tribunal is and how it

⁶⁰ Wilhelm, above n 4, at 2; see also Robbins, above n 4, at 4.

⁶¹ Farmer, above n 10, at 184. See also Arthurs, above n 5, at 2 to 3.

should function.⁶² Specifically, the nature of tribunals is explored in terms of the distinction between courts, tribunals and the executive,⁶³ the functions undertaken by tribunals,⁶⁴ and the kinds of concepts commonly associated with their operation. An examination of these characteristics demonstrates that the formulation of an overarching definition of ‘tribunal’ is possible and worthwhile. The substantiation of this proposition provides sufficient justification for pursuing the primary objective of this thesis: identifying the factors to focus on when planning and implementing tribunal amalgamations.

Courts, tribunals and the executive

While the notion that tribunals constitute a fourth arm of government would be contentious, there appears to be a consensus that tribunals do not fit neatly within any of the three arms of government, namely, the legislature, the executive or the judiciary.⁶⁵ In common law jurisdictions such as the United Kingdom, and to a lesser extent in Australian States, tribunals are regarded as an adjunct to the judicial system and tend to be characterised as “informal courts”.⁶⁶ In contrast, federal tribunals in Australia are more closely aligned with the executive although, according to the Senate Legal and Constitutional Legislation Committee:

While they are essentially executive bodies participating in executive decision making, they have not yet been identified with the executive itself.⁶⁷

⁶² Sayers and Webb have argued that, despite the variety of tribunals, there are “plenty of common threads” that could be focused upon in addressing the “dearth” of material regarding tribunals and how they should perform their role — Sayers and Webb, above n 14, at 36.

⁶³ See, for example, *Shell Company of Australia v Federal Commissioner of Taxation* [1931] AC 275; *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254; *Craig v South Australia* (1995) 184 CLR 163; Robbins, above n 4, at 13; Wraith and Hutchesson, above n 4, from 250.

⁶⁴ Willhelm, above n 4, at 17; Farmer, above n 10, at 85 and 184.

⁶⁵ See, for instance, Willhelm, above n 4; Robbins, above n 4; Farmer, above n 10; the Privy Council in *Shell Company of Australia v Federal Commissioner of Taxation* [1931] AC 275; Creyke, Robin, “Introduction and overview” (1996) 24(2) *Federal Law Review* 221-233; *Craig v South Australia* (1995) 184 CLR 163.

⁶⁶ Senate Legal and Constitutional Legislation Committee, *Inquiry into the provisions of the Administrative Review Tribunal Bill 2000 and the provisions of the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000*, Senate Printing Unit, Canberra, 2001, at 68.

⁶⁷ *Ibid.*, at 22.

Even at a theoretical level, there remains uncertainty over which arm of government tribunals should be aligned with:

The characteristics of a tribunal — part judicial, part executive — create a tension between the curial and the administrative models. If tribunals model themselves on the courts, their work will suffer from inevitable slowness and cost. They may be denied sufficient resources to carry it out efficiently. If tribunals model themselves on the executive branch, they can operate more expeditiously. The executive government will be more responsive to claims for resources. However, the executive model carries the risk that the tribunal itself may become a second bureaucracy, exciting a desire on the part of executive government to control them.⁶⁸

This underlying uncertainty contributes to the confusion surrounding tribunals and permeates the sometimes contradictory discussion and commentary about the operation of individual bodies. The difficulty lies in conceptualising a space for tribunals within the legal–political–administrative framework of modern government. In other words, where do tribunals sit on the three-dimensional spectrum between the legislature, the executive and the courts? It is argued that, while this question applies most clearly to tribunals performing administrative review functions, the following analysis also sheds light on the position of other types of tribunal in light of the overlap in their roles and objectives.

At this point the task can be simplified by putting the legislature to one side. The functions of parliament can be quite easily distinguished from the functions of tribunals, and it is clear that tribunals would not sit comfortably within this arm of government.

The distinction between tribunals, courts and the executive is not so clear-cut. A possible starting point in searching for a clearer understanding of the place of tribunals with respect to these branches of government is to differentiate between the tasks and characteristics of courts and administrators, and then to compare these distinctions to the features that characterise tribunals.

⁶⁸ Brennan, above n 7, at i.

According to Ryan there is a fundamental distinction between judicial and administrative functions:

The differentiation between courts and tribunals has been made historically on the ground that the judicial power is fundamentally different from the executive power. This has been denied by some writers, including Jennings and Robson who, while agreeing that the judicial process was characterised by independence from political influence and a special historical background, considered that the function of judges was essentially administrative, the administration of justice, and that in this respect it was no different from that of tribunals which were also concerned with the dispensation of justice. ... Most writers have however continued to insist that there is a basic distinction between judicial and administrative functions ...⁶⁹

This proposition is supported by a long line of Australian cases that have considered whether various Commonwealth decision-makers could be described as exercising judicial or administrative power in carrying out their functions.⁷⁰ At a theoretical level, Allars has argued that “the tribunal member and the judge are engaged in different enterprises and are situated in different interpretative communities”.⁷¹

A number of commentators have attempted to define the distinction between courts and administrators with greater precision. For instance, Arthurs has argued that courts and judges are characterised by independence and conservatism, while administrators are politically responsive and “collectivist”.⁷² Whereas judges are an elite group who are to some extent “insulated by tenure and by traditions”, administrators are a diverse group who are more likely to have expert knowledge and to work in “areas of social conflict

⁶⁹ Ryan, Kevin, “Judges, courts and tribunals”, a paper presented at *The Australian judicial conference symposium on judicial independence and the rule of law at the turn of the century*, Australian National University, Canberra, November 1996, at 7 to 8.

⁷⁰ Again, the premise underlying these cases is that Commonwealth bodies that are not courts are not permitted to exercise judicial power owing to the separation of powers doctrine in the federal Constitution. See, for example, *R v Davison* (1954) 90 CLR 353, at 368.8 to 370.1 per Dixon CJ and McTiernan J; *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 371.5 to 372.5 per McTiernan J, 373.5 per Kitto J, 393.9 to 399.4 per Windeyer J, and 407.8 to 409.4 per Owen J; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, at 188 to 189 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, at 267.4 per Deane, Dawson, Gaudron and McHugh JJ; *Pasini v United Mexican States* (2002) 187 ALR 404, at [12] to [13] per Gleeson CJ, Gaudron, McHugh and Gummow JJ, [51] to [60] per Kirby J, [63] per Callinan J; *Luton v Lessels* (2002) 187 ALR 529, at [21] per Gleeson CJ, [123] to [125] per Kirby J.

⁷¹ Allars, Margaret, “On deference to tribunals, with deference to Dworkin” (1994) 20(1) *Queens Law Journal* 163-212, at 209.

⁷² Arthurs, above n 5, at 34 to 35.

and ideological sensitivity”.⁷³ Allars has also emphasised the policy-making dimension of administrative decision-making.⁷⁴

Some commentators have relied upon these distinctions between courts and administrators, and the type of power each exercises, in order to define what a tribunal is and how it should perform. For instance, in attempting to define ‘tribunal’ Wraith and Hutchesson undertook a brief comparative study of courts and tribunals.⁷⁵ Similarly, Robbins considered courts as a yardstick by which administrative tribunals may be measured.⁷⁶

Unfortunately, this process has yielded different results in different jurisdictions. While there is general acknowledgement that tribunals do not perform the *same* function as courts, commentary in the United Kingdom aligns tribunals more closely with the judicial arm of government.⁷⁷ This view appears to derive from the analysis put forward by the Franks Committee in the 1950s, which sought to streamline the future development of tribunals by defining a space for them within the legal-political framework of government. The Committee decided that:

Tribunals are not ordinary courts, but neither are they appendages of Government Departments. Much of the official evidence ... appeared to reflect the view that tribunals should be properly regarded as part of the machinery of administration, for which the Government must retain a close and continuing responsibility We do not accept this view. We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the Department concerned The intention of Parliament to provide for the independence of tribunals is clear and unmistakable⁷⁸

⁷³ *Ibid.*, at 35 to 36.

⁷⁴ Allars, above n 71, at 204 to 205 and 207 to 208.

⁷⁵ Wraith and Hutchesson, above n 4, from 250.

⁷⁶ Robbins, above n 4, at 13.

⁷⁷ Partington, above n 1, at 149.

⁷⁸ Committee on Administrative Tribunals and Enquiries (the Franks Committee Report), above n 10, at paragraph 40, quoted in Harlow and Rawlings, above n 3, at 461.

In short, the Committee sought to remake tribunals in the image of ordinary courts.⁷⁹ It recommended that tribunal chairmen be legally qualified, that applicants have access to legal representation, that precedent be observed, and that reasons be given for decisions.⁸⁰ More generally, it concluded that the defining values of tribunals should be “openness, fairness and impartiality”⁸¹ — values often associated with the operation of courts.

In some circles in the United Kingdom there is continuing debate over whether tribunal decision-making should be viewed as an external control on administrators or as a form of administration in itself.⁸² Of course, if tribunals were too closely aligned with courts, they would simply duplicate the judicial function and thereby subvert their own *raison d'être*.⁸³ Nonetheless, the Franks view has been reinforced most recently in the report by Sir Andrew Leggatt recommending the creation of a single tribunals service in the United Kingdom.⁸⁴ The fact that tribunals are widely regarded in the United Kingdom as exercising the judicial power of the state has arguably confused the delineation between the concepts of ‘court’ and ‘tribunal’.

In contrast, the federal Constitution in Australia dictates that no-one but judges may exercise judicial power. This ‘separation of powers’ doctrine, which is implicit in the structure of the federal Constitution, is one means by which official power is controlled and managed within a Westminster system of government. The tasks of making laws,

⁷⁹ Bell, Kathleen, “Disequilibrium in welfare”, *Inaugural lecture*, University of Newcastle-upon-Tyne, 1973, at 16, cited in Wikeley, Nick, “Burying Bell: managing the judicialisation of social security tribunals” (2000) 63(4) *Modern Law Review* 475-501, at 500.

⁸⁰ Harlow and Rawlings, above n 3, at 461. See also Creyke, above n 29, at 413 to 414; Wraith and Hutchesson, above n 4, at 250; Boyle, A., “Sovereignty, accountability, and the reform of administrative law” in Richardson, Genevra and Genn, Hazel (eds), *Administrative law and government action: the courts and alternative mechanisms of review*, Clarendon Press, Oxford, 1994, at 83 to 84, cited in Creyke, above n 29, at 414; Bradley, A. W., “Administrative justice and judicial review: taking tribunals seriously” (1992) *Public Law* 185-191, at 185 and 190.

⁸¹ Partington, Martin, “Restructuring administrative justice? The redress of citizens’ grievances” (1999) 52 *Current Legal Problems* 173-199, at 178.

⁸² Harlow and Rawlings, above n 3, at 460. Also, Farmer rejects the view that tribunals are best viewed as a modern form of court — Farmer, above n 10, 189.

⁸³ Partington, above n 81, at 187.

⁸⁴ Leggatt, Sir Andrew, *Tribunals for users: one system, one service*, the Stationery Office, London, 2001, at Part II: Individual tribunals, the Australian example, paragraph 5.

exercising the powers conferred by those laws, and reviewing the legality of that activity are each performed by separate branches of government.⁸⁵

Thus, in an Australian context tribunals have often been distinguished from courts by the absence of characteristics which define ‘court’ — that is, judicial process, judicial tenure and the ability to exercise judicial power. As Ryan states “a body without all these characteristics is not a court but a tribunal”.⁸⁶ Similarly, Robbins has defined ‘tribunal’ as “any formal adjudication mechanism created by statute which is not a court”.⁸⁷ Australian courts themselves have often described tribunals as bodies which do not exercise judicial power.⁸⁸

While not going as far as the Franks Committee in attempting to define a space for tribunals within the Australian system of government, the Kerr Committee also drew a firm distinction between the function of courts and tribunals on the basis of the power that each is permitted to exercise. In its view:

... a law purporting to confer on a court a general power to review on the merits would be invalid. It would involve a discretion which could not be given to a court as part of judicial power.

Due to Constitutional problems, courts should not have jurisdiction to review decisions on their merits. They should only have supervisory jurisdiction.⁸⁹

Put more positively, the separation of powers doctrine has led Australian commentators to locate tribunals within the executive arm of government.⁹⁰ This description is arguably

⁸⁵ The separation of powers doctrine was reaffirmed in *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254. See also, *Clyne v East* (1967) 68 SR (NSW) 385; *Building Construction Employees and Builders’ Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372; *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577; *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220 — cited in Creyke, above n 29, at 406 (note 27); Ryan, above n 69.

⁸⁶ Ryan, above n 69.

⁸⁷ Robbins, above n 4, at 14.

⁸⁸ As discussed above, unlike State and Territory tribunals, tribunals operating in the federal sphere are unable to exercise judicial power owing to the separation of powers doctrine that is enshrined in the federal Constitution. As the High Court held in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, it is impermissible for a Commonwealth tribunal to exercise judicial power, for instance by making binding orders affecting the rights of citizens — see s 71 of the Constitution. See also *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361; *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254; *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934. Thus, the tribunal system established at Commonwealth level is largely focused upon the task of administrative review.

⁸⁹ *Commonwealth Administrative Review Committee Report* (Kerr Report), above n 18, at 72 and 74. See also *ibid.*, at 68.

appropriate in relation to Commonwealth merits review tribunals whose task is to come to the correct and preferable decision by standing in the shoes of the original decision-maker.⁹¹ This task often involves gathering evidence and making policy choices in a way that courts are not free to do. As Peter Bayne has argued:

Policy or value choices are endemic to the application of statutes conferring administrative power. This is most obvious where the application of the law requires the exercise of a discretion, or the making of a discretionary judgment. And the exercise of discretion is at the heart of administrative power. Recognising and then dealing with the role of administrative tribunals in the evolution of policy has been made more difficult by a failure to grasp that the task of making administrative decisions necessarily means that tribunals are involved in the process of making policy. (Policy is used here in the sense of a standpoint on an issue that at bottom requires a position to be taken on the distribution of goods and services and other things of benefit in our society.)⁹²

Moreover, although Commonwealth tribunals are expected to operate in a manner that is independent, judicious and fair, tribunal members do not have the protections afforded to judges, such as tenure, which encourage them to operate in this manner.

While these features reinforce the distinction between Commonwealth tribunals and courts, they are difficult to reconcile with the firm distinction that should be drawn between tribunals and primary administrators.⁹³ This thesis argues that tribunals must be one step removed from the level of primary decision-maker if they are to function effectively in reviewing administrative decisions.⁹⁴ To align tribunals too closely with the executive would, in many instances, undermine their reason for existence, in the same way that an over-zealous tendency to treat tribunals as courts would. The ongoing tensions associated with finding an appropriate ‘place’ for tribunals at the federal level in Australia highlight the difficulties in defining the nature of tribunals more generally.

⁹⁰ Senate Legal and Constitutional Legislation Committee, above n 66, at 32; Administrative Review Council, *Better decisions: a review of Commonwealth merits review tribunals*, AGPS, Canberra, 1995, at vii (note 3), cited in Davidian, Alison, “Reform or regression? The Administrative Review Tribunal Bill” (2001) 12(1) *Polemic* 47-52, at 48.

⁹¹ *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934 at 943. See, for instance, s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth).

⁹² Bayne, Peter, “The proposed Administrative Review Tribunal — is there a silver lining in the dark cloud?” (2000) 7 *Australian Journal of Administrative Law* 86-99, at 93 (footnotes omitted).

⁹³ See, for instance, *Brian Lawlor Automotive Pty Ltd and the Collector of Customs NSW* (1978) 1 ALD 167; Allars, Margaret, *Introduction to Australian administrative law*, Butterworths, Sydney, 1990, at 74.

⁹⁴ Goldring, Handley, Mohr, and Thynne, above n 39, at 163.

The position is similarly uncertain in relation to State tribunals. Because Australian States and Territories are unconstrained by the separation of powers doctrine in the federal Constitution, State bodies are able to exercise judicial power in determining disputes. For instance, there are examples of State tribunals that can impose penalties.⁹⁵ In relation to the ADT in NSW and VCAT in Victoria, the determinations they make (including orders to pay damages and costs) are binding on parties.⁹⁶ At the same time, many of the features that characterise federal administrative tribunals — such as lack of tenure for members, the oversight of courts, and an emphasis on informality, efficiency, specialisation and accessibility — apply equally to State bodies. For these reasons it is difficult to properly characterise State tribunals — even those performing court-substitute functions — as either courts or administrators. This, in turn, compounds the confusion that has been shown to exist over the objectives and roles that tribunals should strive to fulfil.

Like tribunals in Australian States and Territories, “Canada has a very broad range of tribunals performing tasks ranging from court-like adjudication to policy-making”.⁹⁷ Nonetheless, while the distinction between courts and tribunals in Canada is not so clear-cut as it is at federal level in Australia, there are limits upon the powers that tribunals (as opposed to courts) may exercise.⁹⁸ Specifically, some tasks are reserved under the *Constitution Act 1867* (Cda) for federally-appointed courts.⁹⁹

Overall, there are conflicting opinions about whether tribunals should be regarded as more closely aligned with courts or the executive. On one view, failure to define tribunals as one or the other merely perpetuates confusion about the place of tribunals

⁹⁵ Robin Creyke cites the example of the ACT Administrative Appeals Tribunal, which can impose fines when reviewing decisions under ss 58, 60A and 104 of the *Liquor Act 1975* (ACT) — Creyke, above n 29, at 407.

⁹⁶ See, for example, s 88 of the *Administrative Decisions Tribunal Act 1997* (NSW) which gives the ADT the power to award costs, and s 109 of the *Victorian Civil and Administrative Appeals Tribunal Act 1998* (Vic). See also Creyke, above n 29, at 417. As noted above, the High Court in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 held that the making of binding orders affecting the rights of citizens was an exercise of judicial power that Commonwealth tribunals are not permitted to exercise.

⁹⁷ Mullan, David, “Where do tribunals fit into the system of administration and adjudication? A Canadian perspective” in Creyke, Robin (ed), *Administrative tribunals: taking stock*, Centre for International and Public Law, Canberra, 1992, 1-20, at 5.

⁹⁸ *Ibid.*, at 3.

⁹⁹ *Ibid.*, at 2 to 3 and 5.

within government. Alternatively, it can be argued that maintaining the distinctions between tribunals, the judiciary and the executive is vital, as any attempt to collapse them would undermine the *raison d'être* of tribunals.¹⁰⁰ Ultimately the position of tribunals within the political/legal structure of government is perhaps best described as external to the government of the day, yet not exercising judicial power. As such, tribunals float somewhere between the concepts of 'court' and 'administrator'.

The proposition that tribunals occupy a unique space distinct from that of courts and the executive is largely consistent with the views expressed by government, academics and tribunals themselves about their role and function. Conceptually, there are compelling reasons to regard tribunals as a *de facto* fourth arm of government, operating alongside courts and administrators.¹⁰¹ Such a concept would maintain fidelity to the principle that tribunals are not courts and therefore should not exercise judicial power, as well as the converse principle that tribunals must maintain a degree of independence from the executive in order to function effectively. Moreover, it would avoid the trap of seeking to define tribunals solely in opposition to the role and nature of other types of institutions.¹⁰²

It is argued that further consideration of the distinction between courts, executive decision-makers and tribunals would enhance our understanding of tribunals and our ability to evaluate proposals for reform. In the meantime, while the concept of 'tribunal' as a *de facto* fourth arm of government does not define a space for tribunals with a significant degree of accuracy, it begins to give this space shape, and to contribute to our understanding of the role of tribunals in common law systems of government. Thus, the above discussion assists in the task of evaluating tribunal amalgamations by providing a theoretical framework within which to analyse the amalgamations examined in subsequent Chapters. This framework is given further definition by the following

¹⁰⁰ For instance, Harris has argued that an effective generalist administrative tribunal must be separate from both the ordinary court system and the bureaucracy — Harris, above n 2, at 189. See also *ibid.*, at 200 and 205.

¹⁰¹ Cf Peter Bayne, who has argued that tribunals have a "dual role", in that they "occupy a place in both the system of justice and the system of administration" — Bayne, Peter, *Tribunals in the system of government: papers on Parliament, no. 10*, Senate Publishing Unit, Canberra, 1990, at 3.

¹⁰² See Farmer, above n 10, at 189; Partington, above n 1, at 146.

discussion about the function of tribunals, and the types of concepts commonly associated with their operation.

The functions and characteristics of tribunals

Tracing the history of tribunals and analysing their place within government demonstrates that the bodies we label ‘tribunals’ have long been recognised as performing a unique and valuable function. Since the 1950s in the United Kingdom and the 1970s in Australia, inquiries into the structure and organisation of the decision-making apparatus of both countries have consistently reflected a general assumption that tribunals have an essential role to play in the administration of a modern society.

Without engaging in rigorous analysis in order to justify their actions, policy-makers and legislators have often chosen to rely upon tribunals to perform specific tasks, rather than other bodies such as courts or government departments.¹⁰³ Commentators consider that tribunals have been established in specific jurisdictions in order to relieve the increasingly heavy caseload of courts, to provide an alternative, less adversarial means of dispute resolution, or to create forums for higher level decision-making in new areas of the law.¹⁰⁴

In an Australian context, the federal Parliament has vested the task of merits review almost exclusively in tribunals. The creation of the AAT and subsequent specialist tribunals — such as the Veterans’ Review Board (VRB), the Social Security Appeals Tribunal (SSAT), the Migration Review Tribunal (MRT) and the RRT — in all bulk decision-making jurisdictions involving Commonwealth legislation, demonstrates an ongoing assumption that tribunals perform a distinct and valuable function.

Other commentators have pointed to more cynical reasons why governments may be eager to establish tribunals. That is, governments may wish to create tribunals in order to

¹⁰³ Genn, above n 15, at 393.

¹⁰⁴ Handley, John, “Internal review and alternative dispute resolution: the hidden face of administrative law — II” in Cole, Kathryn (ed), *Administrative law and public administration — form vs substance*, proceedings of the 1995 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1995, 171-178, at 171.

provide citizens with a mechanism of external review or dispute resolution that is less independent than courts and perhaps more inclined to apply government policies,¹⁰⁵ but which allows citizens to feel as though they have had their ‘day in court’. In other words, the argument is that tribunals serve the function of giving governments the *appearance* of liberalism.¹⁰⁶ According to Prosser, tribunals are often established as a “legal buffer against political action”.¹⁰⁷ In relation to the creation of welfare appeals tribunals in the United Kingdom he wrote:

The introduction of appeals machinery provided a means of defusing opposition to mass welfare cuts by directing it into channels where it could be controlled.¹⁰⁸

On the other hand, it may be argued that, in some circumstances, the creation of a tribunal provides an avenue of redress for the individual that was previously non-existent.

Whichever view is adopted, it can be argued that tribunals are regarded as a popular option by virtue of some inherent characteristics that courts and government departments lack. For instance, in rejecting the view that courts or departments should take over the function of administrative review to the exclusion of tribunals, both the Kerr and Bland Committees implied that tribunals offer a unique service which cannot be effectively undertaken by any other branch of government. This suggests that tribunals share certain qualities in the eyes of their creators which lead them to be chosen above other decision-making mechanisms. In turn, this suggests it is possible to define ‘tribunals’ by reference to these characteristics or, conversely, that bodies which have these kinds of characteristics might be defined as tribunals.

Strangely, no-one has yet attempted to definitively articulate what these characteristics are. As stated by the Australian Law Reform Commission: “we have never really

¹⁰⁵ See, for instance, Bayne, Peter, “The silver lining in the dark cloud of the proposed Administrative Review Tribunal”, a paper presented at *Public Law Weekend*, conference by the Centre for International and Public Law, Canberra, November 1998, at 11 and 15; Bayne, above n 92, at 93 to 98.

¹⁰⁶ Harlow and Rawlings, above n 3, at 463.

¹⁰⁷ Cited in *id.* See also Wikeley, above n 79, at 479.

¹⁰⁸ Cited in Harlow and Rawlings, above n 3, at 463. See also Genn, above n 15, at 396.

wrestled with what it is that makes [tribunals] different”.¹⁰⁹ This makes it difficult to engage policy-makers in a constructive, directed discussion about the performance of existing tribunals, let alone abstract models of tribunals or how and when tribunal reform should be undertaken.

In beginning to redress this, it is useful to consider the function of tribunals in more detail.¹¹⁰

This thesis argues that tribunals can be grouped into bodies that exercise three main types of function: administrative review, the resolution of professional discipline matters, and court-substitute decision-making.¹¹¹ O’Neill separates the function of court-substitute decision-making into two tasks: performing the role of a specialist court-like body, and making certain kinds of judicial decision-making more accessible. He sees guardianship tribunals as performing the latter task.¹¹² However, it could be argued that the task of guardianship tribunals is to perform in a specialist way a function that ordinary courts of law would otherwise undertake.¹¹³ These functions are therefore treated as one in the context of this thesis.

A closer examination of the kinds of tribunals performing these functions indicates that each type of body relies upon a number of common features in order to successfully perform its role. This reinforces the proposition that tribunals share mutual

¹⁰⁹ Senate Legal and Constitutional Legislation Committee, above n 66, at 68. See also Ellis, Elizabeth, “Promise and practice: the impact of administrative law reform in New South Wales” (2002) 9(3) *Australian Journal of Administrative Law* 105-124, at 113.

¹¹⁰ Note that this thesis does not extend to considering tribunals of inquiry or royal commissions. These are defined by Geoffrey Lindell as bodies or inquiries established by Parliament to inquire into particular issues, and given power “to compel the attendance of witness and the production of documents” — Lindell, Geoffrey, *Tribunals of inquiry and royal commissions: law and policy paper no. 22*, Centre for International and Public Law, Canberra, 2002, at 2.

¹¹¹ This can be compared to the approach adopted by members of the Tribunal Research Program at the University of Wollongong who, in defining ‘tribunal’ for the purposes of their project, distinguished between tribunals that perform primary decision-making and review functions — Handley, above n 27, at 38; Goldring, Handley, Mohr, and Thynne, above n 39, at 162.

¹¹² O’Neill, Nick, “Tribunals — they need to be different”, a paper presented at the *Fourth AIJA tribunal’s conference*, conference by the Australian Institute of Judicial Administration, Sydney, 8 June 2001, at 5.

¹¹³ See Carney, Terry and Tait, David, *The adult guardianship experiment: tribunals and popular justice*, Federation Press, Sydney, 1997.

characteristics that, if pinpointed, would enable them to be defined, measured and improved in systematic ways.

Administrative or merits review tribunals

Tribunals performing administrative or merits review functions are particularly common at Commonwealth level in light of the separation of powers doctrine embedded in the federal Constitution. The most obvious examples are the Commonwealth AAT, the RRT, the MRT, the SSAT and the VRB. There are also examples of this type of tribunal operating at State level, including the former Victorian AAT and the AAT in the Australian Capital Territory.

It is largely accepted that, in addition to the normative effect, one of the primary functions of a merits review tribunal is to reach the correct or preferable decision in matters before it.¹¹⁴ This view has been endorsed by academics, administrators and legislators alike. For instance, when the Parliaments of Victoria and NSW created VCAT and the ADT respectively, both enabling statutes contained provisions codifying the requirement that, in undertaking administrative review, each tribunal make the ‘correct and/or preferable’ decision on the material before it, in substitution for the decision of the original decision-maker.¹¹⁵

As the Administrative Review Council has pointed out, the phrase ‘correct or preferable decision’ recognises that there may be more than one correct outcome in the resolution of a particular matter. Tribunals making decisions in circumstances where a number of outcomes may fulfil a given set of statutory criteria need to have the ability to choose between competing interests and exercise discretion in a manner that is perceived to be fair and logical. It is generally accepted that the functions of tribunals such as the AAT

¹¹⁴ Soon after the Commonwealth AAT was established in 1975, the Full Federal Court in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 held that the Tribunal’s function upon reviewing a matter was to reach the correct or preferable decision on the basis of all the material before it. See also *Re Elston and Australian Community Pharmacy Authority* (1996) 44 ALD 126 at 128.

¹¹⁵ See s 63(1) of the *Administrative Decisions Tribunal Act 1997* (NSW) and s 50 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

and the administrative review divisions of the ADT and VCAT involve making policy choices in order to reach decisions that are sensible as well as lawful.¹¹⁶

Characteristics associated with the task of reaching the correct or preferable decision in particular jurisdictions include specialisation, and the concept of ‘error correction’. It is arguable that the task of correcting primary decisions is better represented by the language of efficiency rather than the language of justice and fairness. Common features of merits review tribunals that reflect these characteristics and reinforce the distinctions between courts and tribunals include accessibility, informality, efficiency and speed.

On the other hand, like courts, merits review tribunals are required to operate in a manner that is independent, fair and just. Another important function of administrative tribunals is to establish a jurisprudence that can guide and improve the performance of primary decision-makers (the normative effect).¹¹⁷

Thus, administrative tribunals can be described as performing the dual functions of providing an avenue of review that is quick, accessible and efficient, while at the same time maintaining a perception that the review service it provides is independent, fair and just. Administrative tribunals must adopt a successful mix of all of these characteristics in order to satisfy the demands of two potentially competing stakeholder groups, namely, the government and applicants. As well as distinguishing administrative tribunals from the roles performed by courts and the executive, these features resonate with the characteristics exhibited by the other two types of tribunals examined.

Professional disciplinary tribunals

There are some tribunals at federal level that hear professional disciplinary matters, such as the Federal Police Disciplinary Tribunal and the Defence Force Discipline Appeal Tribunal.¹¹⁸ However, there are more numerous examples of this type of tribunal

¹¹⁶ See, for instance, Bayne, above n 92, at 93.

¹¹⁷ Creyke, Robin and McMillan, John, “Executive perceptions of administrative law — an empirical study” (2002) 9(4) *Australian Journal of Administrative Law* 163-190, at 163.

¹¹⁸ The Federal Police Disciplinary Tribunal is established by the *Complaints (Australian Federal Police) Act 1981* (Cth). The Tribunal deals with disciplinary offences under the *Australian Federal Police (Discipline)*

operating at State level where there is no restriction on tribunals exercising judicial power.

A number of professional disciplinary tribunals operating in Victoria were amalgamated when VCAT was formed. These included the Credit Authority, the Estate Agents Disciplinary and Licensing Appeals Tribunal, the Motor Car Traders Licensing Authority, the Prostitution Control Board, and the Travel Agents Licensing Authority.¹¹⁹ (The Victorian Business Licensing Authority still exists separately from VCAT.) In NSW, the Legal Services Tribunal became part of the NSW ADT when amalgamation took place in that State.

The function of professional disciplinary tribunals is to hear charges against professionals working in various disciplines, and to consider whether disciplinary action should be imposed in the circumstances of a particular case. Like merits review and court-substitute tribunals, the decisions made by professional disciplinary tribunals can have serious consequences. For instance, they have the ability to deprive professionals of their livelihood. As with decisions of a tribunal like the RRT, which in some matters can have life or death consequences, or highly emotive decisions such as those made by anti-discrimination or guardianship tribunals, there are requirements for the decisions of disciplinary tribunals to be made in a manner that is fair, just, independent and accountable.

At the same time, these bodies perform a normative function by encouraging others in a particular profession to abide by the standards which their peers are punished for breaching. This, in turn, should improve a profession's standards and the public's confidence in its members.

Regulations 1979. The Defence Force Discipline Appeal Tribunal was established under the *Defence Force Discipline Appeals Act 1955* (Cth) to hear and determine appeals from courts martial and Defence Force magistrates in respect of service offences by members of the Australian Defence Force.

¹¹⁹ Wade, above n 29, at 974.

Court-substitute tribunals

There are few examples of tribunals that perform court-substitute functions at federal level in Australia. The Australian Industrial Relations Commission arguably performs court-substitute functions when hearing disputes between unions and employers. The Australian Competition Tribunal may be another example. However, arrangements must be put in place to avoid breaching the principle that Commonwealth tribunals cannot exercise judicial power.¹²⁰

There are more numerous examples of court-substitute tribunals operating at State level, several of which were amalgamated to form VCAT in Victoria and the ADT in NSW. Bodies in Victoria included the former Anti-Discrimination Tribunal, the Guardianship and Administration Board, the Small Claims Tribunal, the Residential Tenancies Tribunal, and the Domestic Building Tribunal.¹²¹ The NSW Anti-Discrimination Tribunal was a court-substitute tribunal incorporated into the ADT, while the Guardianship Tribunal and the newly-amalgamated Consumer, Trader and Tenancy Tribunal (CTTT) continue to operate in NSW as court-substitute tribunals in their own right.

In general, the function of these tribunals is to resolve citizen-citizen disputes, many of which have personally significant implications for the parties involved. Genn has described ‘court-substitute’ tribunals as bodies which “do not have responsibility for making regulations or devising policy, but are required to act as informal courts”.¹²² While parliaments in each jurisdiction in Australia have decided that most disputes between citizens should be resolved by the ordinary courts, numerous categories of dispute are still channeled through tribunal systems at State and Territory level. Because court-substitute tribunals are created to perform functions in preference to courts, they are

¹²⁰ The functions of the Australian Industrial Relations Commission under the *Workplace Relations Act 1996* (Cth) include preventing and settling industrial disputes, so far as possible by conciliation, and, where appropriate within the limits specified by the Act, by arbitration, and conciliating claims for relief in relation to termination of employment, and if necessary arbitrating whether a termination is harsh, unjust or unreasonable. The Australian Competition Tribunal was established under the *Trade Practices Act 1965* (Cth) and continues under the *Trade Practices Act 1974* (Cth) (prior to 6 November 1995, the Tribunal was known as the Trade Practices Tribunal).

¹²¹ Wade, above n 29, at 974.

¹²² Genn, above n 15, at 394.

often characterised by features that distinguish them from courts. These features include specialisation, accessibility, economy and efficiency.

The existence of court-substitute tribunals highlights that one of the main purposes of tribunals is to provide an alternative mechanism of dispute resolution that is specialised, and more cost-effective and accessible than that provided by courts. As Harlow and Rawlings have pointed out, court processes are considered slow and costly, in part because one of their objectives is to provide the highest standard of justice possible.¹²³ In contrast, one of the primary objectives of a tribunal system is efficiency.

Common characteristics of tribunals

The above discussion demonstrates that common characteristics are shared by tribunals performing any one of the three functions examined. These include accessibility, fairness, justice, informality, efficiency, speed, independence, accountability and specialisation. The retention of these features better enables all three types of tribunal to undertake the range of functions they are expected to perform.

It could be argued it is the functions given to tribunals that have influenced the types of characteristics they have developed. For instance, tribunals created to relieve the caseload of courts need to be quicker and more efficient than courts. They would therefore be inclined to abandon formal, slow procedures and would, in turn, become characteristically more accessible and efficient than courts. Indeed, Genn has argued that the similarities between tribunals performing different types of functions “reside[s] in the *absence* of certain features of courts”.¹²⁴ Similarly, tribunals created to make decisions in areas involving technical or specialist knowledge may need to employ expert, non-legal members. This would generally lead to the development of tribunals that are characteristically specialised, non-legalistic and informal.¹²⁵

¹²³ Harlow and Rawlings, above n 3, at 459.

¹²⁴ Genn, above n 15, at 395.

¹²⁵ An exception to this is the former NSW Legal Service Tribunal which was established to hear professional discipline charges against members of the legal profession. Unsurprisingly in light of its users, this Tribunal adopted a particularly legalistic mode of operating.

Conversely, it could be argued that the features commonly displayed by tribunals have led them to be chosen to perform particular types of functions. For instance, the characteristics set out above would no doubt be attractive to policy-makers wanting to develop decision-making mechanisms that are acceptable to a diverse range of stakeholders, have a normative effect on primary decision-making, bring specialist expertise to decision-making, and provide an effective alternative to curial mechanisms of dispute resolution.¹²⁶

Either way it seems clear that tribunals performing administrative review, professional disciplinary and court-substitute functions will strive to meet similar objectives and, in doing so, will face similar challenges when undertaking their roles. This point is reinforced by further discussion of the objectives of tribunals in Chapter 4. More importantly, the fact that bodies performing these distinct functions share common characteristics reinforces the proposition that ‘tribunals’ are a distinct entity that can be defined and, therefore, measured. As well as enhancing our understanding of tribunals, this highlights the viability of seeking to pinpoint the ingredients that must be present in order to achieve optimal tribunal reform.

CONCLUSIONS

There is a widespread view that tribunals have become an inevitable feature of the political/legal landscape¹²⁷ — so much so, that there has developed an unarticulated notion that tribunals constitute a *de facto* fourth arm of government.¹²⁸ However, the discussion in the first part of this Chapter demonstrates that a lack of consensus remains over what a ‘tribunal’ is and how it should operate. An examination of the historical development of tribunals highlighted the *ad hoc* nature of their development and the absence of an overarching theoretical framework within which tribunal reform can take place.

¹²⁶ See Macauley, R. W., *Practice and procedure before administrative tribunals: volume 1*, Carswell, Toronto, 1997, at 1-2, cited in Creyke, above n 29, at 404.

¹²⁷ See, for instance, Creyke, above n 29, at 403.

¹²⁸ See, for instance, Creyke, above n 65, at 228.

It is argued that greater awareness of the ill-definition of tribunals and the difficulties this causes goes some way towards assisting policy-makers to establish and maintain effective tribunal systems. The conclusions drawn from the discussion in the remainder of Chapter 1 go even further. An analysis of the position of tribunals compared to that of courts and the executive indicates that it is distinct, and that tribunals have a specific role to play in the administration of government. Moreover, the functions and types of features which characterise administrative review, professional disciplinary and court-substitute tribunals can be contrasted with the types of features used to describe courts and the adversarial process. This suggests that, on a conceptual level at least, tribunals are widely perceived to fulfil a unique role and to share common, distinctive characteristics.

The conclusion reached is that there is something essential or inherent in the nature of 'tribunal' which can be explored and, to some extent, defined. Specifically, the discussion in this Chapter supports the proposition that the nature of tribunals is determinable, and that further exploration will help refine our understanding of the concept and functions of tribunals more generally. While further work is required, there is every indication this would yield positive results in redressing the ongoing ill-definition of tribunals.

In addition, this conclusion underlines the viability of constructing a methodology for measuring the effectiveness of tribunals, and using that methodology to assess the performance of existing tribunals. In turn, this exercise would contribute to an enhanced understanding of what can be expected of specific tribunal models in terms of performance and outcomes.

More relevantly in the context of this thesis, the discussion in Chapter 1 validates the objective of pinpointing the key ingredients of successful tribunal amalgamation. The proposition that different amalgamation experiences can be compared and measured is reinforced by the conclusion that different tribunals share common features and characteristics. Thus, it is possible to illuminate the reasons behind effective tribunal reform by examining the comparative success of the Australian Government's proposal

to establish an Administrative Review Tribunal, and the tribunal amalgamations in NSW and Victoria.

Chapters 2 and 3 begin this process by outlining the developments that have taken place so far in the ongoing trend to amalgamate tribunals.

CHAPTER 2: RECENT DEVELOPMENTS — THE FEDERAL ART

The discussion in Chapter 1 highlighted the ill-definition of the concept of ‘tribunal’, and the fact that further work remains to be done in order to achieve consensus about the role and function of these bodies. In spite of this, there have been numerous proposals in the last decade to reform existing tribunal systems in several common law jurisdictions. Across the board, there have been proposals to adopt generalist tribunal models in preference to smaller, specialist tribunal systems, and to achieve these changes through the process of amalgamation.

These reforms are taking place in the absence of data about their likely implications, and without a thorough understanding of the objectives that generalist versus specialist tribunal systems can realistically achieve.¹ It is argued that this is all the more reason to examine the ways in which amalgamations are being approached. More specifically, if governments in common law jurisdictions are intent on reforming their tribunal systems by pursuing the amalgamation of specialist bodies, it is timely to study the experiences of jurisdictions in which this process has already taken place. In particular, this will inform the process of reform in jurisdictions that are about to undertake amalgamation processes.

The purpose of Chapters 2 and 3 is to describe the changes that have taken, or are taking, place in several jurisdictions throughout Australia and the United Kingdom with a view to exploring, in subsequent Chapters, the elements that constitute an *optimal* amalgamation. The picture of current developments painted in these Chapters is drawn upon in Chapter 4 when pinpointing the key ingredients of successful reform. The picture is drawn upon again when testing the hypothesis developed in Chapter 4 against the experiences of amalgamation at Commonwealth level and in Victoria and NSW.

¹ Sayers, Michael and Webb, Adrian, “Franks revisited: a model of the ideal tribunal” (1990) 8 *Civil Justice Quarterly* 36-50, at 36.

The developments examined in Chapters 2 and 3 are described in terms of the following themes:

- *the nature and scope of the amalgamation and the commitment to its success*: this involves examining features of the legislation establishing each amalgamated tribunal and the extent of political and financial commitment to its success;
- *function and organisational structure*: this involves examining the function and structure of the amalgamated tribunals that have been proposed or created, including the way in which registry staff are organised and the nature of member appointments to each tribunal;
- *the powers, processes and procedures of each amalgamated tribunal*: this includes examining the scope of appeals to the tribunal, the availability of multi-member panels, the mix of specialist versus uniform procedures, and the extent to which practices and procedures are codified in legislation; and
- *organisational culture*: this involves examining the features of each tribunal that are indicative of its organisational culture or the approach it would take towards exercising its function, including the scope for using alternative dispute resolution (ADR) techniques, and the availability of legal representation.

The present Chapter will focus on the first development in the recent trend to amalgamate tribunals — namely, the proposal to create an Administrative Review Tribunal (ART) at federal level in Australia. This amalgamation was initially proposed by the Administrative Review Council in its 1995 report *Better Decisions*. Subsequently, in 1998 the Commonwealth Government announced that an amalgamation process would take place involving four Commonwealth merits review tribunals. Specifically, the Government proposed to amalgamate the Administrative Appeals Tribunal (AAT), the Social Security Appeals Tribunal (SSAT), the Refugee Review Tribunal (RRT) and the Migration Review Tribunal (MRT) to form one ‘super-Tribunal’ — the ART.

As noted in the Introduction, legislation drafted by the Government to establish the ART was blocked in the Senate in 2000. In a subsequent press release the Government stated

that, while it would not seek to reintroduce the ART legislation in the current Parliament, it:

... remains convinced that amalgamation of the tribunals will provide real benefits for people seeking administrative review of government decisions and will investigate options for amalgamation in the future.²

In the meantime, the Government proposed to undertake reforms of the existing Commonwealth tribunal system. For instance, it has foreshadowed reforms to the AAT with respect to its procedures and the qualifications of members which, like the ART proposals, are intended to redress the “cost and legalism” of AAT review.³ In addition, moves are already underway to combine elements of the MRT and RRT, beginning with the appointment of the same Principal Member to both tribunals and the merger of their corporate and research services.⁴ The apparent decision to gradually merge the MRT and RRT is likely to present a useful case study in the advantages and disadvantages of the ‘co-location model’ as a way of organising tribunal systems.⁵

While the Bills containing the ART proposal were ultimately defeated, it is nonetheless informative to examine in some detail the legislation that was drafted. A great deal of information about the nature, scope and detail of the proposal can be ascertained by analysing the *Administrative Review Tribunal Bill 2000* (Cth) (ART Bill) and the *Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000* (Cth) (CTP Bill). The description of the ART proposal contained in this Chapter provides a foundation for the subsequent analysis in Chapter 6, which underscores the importance of law in successfully implementing an amalgamation proposal.

However, before embarking upon this exercise it is useful to describe the significant features of the federal tribunal system that policy-makers sought to reform. As well as

² Williams, Daryl, Commonwealth Attorney-General, *News release: improving the federal merits review tribunal system*, 6 February 2003.

³ *Id.*

⁴ Refugee Review Tribunal, *Annual report 2002–2003*, RRT, Sydney, 2003, at 50 to 60. In addition, the Melbourne registries of the MRT and RRT have now moved into joint premises — <http://www.mrt.gov.au/>, accessed on 13 December 2003.

⁵ See Creyke, Robin, “Tribunals and access to justice” (2002) 2(1) *Queensland University of Technology Law and Justice Journal* 64-82.

contextualising the discussion of recent developments, this approach highlights the types of challenges commonly faced by those responsible for implementing decisions to amalgamate tribunals. It is useful to examine at least one amalgamation process in this level of detail. In particular, the following discussion demonstrates the difficulties involved in balancing the retention of necessary specialisation developed by small, specialist tribunals, against the desirability of introducing consistent practices, procedures and culture in an amalgamated tribunal. This facilitates a more thorough analysis in subsequent Chapters of the likely implications of the federal Government's approach to amalgamation.

More generally, the following discussion highlights the importance of conducting a thorough, detailed analysis of an existing tribunal system in order to fully understand the types of features that will need to be retained, and the pitfalls to avoid when pursuing a proposal for reform.

EXISTING COMMONWEALTH MERITS REVIEW TRIBUNALS: THE VALUE OF DIVERSITY

As noted in Chapter 1, the Commonwealth AAT was established in 1975 as part of the 'new administrative law' package implemented by the federal government in the 1970s.⁶ It is arguable that, in merging a number of existing Commonwealth merits review tribunals, the creation of the AAT constituted the 'first wave' of tribunal amalgamation in Australia.⁷ The AAT was the first high profile, generalist tribunal of its type in Australia, and its creation heralded the beginning of the development of a comprehensive system of Commonwealth merits review.⁸

⁶ Creyke, Robin and McMillan, John (eds), *The Kerr vision of Australian administrative law*, Centre for International and Public Law, Canberra, 1998, at iii.

⁷ The Commonwealth AAT replaced the "compensation jurisdiction formerly exercised by the Commonwealth Employees Compensation Tribunal; the veterans' jurisdiction formerly exercised by the Repatriation Review Tribunal; and the taxation jurisdiction formerly exercised by the Taxation Boards of Review" — McMillan, John and Todd, Robert, "The administrative tribunals system: where to from here?" in Argument, Stephen (ed), *Administrative law: are the States overtaking the Commonwealth?*, proceedings of the 1994 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1996, 116-130, at 123. See also Vines, Greg, *Report of the review of administrative appeal processes*, Office of the State Service Commissioner, Hobart, 2003, at 25.

⁸ Vines, above n 7, at 25.

In the following two decades a number of smaller, specialist tribunals have been established to hear matters in particular jurisdictions. Of interest in this context is the creation of the Veterans' Review Board (VRB) in 1985, the SSAT in 1988, the MRT in 1989⁹ and the RRT in 1995. As with the RRT, the MRT operates in the migration jurisdiction, reviewing decisions made by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) to refuse applications for various classes of visa.¹⁰ The operation of the migration tribunals is characterised by single-member panels, lack of departmental attendance at hearings, and an emphasis on efficient, accessible processes.

The SSAT operates in the social security jurisdiction and conducts *de novo* merits review of departmental decisions under the social security law.¹¹ However, unlike RRT and MRT reviews, applicants may appeal SSAT decisions to the AAT for a complete rehearing on the merits of an application. Being a first-tier merits review body, the SSAT is characterised by informality, accessibility and quick decision-making. It routinely uses two- and three-member panels, and employs members with a range of legal and other skills.¹²

The VRB operates in a similarly informal manner in conducting merits review of decisions made under the *Veterans' Entitlements Act 1986* (Cth).¹³ It is constituted by up

⁹ Creyke, Robin, *The procedure of the federal specialist tribunals*, Centre for International and Public Law, Canberra, 1994, at 4 to 5.

¹⁰ As explained in Chapter 1, the RRT is responsible for reviewing decisions to reject applications for protection visas, while the MRT hears matters involving a broad range of visa classes. Both Tribunals are established under the *Migration Act 1958* (Cth).

¹¹ The statutes that currently form the 'social security law' are the *Social Security Act 1991* (Cth), the *Social Security (Administration) Act 1999* (Cth) and the *Social Security (International Agreements) Act 1999* (Cth).

¹² Bacon, Rachel, "Are the babies being thrown out with the bathwater? Retaining the benefits of specialist tribunals within the ART", in Finn, Chris (ed), *Sunrise or sunset? Administrative law for the new millennium*, proceedings of the 2000 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 2000, 150-175, at 160 to 161; Chenoweth, Rieteke and Huck, Jill, "Tribunal triptychs and emerging variations on a theme: multi-member and multi-disciplinary tribunal panels", a paper presented at *Administrative law: the essentials*, conference by the Australian Institute of Administrative Law, Canberra, 5-6 July 2001; Administrative Review Council, *Better decisions: a review of Commonwealth merits review tribunals*, AGPS, Canberra, 1995, at paragraphs 3.49 to 3.52.

¹³ The VRB was originally established by an amendment to the *Repatriation Act 1920* (Cth) — see Creyke, above n 9, at 4.

to three members with a range of legal and specialist qualifications,¹⁴ and parties may seek further merits review of Board decisions by the AAT. Despite its many similarities to the SSAT, for political reasons the VRB was not included in the Government's ART proposal.

Broadly speaking, there are a number of similarities between the tribunals that were to be amalgamated to form the ART. Each has jurisdiction to conduct merits review of decisions made by Commonwealth government departments that have serious ramifications for the individual applicants involved; each operates in a manner that, at least to some extent, is inquisitorial rather than adversarial; and the operation of each Tribunal is characterised to varying degrees by informality and specialist expertise. In justifying its ART proposals, the Government said of the AAT, SSAT, MRT and RRT:

To have several tribunals performing a *similar review function*, but with separate membership, staff, premises, information technology and corporate services systems, is wasteful of resources (emphasis added).¹⁵

In many ways amalgamation of these Tribunals is logical given that the SSAT, MRT and RRT have been modelled on the AAT, and have adopted its basic structure and function. Like the AAT, the fundamental task of the specialist tribunals is to arrive at the "correct or preferable decision on the material before the Tribunal"¹⁶ by conducting *de novo* review of primary decisions.¹⁷ Like the AAT, the specialist tribunals are created as autonomous, independent bodies with their own members, management and administrative support staff (registry). In addition, they generally share the objective of providing merits review that is fair, just, informal, economical and quick.¹⁸

¹⁴ Creyke, above n 9, at 33 to 34.

¹⁵ Williams, Daryl, Commonwealth Attorney-General, "Second Reading Speech for the *Administrative Review Tribunal Bill 2000*", Australia, *House of Representatives Debates*, 28 June 2000, 18404-18407, at 18405.

¹⁶ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419.

¹⁷ *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934.

¹⁸ Sections 353 and 420 of the *Migration Act 1958* (Cth); s 140 of the *Social Security (Administration) Act 1999* (Cth), (see also former s 1246 of the *Social Security Act 1991* (Cth)). The AAT is required to conduct proceedings "with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit" — s 33(1)(b) of the AAT Act.

At the same time, there are differences in the practices and procedures which have evolved in each tribunal in response to the requirements of the particular jurisdiction/s in which it operates. The variations between these bodies posed challenges to those designing the Commonwealth amalgamation process. One of the greatest challenges was to ensure that the ART retained those specialist procedures which enhance the task of merits review in specific jurisdictions, while at the same time operating as a cohesive body. In responding to these challenges, this thesis postulates that policy-makers chose between the following options:

1. designing an ART that adopted the worst features of the four Tribunals to be amalgamated (the lowest common denominator approach);
2. designing an ART that adopted the best features available or that imposed new standards of performance on all four Tribunals; or
3. retaining the specialist features of each Tribunal within an overarching ART structure (the minimalist reform or ‘co-location’ approach).

It is argued that options two and three will each be appropriate in particular circumstances, the objective being to strike a balance between the retention of necessary specialisation and the setting of uniform standards. A successful balance will better enable the maximum potential benefits of an amalgamation process to be realised.

The following discussion explores the existing tribunal system in place at Commonwealth level, before going on to describe how it would have been altered by the ART proposal. As noted above, the value of examining at least one amalgamation proposal in detail is the insight this affords into the nature of the challenges policy-makers confront when designing and implementing an amalgamation process. The hypothesis developed in Chapter 4 is that attention must be paid to the key ingredients of law, context, organisation and people in order to successfully address these challenges.

Tribunal constitution

One of the key challenges faced by Commonwealth policy-makers was how to accommodate the varying practices of the AAT, SSAT, MRT and RRT in convening multi-member panels. This issue proved particularly contentious when the details of the ART proposal were released. Of the four Tribunals to be amalgamated, only the AAT, MRT and SSAT are able to constitute panels using more than one member,¹⁹ and only the SSAT has made use of two- and three-member panels on a routine basis.²⁰

Whereas the MRT rarely makes use of multi-member panels, the AAT is constituted by two or three members in matters where specialist knowledge is particularly useful. For instance, tribunals constituted to hear appeals from the VRB, where medical and defence issues are prominent, often include members with expertise in medicine or war service, as well as legal members. Similarly, matters which are deemed to have significant precedent value or to be particularly complex are often heard by a Presidential member and one or two other members. A small number of statutes conferring jurisdiction on the AAT require that the Tribunal be constituted by members with particular skills.²¹ Otherwise, most matters before the AAT are dealt with by single-member tribunals, some of whom have specialist medical or other knowledge and experience.²²

The anecdotal evidence concerning the routine use of multi-member panels in the SSAT is that they enhance the Tribunal's ability to conduct administrative review in the social

¹⁹ Section 357 of the *Migration Act 1958* (Cth); s 21 of the AAT Act; cll 10 and 11 of Schedule 3 to the *Social Security (Administration) Act 1999* (Cth) (see also former s 1328 of the *Social Security Act 1991* (Cth)).

²⁰ The SSAT has only relatively recently been expressly authorised to conduct reviews using single-member panels — see Schedule 3 to the *Social Security (Administration) Act 1999* (Cth), which came into effect on 20 March 2000. This change appears to have been made in preparation for the move to an ART, where there was to have been a presumption against the use of multi-member panels (see below).

²¹ See, for instance, s 141(6) of the *Commonwealth Electoral Act 1918* (Cth); s 106E(3) of the *Disability Discrimination Act 1992* (Cth); ss 63 and 40 of the *Insurance Act 1973* (Cth); and s 61(3) of the *Privacy Act 1988* (Cth).

²² See, for example, the statistics set out in Administrative Appeals Tribunal, *Annual report 1995–96*, AGPS, Canberra, 1996, at 107. In the two Divisions which made the most use of multi-member panels, the General and Veterans' Division and the Taxation Division, 31% of matters in the General and Veterans' Division were heard by multi-member panels in the year 1995–1995, while 22% of taxation matters were heard by multi-member panels over the same period. In the 1998–99 financial year, 31% of matters in the General and Veterans' Division were heard by multi-member panels, compared with 12% of taxation matters — Administrative Appeals Tribunal, *Annual report 1998–99*, AAT, Sydney, 1999, at 110.

security jurisdiction.²³ Many argue that the SSAT operates more efficiently — makes decisions more quickly and makes fewer errors — than tribunals which operate using only single member panels.²⁴ The reason for this is said to be that members are more confident about making quick decisions when they are not alone in doing so. There is also evidence that multi-member panels strengthen applicants' perceptions of the independence of tribunals. This is because they avoid giving a single member the dual functions of challenging parties' evidence and making a final decision on the merits of a matter.²⁵

Moreover, the different members on SSAT panels generally bring complementary expertise and skills to the decision-making process. In non-medical matters, an SSAT panel typically consists of three members with legal, social welfare and administrative skills respectively. Where medical issues are involved, a member with medical qualifications is generally included.²⁶ Members can therefore rely on the knowledge of others on the panel, rather than having to seek out information from other sources. While the SSAT may now constitute tribunals using single-member panels,²⁷ it is argued that the use of multi-member panels evolved in the social security jurisdiction in response to a need generated by a large caseload,²⁸ the vulnerability of social security applicants, the high number of cases involving medical issues, and the complexity of social security legislation and administration.

²³ Bacon, above n 12, at 160 to 161; Chenoweth and Huck, above n 12; Administrative Review Council, above n 12, at paragraphs 3.49 to 3.52.

²⁴ It should be noted that, unlike appeals tribunals in the United Kingdom, the SSAT does not make use of 'lay members'. Some of the disadvantages of multi-member panels involving lay members are discussed in Wikeley, Nick, "Two's company, three's a crowd: chairmen's views on the composition of appeal tribunals" (2000) 7 *Journal of Social Security Law* 88-116.

²⁵ These propositions are reinforced by findings from a study of the composition of appeal tribunals conducted by Wikeley in 1999. For instance, respondents from that study indicated that multi-member panels gave tribunals greater legitimacy when determining questions of credibility. There were also indications that, in some cases, multi-member panels were more efficient, and facilitated consistency and the making of difficult judgements — Wikeley, above n 24.

²⁶ Social Security Appeals Tribunal, *Annual report 1998–99*, SSAT, Canberra, 1999, at 13. See also Creyke, above n 9, at 33 to 34.

²⁷ As noted above, the SSAT was only expressly authorised to conduct reviews using single-member panels in 2000 — see Schedule 3 to the *Social Security (Administration) Act 1999* (Cth), which came into effect on 20 March 2000.

²⁸ In the period 2002–2003 the SSAT finalised a total of 9,762 applications — Social Security Appeals Tribunal, *Annual report 2002–03*, SSAT, Melbourne, 2003, at 56.

Unless the differences relating to multi-member panels were to be retained in the move to an ART, policy-makers had the choice of either improving the ability of the former migration Tribunals to constitute multi-member tribunals, or significantly altering the nature of review in the social security jurisdiction. It is argued below that the legislation establishing the ART did the latter.

Staffing and membership structures

Similar challenges arose in relation to the statutory requirements regarding the qualifications and appointment of tribunal members. For instance, s 7 of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) is designed to meet the AAT's needs as a generalist tribunal. It requires that the AAT President be a Federal Court judge, that Deputy Presidents be enrolled as legal practitioners of the High Court, another federal court, or a Supreme Court for at least five years, and that senior members have the same qualifications as Deputy Presidents or else have special knowledge or skills relevant to the duties of a member.²⁹ In contrast, the SSAT, MRT and RRT have a much flatter membership structure and more generic statutory provisions regarding qualifications for membership.

Arguably, the more hierarchical membership structure of the AAT is suited to its status as the peak administrative review body at Commonwealth level — one which reviews decisions made by other tribunals, and whose decisions are often relied upon as precedent. In the same way, the more flexible requirements relating to membership of the specialist tribunals encourage informality and enable members to be drawn from a wide variety of disciplines. It is certainly the case that not all SSAT, MRT and RRT members have legal qualifications; rather, members are chosen for a range of skills which are pertinent to the work of the Tribunal in question. The challenge confronting the creators of the ART was to develop requirements that would encourage appropriate

²⁹ See ss 7(1), 7(1A), 7(1B)(a) and 7(1B)(b) of the AAT Act. Ordinary members must be enrolled as a legal practitioner of the High Court, another federal court, or a Supreme Court, have had at least five years' experience at high level in industry, commerce, public administration, industrial relations, a profession or public service, have a degree or other educational qualification in a relevant field, or have special knowledge or skill in relation to any class of matters in respect of which decisions may be made by the Tribunal — s 7(2).

appointments in different divisions, while at the same time avoiding undue complexity and inflexibility.

A further challenge was posed by structural differences between the four Tribunals to be amalgamated. For instance, the AAT is the only tribunal whose members have associates and personal assistants — a feature which is said to reinforce its adversarial, court-like culture. In contrast, the MRT, RRT and SSAT have central research and/or legal sections, or access to staff who can provide this support.

These structures are driven by the nature of the tasks undertaken by each Tribunal. For instance, the existence of a Country Research Section within the RRT is necessitated by the task of assessing applicants' claims to fear persecution in foreign countries.³⁰ The nature and amount of material required in these matters often precludes members from conducting all of their own inquiries.

Similarly, the SSAT makes use of flexible staffing arrangements in order to adjust to its sometimes fluctuating workload.³¹ As well as employing its own administrative staff under the *Public Service Act 1999* (Cth), the SSAT retains staff employed by the Department of Family and Community Services, with numbers being determined under a staffing model agreed with the Department. The Tribunal relies upon these support staff for legal advice, or advice on administrative matters such as human resources and finance.³² The SSAT also has a unique membership structure which includes executive members who are on temporary transfer from the Department of Family and Community Services.³³ The staffing and membership structure of the SSAT gives it the flexibility to run cheaply and efficiently, and to call on members with departmental expertise in appropriate cases.³⁴

³⁰ The Country Research Section assists members to undertake an investigative role, in recognition of the difficulties faced by potential refugees in accessing information themselves — Refugee Review Tribunal, *Annual report 1994–95*, RRT, Sydney, 1995, at 2.

³¹ The SSAT's workload often rises sharply in response to legislative change or changes in Departmental practices.

³² Social Security Appeals Tribunal, above n 26, at 11.

³³ *Id.*

³⁴ The MRT, when it was established in June 1999, had a similar staffing structure to that of the former IRT, which had a legal research section located in Canberra, responsible for giving legal advice to members in Registries

While the final details of the ART's staffing structure were sketchy, it would have been difficult to retain the structural features of all four Tribunals in the transition to an amalgamated tribunal.

Independence from the departments whose decisions are reviewed

One of the key questions following the announcement of the ART was whether the Government would take advantage of the amalgamation to improve the independence and standing of the smaller, specialist tribunals to match that of the AAT.

The AAT, being the peak administrative review body at federal level, is somewhat removed from the departments whose decisions it reviews. In part, this is due to its status and reputation as a more 'court-like' tribunal and its more adversarial mode of operation. Indeed, the AAT is often criticised for being overly legalistic and formal in the way it conducts proceedings.³⁵ Features contributing to the AAT's formality include the court-like design of its hearing rooms, the fact that the departmental decision-maker is generally represented at hearings, the fact that its members have associates and

throughout Australia. Currently, the MRT shares a range of resources — including human resources — with the RRT — see Refugee Review Tribunal, above n 4, at 50 to 60.

³⁵ This is clearly implied in comments by government officials about the need to reduce "undue legalism and formality" in the Commonwealth AAT. See, for instance, Leon, Renée, "Reform of federal merits review tribunals — the Government's position", a paper presented at *Administrative law and the rule of law: still part of the same package?*, conference by the Australian Institute of Administrative Law, Melbourne, 18 June 1998, at 5; Pidgeon, Sue, "Amalgamating Commonwealth Tribunals: the Government's accountability through the proposed Administrative Review Tribunal", paper presented at *Managing service provider liabilities and accountability*, conference, Sydney, February 1999, at 5 and 7. De Maria has criticised the legalism of the AAT, arguing that "the AAT was kidnapped at birth and raised in a community of lawyers" — De Maria, William, "The Administrative Appeals Tribunal in review: on remaining seated during the standing ovation" in McMillan, John (ed), *Administrative law: does the public benefit?*, proceedings of the 1992 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1992, 96-121, at 97 and 101. See also Bayne, Peter, *Tribunals in the system of government: papers on Parliament, no. 10*, Senate Publishing Unit, Canberra, 1990, at 17; McMillan and Todd, above n 7, at 124; Harris, Michael, "There's a new tribunal now: review of the merits and the general administrative appeal tribunal model" in Harris, Michael and Waye, Vicki (eds), *Australian studies in law: administrative law*, Federation Press, Sydney, 1991, 188-220, at 214. It has been noted by various commentators that the Commonwealth AAT operates according to some of the principles of adversarial litigation. See Brennan, Justice Gerard, "Administrative law: the Australian experience", in Scott, E. N. (ed), *International perspectives in public administration*, CCAE, Canberra, 1981, 77-78, in which Justice Brennan said: "... it is the applicant's appearance and his adducing of evidence before the Tribunal which stimulates the respondent's reply, and this 'adversarial' production and testing of evidence which is the means by which the facts, gathered by the parties, are furnished to the Tribunal. It is different to the process of primary administration". See also Allars, Margaret, "Administrative law: neutrality, the judicial paradigm and tribunal procedure" (1991) 13 *Sydney Law Review* 377-413. See, however, Australian Law Reform Commission, *Discussion paper no. 62: review of the federal civil justice system*, JS McMillan Printing Group, Sydney, 1999, at 421, in which the AAT claimed that "its present culture is not biased towards adversarial procedures".

‘chambers’, and the fact that a number of members with legal training choose to adhere to some extent to the rules of evidence.

The legislative framework within which the AAT operates also encourages a perception that the AAT is independent and relatively ‘court-like’. In particular, the AAT is created by its own statute rather than by portfolio specific legislation. This statute contains detail of a kind that would be found in legislation establishing a court.³⁶ For instance, the Act contains provisions regarding the ‘slip rule’,³⁷ frivolous or vexatious proceedings,³⁸ dismissal of applications,³⁹ places of sitting,⁴⁰ the circumstances in which public hearings may be dispensed with,⁴¹ and the number and type of documents which must be lodged with the Tribunal when an application for review is made.⁴² These matters are dealt with either far more cursorily or not at all in the portfolio legislation establishing the three specialist Tribunals.

In addition, part of the AAT’s role is to conduct merits review of decisions made by other Commonwealth tribunals, namely, the SSAT and VRB. It is also responsible for reviewing migration decisions involving ‘more serious’ issues such as criminal deportation or Article 1F of the *1951 Convention Relating to the Status of Refugees*.⁴³ It is argued that the nature of the AAT as a “higher order” administrative review body,⁴⁴

³⁶ Cf *Federal Court of Australia Act 1976* (Cth).

³⁷ Section 43AA of the AAT Act. This rule enables the Tribunal to correct minor errors occurring on the face of a record of decision, without reopening the matter in question.

³⁸ Section 42B of the AAT Act.

³⁹ Section 42A of the AAT Act.

⁴⁰ Section 24 of the AAT Act.

⁴¹ Section 34B of the AAT Act.

⁴² Sections 37 and 38 of the AAT Act.

⁴³ This article of the Convention is relevant in the determination of protection visa applications. Generally speaking, Australia does not owe protection obligations to applicants who, although they may fall within the definition of ‘refugee’ in Article 1A(2) of the Convention, have committed crimes against humanity or peace or serious non-political crimes within the meaning of Article 1F. See *Daher v Minister for Immigration and Ethnic Affairs* (1997) 77 FCR 107, which determined that the AAT is the appropriate body to hear matters of this magnitude.

⁴⁴ See, for example, the Full Federal Court’s comments in *Daher v Minister for Immigration and Ethnic Affairs* (1997) 77 FCR 107 at 110 per Davies, Hill and Heerey JJ, where their Honours stated that:

The Administrative Appeals Tribunal is a high ranking review tribunal, the President of which is a judge of this Court. It is a body which is well suited to dealing with the issues which arise under Art 1F [of the *1951 Convention Relating to the Status of Refugees*]. The [Migration] Act has specified that, for the purposes

and the subsequent expectations of parties and other stakeholders, strengthens perceptions of the AAT's independence and encourages a more 'judicial' approach to its review task.

Moreover, the AAT is situated within the Attorney-General's portfolio and reviews decisions made by a range of departments under some 395 statutes⁴⁵ — a circumstance which inevitably reinforces a perception that the AAT is independent from primary decision-makers. Also relevant is the fact that the AAT is treated as an independent statutory agency for funding and staffing purposes. Like other independent statutory bodies, the AAT receives funding in the form of a one-line appropriation in the federal budget.⁴⁶ In relation to statutory schemes such as the *Public Service Act 1999* (Cth), the AAT is the only one of the four Tribunals to be named as a 'statutory agency' for the purposes of managing the terms and conditions of its staff.⁴⁷

The position of the three specialist Tribunals is very different. Each one is established by portfolio legislation — namely, the *Migration Act 1958* (Cth) (Migration Act) and the *Social Security (Administration) Act 1999* (Cth)⁴⁸ — and each operates within the relevant ministerial portfolio. The SSAT negotiates funding agreements with the Department of Family and Community Services on the basis of an activity-based, outcomes and output costing model, and the Department provides administrative and legal support and advice to the Tribunal under a negotiated Service Level Agreement.⁴⁹ More recently, this has been supplemented by Memoranda of Understanding with the Department and Centrelink. In addition, the SSAT uses Centrelink's mainframe financial

of reviewing such a decision, the Administrative Appeals Tribunal shall be constituted by a presidential member. High quality decision making is sought.

⁴⁵ Administrative Appeals Tribunal, *Annual report 2002–03*, AAT, Sydney, 2003, at 8.

⁴⁶ See, for example, Administrative Appeals Tribunal (1996), above n 22, at 50; Administrative Appeals Tribunal (1999), above n 22, at 54.

⁴⁷ See Schedule 1, cl 41 to 47 to the *Public Employment (Consequential and Transitional) Amendment Act 1999* (Cth), and especially cl 46 which provides that the AAT's Registrar and staff constitute a Statutory Agency for the purposes of the *Public Service Act 1999* (Cth), and that the Registrar is the head of that Statutory Agency. The significance of this is that it enables the Registrar of the AAT to exercise all of the employer powers set out in the *Public Service Act 1999* (Cth), relating to the terms and conditions of AAT staff.

⁴⁸ As noted above, prior to the enactment of this statute, the legislative provisions relating to the establishment and operation of the SSAT were contained in the *Social Security Act 1991* (Cth).

and personnel management information systems in carrying out its administrative functions.⁵⁰

Similarly, the RRT maintains a number of administrative and other links with DIMIA and its Minister. In particular, under the *Public Service Act 1999* (Cth) the Tribunal's Agency Head is the Secretary of the Department.⁵¹ The RRT also shares the Department's personnel and country information management systems. In addition, the migration Tribunals are required to perform their functions and exercise their powers in accordance with any general directions given to them by the Minister.⁵² These factors encourage a perception that the MRT, RRT and SSAT are closely linked to the departments and agencies whose decisions they review.

Moreover, unlike the AAT, the independence of the specialist Tribunals is not reinforced by their court-like status or adversarial modes of operating. On the contrary, the three specialist Tribunals are among the least formal of any Commonwealth administrative tribunal.⁵³ For example, the SSAT's hearing rooms are more like conference rooms than court rooms, departmental decision-makers are not represented, members generally do their own photocopying and most of their own research, and the rules of evidence are not often strictly applied. Also, the fact that many matters are heard by multi-member panels means that hearings are more like discussions or formal meetings than adversarial legal proceedings.

In the migration jurisdiction, only the applicant appears at hearings and the majority of members do not adhere to strict legal processes. While hearing rooms have a similar structure to those at the AAT, representatives have a relatively minor role in the hearing

⁴⁹ Information obtained from the SSAT's website at <http://www.ssat.gov.au/aractiv.pdf> and <http://www.ssat.gov.au/arstruct.pdf>, accessed on 15 May 2000.

⁵⁰ *Id.*

⁵¹ Note that, whereas the AAT is defined as a Statutory Agency for the purposes of the *Public Service Act 1999* (Cth), and its Registrar as the Agency Head (see Schedule 1, cl 41 to 47 to the *Public Employment (Consequential and Transitional) Amendment Act 1999* (Cth), particularly cl 46), there are no equivalent provisions in relation to the RRT, MRT or SSAT.

⁵² Section 499 of the Migration Act.

process. Members also have the ability to make favourable decisions ‘on the papers’⁵⁴ and, in some circumstances, the MRT and RRT may even make adverse decisions without offering an oral hearing.⁵⁵ The specialist Tribunals’ lack of focus on hearings as the culmination of the administrative review process contributes to their less formal, ‘non-adversarial’ approach to review.

Overall, the informality of the specialist Tribunals, as well as the requirement that SSAT and RRT hearings be conducted in private,⁵⁶ can lead to perceptions that specialist merits review is conducted ‘behind closed doors’ and is less than fully independent. These are very different issues to those faced by the AAT.⁵⁷ However, it is not clear whether these differences were taken into account by policy-makers. An examination of the ART proposal and other publicly available material indicates that the Government was more focused on redressing the perceived legalism of the AAT than improving the independence of the specialist Tribunals.⁵⁸

Differences in practice and procedure

A significant challenge — namely, how to strike a balance between the retention of necessary specialisation and the introduction of uniform standards — arose as a result of numerous variations in the practices and procedures followed by the four Tribunals. This point can be demonstrated by describing a selection of these differences.

In relation to applications for review, s 154 of the *Social Security (Administration) Act 1999* (Cth) provides that applicants to the SSAT may apply for review of a decision orally, including by telephone. This procedure stands in contrast to those applicable in

⁵³ An exception to the general view can be seen in Susan Kneebone’s article about the nature of merits review in the RRT — Kneebone, Susan, “Refugee Review Tribunal and the assessment of credibility: an inquisitorial role” (1998) 5 *Australian Journal of Administrative Law* 78-96.

⁵⁴ This means, for instance, that the RRT may overturn a decision to refuse to grant an applicant a protection visa on the basis of the written material before the Tribunal, without gathering evidence at an oral hearing. See s 425(2)(a) of the Migration Act.

⁵⁵ See ss 359 to 359C and 424 to 424C of the Migration Act.

⁵⁶ Section 429 of the Migration Act; s 168(1) of the *Social Security (Administration) Act 1999* (Cth).

⁵⁷ McMillan and Todd, above n 7, at 122.

⁵⁸ See, for instance, Williams, Daryl, Commonwealth Attorney-General, “A step towards better administrative law”, *Canberra Times*, 22 May 1998, 11.

the migration Tribunals where there have always been strict requirements regarding the form of applications for review.⁵⁹

In addition, applications for review to the MRT and RRT must be made within statutorily prescribed, non-extensible time limits.⁶⁰ Similar time limits apply in relation to a range of other procedures under the Migration Act.⁶¹ The administration of these provisions has required the migration tribunals to implement a series of administrative procedures concerning postage and recording of dates, which are regularly adjusted to accommodate changes in statutory provisions and related case law.⁶² There are no equivalent restrictions in matters before the SSAT or AAT.⁶³ While it may be correct to impose time limits in migration matters where applicants may benefit from delay, it is argued that this does not justify preventing tribunals from extending time limits in appropriate cases.

Another procedural variation relates to the ability of the SSAT and AAT to allow persons whose interests are affected by the decision under review to be joined as parties to the

⁵⁹ See, for instance, *Minister for Immigration and Multicultural Affairs v A* (1999) 91 FCR 435; *Phanouvong v Minister for Immigration and Multicultural Affairs* [1999] FCA 1489 (unreported, Finn J, 3 November 1999); *Li Wen Han v Minister for Immigration and Multicultural Affairs* [2000] FCA 421 (unreported, Heerey J, 5 April 2000); *Kundu v Minister for Immigration and Multicultural Affairs* [2000] FCA 560 (unreported, Lindgren J, 3 May 2000); *Yilmaz v Minister for Immigration and Multicultural Affairs* [2000] FCA 906 (unreported, Spender, Marshall and Gyles JJ, 14 July 2000); *Minister for Immigration and Multicultural Affairs v Wen Han Li* [2000] FCA 1456 (unreported, Ryan, Sackville and Emmett JJ, 18 October 2000).

⁶⁰ There are several statutorily prescribed time limits in relation to various applications for review to the MRT and RRT — in relation to the MRT see s 347 of the Migration Act. Applications for review of decisions refusing protection visas must be made within a non-extendable period of 28 days from the date on which the applicant was notified of the primary decision — see ss 66 and 412 of the Migration Act and reg 4.31 of the *Migration Regulations 1994*.

⁶¹ These procedures include judicial review of Tribunal decisions (see Part 8 of the Migration Act, especially ss 477 and 486A); and requests by the Tribunals for information or comment (in relation to the RRT, see ss 424, 424C and 424A of the Migration Act; in relation to the MRT see ss 359, 359A, 359B and 359C). If applicants do not respond within time, the Tribunals may proceed to make an adverse decision ‘on the papers’, that is, without holding a hearing.

⁶² See, for example, *Minister for Immigration and Multicultural Affairs v Harinder Pal Singh* (2000) 171 ALR 53; *Santos v Minister for Immigration and Multicultural Affairs* (1998) 74 FCR 334; *Tabet v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 446; *Shrestha v Minister for Immigration and Multicultural Affairs* [1997] FCA 1051 (unreported, Sackville J, 13 October 1997); *Tjandra v Minister for Immigration and Multicultural Affairs* (1998) 50 ALD 454; *Dharminder Singh v Minister for Immigration and Multicultural Affairs* [1999] FCA 506 (unreported, Hill J, 20 April 1999); *Fernando v Minister for Immigration and Multicultural Affairs* (2000) 97 FCR 407; *Naheem v Minister for Immigration and Multicultural Affairs* [1999] FCA 1360 (unreported, Sundberg J, 1 October 1999); *Sook Rye Son v Minister for Immigration and Multicultural Affairs* (1999) 86 FCR 584; *Wang v Minister for Immigration and Multicultural Affairs* (1997) 71 FCR 386.

⁶³ While ‘date of effect’ rules in the social security jurisdiction may have a punitive effect in some circumstances, applicants are not denied the right to seek merits review after the expiry of a specific period.

review.⁶⁴ There are no equivalent provisions in the Migration Act, even though decisions made by the MRT and RRT have the potential to affect the interests of relatives who may be Australian citizens. Similar comments may be made about the ability of the SSAT to reimburse some costs to applicants, for instance travel and accommodation costs, which are incurred in connection with the review of social security decisions.⁶⁵

In relation to hearings, the AAT and MRT are required to conduct them in public unless they direct otherwise,⁶⁶ whereas hearings before the SSAT and RRT are to be conducted in private.⁶⁷ The reason for this difference lies in the highly sensitive nature of matters before the RRT and SSAT.

A further procedural difference is the availability of ADR processes in each Tribunal. The AAT Act, in recognition of the formality of the AAT's processes, provides applicants with the opportunity to settle matters via ADR processes. After applications have been filed with the AAT, all parties are required to attend at least two compulsory conferences with the aim of negotiating and determining the issues in dispute, and preparing a matter for hearing.⁶⁸ Appropriate cases are channeled through a mediation process which aims to settle matters before they reach a hearing. In contrast, the specialist Tribunals do not rely on ADR techniques as this would arguably duplicate the hearing process which is already informal in nature.

Evolution of a species

The four Commonwealth Tribunals that were to be amalgamated are essentially similar in structure and function. At the same time, there are a number of distinct features characterising the operation of each Tribunal. Many of these distinctions are products of the differing needs of applicants, or of specific political, social or other pressures in the

⁶⁴ See s 156 of the *Social Security (Administration) Act 1999* (Cth); and s 30(1A) of the AAT Act.

⁶⁵ Section 177 of the *Social Security (Administration) Act 1999* (Cth) provides that these costs will be repaid by the Commonwealth.

⁶⁶ Section 365 of the Migration Act; s 35 of the AAT Act.

⁶⁷ Section 429 of the Migration Act; s 168(1) of the *Social Security (Administration) Act 1999* (Cth).

jurisdictions in which each Tribunal operates.⁶⁹ Perhaps the clearest example is the way in which the strict procedures applied by the RRT reflect the political pressures in that jurisdiction and the general mistrust of refugees held by politicians and the Australian community.⁷⁰

Some specialist features enable each Tribunal to be more effective in its specific jurisdiction. For instance, the ability of the SSAT to accept oral applications for review caters to clients who might be disabled, or living in remote parts of Australia. Similarly, the inquisitorial nature of the review process in the RRT is particularly important in the refugee jurisdiction where many applicants have little or no documentary proof of their experiences. The RRT's procedures reflect its experience in conducting reviews in these circumstances, just as the adoption of ADR techniques by the AAT counteracts that Tribunal's tendency towards formality.

Other features are harder to justify, such as the non-extensible nature of the time limits applying in the migration jurisdiction. Such procedures do little to enhance the ability of the MRT and RRT to conduct administrative review. Rather, it is argued they are a reflection of the fact that politicians feel pressured to restrict the access of non-citizens to administrative review.

The relevance of the differences between these four Tribunals is threefold. First, it means that any proposal to amalgamate these Tribunals would have had different implications for the conduct of administrative review in each jurisdiction that was formerly serviced by its own Tribunal. While some specialist features could have been retained following

⁶⁸ Section 34 of the AAT Act. See also Administrative Appeals Tribunal, *General practice direction*, 26 April 1991. This should be read in conjunction with Administrative Appeals Tribunal, *Conciliation conferences direction*, 1 July 1998.

⁶⁹ Neave, Marcia, "Bureaucratic rationality versus individualised justice — new developments in Australian federal administrative review tribunals", paper presented at the *Conference on best practices in administrative justice*, Canadian Council of Administrative Tribunals, Vancouver, October 1999, at 17, cited in Creyke, Robin, "Tribunals: divergence and loss" (2001) 29(3) *Federal Law Review* 403-425, at 422.

⁷⁰ McKinnon, Michael, "Illegal immigrants pose the question: do we act like good global citizens or do we send 'em home?" in *Northern Territory News*, 31 August 2000; McKinnon, Michael, "Delaying tactics" in *Courier Mail*, 17 November 1999; Harris, Tony, "Here to stay" in *Financial Review*, 30 August 2000; Maiden, Samantha, "\$169,000 to fly asylum seekers: 'leaders' of Hedland riots among them" in *The Advertiser*, 24 January 2001; Barton, Mairi, "Boat people push system 'to collapse'" in *The West Australian*, 1 May 2000; McKinnon, Michael,

amalgamation, a certain degree of consistency in procedure and approach is desirable, if not inevitable in an amalgamated tribunal. This necessitated a careful approach to the implementation of amalgamation at Commonwealth level.

Secondly, the differences between the AAT, MRT, RRT and SSAT demonstrate the nature of the challenge that confronted the creators of an ART. An effective ART proposal would have been one that embraced the specialist practices that had evolved in response to the requirements of particular jurisdictions, while discarding those that had been imposed for non-essential reasons. This would have been necessary in order to strike a successful balance between the retention of useful specialisation and the introduction of consistent standards.

Finally, the numerous subtle differences between the four Tribunals gave policy-makers an opportunity to ensure that the standards established in the ART reflected the best, rather than the worst, features of each body (as judged by reference to the values articulated in the Introduction to this thesis). For instance, rather than impacting adversely upon the perceived independence enjoyed by the AAT, an amalgamation could have resulted in the specialist Tribunals improving their reputations in this regard. If these opportunities had been pursued, the potential benefits of an ART would have been maximised.

It is against this background that the following description of the ART proposals can proceed. One of the themes that begins to emerge from this discussion is the importance of a considered approach to tribunal amalgamation that is informed by theory and research.

THE ART PROPOSAL

In putting forward the concept of amalgamation at Commonwealth level in 1995, the Administrative Review Council (ARC) recommended establishing a new tribunal that

“Ruddock to sink court actions by boatpeople” in *Courier Mail*, 15 March 2000; Reed, David, “Lawyers attack brake on refugee tribunal appeals” in *The West Australian*, 29 January 2000.

would combine the *best* features of all existing Commonwealth merits review tribunals.⁷¹ The ARC's Report recommended that an ART be created through a process of amalgamation, although the ARC did not expand on what this process would involve or how it should be approached. Generally speaking, the idea of amalgamation at federal level received wide acceptance. At a political level the ARC's recommendations were initially accepted by the then Labor Government in 1995, and by the Coalition Government in 1998.

It will be argued in Chapter 4 that the key ingredients of optimal tribunal reform are law, context, organisation and people. Chapter 6 builds on the description of the ART proposal set out below to demonstrate the importance of a sound legislative foundation in establishing a successful amalgamated tribunal. Elements of this proposition begin to emerge in the following discussion.

Overview of the ART and CTP Bills

Two statutes were drafted establishing the structure of the ART and setting out the powers and procedures that would be used in its various divisions. The first was the ART Bill which provided generally for the divisional structure, membership and powers of the ART, and which outlined the role of the President, Chief Executive Officer (or Registrar) and portfolio ministers. Further legislation was then developed — the CTP Bill — amending those parts of existing portfolio legislation which conferred review jurisdiction on the four Tribunals that were to be amalgamated. The CTP Bill also had two further purposes:

- to set out the procedures to be followed by particular divisions of the ART where these differed from, or were not specified in, provisions of the ART Bill; and
- to provide transitional arrangements for the transfer of matters from the existing system to the ART.⁷²

⁷¹ Administrative Review Council, above n 12, at x.

⁷² Senate Legal and Constitutional Legislation Committee, *Inquiry into the provisions of the Administrative Review Tribunal Bill 2000 and the provisions of the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000*, Senate Printing Unit, Canberra, 2001, at 2.

The ART Bill bore a number of similarities to the AAT Act and the legislation establishing the NSW ADT and VCAT. In particular, it was intended to be a dedicated foundational statute prescribing the structure and mode of operating of an independent statutory tribunal, and the circumstances in which its decisions could be appealed both internally and to the Federal Court. Like the AAT Act it was intended to replace, the ART Bill provided for the continuation of the Administrative Review Council. Moreover, like the statutes establishing the NSW ADT and VCAT, the ART Bill envisaged that the different divisions constituting the ART would have the ability to exercise different powers and apply different procedures in the review of matters arising in different jurisdictions.

To some extent the ability or inclination of different ART divisions to adopt their own practices and procedures may have been tempered by the dedication of a number of provisions in the ART Bill as ‘core provisions’. Clause 7 of the Bill provided that, as far as possible, other Acts were to be interpreted as not affecting the operation of ‘core provisions’. These were defined in cl 7(3) as those provisions of the ART Bill relating to the structure, membership, staff and administration of the Tribunal, the application of the rules of evidence and procedural fairness, and the making of practice and procedure directions. Other than this, the provisions of the Bill were able to be modified by subordinate legislation, as well as by subsequent statutes.⁷³

A detailed evaluation of the ART and CTP Bills is set out in Chapter 6. However, it is worth noting at this point that, while a number of the proposals reflected in the legislation were problematic, the ART Bill did contain several positive, uncontroversial features. For instance, the main objects of the Bill reflect what are generally accepted to be the objectives of merits review tribunals. These were described in cl 3 as:

- (a) to establish the Administrative Review Tribunal to review administrative decisions where other enactments provide for applications for review to be made; and
- (b) to provide for the Tribunal to review the merits of such decisions independently of the persons or bodies who made them; and

⁷³ See cl 7(2) of the ART Bill.

- (c) to ensure the Tribunal provides an accessible mechanism for reviewing such decisions that is fair, just, economical, informal and quick; and
- (d) to enable the Tribunal to review decisions in a non-adversarial way; and
- (e) to enable the Tribunal, in reviewing decisions, to adopt flexible and streamlined procedures and a variety of processes for resolving issues, including making appropriate use of technology; and
- (f) to improve the quality and consistency of the making of such decisions.

Nonetheless, the discussion in Chapter 6 demonstrates that, even if it contains *some* positive features, foundational legislation that is not of consistently high quality will fail to maximise the potential benefits of an amalgamation process.

The following discussion examines the nature and features of the ART as ultimately proposed in relation to the four themes set out above: the nature and scope of the amalgamation and the commitment to its success; the function and organisational structure of the ART; its powers, processes and procedures; and the features of the ART that are indicative of the organisational culture it would have developed had the proposals been implemented.

The nature and scope of the amalgamation and the commitment to its success

The extent of the similarities between the four Tribunals that were to be amalgamated gave the ART proposals a certain compelling logic that few disputed in theory. However, a number of significant Commonwealth tribunals were not included in the Government's proposal. Most notably the VRB, which conducts *de novo* merits review of decisions made by the Department of Veterans' Affairs, would have continued to operate outside the ART structure. As such, the proposal was more limited in scope than that put forward by the ARC. The reason given for the retention of the VRB as an independent statutory tribunal was that this was "part of the Government's commitment to the veterans community".⁷⁴ The implications of this decision for the credibility of the ART proposal are explored in more detail in Chapter 6.

⁷⁴ Williams, Daryl, Commonwealth Attorney-General, "Second Reading Speech for the *Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000*", Australia, *House of Representatives Debates*, 12 October 2000, 21407-21411, at 21408.

There were several additional ways in which the Government's ART proposals were narrower in scope than they could have been. In particular, little advantage was taken of the opportunity that amalgamation provided to improve those features of the Commonwealth Tribunals that had been criticised in the past. This thesis argues that the legislation that was drafted tended to incorporate the *worst* features of the AAT, SSAT, MRT and RRT and, in some instances, even introduced measures that downgraded the existing tribunal system.

For instance, rather than capitalising on the strengths of 'higher order' tribunals such as the AAT, the Government envisaged that the six divisions of the ART would function as distinct administrative or management units with numerous links to relevant portfolio departments.⁷⁵ Moreover, it was proposed that individual ART divisions be charged with the responsibility of negotiating funding agreements with the relevant portfolio departments.⁷⁶ It was also proposed that portfolio ministers be given the responsibility of recommending appointment of ART members to relevant divisions, and that matters be referred back to the department when new evidence arose in a Tribunal context.⁷⁷ In addition, cl 161(6) of the ART Bill enabled portfolio ministers to issue practice and procedure directions that would have overridden the President's directions in the event of any inconsistency.

These proposals undermined the potential of the ART to increase the effectiveness and independence of the specialist Tribunals it would have replaced. This was particularly disappointing for the migration Tribunals, whose independence has often been questioned on the basis of their close links to DIMIA and its Minister.⁷⁸

⁷⁵ Leon, above n 35, from 2.

⁷⁶ *Ibid.*, at 3.

⁷⁷ *Ibid.*, at 4 and 7; Pidgeon, above n 35, at 8. The latter two proposals subsequently materialised in cll 161 and 124 of the ART Bill.

⁷⁸ A number of commentators have criticised the RRT's lack of independence from government in light of the fact that RRT members are on short-term contracts, that the Minister for Immigration and Multicultural and Indigenous Affairs is responsible for appointing and reappointing members, and that members who set aside too many decisions come under pressure and are not reappointed. See, for instance, Harris, above n 70; Buggins, Anne and Cowan, Sean, "Minister eyes new facilities to hold illegal immigrants", *The West Australian*, 11 February 2001; Haigh, Bruce, "Inhumane approach to victims shames us", *The Australian*, 22 June 2000;

The Government's emphasis on the projected savings that would have been realised through the ART suggests it was more focused on cost-cutting than improving the quality of Commonwealth merits review. The Government claimed its proposal would see a substantial increase in efficiency⁷⁹ and would save between \$28 and \$31 million over four years by "removing duplication of facilities"⁸⁰ and by introducing "cost-effective and non-legalistic procedures".⁸¹ Significant emphasis was placed on the cost savings that would have flowed from the sharing of resources among ART divisions and the introduction of uniform procedures ('streamlining'). There were also unsubstantiated claims that a reduction in the use of multi-member panels would reduce costs.⁸²

In addition, the Government proposed taking advantage of the amalgamation to put into practice principles of outsourcing and contracting out which it has sought to implement across the public sector. According to a government official: "Corporate services [were to] be ... outsourced where that is most efficient and appropriate".⁸³ This would have been most likely in relation to services such as information technology, registry and library support.

These statements suggest that the opportunity to reduce expenditure on tribunals and to pursue policies of contracting out were significant motivations behind the Government's ART proposals. While not necessarily inconsistent with the objective of achieving an

Clennell, Andrew, "Libs' \$520-a-day part-timers", *Sydney Morning Herald*, 19 June 2001. De Maria has also noted the politicisation of merits review in the migration jurisdiction — De Maria, above n 35, at 117.

⁷⁹ Leon, above n 35, at 1.

⁸⁰ Newman, Jocelyn, Commonwealth Minister for Social Security, *News release*, 4 February 1998; Burgess, Verona, "Tribunal to save \$28.5m over 4 years", *Canberra Times*, 10 May 2000, 25.

⁸¹ Williams, Daryl, Commonwealth Attorney-General, *News release: establishment of the Administrative Review Tribunal*, 9 May 2000. See also Swain, Phillip, *Challenging the dominant paradigm: the contribution of the welfare member to administrative review tribunals in Australia*, 1998, unpublished, at 44, 45 to 46 and 221; Newman, above n 80.

⁸² Leon, above n 35, at 8.

⁸³ *Ibid.*, at 2. See also Murphy, Helen, "Administrative review rights and changes to Commonwealth Government service provision" (1998) 2 *Flinders Journal of Law Reform* 235-251; Davis, Glyn; Sullivan, Barbara; and Yeatman, Anna (eds), *The new contractualism?*, CAPSM, Melbourne, 1997; Stewart, Jenny, "Administrative law in the age of the contract", in McMillan, John (ed), *Administrative law under the Coalition Government*, proceedings of the 1997 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1997, 152-155; Schoombee, H., "Privatisation and contracting out — where are we going?" (1998) 87 *Canberra Bulletin of Public Administration* 89-93; Seddon, Nick, "Privatisation and contracting out — where are we going? — Commentary" (1998) 87 *Canberra Bulletin of Public Administration* 94-96; Administrative Review Council, *The contracting out of government services*, AGPS, Canberra, 1997.

optimal amalgamation, the discussion in Chapters 4 and 7 highlights that a sufficient commitment in terms of resources and political will are essential features of an effective amalgamation process. In the case of the ART, there is evidence to suggest that these motivations were a distraction which contributed to the narrow scope of the ART proposals.

The function and organisational structure of the ART

The structure of the proposed ART was basically the same as that recommended by the ARC in its *Better Decisions* Report,⁸⁴ minus the VRB. The Government proposed that the ART be divided into six divisions, with an executive member heading each division. The proposed divisions were:

- the Immigration and Refugee Division;
- the Income Support Division;
- the Taxation Division (including the Small Taxation Claims Tribunal);
- the Compensation Division;
- the Veterans' Appeals Division; and
- the Commercial and General Division, comprising the remaining review jurisdictions.⁸⁵

The ART's divisions would have subsumed the work currently undertaken by the existing Tribunals. For instance the Immigration and Refugee Division and the Income Support Division would have subsumed the work of the MRT and RRT, and the SSAT respectively. In addition, the Veterans' Appeals Division was to hear appeals from the existing VRB on the same basis as currently applies to AAT review of VRB decisions. On its face, the divisional structure proposed in the legislation had the potential to accommodate an appropriate degree of specialisation in the transition to an ART.

⁸⁴ Administrative Review Council, above n 12, at Chapter 8.

⁸⁵ Clause 11 of the ART Bill. Note that cl 11(g) also gave scope for other divisions to be added in the future via amendments to the regulations under the ART Bill. See also Williams, above n 58. See also Campbell, Rod, "Review changes upset lawyers", *Canberra Times*, 20 May 1998; Leon, above n 35, at 2; Senate Legal and Constitutional Legislation Committee, above n 72, at 7.

There were to have been two tiers of review in the ART.⁸⁶ The first tier would have heard applications for review of primary decisions across a range of jurisdictions.⁸⁷ A party aggrieved by a first-tier decision would have had only limited access to second-tier review by a panel of the Tribunal.⁸⁸ Specifically, leave to appeal to the second-tier of the ART would only have been granted where a matter raised a principle or issue of general significance, if the parties to the application agreed that a manifest error had occurred at first-tier review,⁸⁹ or where such an error was clear to the President or executive member hearing the application for second-tier review.⁹⁰ Except in special circumstances, applications for leave to seek second-tier review were to be decided without a hearing.⁹¹ While this could have provided an additional layer of review in a handful of migration matters, the restrictions placed on access to second-tier review represented a downgrading of the two-tier review structure currently available to social security applicants.

In relation to membership structure it was intended that, in addition to a President, the ART would have executive members and members.⁹² Executive members would have been responsible for managing the ART's divisions,⁹³ while cl 16 of the ART Bill would have enabled members to be cross-appointed to more than one division. There may also have been an emphasis on appointing part-time members to the ART,⁹⁴ particularly in bulk jurisdictions such as social security and migration.

⁸⁶ See cl 5 and, more generally, Division 2, Part 4 of the ART Bill.

⁸⁷ Leon, above n 35, at 5.

⁸⁸ Bacon, Rachel, "Tribunals in Australia — recent developments" (2000) 7(2) *Australian Journal of Administrative Law* 69-85, at 72. See also Bayne, Peter, "The proposed Administrative Review Tribunal — is there a silver lining in the dark cloud?" (2000) 7(2) *Australian Journal of Administrative Law* 86-99; Pidgeon, above n 35, at 3.

⁸⁹ Commentators have argued that this condition was unlikely to have been met in many cases — see Senate Legal and Constitutional Legislation Committee, above n 72, at 47.

⁹⁰ Clause 65 of the ART Bill.

⁹¹ Clause 65(6) of the ART Bill. See also Senate Legal and Constitutional Legislation Committee, above n 72, at 12.

⁹² Clauses 12 and 13 of the ART Bill.

⁹³ Clause 14 of the ART Bill. See also Williams, Daryl, Commonwealth Attorney-General, *News release*, 3 February 1998.

⁹⁴ This was the view of several members of the AAT — see Dwyer, Joan *et al*, "Letter to the editor", *Canberra Times*, 2 June 1998. Part-time appointments were certainly envisaged — see cl 17 of the ART Bill.

The Government had also considered how the Tribunal was to be constituted in individual matters. Of particular concern to those with an interest in SSAT review was the proposed presumption against the use of multi-member panels in the ART. The Government intended this presumption to apply across divisions as, in its view, multi-member panels “are being used unnecessarily, increasing cost and delays”.⁹⁵ This proposal was reflected in cl 69(2) of the ART Bill, which stated:

When 2 or 3 members are to conduct the review

- (2) The President is only to direct that 2 or 3 members are to constitute the Tribunal if the President considers that it is appropriate to do so:
- (a) because the review raises a principle, or issue, of general significance; or
 - (b) because one or more of the members have particular expertise of relevance.

Presumably, multi-member panels would have been constituted to hear appeals to the second-tier of the ART or in first-tier matters that had potential precedent value. It is unclear how broadly the requirement in cl 69(2)(b) would have been interpreted. All other matters were to be dealt with by single-member tribunals. This provision, being a ‘core provision’, would have operated across divisions as a presumption against multi-member tribunals.⁹⁶ While single member panels are currently the norm in the migration tribunals, cl 69 would have resulted in the loss of specialist procedures used by the SSAT in processing large numbers of cases.

In terms of staffing structure, there was no mention in the ART proposals of the research support that an inquisitorial tribunal needs in order to properly perform its function. It seems fairly clear that members of the new ART would not have had associates, as this would have reintroduced one of the ‘court-like’ features of the AAT which the proposal was aimed at eradicating.⁹⁷ However, it is unclear whether each division of the ART would have had its own research section, whether ART members in different jurisdictions would have been asked to rely on a central pool of widely talented researchers, or whether the intention was that portfolio departments would provide the necessary support

⁹⁵ Leon, above n 35, at 8.

⁹⁶ Clause 7(3)(c) of the ART Bill stated that Part 5 of the Bill, which included the provisions relating to the constitution of the ART, contained core provisions. This meant that, unless provisions in the regulations or other legislation expressly provided otherwise, they were to be applied across all divisions of the Tribunal.

⁹⁷ Leon, above n 35, at 5; Pidgeon, above n 35, at 5 and 7.

staff. Presumably, there would have been some kind of central research section to meet the needs of members.

In a novel development, there was an emphasis throughout the ART Bill on the freedom of the ART's Chief Executive Officer (CEO) to engage 'consultants' to perform various services on behalf of the Tribunal.⁹⁸ Many of the services mentioned in the Bill would normally be undertaken by tribunal staff or members. For example, cl 48 enabled the CEO to engage consultants on contract to conduct conferences or inquiries. Conferences in the AAT are currently conducted by conference registrars employed by the Tribunal for this purpose. As with many other provisions in the ART Bill, there was a large amount of discretion as to whether or not this opportunity was taken up by the ART.

As for the registry functions of the new Tribunal, it is clear that each division was intended to share the resources of a single ART Registry.⁹⁹ As noted above, this was one means by which the Government proposed to reduce costs.¹⁰⁰ This would have had implications for the success of the ART proposal in reducing complexity and inefficiency — an issue explored in more detail in Chapter 6.

More generally, the ART Bill provided that the CEO of the ART would have been the Tribunal's Agency Head for the purposes of the *Public Service Act 1999* (Cth).¹⁰¹ This would have represented a positive development for existing Commonwealth Tribunals such as the RRT which currently share Agency Heads with their portfolio departments.

Powers, processes and procedures of the ART

There are a variety of options for establishing, implementing and managing the practices and procedures of administrative tribunals. One option is to enable a tribunal to regulate its own procedures. The ART Bill enabled a number of procedures to be developed and

⁹⁸ See cl 4(4) of the ART Bill.

⁹⁹ Pidgeon, above n 35, at 2.

¹⁰⁰ Leon, above n 35, from 2.

¹⁰¹ Clause 47 of the ART Bill.

regulated by the ART itself and by individual divisions in response to their needs.¹⁰² For instance, the Government proposed that ART management would have had the ability to issue practice directions governing the operations of the Tribunal.¹⁰³ Consistent with this proposal, the ART Bill gave the President, executive members and portfolio ministers the ability to issue directions which regulated the practice and procedure of the Tribunal and its divisions. Clause 161 of the ART Bill provided:

161 Practice and procedure directions

Matters covered by directions

- (1) The President, the responsible Minister for a Division or the executive member appointed to a Division may issue directions in writing about any thing required or permitted by another provision of this Act to be dealt with in the practice and procedure directions.

Interestingly, it was the directions issued by portfolio ministers, rather than the President or executive members of the Tribunal, which prevailed in the event of any inconsistencies.¹⁰⁴ This proposal was subject to the criticism that it seriously undermined the Tribunal's independence¹⁰⁵ — an issue that is explored further in Chapter 6.

In addition, the ART Bill gave the Tribunal the power to determine its own practice and procedure in relation to the conduct of individual reviews.¹⁰⁶ Thus, in some respects, the ART would have been able to regulate its own procedures according to its needs, as long as it did not adopt procedures that were inconsistent with the legislation establishing the Tribunal. This would have given different ART divisions some flexibility in how they approached the review of decisions in specific jurisdictions. In particular, it would have enabled divisions to devise procedures that were suited to specific classes of matters.

More generally, the President of the ART was given a lot of power under the ART Bill in relation to the administration and operation of the Tribunal. For instance, the President

¹⁰² Interestingly, a number of submissions to the Senate Legislation Committee inquiry into the ART and CTP Bills expressed concern over the extent of the ART's powers to control the review process — see, for instance, Senate Legal and Constitutional Legislation Committee, above n 72, at 51 to 53.

¹⁰³ Bacon, above n 88, at 73 to 74.

¹⁰⁴ Clause 161(6) of the ART Bill.

¹⁰⁵ See Campbell, above n 85. This comment was based on Campbell's understanding of the original government proposal for an ART.

¹⁰⁶ Clause 108 of the ART Bill.

was responsible for managing the administrative affairs of the Tribunal,¹⁰⁷ and was able to issue directions regulating the ART's operation and procedures.¹⁰⁸ The President also had power to set the terms and conditions on which a member held office in relation to matters not already covered by the Bill.¹⁰⁹ The President had similar powers in relation to the CEO.¹¹⁰

The qualitative research presented in Chapters 7 to 11 indicates the establishment of the ART would have been facilitated by the degree of control given to the Tribunal and its President in managing its own affairs.

Another option in establishing the ART would have been to incorporate a code of procedure into the legislation, setting out the procedures which divisions were to apply in their day-to-day operations. As the following quote indicates, codes of procedure come in a variety of forms:

In its purest form a code of procedure is embodied in a single Act that applies to all administrative tribunals. At the other end of the spectrum is the option of having a set of statutory or administrative guidelines that are used as a model or checklist that is referred to when a new tribunal is being created. The content of the code is also variable. It may state a minimal number of procedural rules (for example, the body shall abide by the rules of natural justice), or go considerably further, defining with particularity the rules governing every aspect of tribunal operations including rule-making.¹¹¹

Australia has not previously had a uniform code of procedure for its merits review tribunals. The establishment of the ART represented an opportunity to introduce a code which retained some flexibility, while at the same time improving on the practices of existing Tribunals.

Originally, the Government claimed that a uniform code of procedure would be incorporated in some way into the ART legislation. In addition to providing the Tribunal with a degree of discretion in regulating its own procedure, the intention was to include

¹⁰⁷ Clauses 4(3) and 32 of the ART Bill.

¹⁰⁸ Clause 161 of the ART Bill. See also cll 68, 107 and 108.

¹⁰⁹ Clause 30 of the ART Bill.

¹¹⁰ Clause 44 of the ART Bill. More generally, cl 50 of the Bill would have enabled the President to delegate certain of his or her powers to a member, the CEO, staff, or a consultant.

¹¹¹ Creyke, above n 9, at 6.

some simple, standard procedures that would apply across divisions. However, in the end the ART and CTP Bills simply adopted many of the diverse provisions that currently regulate the practices and procedures of the specialist Tribunals. Specifically, the Bills incorporated those provisions of the Migration Act and the social security law which regulate the operation of the MRT, RRT and SSAT, with the intention that different procedures apply in different divisions.

Therefore, although Division 4, Part 6 of the ART Bill set out the practices and procedures to be used by the ART, only a small number of these were core provisions.¹¹² Many of the procedures to be followed by individual divisions were contained in the CTP Bill.¹¹³ In particular, Part 1 of Schedule 4 to the Bill had the effect of creating a self-contained code for the conduct of migration and refugee matters. This code would have replaced Parts 4 to 10 of the ART Bill in their entirety.¹¹⁴ Thus, uniform procedures would only have been adopted by the ART in order to fill gaps left in the portfolio statutes applying to specific divisions — in other words, “in the absence of jurisdiction-specific procedures contained in portfolio legislation”.¹¹⁵

This aspect of the ART legislation represented a clear preference for the retention of specialist procedures applied by the existing Tribunals in their respective jurisdictions. Indeed, the Government was adamant that the specialist features of the four Tribunals to be amalgamated, which have developed over time in response to the specific needs of their clients and jurisdictions, would be maintained and reflected in the different divisions of the ART:

The overriding message is that procedures and practices should be tailored to suit individual cases and to suit the needs of particular jurisdictions and their client groups. The Government is fully cognisant of the fact that different Divisions will and should have different procedures, just as the specialist tribunals have evolved procedures that are particularly suited to their caseload.¹¹⁶

¹¹² See cl 7(3) of the ART Bill.

¹¹³ Williams, above n 74, at 21407.

¹¹⁴ *Ibid.*, at 21409.

¹¹⁵ *Id.*

¹¹⁶ Leon, above n 35, at 6.

The primary challenge posed by this approach would have been to manage the logistics of a single body operating under a range of different procedural requirements and time standards. While it is likely that the benefits developed by specialist Tribunals would have been retained, the extent to which the procedures currently used by the four Tribunals differ could have made it difficult for the ART's divisions to operate through a single registry. This issue is explored in more detail in Chapter 6.

Another fundamental issue is whether the ART would have been able to hear appeals 'on their merits' (*de novo*), or whether its review power was to be restricted in some way. In general, the ART would have been responsible for conducting *de novo* review of primary decisions.¹¹⁷ The Tribunal's powers were basically the same as those currently exercised by the RRT, MRT, AAT and SSAT. Clause 133 of the ART Bill would have enabled the ART to affirm, vary, or set aside and substitute the primary decision, or remit a matter to the decision-maker for reconsideration in accordance with directions or recommendations.

However, the details of the Government's proposal sparked debate about the role of 'new evidence' in ART reviews of primary decisions. As a matter of general principle, existing merits review bodies make decisions on the basis of the facts and evidence before them during a review. If the experience of existing Commonwealth tribunals is any guide, in many cases the ART would have learned of factual material not known to the primary decision-maker. A government official stated that in such cases the ART would have started from the position that the matter "should be referred back to the original decision maker for consideration rather than becoming the basis for the review decision".¹¹⁸ The only concession was that the ART member might have been able to take new evidence into account "where this will bring about a more efficient and speedy resolution of the matter and both parties agree [to that course]".¹¹⁹

¹¹⁷ Clause 133 of the ART Bill.

¹¹⁸ Leon, above n 35, at 7.

¹¹⁹ *Id.*

This proposal was reflected in the ART Bill. Clauses 124 and 125 gave the Tribunal the power to request that a decision-maker reconsider their decision in light of new information which had come to light after the primary decision was made, or at any other time. In particular, cl 124 provided:

124 Request to decision-maker to reconsider decision having regard to new information etc.

- (1) If, during the review of a decision, the Tribunal becomes aware that information that it has, or that is given to it, is new information (see subsection (7)), the Tribunal must decide whether to:
 - (a) refer the new information to the decision-maker; and
 - (b) ask the decision-maker to reconsider:
 - (i) in the case of the first-tier review of an original decision—the original decision; or
 - (ii) in the case of the second-tier review of a first-tier decision—the original decision whose review resulted in the first-tier decision (including that original decision as varied by the first-tier decision);having regard to the new information.

While this provision would not have made it compulsory for the ART to refer matters back to the primary decision-maker in all circumstances, the Tribunal would have been required to consider in each case whether to exercise its discretion. This raised concerns about the efficiency of administrative review and the potential frustration caused by endless to-ing and fro-ing between primary decision-makers and the Tribunal. These issues are further explored in Chapter 6. At this point it suffices to note that, far from improving the existing tribunal system or even retaining the status quo, this proposal had the potential to reduce the quality of Commonwealth merits review.

Another controversial aspect of the ART proposal concerned the availability of legal representation to parties appearing before the Tribunal. There were early indications that the Government would seek to reinforce the non-adversarial approach of the ART by restricting legal representation before the Tribunal. According to Campbell, there would have been “a presumption against legal representation”.¹²⁰ This was denied by government officials:

... an assumption of legal representation will not be the starting point. It may well be the outcome in any given case, but that will be because the circumstances warrant such representation rather than because the culture of the Tribunal creates the need or the expectation of representation.¹²¹

Nonetheless, there would have been greater restrictions on legal representation than currently exists in a number of Commonwealth tribunals. As another official stated:

... the Government expects the majority of cases to be heard without the agency being present, as now happens in the SSAT and the immigration tribunals. In these circumstances there should be no need for legal representation for many straightforward cases.¹²²

It was envisaged that portfolio legislation relevant to particular classes of matters would have stated applicable principles, and that the practice directions of the ART would have spelt out the factors to be considered by the Tribunal in deciding whether or not to permit legal representation. Relevant factors would have included the physical, educational, cultural or linguistic status of the applicant, the complexity of the issues to be determined and the possible normative value of the decision.¹²³

Clause 105 of the ART Bill was consistent with these statements. It provided that parties before the ART could choose someone to represent them, provided the Tribunal agreed and the practice and procedure directions did not prohibit it. The way in which this provision was worded envisaged that practice directions could have been made preventing applicants from having representation. No doubt it would have been more difficult for applicants to obtain leave to be legally represented before the ART than is

¹²⁰ Campbell, above n 85; see also Pidgeon, above n 35, at 5 to 6.

¹²¹ Leon, above n 35, at 7.

¹²² Pidgeon, above n 35, at 6.

¹²³ *Id.*

currently the case before the AAT.¹²⁴ The implications of this are further explored in Chapter 6.

Features indicative of organisational culture

Statements by the Attorney-General regarding the nature of the ART displayed a definite emphasis on reducing “excessive legalism” and formality.¹²⁵ According to the Attorney-General, there would have been:

... [an] onus on Tribunal members to be proactive and interventionist in the way they handle cases. It will require active questioning by the presiding member to obtain the facts relevant to the issues. This in itself will encourage a non-adversarial approach and help avoid any tendency to move down a quasi-judicial path.¹²⁶

Consistently with this emphasis, cll 90 to 92 of the ART Bill would have required the Tribunal to comply with the rules of procedural fairness but not with the rules of evidence, and to operate with as little technicality and formality as possible.

It would also have been consistent with this emphasis if the legislation establishing the ART had encouraged the use of ADR techniques such as mediation, conciliation and neutral evaluation. While not expressly addressed in the ART Bill, cl 110 did permit the Tribunal to require participation in conferences or “some other process”. Beyond this, there is little to indicate the extent to which ADR processes would have been used by the ART had it commenced operation. Although cl 110 would have provided scope for individual divisions to apply these techniques, the legislation certainly did not encourage their use.

A further feature of the ART legislation that was not necessarily consistent with the Government’s purported emphasis on avoiding excessive legalism were the provisions relating to the participation of departmental decision-makers in reviews before the Tribunal. Relevantly, cl 84 provided that the participants in a review were to be the applicant and the decision-maker. Admittedly, cl 85 provided that decision-makers could

¹²⁴ Senate Legal and Constitutional Legislation Committee, above n 72, at 60 to 61.

¹²⁵ See, for instance, Williams, above n 58.

¹²⁶ *Id.*

decline to be participants. There was also scope for heads of particular agencies (such as the head of DIMIA) to make a general statement that decision-makers in their agency would not participate in the review of all decisions, or in reviews of specified classes of decisions.¹²⁷ However, generally speaking, the legislation took as its starting point the proposition that decision-makers would participate or be represented in matters before the ART.

The application of these provisions would have represented a significant departure from the way in which merits review is currently conducted in tribunals such as the RRT, MRT and SSAT. As a general rule, decision-makers from the departments or agencies whose decisions are reviewed do not appear to put their case. Again, this aspect of the legislation represented a downgrading of the arrangements currently in place. This thesis argues that these provisions would have encouraged the development of an adversarial culture within the new ART, thereby prolonging the cost and speed of decision-making.

Other provisions may have been more successful in encouraging the development of a non-legalistic culture within the new Tribunal. For instance, the ART Bill contained provisions relating to the management of members' performance. Clause 24 of the ART Bill would have required each member, other than the President, to enter into a performance agreement with the President or an executive member. Members were able to be removed from office for failure to enter a performance agreement, or for breaching the code of conduct established under the ART Bill.¹²⁸ These provisions were arguably aimed at widening the distinction between tribunal members and tenured judicial officers.

This development would have altered the situation pertaining in existing Commonwealth tribunals, where members may only be removed from office on the grounds of proved misbehaviour, physical or mental incapacity, bankruptcy, unapproved absence, or some pecuniary conflict of interest.¹²⁹ Apart from the ability of the heads of tribunals to promote some kind of performance review system, which cannot result in removal from

¹²⁷ Clause 85(2)(b)(ii) of the ART Bill.

¹²⁸ Clause 28 of the ART Bill. See also Senate Legal and Constitutional Legislation Committee, above n 72, at 9.

office, there has traditionally been no way of regulating member performance that is below standard or incompetent.

Moreover, there was to be no emphasis on legal skills in the selection processes undertaken for ART members, although lawyers would have been appointed.¹³⁰ Even in relation to the role of President: “[t]he proposal is that the President be selected ‘on the basis of professional and management expertise...’”; there was to be no requirement that, as in the AAT, the ART President be a judge of the Federal Court.¹³¹ There were also indications that the skills the Government would look for in ART members would be those possessed by primary decision-makers. For instance, one official commented:

It is not unreasonable to expect that, for many decisions, the reviewer might appropriately have a similar knowledge-base and background to the original decision-maker. ... the Government does not believe that lawyers are needed to decide all the many and varied administrative matters that will come before the Tribunal.¹³²

The emphasis placed on having non-legal ART members would have had implications for the development of a broad knowledge-base within the Tribunal, particularly in the generalist divisions where general legal skills are important.¹³³ These issues are explored further in Chapter 6.

CONCLUSIONS

The task of establishing a Commonwealth ART posed a number of challenges to policy-makers. The numerous differences that had evolved in the four Tribunals to be amalgamated required difficult choices to be made about which features to retain and which to discard. The wrong choices would have resulted in an amalgamated tribunal that displayed the worst features of the system it replaced, or that downgraded the quality of administrative review compared to that which had existed previously. This

¹²⁹ Sections 403 and 468 of the Migration Act; s 13 of the AAT Act; cl 17 of Schedule 3 to the *Social Security (Administration) Act 1999* (Cth).

¹³⁰ Pidgeon, above n 35, at 5.

¹³¹ It was widely assumed that the Government did not intend to appoint a judicial officer to head the ART — see Dwyer, Joan *et al*, above n 94. However, government officials stated only that “the President will not *need to be* a judge (emphasis added)” — Pidgeon, above n 35, at 5.

¹³² Leon, above n 35, at 5.

demonstrates the potential for amalgamation to be a double-edged sword — in other words, a process that can facilitate beneficial tribunal reform, or undermine hard-won gains.

The above discussion highlighted a number of significant differences between the ART and CTP Bills on the one hand, and the legislation conferring jurisdiction on the AAT, SSAT, MRT and RRT on the other. In particular, the Government's ART proposal diverged in several significant respects from the processes developed by the smaller, specialist Tribunals in reviewing administrative decisions in bulk jurisdictions like social security and migration. While a handful of these differences would have delivered beneficial reforms or retained existing specialisation, many more would have downgraded the processes currently in place at federal level. Rather than imposing higher standards of performance across the ART, the approach more often taken was to adopt the worst features of existing Tribunals or to propose new developments that would have undermined current standards.

The implications of the ART as proposed, and the importance of sound legislation in achieving optimal tribunal reform, are further highlighted by the analysis of the ART and CTP Bills undertaken in Chapter 6.

In the meantime, Chapter 3 will provide an overview of developments in other common law jurisdictions, to demonstrate the alternative approaches to amalgamation that have been pursued by policy-makers with varying degrees of success. This discussion, in combination with the material set out above, provides an important backdrop to the analysis in subsequent Chapters of the dangers of pursuing tribunal reform in the absence of adequate research and a sound theoretical understanding of its impact.

The solution proposed in this thesis is to develop and implement amalgamation proposals within a coherent theoretical framework that defines the key factors likely to determine their success. The hypothesis developed in Chapter 4 is that law, context, organisation and people are the key ingredients of optimal tribunal reform. As Chapters 2 and 3

¹³³ Bayne, above n 88, at 93.

demonstrate, conscious consideration of these factors is noticeably absent from most amalgamation processes that have been pursued in Australia and the United Kingdom to date.

CHAPTER 3: THE GROWING TREND TO AMALGAMATE TRIBUNALS

Apart from the ART, the most significant recent developments to occur in Australia in relation to tribunals have taken place in Victoria and NSW during the past five years. Both States have pursued policies of amalgamation, bringing together tribunals from such different jurisdictions as equal opportunity and town planning, and bodies with such diverse procedures as disciplinary tribunals and guardianship boards.

After describing the nature of the amalgamations in NSW and Victoria, this Chapter goes on to examine similar developments currently taking place in WA and the United Kingdom, and being considered in Tasmania and Canada. The proposals being discussed in those jurisdictions reinforce the proposition that there is a trend throughout common law countries to amalgamate specialist tribunals to form larger, generalist bodies. These developments highlight the problem addressed by this thesis — namely, that amalgamations are being pursued without understanding what makes them successful.

Thus, the remainder of this thesis will develop and test a set of ingredients that can be used by policy-makers in better ensuring the success of their amalgamation proposals. It is argued that the usefulness of these ingredients in predicting and controlling the outcome of tribunal amalgamations is validated by the analysis of the federal, NSW and Victorian amalgamation experiences undertaken in Chapters 6 to 11.

RECENT DEVELOPMENTS IN NSW

There have been significant developments regarding tribunals in NSW over the past five years.¹ In particular, the Bill for the *Administrative Decisions Tribunal Act 1997* (ADT Act) created an ADT which commenced operations on 6 October 1998.² As noted in the Introduction, the NSW ADT is the product of the amalgamation of a number of smaller, specialised tribunals and bodies which operated in a range of jurisdictions. In addition, a

¹ See Anderson, Jill, “Something old, something new, something borrowed ... the New South Wales Administrative Decisions Tribunal” (1998) 5 *Australian Journal of Administrative Law* 97-112.

² Administrative Decisions Tribunal, *Annual report 1999–2000*, ADT, Sydney, 2000, at 4.

significant feature of the ADT was the establishment of a General Division with responsibilities for administrative review of a range of government decisions. Prior to this there was:

... some limited merits review available in relation to certain specific decisions through specialist bodies but for the most part administrative decisions [were] only amenable to judicial review through the Supreme Court.³

Thus, in many ways the creation of the ADT represented the implementation of recommendations by the NSW Law Reform Commission from 1973 that public administration in NSW be made more accountable, and that an administrative review tribunal be constituted for this purpose.⁴

The statute establishing the ADT displays many similarities to the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) in terms of structure and content. Like the Commonwealth AAT, the ADT is a generalist Tribunal which has the capacity to employ a range of ADR and adversarial techniques. Similarly, the ADT has a hierarchical membership structure reflecting its status as the peak administrative review body in its jurisdiction. However, it is clear that the way in which the ADT was created — namely, through bringing together a number of specialist tribunals with diverse functions, cultures and stakeholders — has had a significant impact on the nature and operation of this Tribunal. The following exploration of the key features of the ADT sets the scene for further evaluation of the success of this amalgamation process in Chapters 7 to 11.

The nature and scope of the amalgamation and the commitment to its success

There was not the same compelling logic to the way the ADT was conceptualised and implemented as was manifest in the Commonwealth ART proposal. That is, rather than amalgamating a number of tribunals that were already very much alike, the creation of

³ Whelan, Paul, Minister for Police, “Second Reading Speech for the *Administrative Decisions Tribunal Bill 1997*”, NSW, *Legislative Assembly Debates*, 29 May 1997, 9602-9606, at 9603.

⁴ This recommendation was included in the NSW Law Reform Commission’s report entitled *Report on the right of appeal from administrative tribunals and offices* — see O’Neill, Nick, “Tribunals — they need to be different”, a paper presented at the *Fourth AIJA tribunal’s conference*, conference by the Australian Institute of Judicial Administration, Sydney, 8 June 2001, at 1. See also Whelan, above n 3, at 9602 to 9603; Ellis, Elizabeth, “Promise and practice: the impact of administrative law reform in New South Wales” (2002) 9(3) *Australian Journal of Administrative Law* 105-124, at 106.

the ADT involved the merger of specialist tribunals with such different functions as the Community Services Tribunal, the Legal Services Tribunal and the Equal Opportunity Tribunal, all of which operated in NSW prior to the amalgamation. The challenges associated with bringing together bodies with distinct cultures and ways of operating are further explored in Chapters 9 to 11.

Interestingly, this feature of the process did not impact as much on the success of the ADT as the fact that a number of significant tribunals operating in NSW were not included in the amalgamation. Most notable among these were the Guardianship Tribunal, the Mental Health Review Tribunal, the Consumer and Fair Trading Tribunal, and the Residential Tenancies Tribunal.⁵ While the stated policy of the NSW Government was that successive jurisdictions would be incorporated into the ADT over time, this has not resulted in mergers with any of the high profile Tribunals just mentioned. Nor have new rights of administrative review been created on any significant scale.⁶ Indeed, the Government has been the subject of sustained criticism over its failure to maintain the ‘original impetus’ which led to the establishment of the ADT in 1998.⁷

As a result, the workload of the ADT is very small compared to that of other tribunals, such as VCAT in Victoria. For instance, in the year 2000–2001 the ADT had a caseload of 674,⁸ while VCAT’s caseload was 91,482.⁹ This difference can be largely explained by the fact that ‘bulk’ jurisdictions — such as residential tenancies and guardianship —

⁵ The latter two Tribunals were amalgamated in February 2002 to form the Consumer, Trader and Tenancy Tribunal (CTTT).

⁶ Ellis, above n 4, at 105 and 108 to 109.

⁷ See, for example, Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on the jurisdiction and operation of the Administrative Decisions Tribunal*, NSW Parliament, Sydney, 2002, at 20. The Committee’s recommendation that legislation be “brought forward to merge separate tribunals with the ADT” has not yet been acted upon — *ibid.*, at 21.

⁸ This figure is the sum of the total number of disposals of each division of the ADT reported in the 2000–2001 Annual Report. The figure includes 45 decisions that were made by the ADT Appeal Panel during this period. Administrative Decisions Tribunal, *Annual report 2000–2001*, ADT, Sydney, 2001, at 33 to 37. Note that the workload of the Tribunal has increased since the qualitative research undertaken for this thesis was conducted. In 2001–2002 a total of 756 matters were filed across the ADT as a whole (including with the Appeal Panel) — Administrative Decisions Tribunal, *Annual report 2001–2002*, ADT, Sydney, 2002, at Appendix E.

⁹ Victorian Civil and Administrative Appeals Tribunal, *2000–01 Annual report*, VCAT, Melbourne, 2001, at 2.

have not been incorporated into the ADT.¹⁰ The Tribunal's relatively small workload is reflected in the size of its budget. In 2000-2001 the ADT had a budget of around \$1.9 million,¹¹ whereas VCAT's budget for the same period was nearly \$20 million.

Also relevant to the scope and nature of the amalgamation in NSW is the fact that the NSW Attorney-General's Department retained a significant role in the day-to-day operations of the Tribunal. For instance, at the time research was conducted, the Department had the ability to terminate staff whereas the President of the ADT did not. Similarly, the Department retained a role in staff selection processes.¹² This may be contrasted with the independence of other tribunals, such as the Commonwealth AAT and VCAT, in regulating their own day-to-day operations and administration.

It is argued that the extent of the amalgamation proposal in NSW reflected the degree of political commitment to the process of tribunal reform in that State. It is revealing that further tribunal reform has been taking place in NSW separately to the establishment and operation of the ADT. Most significantly, the Fair Trading Tribunal and the Residential Tenancies Tribunal were amalgamated in February 2002 to form the Consumer, Trader and Tenancy Tribunal (CTTT). The implications of these developments for the status and effectiveness of the ADT are highlighted in the qualitative research presented in Chapters 7 to 11.

The function and organisational structure of the ADT

The ADT comprises six divisions:

- the Community Services Division;
- the Equal Opportunity Division;
- the General Division;

¹⁰ Note that the CTTT alone finalised 68,461 matters in the period 2001 to 2002 — Consumer, Trader and Tenancy Tribunal, *2001–2002 Annual report*, CTTT, Sydney, 2002, at 9.

¹¹ Administrative Decisions Tribunal, above n 8, at 31.

¹² ADT Registry Staff Member 1 at paragraphs 25 to 33. Further detail regarding the methodology for the qualitative research set out in Chapters 6 to 10 is contained in Chapter 4. At this point, it should be noted that the references to paragraph numbers throughout this thesis refer to transcripts of interviews prepared by the author. A

- the Legal Services Division;
- the Revenue Division;¹³ and
- the Retail Leases Division.¹⁴

As at May 2002, the NSW Parliament had also passed legislation to establish an Occupational Regulation Division, however a commencement date has not yet been announced.¹⁵

Most of these Divisions represent the smaller, specialist tribunals that were amalgamated to form the ADT. For instance, the role of the Community Services Division is to review decisions and undertake functions as set out in the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW) and the *Youth and Community Services Act 1973* (NSW). The Equal Opportunity Division carries out functions relating to the *Anti-Discrimination Act 1977* (NSW); the Legal Services Division carries out functions relating to the *Conveyancers Licensing Act 1995* (NSW), the *Legal Profession Act 1987* (NSW) and the *Public Notaries Act 1997* (NSW); and the Retail Leases Division carries out functions under the *Retail Leases Act 1994* (NSW). The General Division reviews decisions made under a wide range of statutes.¹⁶

Like the proposed ART, an Appeal Panel of the ADT may be constituted by the President for the purposes of reviewing decisions made by the Tribunal at first instance.¹⁷ Another structural feature of the ADT not found in other tribunals is the Rule Committee. The ADT Act gives this Committee the function of making rules about Tribunal practice and

more comprehensive breakdown of the interviews conducted for this thesis and the relevant characteristics of each interview subject is at Appendix B.

¹³ The Revenue Division commenced operation on 2 July 2001 — *Administrative Decisions Tribunal Legislation Amendment (Revenue) Act 2000* (NSW), cited in Ellis, above n 4, at 107.

¹⁴ Schedule 1 to the *Administrative Decisions Tribunal Act 1997* (NSW); *Administrative Decisions Tribunal Legislation Further Amendment Act 1998* (NSW). In addition, see generally Administrative Decisions Tribunal, above n 8, at 3.

¹⁵ Administrative Review Tribunal Taskforce, *Western Australian Civil and Administrative Review Tribunal Taskforce report on the establishment of the State Administrative Tribunal*, Perth, May 2002, at 51; http://www.lawlink.nsw.gov.au/adt.nsf/pages/adt_1, accessed on 13 December 2003.

¹⁶ Schedule 2 to the ADT Act.

¹⁷ Section 24 of the ADT Act. See also Chapter 7, Part 1 of the Act more generally.

procedure.¹⁸ Section 90(2) provides that the Committee may make rules with respect to the commencement of proceedings in the Tribunal, the practice and procedure to be followed in proceedings or in mediation, and the functions of officers under the ADT Act. The legislation requires that people representing the community and other special interests be included on the Rule Committee and its sub-committees, and that a public consultation process be followed before rules are gazetted.¹⁹

In addition, the ADT has a central registry which takes responsibility for the administrative tasks arising at each stage of the decision-making process.²⁰ In keeping with the workload of the Tribunal, the ADT Registry is relatively small and, consequently, has fewer resources at its disposal. As at 2001 when much of the qualitative research for this thesis was undertaken, the ADT Registry was staffed by approximately 11 people who were grouped into small teams.²¹

The membership structure outlined in Part 2 of the ADT Act is similar to that outlined in the AAT Act. The Tribunal consists of a President, Deputy Presidents, non-presidential judicial members and non-judicial members.²² There are different qualification requirements for each level of membership.²³ Presidential members are appointed by the Governor, while non-presidential members are appointed by the relevant minister.²⁴ There is significant scope for judges and magistrates to be appointed to the ADT. For instance, s 14 of the ADT Act enables judicial officers to act as members of the Tribunal

¹⁸ Section 90 of the ADT Act.

¹⁹ See ss 97(2)(d) and 98 of the ADT Act.

²⁰ This includes tasks such as processing applications on lodgement, listing hearings, managing files and electronic case management systems, and processing decisions that the Tribunal makes.

²¹ ADT Registry Staff Member 1 at paragraph 95.

²² Section 12 of the ADT Act.

²³ For instance, the President must be a judge of the NSW District Court, the Industrial Relations Commission, the Land and Environment Court, or the Supreme Court of NSW. Deputy Presidents and non-presidential judicial members must be judicial officers or legal practitioners of at least seven years' standing. The Act also provides for the appointment of non-judicial members with special knowledge or skill relevant to an area within the Tribunal's jurisdiction — s 17 of the ADT Act.

²⁴ Section 13 of the ADT Act.

in particular proceedings.²⁵ The fact that a number of ADT members have the status and employment conditions of judges reinforces the perception of independence associated with the Tribunal.²⁶

A striking feature of the ADT's membership structure is the fact that, as at 2002, only two of its members — the President and one Deputy President — were appointed on a full-time basis. The rest of the ADT's membership — over 130 members — were appointed on a part-time basis.²⁷ In addition, at the time data were collected, it was unusual for ADT members to be cross-appointed to more than one division. Out of over 130 members appointed in 2000–2001, less than 25 were cross-appointed.²⁸ In practice, the number of members who regularly sit in more than one division was reported to be even lower:

It's not very common. There's probably four or five members who would sit [in] more than one division — that's all.²⁹

In terms of function, unlike any tribunal at Commonwealth level, the ADT has an original decision-making function³⁰ as well as a review function.³¹ For instance, while many of the matters dealt with by the General Division involve review of government decisions,³²

²⁵ The indications are that these provisions are used in practice — the 2000–2001 Annual Report lists two judges and a number of judicial members among the membership of the ADT. See Administrative Decisions Tribunal, above n 8, at Appendix B.

²⁶ Concerns about a lack, or even a perceived lack, of independence were not raised by any of the subjects interviewed for the purpose of this thesis.

²⁷ Administrative Decisions Tribunal, above n 8, at 27 to 30; ADT Registry Staff Member 1 at paragraph 115.

²⁸ Administrative Decisions Tribunal, above n 8, at 27 to 30. ADT management has reported that this number has since grown to 28, and that many cross-appointed members are actively used.

²⁹ ADT Senior Member 2 at paragraph 207. These statistics were current at the time the author conducted qualitative research with ADT subjects in 2001 and 2002. Comments since provided by ADT management indicate that ADT members who are cross-appointed are now used more regularly.

³⁰ Section 41 of the ADT Act. An original decision is a decision of the Tribunal made in relation to a matter over which it has jurisdiction under an enactment to act as the primary decision-maker. An example of the original jurisdiction of the Tribunal is that which it exercises under Part 7A of the *Anti-Discrimination Act 1977* (NSW). Other examples are mentioned in Schedule 2 to the ADT Act. As discussed in Chapter 1, tribunals operating at State level are able to undertake both original decision-making and review functions as these bodies are not affected by the separation of powers doctrine in the federal Constitution.

³¹ Section 47 of the ADT Act. See more generally Chapter 4, Part 3 of the Act. A reviewable decision is a decision of an administrator that the Tribunal has jurisdiction under an enactment to review. Examples of the review jurisdiction of the Tribunal are mentioned in Schedule 2 to the ADT Act.

³² Like the Commonwealth AAT, when reviewing a decision the ADT has the power to affirm, vary or set it aside — s 63 of the ADT Act. *Cf s 43 of the Administrative Appeals Tribunal Act 1975* (Cth).

the Legal Services and Equal Opportunity Divisions have original decision-making functions.

Powers, processes and procedures of the ADT

In general, the legislative scheme governing the operation of the ADT gives its various divisions enough flexibility to maintain the specialist procedures that each had developed when operating as independent tribunals.³³ Schedule 2 to the Act sets out the enactments that confer jurisdiction on different divisions of the Tribunal. Many of these statutes contain procedures that various divisions are to apply in undertaking their decision-making functions in different jurisdictions. For instance, s 32 of the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW) contains additional powers that the Community Services Division may use when hearing matters under that Act. Similarly, s 168 of the *Legal Profession Act 1987* (NSW) provides that:

For the purpose of conducting a hearing into a question of professional misconduct, the Tribunal is to observe the rules of law governing the admission of evidence despite any contrary provisions of section 73 (Procedure of the Tribunal generally) of the *Administrative Decisions Tribunal Act 1997*.

In addition, the ADT Act contains many provisions designed to address issues of practice and procedure. These are contained in Chapter 6, Parts 1 and 2 of the Act. They cover matters such as the opportunity for parties to make submissions, preliminary conferences, public hearings, the slip rule and costs.

While other aspects of the ADT's procedure are largely within its discretion,³⁴ the Tribunal is bound to comply with certain standards and guidelines regarding the way in which it conducts matters. For instance, there is a requirement that the Tribunal act according to equity, good conscience and the substantial merits of a case without regard to technicalities or legal forms.³⁵ The Tribunal as a whole is also required to act as quickly as is practicable, and to ensure that all relevant material is disclosed so that it can

³³ See Schedule 2 to the ADT Act, which sets out the composition and functions of the Tribunal's different divisions.

³⁴ Section 73 of the ADT Act.

³⁵ Sub-section 73(3) of the ADT Act.

determine all of the relevant facts in issue in any proceedings.³⁶ Thus, there is a mixture of standardised and specialist procedures provided for in the ADT Act.

In terms of function, there are a number of interesting differences between the ADT Act and the legislation establishing older tribunals, such as the Commonwealth AAT. As well as incorporating recent developments in ADR, the way in which the ADT Act deals with government policy reflects a trend that appears to be developing in a number of jurisdictions. Section 64 of the ADT Act states that:

In determining an application for a review of a reviewable decision, the Tribunal must give effect to any relevant Government policy in force at the time the reviewable decision was made except to the extent that the policy is contrary to law or the policy produces an unjust decision in the circumstances of the case.

This provision reflects the way in which cases such as *Drake* have required the Commonwealth AAT to treat government policy.³⁷

In relation to its administrative review function, s 63 of the ADT Act sets out the scope of appeals to the ADT. The Tribunal must decide what the correct and preferable decision is, having regard to the material before it, including:

- (a) any relevant factual material,
- (b) any applicable written or unwritten law.³⁸

This gives the ADT broad scope to conduct *de novo* review of administrative decisions, and enables the Tribunal to take into account changes in the facts or law which occurred after the original decision was made. Section 63(3) gives the ADT the power to set aside the reviewable decision and substitute its own decision — a power which is consistent with conducting *de novo* review. These features appear to be modelled on the Commonwealth AAT Act.

³⁶ Sub-sections 73(5)(a) and 73(5)(b) of the ADT Act.

³⁷ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 per Bowen CJ and Deane J, at 420 and following.

³⁸ Sub-section 63(1) of the ADT Act.

Features indicative of organisational culture

There are a number of features of the ADT Act that suggested the Tribunal would tend towards an adversarial, as opposed to inquisitorial, style of operating. While s 73 of the Act requires the ADT to ensure that all relevant material is disclosed in the course of any proceedings before it³⁹ — a provision which would suggest an inquisitorial style of operating — other features of the legislation had the potential to work against this. These included the appointment of significant numbers of judicial members and the potential for close association with various NSW courts.

On the other hand, there are a number of provisions in the ADT Act that encourage greater informality. Part 4 of the Act contains innovative provisions encouraging the use of ADR, and featuring several new techniques not previously used by most tribunals. Part 4, Chapter 6 of the ADT Act is dedicated to the definition and implementation of certain ADR processes: specifically, mediation and neutral evaluation. There is also provision for the ADT to use assessors to conduct inquiries and assist members in hearings.⁴⁰ The fact that ADR has a central place within the statutory scheme establishing the ADT represents a shift in thinking since the Commonwealth AAT Act was enacted in 1975. As well as being more detailed and covering more issues raised by the use of ADR procedures, the ADT legislation reflects a more accepting, if prescriptive, approach towards the use of non-adversarial procedures in administrative tribunals than is found in legislation establishing any Commonwealth tribunal.

The ADT Act deals comprehensively with the issue of legal representation for applicants. Section 71 provides that parties may appear without representation, or may be represented by an agent. There are special provisions regarding the appointment of agents for incapacitated parties.⁴¹ Although there is no presumption one way or the other about whether a party may be represented, under s 71(2) the Tribunal may:

... order that parties may not be represented by an agent of a particular class for the purpose of the presentation of oral submissions.

³⁹ Sub-sections 73(5)(a) and 73(5)(b) of the ADT Act.

⁴⁰ See Chapter 2, Part 5 of the ADT Act.

⁴¹ See ss 71(1)(c), 71(4) and 71(7) of the ADT Act.

Section 71(3) lists the factors that the Tribunal must take into account when exercising its discretion under s 71(2). These include the complexity of the matter, whether it involves legal issues, and the capacity of parties to present cases by oral submission. The way in which these provisions have been applied in the different divisions of the ADT, each of which has largely retained its own culture following amalgamation, is further explored in the qualitative research presented in Chapters 7 to 11.

Conclusions on the ADT

As the above discussion highlights, the ADT Act contains a number of interesting innovations hitherto untested in other tribunals. In addition, there have been indications that the ADT Act may evolve in new directions in the future. On the Second Reading of the *Administrative Decisions Tribunal Bill 1997* (NSW), Mr Paul Whelan, then a government Minister, flagged the possibility of conferring on the Tribunal “concurrent jurisdiction with the common law forms of judicial review”.⁴² While this would not be unconstitutional in a State jurisdiction, it would certainly raise the issue of whether, as a matter of policy, it is desirable to blur the boundaries currently separating tribunals and courts. However, this is likely to remain a moot point, as the NSW Government’s spotlight appears to have long since shifted away from the ADT.

More generally, the way in which the amalgamation in NSW was conceived and executed contains a number of valuable lessons for policy-makers in other common law jurisdictions. This is particularly so when compared to the amalgamation process in Victoria. The different approaches taken in each State — and the distinctly different outcomes in the success of each Tribunal — demonstrate the importance of taking a careful and considered approach to the implementation of an amalgamation process. The following section describes the Victorian experience in more detail.

RECENT DEVELOPMENTS IN VICTORIA

As in NSW, the tribunal system in Victoria has recently undergone a major overhaul. The *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (VCAT Act) created a

new ‘super-Tribunal’ called VCAT, which commenced operations on 1 July 1998. In total, 15 boards and tribunals from a range of jurisdictions were amalgamated to form VCAT.⁴³

The Victorian Government’s stated reasons for creating VCAT included improving access to justice in regional areas, encouraging the use of ADR processes, and improving efficiency.⁴⁴ Like the ADT and the proposed ART, VCAT and many of its core functions are established under the VCAT Act, while the jurisdiction exercised by particular ‘lists’⁴⁵ is conferred by portfolio legislation. Yet despite extensive similarities in their enabling statutes, there are significant differences in the way that amalgamation was approached in Victoria, the implications of which are analysed in detail in Chapters 7 to 11.

The nature and scope of the amalgamation and the commitment to its success

It appears that all significant tribunals operating in Victoria were amalgamated to form VCAT. These included the Victorian Administrative Appeals Tribunal (which also heard planning matters), the Guardianship Board and the Residential Tenancies Tribunal.⁴⁶ Thus, the amalgamation process in Victoria was on a significantly larger scale than that proposed at federal level and implemented in NSW.⁴⁷

⁴² Whelan, above n 3, at 9605.

⁴³ Vines, Greg, *Report of the review of administrative appeal processes*, Office of the State Service Commissioner, Hobart, 2003, at 27.

⁴⁴ Wade, Jan, Victorian Attorney-General, “Second Reading Speech for the *Victorian Civil and Administrative Tribunal Bill 1998*”, Victoria, *Legislative Assembly Debates*, 9 April 1998, 972-975, at 973; Administrative Review Tribunal Taskforce, above n 15, at 46 to 47.

⁴⁵ Different parts of VCAT are referred to as ‘lists’ rather than ‘divisions’, as in the ADT and the proposed federal ART.

⁴⁶ Transitional provisions relating to, for instance, the abolition of the Victorian Administrative Appeals Tribunal and the creation of VCAT were contained in the *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998* (Vic).

⁴⁷ See Bacon, Rachel, “Tribunals in Australia — recent developments” (2000) 7(2) *Australian Journal of Administrative Law* 69-85; Pizer, Jason, “The VCAT — a practical overview”, a paper presented at *Administrative Law Session W*, conference by the Law Institute of Victoria, Melbourne, 11 September 1998.

Due to the extensive scope of the amalgamation, VCAT has one of the largest caseloads of any tribunal in Australia. In the year 2000–2001 VCAT’s caseload was 91,482.⁴⁸ Certainly, the volume of residential tenancies matters has a significant impact on VCAT’s overall workload — this List finalised a total of 71,621 matters in 2000–2001.⁴⁹ In order to maintain this caseload, VCAT had 43 full-time members (including judicial and senior members) during this period, as well as 136 part-time (or sessional) members.⁵⁰

In relation to the provision of resources by government, VCAT’s budget appropriation for 2000–2001 was \$11.24 million. Additional funding of \$6.31 million was provided by users of the Residential Tenancies List in the form of the Residential Tenancies Trust Fund.⁵¹ VCAT’s total budget of \$19.73 million contrasts with the ADT’s budget of \$1.9 million for the same period.

Another feature distinguishing VCAT from the ADT is the ability of the Victorian Tribunal to manage its own affairs. The qualitative data presented in Chapters 7 to 11 highlights the many measures that VCAT management has taken to improve its processes and procedures and to organise the administration of the Tribunal as they have seen fit. Whether this has occurred because of the size and budget of the organisation, the commitment of the Victorian Government to establishing an effective amalgamated tribunal, or the influence of individuals such as the President and Deputy Presidents, there is little doubt that VCAT has established itself as an important institution in the government/legal landscape in Victoria.

The function and organisational structure of VCAT

VCAT has three divisions — a Civil Division, an Administrative Division and a more recently formed Human Rights Division.⁵² Each Division comprises a number of lists

⁴⁸ Victorian Civil and Administrative Tribunal, *2000–01 Annual report*, VCAT, Melbourne, 2001, at 2.

⁴⁹ *Ibid.*, at 3 and 31 to 32.

⁵⁰ *Ibid.*, at 48.

⁵¹ *Ibid.*, at 3.

⁵² Rule 2.01(2) of the *Victorian Civil and Administrative Tribunal Rules 1998* (Vic).

responsible for hearing particular classes of matters. The Civil Division deals with matters involving civil claims, credit, domestic building, real property, residential tenancies and retail tenancies. This Division is primarily responsible for exercising VCAT's original jurisdiction.⁵³ It operates as a 'court-substitute' in that it deals with citizen/citizen disputes that would ordinarily be determined by courts. Similarly, the Human Rights Division hears matters in the anti-discrimination and guardianship jurisdictions.⁵⁴

In contrast, the Administrative Division has jurisdiction to review government decisions made under a range of statutes. It conducts administrative review of decisions in areas such as land valuation, occupation and business regulation, planning and taxation. This Division includes the General and Taxation Lists, which largely subsumed the work of the Victorian AAT.

All three Divisions are supported by a registry that has been structured to cater for a tribunal of VCAT's size. The VCAT Registry is divided into three parts: the Administrative and Civil Divisions share one group of registry staff, while the Residential Tenancy and Guardianship Lists are each serviced by their own registry staff. VCAT has appointed three Senior Registrars to manage each part of the registry⁵⁵ which, in 2001, had a total staff of around 150. While registry staff were divided into teams serving different lists, managers retained the flexibility to borrow staff from other areas to address fluctuations in workload.⁵⁶

The membership structure of VCAT is similar to that of the Commonwealth AAT. Division 1, Part 2 of the VCAT Act provides for the appointment of a President, Vice Presidents, Deputy Presidents, senior members and ordinary members. Like the AAT and the ADT, the President of VCAT is a judge. Members are appointed for fixed terms of five years, and senior and ordinary members may be employed on a full-time or

⁵³ Pizer, above n 47, at 3.

⁵⁴ Vines, above n 43, at 27.

⁵⁵ VCAT Registry Staff Member 1 at paragraphs 37 to 43.

⁵⁶ *Ibid.*, at paragraphs 185 to 188.

part-time basis. Unlike the proposed ART, VCAT's membership structure is dominated by members with legal qualifications. As well as the requirement that the President be a Supreme Court judge, Vice Presidents must be County Court judges, and Deputy Presidents and senior members must be experienced legal practitioners.⁵⁷

An interesting feature of VCAT's membership structure is that well over half its members are cross-appointed to more than one list.⁵⁸ A recent VCAT Annual Report referred to the benefits of this approach as including greater career flexibility and satisfaction for members, as well as the opportunity to share different perspectives and knowledge across lists.⁵⁹ Unlike the ADT, a significant proportion of VCAT's members are appointed on a full-time basis — in 2000–2001 24% of its 179 members worked full-time. As demonstrated in Chapters 7 to 11, these features have significant implications for the success of an amalgamation process.

Powers, processes and procedures

Under the VCAT Act, the Tribunal has discretion to regulate its own procedures. Section 98(3) provides that VCAT can regulate its own procedures in relation to hearings, while s 98(1)(b) states that:

... the VCAT is not bound by any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures.

As to the general procedures laid down in Part 4 of the VCAT Act, almost all of these are framed in discretionary terms. According to Pizer, the degree of discretion contained in the Act gives the Tribunal the flexibility to adapt its procedures to suit the matter before it.⁶⁰ For instance, it allows issues such as guardianship to be dealt with on an informal, inquisitorial basis, while enabling complex tax matters to be conducted in an adversarial manner involving legal representatives. This potential for flexibility means the specialist

⁵⁷ Note that senior members may also be appointed on the basis of “extensive knowledge or experience in relation to any class of matter in respect of which functions may be exercised by the Tribunal” — s 13(2)(b) of the VCAT Act.

⁵⁸ Victorian Civil and Administrative Tribunal, above n 48, at 55 to 58.

⁵⁹ *Ibid.*, at 48.

⁶⁰ Pizer, above n 47, at 8.

practices and features developed by the tribunals amalgamated to form VCAT can continue to operate in the context of the larger Tribunal.⁶¹

In addition to enabling statutes that confer jurisdiction on particular lists, Schedule 1 to the VCAT Act sets out particular practices and procedures that are to be applied in specific classes of cases. For instance, Part 5 of Schedule 1 varies the operation of the VCAT Act in relation to issues such as representation of parties and the power of the Tribunal to make declarations. Part 9 of Schedule 1 makes similar provision in relation to the constitution of the Tribunal and the role of the Public Advocate in proceedings before the Guardianship List. Thus, the practices, powers and procedures of VCAT vary to some extent from list to list.

At the same time, the VCAT Act contains several procedural provisions that apply across the Tribunal. For instance, VCAT is required to act fairly and according to the substantial merits of each case,⁶² it is bound by the rules of natural justice,⁶³ the Tribunal may inform itself on any matter as it sees fit,⁶⁴ and the Tribunal must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the relevant statutes permit.⁶⁵ This thesis argues that the existence of a number of uniform procedures and operating standards has encouraged the development of a cohesive and identifiable ‘VCAT culture’ — a development that is further explored in Chapters 9 to 11. As with the ADT, the mix of standardised and specialised procedures in the VCAT Act strikes an appropriate balance between the retention of necessary specialisation and the introduction of consistent standards.

⁶¹ The general jurisdiction, functions and procedures of the Tribunal as set out in Parts 3 and 4 of the VCAT Act vary in proceedings under certain enabling enactments. The variations to the functions and procedures of the Tribunal are set out, jurisdiction by jurisdiction, in Schedule 1 to the VCAT Act.

⁶² Section 97 of the VCAT Act. In addition, the Tribunal is given express powers under s 78 to make appropriate orders where one party is conducting a proceeding in a way that unnecessarily disadvantages another party.

⁶³ Section 98(1)(a) of the VCAT Act. See also *Australand Holdings Ltd v Maningham* No. 1998/17667.

⁶⁴ Section 98(1)(c) of the VCAT Act. The Tribunal’s powers to inform itself and gather evidence are enhanced by the fact that a person is not excused from answering questions or producing documents on the ground that doing so might incriminate the person — s 105 of the VCAT Act. See also *Treverton v TAC* No. 1997/6059.

⁶⁵ Section 98(1)(d) of the VCAT Act. See also *Thwaites v DHS* No. 1997/59582.

Another noteworthy feature of the VCAT Act is the way it deals with government policy. When undertaking administrative review, s 57 enables relevant ministers to require the Tribunal to apply a statement of policy in circumstances where two conditions are satisfied. The first is that a minister has certified that the relevant policy is applicable to the kind of decision under review. The second is that:

- (a) the Tribunal is satisfied that, at the time the decision was made —
 - (i) the applicant was aware of the statement of policy; or
 - (ii) persons entitled to apply for review of a decision under the enabling enactment could reasonably have been expected to be aware of the statement or policy; or
 - (iii) the statement of policy had been published in the Government Gazette; and
- (b) the decision-maker states in the material lodged with the Tribunal under section 49 that the decision-maker relied on the statement of policy in making the decision.⁶⁶

This provision does not permit VCAT to decline to apply government policy where this would produce an unfair outcome, or where the relevant policy is contrary to law. This differs significantly from the powers of the Commonwealth AAT and the ADT to depart from government policy in these circumstances. In relation to VCAT, s 57 had the potential to create a perception that the Tribunal is not entirely independent from the departments whose decisions it reviews. Interestingly, this is not borne out in the qualitative research set out in Chapters 7 to 11. Section 57 also potentially interferes with the VCAT's ability to conduct *de novo* review. That is, it may require the Tribunal to review a decision in light of the circumstances that existed at the time the primary decision was made, rather than the circumstances existing at the time of the review.

Apart from this, the legislation provides that VCAT would conduct *de novo* review in most matters. As mentioned, s 98(1)(b) of the VCAT Act provides that VCAT is not bound by the rules of evidence, and s 98(1)(c) provides that the Tribunal may inform itself on any matter as it sees fit. Moreover, s 51(1)(a) states that, in exercising its review jurisdiction in respect of a decision, the Tribunal has all the functions of the primary decision-maker. These provisions are essentially the same as those in the AAT and ADT

⁶⁶ Section 57(1) of the VCAT Act.

Acts which enable both Tribunals to conduct *de novo* review. Unlike the proposed ART, the VCAT Act places no restriction on the Tribunal's ability to finalise matters in light of new evidence.

Features indicative of organisational culture

Like the ADT Act, the VCAT Act places emphasis on the utilisation of ADR techniques. Division 5 of the Act enables VCAT to hold compulsory conferences and mediations, while Division 6 provides for the use of special referees who may decide, or give opinions in respect to, questions referred to them by the Tribunal. These special referees appear to perform a function similar to assessors in the ADT Act. The VCAT Act is, however, less detailed as to their precise role.⁶⁷ The Tribunal can require parties to attend one or more compulsory conferences,⁶⁸ the functions of which are:

- (a) to identify and clarify the nature of the issues in dispute in the proceeding;
- (b) to promote a settlement of the proceeding;
- (c) to identify the questions of fact and law to be decided by the Tribunal; [and]
- (d) to allow directions to be given concerning the conduct of the proceeding.⁶⁹

Sections 88 to 93 of the VCAT Act deal with mediation. Section 89 provides that a member or principal registrar may require a party to attend mediation, either personally or by a representative with authority to settle proceedings on that party's behalf. While voluntary mediation has proved popular in the Commonwealth AAT and the ADT, compulsory mediation is not a technique employed by either Tribunal, and there has been some debate over its merits.⁷⁰

In practice, there has been a very strong emphasis on mediation within VCAT since its inception, with a number of initiatives capitalising upon the discretion provided in the VCAT Act. Specifically, VCAT management has established a Mediation Committee

⁶⁷ See s 95 of the VCAT Act.

⁶⁸ Section 83(1) of the VCAT Act.

⁶⁹ Section 83(2) of the VCAT Act.

⁷⁰ In relation to the AAT, see Evans, Rhonda, *Revised draft policy — assisted resolution in the Tribunal — further issues for consideration*, Sydney, 1997, unpublished, at 4. See too s 103 of the ADT Act. More generally, see Partington, Martin, "Access to justice: re-forming the civil justice system of England and Wales" (2001) 30(1) *Common Law World* 115-133, at 119.

responsible for promoting mediation throughout the Tribunal, and have appointed a senior member as VCAT's Principal Mediator. The role of the Principal Mediator is to co-ordinate mediation activities within the Tribunal, including training sessions for members. In 2001 the President established VCAT Mediation Services, the role of which is to:

- list mediations and assign mediators to particular mediations, depending on their individual expertise;
- arrange appropriate professional development activities for VCAT's mediators; and
- collect statistics that reflect the extent of VCAT's mediation work.⁷¹

As highlighted in the qualitative data set out in Chapters 7 to 11, mediation and other forms of ADR are now regarded as one of the features of VCAT that underlines the success of the amalgamation experiment in Victoria.

The VCAT Act deals specifically with the issue of legal representation in s 62. In many ways this provision reflects contemporary debate over the merits of legal representation before administrative tribunals. As explained in Chapter 6, there is a view that legal representation encourages formalism and the development of a legalistic culture within tribunals that increases cost and delay. Others argue that vulnerable parties would be disadvantaged if they were refused legal representation, and that the presence of skilled advocates ensures natural justice.⁷²

Section 62 attempts to accommodate both these views. It provides that a party may appear personally, be represented by a professional advocate, or be represented by any person permitted by the Tribunal. In most cases, however, there are restrictions as to when parties are allowed to appear with a professional advocate.⁷³ They may only do so if another party is a professional advocate, or is represented by a professional advocate, or if all parties agree. These restrictions do not apply where the party concerned is a

⁷¹ Victorian Civil and Administrative Tribunal, above n 48, at 16.

⁷² See Redfern, Michael, *The VCAT Bill and legal representation*, Law Institute of Victoria, Melbourne, 1998 unpublished, at 8 to 16.

⁷³ This concept is defined to include legal practitioners and others with legal experience, as well as those who have advocacy experience — see s 62(8) of the VCAT Act.

child, a municipal council, the State or a minister, a public authority, the holder of a statutory office, a credit provider or an insurer of a certain kind.⁷⁴ As such, the VCAT Act is more flexible than the proposed ART Bill, but demonstrates less commitment to representation than the ADT Act.

Another factor which can impact upon a tribunal's organisational culture is its members. It could be argued that the provisions in the VCAT Act requiring various classes of VCAT members to have judicial and legal qualifications had the potential to inculcate VCAT with a court-like culture. In addition, ss 10 and 11 allow the President and Vice Presidents to maintain continuing relationships with the courts from which they came while serving on VCAT. The close association between VCAT and the Supreme and County Courts was expected to have some effect on the way the Tribunal operated.⁷⁵ Indeed, features such as these led some commentators to initially question the effectiveness of VCAT as an informal, merits review tribunal:

... the VCAT has been clothed with many of the trappings of a Court. This, of course, is an interesting development that may eventually undermine the traditional rationale for the creation of Tribunals in first place: namely, to provide a cheap, quick and informal alternative to litigation in the courts.⁷⁶

However, the qualitative data gathered for this thesis indicates that other features of VCAT have provided an effective counterbalance to any curial tendencies that may have developed as a result of these statutory provisions. In particular, VCAT's emphasis on ADR processes in relevant jurisdictions, as well as the flexibility of lists to apply different procedures in different jurisdictions, have encouraged more informal, inquisitorial modes of operating where this is appropriate.

Conclusions on VCAT

As the above discussion demonstrates, the description of VCAT that can be compiled on the basis of written sources — the legislation establishing the Tribunal and VCAT's annual reports — paints a picture of a Tribunal that is not remarkably different from the

⁷⁴ Section 62(2) of the VCAT Act.

⁷⁵ Bacon, above n 47, at 79.

⁷⁶ Pizer, above n 47, at 4.

ADT or the proposed ART. In particular, the conceptualisation, form and function of the Tribunals reflected in the enabling statutes of VCAT and the ADT are very similar.

However, the qualitative research set out in Chapters 7 to 11 highlights a number of differences between the perceived success of the amalgamations in NSW and Victoria. This indicates there are factors other than legislation which will impact upon the outcome of an amalgamation process — namely, context, organisation and people. This proposition is further tested in Chapter 6 in relation to the ART, and in Chapters 7 to 11 in relation to VCAT and the ADT.

The outcome of these discussions will provide valuable lessons for policy-makers involved in implementing government decisions to pursue amalgamations in WA and the United Kingdom. The following descriptions of the amalgamation proposals being pursued in these jurisdictions are not used to advance or test the hypothesis developed in Chapter 4. However, the fact that the WA and United Kingdom governments are about to implement amalgamation proposals reinforces the imperative of establishing a coherent framework within which ongoing developments can take place in a more controlled and predictable manner.

RECENT DEVELOPMENTS IN WESTERN AUSTRALIA

In March 2001, the Western Australian Attorney-General established a taskforce to develop a model of a generalist civil and administrative review tribunal for consideration by government.⁷⁷ The creation and terms of reference of the Administrative Review Tribunal Taskforce were the culmination of a number of reports in WA recommending reform of the State's system of administrative, disciplinary and original decision-making tribunals and bodies.⁷⁸ These included the fourth report of the Commission on Government of Western Australia (which recommended the creation of a Western Australian Administrative Review Tribunal);⁷⁹ a 1996 report commissioned by the then

⁷⁷ Administrative Review Tribunal Taskforce, above n 15, at i.

⁷⁸ Fraser, Ron, "Developments in administrative law" (2002) 35 *AIAL Forum* 1-10, at 1.

⁷⁹ See Johnston, Peter, "Recent developments concerning tribunals in Australia" (1996) 24(2) *Federal Law Review* 323-342, at 324.

Attorney-General (which recommended the amalgamation of existing tribunals into a single, overarching body);⁸⁰ and a 1999 Western Australian Law Reform Commission (WALRC) report (which recommended the creation of a Western Australian Civil and Administrative Tribunal via the amalgamation of a number of existing boards and tribunals).⁸¹

In keeping with these reports, the 2001 Taskforce recommended the creation of a ‘super-Tribunal’ called the State Administrative Tribunal (SAT) via the amalgamation of most boards and tribunals operating in WA. While there are currently bodies in WA performing administrative review functions, the creation of an SAT has been treated by government as an opportunity to establish a more comprehensive system for the review of government decisions.⁸²

However, before examining the detail of the SAT it is informative to set out the key features of the Commission on Government’s 1996 proposal. Of particular interest is the way in which the experience of amalgamation in NSW, Victoria and at Commonwealth level appears to have influenced the types of recommendations now being considered in WA.

1996 proposal for a Western Australian Administrative Review Tribunal

The generalist tribunal proposed by the WA Commission on Government would have comprised a General Division and two specialist divisions in the fields of State taxation, and environment, planning and development control.⁸³ The Commission took a broad approach to the question of the Tribunal’s jurisdiction. It recommended that its enabling legislation should “start from the position that every administrative decision should be

⁸⁰ Administrative Review Tribunal Taskforce, above n 15, at iii.

⁸¹ Western Australian Law Reform Commission, *Report of the WALRC on the review of the civil and criminal justice system*, WALRC, Perth, 1999; Administrative Review Tribunal Taskforce, above n 15, at iii.

⁸² Administrative Review Tribunal Taskforce, above n 15, at ii; WA Department of Justice website at <http://www.justice.wa.gov.au/displayPage.asp?structureID=28527836&resourceID=25536838#why>, accessed on 26 January 2004.

⁸³ Commission on Government, *Report no. 4*, COG, Perth, 1996, at paragraph 7.1.5.

reviewable by the proposed ART, unless specifically exempted”.⁸⁴ In relation to the scope of review, in line with its view that the primary objective of the new scheme was “to achieve the correct and preferable decision”,⁸⁵ the Commission proposed that the WA Administrative Review Tribunal (ART-WA) have the ability to exercise all the powers and discretions conferred on the original decision-maker.

The Commission’s recommendations in respect of the procedures to be applied by the ART-WA did not break much new ground. However, it is interesting to note the strong emphasis placed on discouraging “legalism in the process”. The Commission stated as an ideal that “some form of mediation will result in a decision acceptable to the parties in dispute”.⁸⁶ It therefore recommended that the Tribunal have the power to arrange for conciliation and mediation.⁸⁷ Also of note is the recommendation that the Tribunal have an extensive power to dismiss applications. In addition to the usual powers of tribunals to dismiss for failure to appear, and on the ground that an application is vexatious or frivolous, the ART-WA would have been able to dismiss a matter if the applicant had “caused delay” or “acted unreasonably”.⁸⁸

In many respects, the recommendations of the Commission had not been worked through in any detail. It is, however, clear that it desired a body which would be easily distinguishable from the judicial model. This was apparent from its recommendations about membership. In particular, the Commission recommended that the President of the ART-WA need not be a judge but, rather, that he or she “have considerable experience in public sector decision-making, dispute resolution and management”.⁸⁹ Moreover, the tenure of full-time members would have been limited to a renewable term of seven years.

⁸⁴ *Ibid.*, at paragraph 6.3.4. The Commission recommended exemptions in relation to various kinds of decisions — *ibid.*, at paragraph 6.3.5.

⁸⁵ *Ibid.*, at paragraph 6.1.4.

⁸⁶ *Ibid.*, at paragraph 6.1.4.

⁸⁷ *Ibid.*, at paragraph 7.2.1.4.

⁸⁸ *Ibid.*, at paragraph 7.2.1.4.

⁸⁹ *Ibid.*, at paragraph 7.2.2.4.

The model recommended by the Commission was different in several key respects to the models subsequently adopted in Victoria and NSW, and proposed by the Commonwealth Government. It was evident from the submissions noted in the Commission's report that many lawyers would not have been happy with its recommendations which were designed to reduce the significance of legal expertise in the ART-WA's processes. In view of this it is perhaps not surprising that the recommendations put forward in 1996 were never translated into legislation.

2002 proposal for a State Administrative Tribunal

While it appears the WA Government did not wish to be at the forefront of tribunal reform in 1996, the concept of amalgamation retained support. This much is apparent from the report of the 2001 Taskforce which, in May 2002, recommended the creation of the SAT.

The Tribunal envisaged by the Taskforce is similar in design to VCAT. While the Taskforce's report considers the way in which amalgamation was approached in NSW and at federal level, it is clear that the Victorian amalgamation was seen as the most successful and relevant model for WA. The benefits of a 'VCAT-style' amalgamation were seen to include streamlining the existing system of tribunals and bodies in WA; improving the visibility of tribunal decision-making by creating a 'one-stop shop'; developing a more flexible, user-friendly system of decision-making; giving the SAT the opportunity to develop 'best practice' in all its functions, including in the training of members; improving efficiency; and ensuring independence from government.⁹⁰

The WA Government responded favourably to this report in July 2002. According to the WA Attorney-General:

Nearly 40 Western Australian tribunals and boards will be replaced with a single, one-stop shop for handling a vast range of appeals and disciplinary matters in the biggest structural reform of the justice system ever undertaken by the State Government.⁹¹

⁹⁰ Administrative Review Tribunal Taskforce, above n 15, at 63 to 64.

⁹¹ McGinty, Jim, WA Attorney-General, *Media release: huge shake-up planned for administrative appeals*, 4 July 2002.

More recently, the Department of Justice has stated that the SAT will commence operation in mid-2004. Legislation establishing the SAT was introduced into the WA Parliament in June 2003, and referred to the Standing Committee on Legislation after passing the lower House.⁹² The Committee was due to report in December 2003, but had not yet reported at the time of writing.⁹³ In the meantime, six of the tribunals to be amalgamated upon the creation of the SAT have moved into joint premises.⁹⁴ Given the apparent inevitability of the SAT, it is worthwhile exploring the proposal in more detail.

Nature and scope of the proposed amalgamation and the commitment to its success

Like VCAT, the proposed amalgamation in WA would encompass most existing tribunals and bodies responsible for conducting administrative review, disciplinary matters and original decision-making in almost all jurisdictions in the State.⁹⁵ The bulk of the report produced by the Taskforce outlines the bodies that the SAT would replace, and the legislation under which it would be given jurisdiction. As the WA Attorney-General put it:

... the independent tribunal would take over responsibility for:

- a wide range of appeals against administrative decisions that are currently determined by the courts, by Government Ministers or public officials;
- disciplinary proceedings affecting 23 trades and professions; and
- civil complaints in areas ranging from equal opportunity, to neighbourhood disputes about strata titles, and customer complaints against builders.⁹⁶

⁹² *State Administrative Tribunal Bill 2003* (No. 213) (the SAT Bill); *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Bill 2003* (No. 214) (the SAT Transitional Bill).

⁹³ See <http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Committees+-+Current>, accessed on 28 March 2004.

⁹⁴ These tribunals are the Town Planning Appeal Tribunal, the Guardianship and Administration Board, the Commercial Tribunal, the Equal Opportunity Tribunal, the Retirement Villages Disputes Tribunal and the Strata Titles Referee. See WA Department of Justice website at www.justice.wa.gov.au, accessed on 19 November 2003.

⁹⁵ The few bodies operating in WA not included in the current SAT proposal are the Assessor of Criminal Injuries Compensation, the Information Commissioner and the Small Claims Tribunal — Administrative Review Tribunal Taskforce, above n 15, at 121. The Taskforce also proposed that the Small Debts Division and Residential Tenancies jurisdiction of the Local Court remain undisturbed.

⁹⁶ McGinty, above n 91.

Thus, one of the primary objectives behind the proposed amalgamation is to rationalise the “multiplicity of entities engaged in decision-making” in WA, and to standardise the variety of practices and procedures that a range of similar tribunals currently use.⁹⁷

While the Taskforce recommended retaining the Guardianship and Administration Board and the Mental Health Review Board as semi-distinct entities, it recommended that these bodies be co-located with the new SAT, that its members become members of the SAT, that the President of the SAT chair each of these Boards, and that staff of the SAT service the two Boards.⁹⁸ While this proposal was initially endorsed, it now appears the WA Government intends to incorporate the Guardianship and Administration Board wholly within the SAT structure. The comprehensive scope of the amalgamation proposed in WA indicates there is political commitment to its success. This approach can be contrasted with the incremental reforms that have taken place in NSW, and the less extensive Commonwealth ART proposals.

Function and organisational structure of the SAT

Like VCAT and the ADT, the functions of the SAT will include conducting administrative review of government decisions, determination of disputes between citizens (including disputes arising under equal opportunity legislation), and professional disciplinary matters.⁹⁹ In relation to its administrative review function, the SAT will be charged with the task of making the correct or preferable decision in the circumstances of a particular case.¹⁰⁰ Responsibility for the SAT would lie within the Attorney-General’s portfolio — a recommendation that has been adopted by government.

⁹⁷ Administrative Review Tribunal Taskforce, above n 15, at 21.

⁹⁸ *Ibid.*, at vi, 60, 81 and 85.

⁹⁹ See Part 3, Divisions 2 and 3 of the SAT Bill.

¹⁰⁰ Section 27 of the SAT Bill; Administrative Review Tribunal Taskforce, above n 15, at 128.

Like VCAT, the SAT will be divided into lists reflecting the nature of the jurisdictions in which existing WA tribunals and boards currently operate. While not confirmed in the SAT Bills themselves, the Taskforce recommended the SAT's lists be organised as follows:

- a Domestic Building List;
- a Commercial List;
- an Anti-discrimination List;
- a Strata List;
- a Planning, Environment and Valuation List;
- a Revenue List;
- a Professional and Occupational List;
- a Business Regulation List;
- an Economic Regulation List; and
- a General List.¹⁰¹

The Taskforce proposed that the SAT be headed by a President who is a Supreme Court judge, and that it have two Deputy Presidents who are District Court judges.¹⁰² In relation to its members, the SAT will have a mix of full-time, part-time and sessional members, similar to VCAT.¹⁰³

While there is no detail in the 2002 report or the SAT Bills about how different lists will interrelate or how the SAT Registry will be structured, the Taskforce does suggest that resources and personnel be shared, and that members be appointed across lists. Overall, the Taskforce claims that the SAT as proposed will have a flexible structure, and will facilitate cross-fertilisation between lists while retaining the successful practices of existing tribunals that have been developed over time.¹⁰⁴

¹⁰¹ Administrative Review Tribunal Taskforce, above n 15, at 137 to 140.

¹⁰² *Ibid.*, at 61.

¹⁰³ Part 6, Division 1 of the SAT Bill. The Taskforce envisaged that, in the course of amalgamation, members of existing tribunals and bodies with relevant specialist expertise would become members of the SAT — Administrative Review Tribunal Taskforce, above n 15, at 92 and 116.

¹⁰⁴ Administrative Review Tribunal Taskforce, above n 15, at 65, 92 and 135.

Powers, processes and procedures of the SAT

Wherever appropriate the Taskforce recommended that, in order to enhance the accessibility of tribunal review and minimise cost to users, the SAT adopt an inquisitorial approach and use informal procedures. At the same time, the SAT will be required to act fairly and according to the substantial merits of each case.¹⁰⁵

In relation to practice and procedure, the SAT will be able to regulate its own procedure and inform itself on any matter as it sees fit. It will be bound by the rules of natural justice, but not by the rules of evidence unless these are appropriate in the circumstances of a particular case.¹⁰⁶ The Taskforce was especially keen to ensure the SAT would have the freedom to vary and adjust its procedures to suit the requirements of particular matters.¹⁰⁷ More specifically, the Taskforce recommended the SAT have the same powers to make interim and final decisions as the existing body or tribunal whose jurisdiction is transferred to the amalgamated Tribunal. In the exercise of its review jurisdiction, the SAT will have essentially the same powers as exercised by the Commonwealth AAT.¹⁰⁸

Features indicative of organisational culture

A number of features of the SAT as proposed indicate the amalgamated tribunal may develop a relatively formal, curial style of operating. For instance, the Taskforce recommended that the WA Attorney-General have the ability to intervene in proceedings before the SAT at any time¹⁰⁹ — a suggestion which appears to assume the Tribunal will have a relatively adversarial style of operating.¹¹⁰ In addition, parties appearing before the SAT will have the right to legal representation, unless this is already restricted under

¹⁰⁵ Section 9 of the SAT Bill; Administrative Review Tribunal Taskforce, above n 15, at 128.

¹⁰⁶ Section 32 of the SAT Bill.

¹⁰⁷ Administrative Review Tribunal Taskforce, above n 15, at 129.

¹⁰⁸ Section 29 of the SAT Bill; Administrative Review Tribunal Taskforce, above n 15, at 144.

¹⁰⁹ Administrative Review Tribunal Taskforce, above n 15, at 146.

¹¹⁰ This recommendation has been adopted in s 37(1) of the SAT Bill.

existing legislation.¹¹¹ The SAT will also have the power to order that a party pay the costs of another party in a proceeding, as well as the power to issue injunctions and to deal with parties who are treating the Tribunal's procedures with contempt — powers that are generally not exercisable by Commonwealth tribunals.¹¹²

Factors such as these which have the potential to encourage a formal, legalistic way of operating may be countered by other features of the proposed SAT such as the ability of the Tribunal to constitute multi-member panels,¹¹³ use ADR techniques such as mediation, compulsory conferencing and settlement discussions,¹¹⁴ and determine matters on the papers.¹¹⁵ However, as the qualitative research presented in Chapters 7 to 11 highlights, numerous other factors impact upon the way in which an amalgamated tribunal operates. Thus, the organisational culture of the SAT will be difficult to assess until the Tribunal commences operation.

Conclusions on the proposed SAT

Overall, it seems likely that WA will be the next jurisdiction in Australia to adopt a generalist tribunal model by amalgamating a range of existing specialist tribunals. The fact that policy-makers in this State have had the opportunity to learn from the experience of amalgamation in NSW and Victoria, and have opted for a model very similar to VCAT, suggests that the Victorian amalgamation experience is widely perceived to have been a positive one. This perception is reinforced by the data presented in Chapters 7 to 11.

Nonetheless, the fact that WA is adopting a tribunal model that has proved successful in another jurisdiction does not guarantee the success of the SAT. As the research presented

¹¹¹ Administrative Review Tribunal Taskforce, above n 15, at 147. Section 39 of the SAT Bill implements this recommendation and reveals the Government's preference for legal, as opposed to non-legal, representation.

¹¹² Part 4, Divisions 5 and 7 of the SAT Bill. See also Administrative Review Tribunal Taskforce, above n 15, at 154 to 156.

¹¹³ Section 11 of the SAT Bill; Administrative Review Tribunal Taskforce, above n 15, at 147.

¹¹⁴ Administrative Review Tribunal Taskforce, above n 15, at 150. Section 52 of the SAT Bill empowers the Tribunal to conduct compulsory conferences; s 54 enables the SAT to refer matters for mediation; and s 56 clearly envisages settlement discussions taking place between the parties to a matter.

¹¹⁵ Section 60(2) of the SAT Bill. See also Administrative Review Tribunal Taskforce, above n 15, at 151.

in this thesis will demonstrate, context, organisation and people — in addition to law — are central to the success of any amalgamation proposal. While it is beyond the scope of this thesis, the amalgamation in WA will provide further valuable data to those studying the implications of amalgamation and how this process should be approached to better ensure optimal reform.

RECENT DEVELOPMENTS IN TASMANIA

While not being actively pursued by the State Government at this time, there is some momentum for tribunal amalgamation to occur in Tasmania also. In April 2003 the State Service Commissioner, Greg Vines, handed down a report containing the findings of a review into Tasmania's administrative appeals processes.¹¹⁶ Relevantly, the report recommended the establishment of a civil and administrative tribunal in Tasmania, similar in concept to the VCAT model in Victoria. Vines argued that amalgamation would address the current *ad hoc* arrangements for the review of administrative decision-making that currently exist in Tasmania,¹¹⁷ as well as difficulties associated with the relatively small size of the community and the low workload of its administrative review bodies.

Vines recommended that the proposed tribunal initially comprise the Anti-Discrimination Tribunal and the Administrative Appeals Division of the Magistrates Court. There was an expectation in the report that further bodies would be amalgamated over time. Vines recommended that a high-level working party be established with the task of identifying other relevant bodies that should become part of an amalgamated civil and administrative tribunal.¹¹⁸

While the Tasmanian Government has not yet announced its response to the Vines report, the majority of submissions to the review gave “qualified support” to the concept of amalgamation.¹¹⁹ As stated in the report: “The case for amalgamation seems to be very

¹¹⁶ Vines, above n 43; Whinnett, Ellen, “Call for appeals umbrella”, *The Mercury*, 1 July 2003.

¹¹⁷ Vines, above n 43, at 10.

¹¹⁸ *Ibid.*, at 7.

¹¹⁹ *Ibid.*, at 53.

strong where there are relatively small tribunals, often with small registry resources”.¹²⁰ This suggests the proposal to establish an amalgamated tribunal in Tasmania may receive a favourable response from policy-makers.¹²¹

RECENT DEVELOPMENTS IN OVERSEAS JURISDICTIONS

United Kingdom

As in WA, tribunal reform is imminent in the United Kingdom. In May 2000 the Lord Chancellor appointed a committee headed by Sir Andrew Leggatt to review and report on the delivery of justice through tribunals, and to provide recommendations aimed at improving the current tribunal system in England and Wales. There had previously been some small-scale amalgamation of tribunals, the most notable example being the amalgamation of the Social Security Appeal Tribunal and four other tribunals to form a single appeals service.¹²² However, even following these reforms, at the time the Leggatt review commenced there remained over 70 administrative tribunals operating throughout the country in a range of jurisdictions.¹²³

¹²⁰ *Ibid.*, at 55 and 57.

¹²¹ There have been some relevant developments in Queensland. For instance, in 2002 the Queensland Parliament passed the *Tribunals Provisions Amendment Act 2002* (Qld), which implemented the second stage of a three-stage proposal to combine eight tribunals operating in the Tourism, Racing and Fair Trading portfolio, beginning with the centralisation of registry functions — Pyman, Stephen, “Days of super stadiums and super tribunals” (2002) 22(9) *Proctor* 20. This process resembles the administrative changes gradually being made at federal level to merge the Migration Review Tribunal and the Refugee Review Tribunal. While more comprehensive amalgamation proposals have been put forward in Queensland — most notably by the Electoral and Administrative Review Commission in 1993 and an associated Parliamentary Committee in 1995 — these proposals have not been acted upon by government and are therefore not explored in any detail in this thesis. The same may be said about the administrative review tribunal proposed by the Northern Territory Law Reform Committee in 1991. For further information see Electoral and Administrative Review Commission, *Report on review of appeals from administrative decisions*, EARC, Brisbane, 1993; Parliamentary Committee for Electoral and Administrative Review, *Report on review of appeals from administrative decisions: report no. 25*, Legislative Assembly of Queensland, Brisbane, 1995; Bacon, above n 47; Johnston, above n 79; McMillan, John and Todd, Robert, “The administrative tribunals system: where to from here?” in Argument, Stephen (ed), *Administrative law: are the States overtaking the Commonwealth?*, proceedings of the 1994 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1996, 116-130, at 119.

¹²² Wikeley, Nick, “Burying Bell: managing the judicialisation of social security tribunals” (2000) 63(4) *Modern Law Review* 475-501, at 475. See also Wikeley, Nick, “Decision-making and appeals under the *Social Security Act 1998*” (1998) 5 *Journal of Social Security Law* 104-117; Dean, Hartley, “Losing appeal? The changing face of redress” 12(1) (2004) *Benefits* 3-7, at 3.

¹²³ Interestingly, an earlier review of the administrative law system in the United Kingdom had recommended retention of the “existing network of specialised tribunals” — Committee of the Justice-All Souls Review of Administrative Law in the United Kingdom, *Administrative justice: some necessary reforms*, Oxford University Press, London, 1988, at Chapters 7 and 9, cited in Harris, Michael, “There’s a new tribunal now: review of the

The Leggatt review appears to have been motivated, at least in part, by widely perceived problems stemming from the incoherent, haphazard proliferation of tribunals throughout the country. Indeed, the Leggatt Report found that, of the 70 tribunals considered in this review, only 20 heard more than 500 cases a year and many more were defunct or outdated. Leggatt also reported that many tribunals operated in complete isolation and were unaware of even the existence of others.¹²⁴

The Committee's terms of reference were:

To review the delivery of justice through tribunals other than ordinary courts of law, constituted under an Act of Parliament by a Minister of the Crown or for purposes of a Minister's functions; in resolving disputes, whether between citizens and the state, or between other parties, so as to ensure that:

There are fair, timely, proportionate and effective arrangements for handling those disputes, within an effective framework for decision-making which encourages the systematic development of the area of law concerned, and which forms a coherent structure, together with the superior courts, for the delivery of administrative justice;

The administrative and practical arrangements for supporting those decision-making procedures meet the requirements of the European Convention on Human Rights for independence and impartiality;

There are adequate arrangements for improving people's knowledge and understanding of their rights and responsibilities in relation to such disputes, and that tribunals and other bodies function in a way which makes those rights and responsibilities a reality;

The arrangements for the funding and management of tribunals and other bodies by Government departments are efficient, effective and economical; and pay due regard both to judicial independence, and to ministerial responsibility for the administration of public funds;

Performance standards for tribunals are coherent, consistent, and public; and effective measures for monitoring and enforcing those standards are established; and

Tribunals overall constitute a coherent structure for the delivery of administrative justice.¹²⁵

In March 2001 Leggatt presented a report to government recommending that a number of existing tribunals be amalgamated to form a single Tribunals System, headed by a High

merits and the general administrative appeal tribunal model" in Harris, Michael and Waye, Vicki (eds), *Australian studies in law: administrative law*, Federation Press, Sydney, 1991, 188-220, at 190.

¹²⁴ Leggatt, Sir Andrew, *Tribunals for users: one system, one service*, the Stationery Office, London, 2001, at Part I, Chapter 10, paragraph 10.2.

¹²⁵ *Ibid.*, at Foreword, paragraph 2.

Court judge.¹²⁶ Specifically, the report recommended that “the 70 or so tribunals in England and Wales be brought together into a single and separate system”.¹²⁷ This would include the Appeals Service, which currently has a caseload of over 300,000 per year.

It was envisaged that like tribunals would be grouped together in nine divisions supported by a unified Tribunals Service — a common administrative service that appears equivalent to the type of single registry envisaged for the ART and currently operating within the ADT and VCAT.¹²⁸ The nine divisions constituting the Tribunals System would be formed by tribunals grouped together on the basis of subject matter, and each division would have at least one registrar to assist members in case management duties. Existing first-tier tribunals would be grouped into divisions relating to education, finance, health and social services, migration, land and valuation, social security and pensions, transport, and regulation and employment. It was recommended that all tribunals established in the future be incorporated into this unified divisional structure.¹²⁹

As such, the Tribunals System would incorporate court-substitute tribunals that are currently responsible for determining disputes between citizens, as well as tribunals that determine matters involving citizens and the State. As with VCAT, Leggatt recommended that there be differences in the way different types of tribunals are administered. For instance, appellate tribunals would be grouped together in an appellate division, which would hear appeals from first-tier divisions. The report also envisaged that tribunals within divisions could operate with a degree of autonomy in order to retain specialist expertise, while at the same time working to improve the coherence and

¹²⁶ Administrative Review Tribunal Taskforce, above n 15, at 55. The Leggatt Report was publicly released on 16 August 2001 — McPherson, Ian, “Tribunal reform? New government consultation document” (2001) 45 *Employment Law Bulletin* 7-8.

¹²⁷ Creyke, Robin, “Tribunals and access to justice” (2002) 2(1) *Queensland University of Technology Law and Justice Journal* 64-82, at 69.

¹²⁸ The amalgamation of registry functions is often seen as a way of achieving economies of scale in the operation of tribunal systems.

¹²⁹ Leggatt, above n 124, at Part I, Chapter 6, paragraph 6.4.

flexibility of the system.¹³⁰ The procedures and processes adopted in different divisions would be expected to assume a large degree of commonality over time.¹³¹

There is an emphasis throughout the Leggatt recommendations on enhancing the independence and flexibility of tribunals and making them more accessible and user-friendly for applicants.¹³² In order to enhance the independence of the Tribunals System, Leggatt recommended that it fall within the then Lord Chancellor's Department (equivalent to the Attorney-General's Department in Australia).¹³³ The system would be headed by a Senior President who was a judge of the High Court, and Presidents of different divisions would normally be judges. The Tribunals Service and Tribunals System would be analogous to, but separate from, the court system. In keeping with its focus on users, the Report advocated the development of a new culture centred around recognition of the fact that the tribunal experience is often daunting for applicants. The objectives proposed for the Tribunals System were informality, simplicity, efficiency, and proportionality.¹³⁴

As with the amalgamated tribunals operating in NSW and Victoria, Leggatt recommended that a mixture of part-time and full-time members be appointed to the Tribunals System, and that members be cross-appointed to associated tribunals where appropriate. The Committee also made a number of recommendations designed to improve the training provided to tribunal members, the provision of information to applicants, and the information technology used across the system as a whole. As with the Commonwealth ART proposal, Leggatt recommended that there be a system of performance management of members.

¹³⁰ *Ibid.*, at Part I, An Overview, paragraph 9.

¹³¹ *Ibid.*, at Part I, Chapter 6, paragraph 6.5.

¹³² For instance, Chapter Two of the Report is entitled "A more independent system", and Chapter Four is entitled "A more user-friendly system". See also Fraser, above n 78, at 8.

¹³³ Leggatt, above n 124, at Part I, An Overview, paragraphs 4 to 5. Note that, owing to a recent government restructure, the Department for Constitutional Affairs now undertakes many of the functions relating to courts and tribunals.

¹³⁴ Leggatt, above n 124, at Part I, An Overview, paragraph 31.

In addition to the Tribunals System and Tribunals Service, the Committee recommended the creation of a Tribunals Board. The Board's functions would include advising government about qualifications for membership, monitoring appointment processes, co-ordinating training, and reviewing the rules of procedure governing all divisions.¹³⁵ The Board would operate alongside the existing Council on Tribunals, which currently has functions similar to those of the Australian Administrative Review Council.

The Leggatt Committee recommended that the implementation of the Tribunals System and Tribunals Service be staged, in accordance with a planned process. The existing Appeals Service and other tribunals falling within the responsibilities of the then Lord Chancellor's Department would form the nucleus of the amalgamation process. This is an interesting approach to amalgamation which can be contrasted with the 'one-off' approaches adopted in Victoria and proposed at federal level in Australia.¹³⁶ Presumably such an approach would need to be adopted in light of the vastness of the task of amalgamating the members and administrations of 70 separate tribunals.

The British Government's response to Leggatt was to issue a consultation paper about the report, inviting comments by November 2001.¹³⁷ According to a government official:

The Government shares Sir Andrew's view on the need for improvements and is therefore exploring the unified service together with other options for reform.¹³⁸

Since then, the Government has been considering Leggatt's recommendations and the reactions to them, with dedicated resources being put aside specifically for this purpose.¹³⁹ In March 2003 it announced its decision to bring most tribunals together into a single service, accountable to the Lord Chancellor. As in NSW, the proposal is to begin by amalgamating the 10 largest tribunals, and to incorporate smaller tribunals progressively over time. The Government originally intended to publish a White Paper in

¹³⁵ *Ibid.*, at Part I, An Overview, paragraph 13.

¹³⁶ While the NSW ADT was purportedly established on the basis that its jurisdiction would expand progressively over time, this has not in fact occurred in the manner originally envisaged — see Committee on the Office of the Ombudsman and the Police Integrity Commission, above n 7, at 18 to 19 and 20 to 21.

¹³⁷ McPherson, above n 126.

¹³⁸ MacMillan, James, "The way ahead" (2001) 8(2) *Tribunals* 15, at 15.

¹³⁹ Adler, Michael, "Self-help is no substitute" (2001) 8(2) *Tribunals* 18-20, at 18; Adler, Michael, "Who is afraid of Sir Andrew Leggatt?" (2002) 9(4) *Journal of Social Security Law* 177-198, at 180; Fraser, above n 78, at 8.

late 2003 setting out its amalgamation proposal in more detail.¹⁴⁰ This Paper has been delayed and is now not expected until Spring 2004.¹⁴¹

Reaction to the Leggatt recommendations has been largely positive.¹⁴² The initial views of a range of stakeholders were canvassed by the Judicial Studies Board in its *Tribunals* publication in 2001. While some thought the Report's recommendations went too far and others not far enough,¹⁴³ there was a general consensus that Leggatt's proposals would result in improvements. The consultation paper produced by the Lord Chancellor's Department in March 2003 stated that: "there is wide agreement ... on the need to improve the administration of tribunals", and that a majority of academics, non-government organisations, practitioners and tribunals who made submissions "support the idea of bringing tribunals together in a single service".¹⁴⁴

Amalgamation on the scale proposed in England and Wales is clearly a major undertaking, and will no doubt pose significant challenges to policy-makers. The ways in which these are addressed can be expected to provide further valuable insight into the factors that impact upon the success of amalgamation processes.

Canada

It appears Canada has seen the same burgeoning in the quantity and diversity of tribunals as other jurisdictions. As one commentator has stated:

As is the case in Australia, tribunals are used in Canada for a broad range of occupational, professional, business and product manufacture and use licensing. They act as appeal bodies across the social welfare system — workers' compensation, unemployment insurance, veterans' pensions, and basic welfare schemes. They have a significance and ever-growing presence in the arena of land regulation Of especially high profile in the media are those tribunals which

¹⁴⁰ Lord Chancellor's Department, *Consultation response*, March 2003, at www.lcd.gov.uk/consult/leggatt/leggattresp.htm, accessed on 7 July 2003.

¹⁴¹ Adler, Michael, "The slow road to tribunal reform" 12(1) (2004) *Benefits* 13-20, at 15. The Government's White Paper had yet to be released at the time of writing.

¹⁴² *Ibid.*, at 14.

¹⁴³ In particular, Michael Adler has criticised the Leggatt report on the basis that it did not attempt to calculate how much it would cost to implement its proposals, compared to the current cost of administering a large number of individual tribunals — Adler, above n 139, at 177 to 178.

¹⁴⁴ Lord Chancellor's Department, *Consultation paper*, March 2003 at www.lcd.gov.uk/consult/leggatt/leggattresp.htm, accessed on 7 July 2003, at paragraphs 24 to 25.

deal with matters affecting the liberty of the subject — parole boards, penitentiary disciplinary ‘courts’, immigration and citizenship adjudicators, national security clearance bodies, mental health boards, and systems of military and police discipline, as well as mechanisms for dealing with citizen complaints against such organisations.¹⁴⁵

Canadian tribunals have also been established in the areas of human rights and employment law.¹⁴⁶ In light of their number, it is perhaps unsurprising that there have been developments in various jurisdictions across Canada, indicating the trend to amalgamate tribunals has been felt in this country also.

Most significantly, in 1996 the province of Quebec established the Administrative Tribunal of Quebec (QAT), which consisted of four divisions: social affairs, property and land valuation, land use and environment, and economic affairs.¹⁴⁷ The creation of this Tribunal saw the amalgamation of a large number of tribunals operating throughout Quebec. There is flexibility for the Tribunal to be constituted by members with a range of skills in appropriate cases, sitting on panels of between one and three. Members are primarily assigned to one division, but can be cross-appointed. It has been suggested that new tribunals created under subsequent statutes would be incorporated into the generalist QAT.¹⁴⁸

A more recent Canadian proposal was the suggestion by the Ontario Government in February 2001 to create a Unified Workplace Tribunal which would have adopted a ‘super-Tribunal’ model, similar to the model operating in Quebec. However, this proposal was formally withdrawn after five months of controversy arising from fundamental flaws in the proposal unrelated to the concept of tribunal amalgamation *per se*.¹⁴⁹

¹⁴⁵ Mullan, David, “Where do tribunals fit into the system of administration and adjudication? A Canadian perspective” in Creyke, Robin (ed), *Administrative tribunals: taking stock*, Centre for International and Public Law, Canberra, 1992, 1-20, at 1.

¹⁴⁶ *Id.*

¹⁴⁷ Ellis, Ron, “Super provincial tribunals: a radical remedy for Canada’s rights tribunals” (2002) 15 *Canadian Journal of Administrative Law and Practice* 15-50, at 19.

¹⁴⁸ Adler, Michael, speaking at *Towards a more coherent system of tribunals*, research seminar by the Centre for the Study of Administrative Justice, University of Bristol, 2 November 2002, record of proceedings, at paragraph 22.

¹⁴⁹ Ellis, above n 147.

More generally, there has been criticism of governments across Canada for their failure to consider reforming and improving tribunal systems in that country via processes of amalgamation. Ellis has suggested the lack of commitment to necessary tribunal reform in Canada derives from government's desire to maintain a degree of control over the operation of tribunals.¹⁵⁰

CONCLUSIONS

As the above discussion demonstrates, there is a clear trend across common law jurisdictions to pursue policies of tribunal amalgamation. Moreover there are signs, for instance in Tasmania and in the debates over amalgamation in Canada, that this trend will continue into the future.

In general, the reforms examined above have involved the amalgamation of smaller, specialist tribunals into a generalist tribunal with a divisional structure and unified administration. While apparently successful models such as VCAT have been endorsed by policy-makers in WA, there is still no real consensus about how amalgamation should be approached. Indeed, a more detailed examination of each proposal reveals that the scope, structure and mode of operation of the amalgamated tribunals sought to be established so far varies significantly — often for no apparent reason.

The problem posed by this uninformed trend to amalgamate is that governments are investing substantial resources in tribunal reform, without any way of knowing whether this will improve the tribunal systems they are seeking to replace, in the ways that they intend. In other words, owing to an absence of theoretical engagement with this issue, there is no way to predict, let alone control, the likely outcome of an amalgamation process. Rigorous attention is not even being paid to the experiences of those who have already implemented decisions to amalgamate. In all the jurisdictions examined in Chapters 2 and 3, none had based its proposals for reform upon a rigorous analysis of the success or otherwise of similar proposals in other jurisdictions.

¹⁵⁰ *Ibid.*, at 28.

In short, the trend to amalgamate is occurring in the absence of knowledge about how to control its impact. The lack of any theoretical framework that would enable policy-makers to assess different approaches to amalgamation is contributing to this unscientific approach.

For these reasons, and in order to evaluate the amalgamation experiences in NSW, Victoria and at federal level in Australia, the objective in Chapter 4 is to construct a methodology for measuring the effectiveness of amalgamations that outlines the ingredients of *optimal* tribunal reform. This methodology is applied, tested and validated in the data analyses undertaken in Chapters 6 to 11.

CHAPTER 4: EVALUATING AMALGAMATION

The problem that emerges from a discussion of recent developments relating to tribunals is the extent to which amalgamation has been pursued by governments throughout the common law world, in the absence of a thorough understanding of its impact.

There are a number of reasons why governments may wish to pursue policies of amalgamation, many of which are legitimate.¹ The literature suggests that amalgamation is an attractive option for three main reasons. Firstly, because it is perceived to reduce duplication of facilities and procedures, thereby reducing operating costs.² (This factor was certainly prominent in the Australian Government's justifications for the proposed ART.³) Secondly, amalgamated tribunals are often regarded as a neat solution to the proliferation of small, specialist tribunals which continue to emerge in jurisdiction after jurisdiction.⁴ Thirdly, there are suggestions that, in some instances, governments see the process of amalgamation as a way of making their mark or increasing their control over the administrative review functions of tribunals, some of which are perceived to act in a manner that is contrary to government interests.⁵

¹ Elizabeth Ellis has argued that amalgamation can enhance accessibility and efficiency, while noting that "such potential benefits need to be monitored rather than assumed" — Ellis, Elizabeth, "Promise and practice: the impact of administrative law reform in New South Wales" (2002) 9(3) *Australian Journal of Administrative Law* 105-124, at 107.

² *Id.*

³ Leon, Renée, "Reform of federal merits review tribunals — the Government's position", paper presented at *Administrative law and the rule of law: still part of the same package?*, conference by the Australian Institute of Administrative Law, Melbourne, 18 June 1998, at 1; Newman, Jocelyn, Commonwealth Minister for Social Security, *News release*, 4 February 1998; Burgess, Verona, "Tribunal to save \$28.5m over 4 years", *Canberra Times*, 10 May 2000, 25; Williams, Daryl, Commonwealth Attorney-General, *News release: establishment of the Administrative Review Tribunal*, 9 May 2000. Similar assumptions appear to have been made by the Queensland Attorney-General, Rod Welford, regarding the possibility of creating an amalgamated tribunal in Queensland — quoted in Creyke, Robin, "Tribunals and access to justice" (2002) 2(1) *Queensland University of Technology Law and Justice Journal* 64-82, at 64.

⁴ Williams, above n 3. See also Swain, Phillip, *Challenging the dominant paradigm: the contribution of the welfare member to administrative review tribunals in Australia*, 1998, unpublished.

⁵ Some commentators have suggested that governments are motivated to establish new tribunals because "it provides an opportunity for the executive to make a new set of appointments sharing the current executive's perspective" — Daley, John, "Abolishing a specialist tribunal" (1996) 7(2) *Public Law Review* 73-77, at 74. See also Swain, above n 4, at 39. On the other hand, see arguments by Ellis to the effect that amalgamation of specialist tribunals in the Canadian context would enhance their independence and reduce the ability of ministers and government agencies to interfere in their operation — Ellis, Ron, "Super provincial tribunals: a radical remedy for Canada's rights tribunals" (2002) 15 *Canadian Journal of Administrative Law and Practice* 15-50.

So far, amalgamation proposals have been considered in several jurisdictions in Australia, in the United Kingdom, and to a lesser extent in Canada. It would be unsurprising if this trend was adopted in other jurisdictions, given the perceived inducements.⁶

Despite the obvious trend towards tribunal amalgamation and calls for further research in this area,⁷ there is a distinct lack of theoretical engagement and research into the advantages and disadvantages of going down this path. There has been what may be termed an ill-considered approach to amalgamation. In relation to administrative law reform Justice Michael Kirby has argued that:

Judging the need for reform, and evaluating the options offered to secure reform, requires more than hunch and guesswork. All sound law and policy should be based, so far as possible, on sound data.⁸

However, it appears that decisions to amalgamate have been taken in the absence of data assessing the effectiveness of generalist tribunals, or the likely impact of amalgamation on the operation of specialist tribunals.

There is certainly a lack of empirical data on the consequences of amalgamation. Moreover, academics have not worked on the construction of a theoretical framework or model for assessing the likely impact of amalgamation on the delivery of administrative justice, or on the interests of specific stakeholder groups.⁹ As Fleming has commented:

We have seen tribunals, their membership or their jurisdictions, have been created, amalgamated, reviewed or abolished without careful analysis of the best way to achieve their ultimate objectives [*sic*].¹⁰

⁶ Creyke, above n 3, at 82.

⁷ A number of speakers at *Administrative law: the essentials*, a conference by the Australian Institute of Administrative Law, Canberra, July 2001, called for further research into the impact of amalgamation on tribunal performance.

⁸ Kirby, Justice Michael, "Administrative review twenty years forward", a paper presented at *The AAT — twenty years forward*, National Conference of the Commonwealth Administrative Appeals Tribunal, Canberra, July 1996, at 16. See also Kirby, Justice Michael, "The AAT: back to the future" in McMillan, John (ed), *The AAT — twenty years forward*, Australian Institute of Administrative Law, Canberra, 1998, 359-378, at 376.

⁹ Sayers, Michael and Webb, Adrian, "Franks revisited: a model of the ideal tribunal" (1990) 8 *Civil Justice Quarterly* 36-50, at 36.

¹⁰ Fleming, Gabriel, "Tribunal independence: maintaining public trust and confidence", a paper presented at the *Sixth AIJA tribunals conference*, conference by the Australian Institute of Judicial Administration, Sydney, 5-6 June 2003, at 11.

Rather than investigate these issues, a number of untested assumptions are routinely made in justifying amalgamation proposals. These include assumptions that bigger tribunals are more efficient as they can introduce economies of scale, and that specialist tribunals can continue to operate largely as before when they become divisions of a larger tribunal. In short, there is a sense that policy makers are ‘jumping on an amalgamation bandwagon’ without giving rigorous consideration to the consequences, in light of empirically-tested data.¹¹

This ill-considered or ‘over-hasty’ trend towards amalgamation raises a number of questions that have not previously been adequately addressed. An obvious question is whether or not an amalgamated tribunal model is more effective than a series of smaller, specialist tribunals in delivering administrative justice¹² — in other words, whether there is any net gain from a government’s decision to amalgamate. However, this is a most complicated, costly and methodologically challenging question to research: one beyond the scope of this study. A less explored, but equally important, question is how the process of amalgamation should be approached in order to realise the maximum potential benefits that an amalgamated tribunal can bring. That is, to ask what are the elements of an *optimal* amalgamation.

This thesis therefore focuses on the more practical question of how to implement amalgamation decisions once they have been made, rather than attempting to revisit the policy decisions that are being made by governments. The aim is to propose a way of differentiating between good and bad amalgamations, that is grounded in theory and informed by experience to date.

The hypothesis developed in this Chapter — that law, context, organisation and people are the key ingredients of successful tribunal reform — will be applied and tested in the

¹¹ O’Neill, Nick, “Tribunals — they need to be different”, a paper presented at the *Fourth AIJA tribunals conference*, conference by the Australian Institute of Judicial Administration, Sydney, 8 June 2001, at 1. By way of analogy, Genn has criticised the untested assumptions that are routinely made regarding the presumed benefits of informal procedures for unrepresented applicants. She has argued that “[t]heoretical arguments for the benefits of informal procedure require empirical validation” — Genn, Hazel, “Tribunals and informal justice” (1993) 56 *Modern Law Review* 393-411, at 410.

¹² Creyke has acknowledged the relevance of this question in Creyke, above n 3, at 64.

remaining Chapters of this thesis, with reference to the amalgamation experiences at Commonwealth level, and in NSW and Victoria.

IS A GENERALIST TRIBUNAL MODEL MORE EFFECTIVE THAN A SPECIALIST MODEL?

While the objective of this thesis is to formulate a theory of optimal amalgamation, there is nonetheless merit in briefly revisiting the work that has been done on the broader question of the advantages and disadvantages of generalist versus specialist tribunal models. An analysis of these models highlights a number of conceptual issues which arise in the examination of tribunal amalgamation — a process which involves transition from specialist to generalist tribunal.

In addition, the following discussion highlights one of the most significant problems addressed in this thesis — the lack of understanding of tribunals generally and the likely consequences of reform. Specifically, it underlines the need for further research to assist governments in determining which model of tribunal is preferable in a given set of circumstances. Further research is especially important in light of the fact that, in most instances, the question *whether* to amalgamate will precede the question of *how* to amalgamate.

The literature to date

In this thesis, the term ‘specialist tribunal’ is used to refer to a tribunal that operates within one specific jurisdiction or field and, as a consequence, carries out only one kind of function. A ‘generalist tribunal’ is defined as one that makes decisions in relation to a variety of subjects. A generalist tribunal may perform one kind of function in a range of jurisdictions — such as the Commonwealth AAT which conducts administrative review of government decisions made under almost 400 statutes — or multiple functions, including administrative review and court-substitute decision-making.¹³

¹³ The NSW ADT and VCAT are examples of this type of generalist tribunal.

There has been some discussion by commentators about the merits of generalist versus specialist tribunals. For instance, William De Maria has criticised the consequences of creating generalist tribunals by pointing to the more formal, legalistic approach of the Commonwealth AAT compared to the approach of some specialist tribunals.¹⁴ More recently, Terry Carney has questioned the benefits of incorporating a specialist agency such as the Intellectual Disability Review Panel into a generalist tribunal like VCAT.¹⁵ A number of commentators, including tribunal members themselves, recognise the benefits of specialist tribunals having different features in order to meet the needs of stakeholders in different jurisdictions.¹⁶ Such comments arguably cast doubt on the relative merits of generalist tribunals.

Others have argued strongly in favour of generalist tribunals. For instance, Michael Harris has argued that a system of specialised administrative tribunals can be wasteful of resources, and can result in “institutional isolation, and confusion for the citizen seeking review”.¹⁷ In contrast, a generalist administrative tribunal can:

... provide an effective means by which to improve the quality of administrative justice, raise the standard of administrative decision-making and ultimately bring about greater governmental accountability.¹⁸

Consideration has also been given to the merits of specialist versus generalist tribunals in the industrial relations jurisdiction. A number of commentators in that field argue that a centralised tribunal structure leads to greater rigidity in decision-making and

¹⁴ De Maria, William, “The Administrative Appeals Tribunal in review: on remaining seated during the standing ovation” in McMillan, John (ed), *Administrative law: does the public benefit?*, proceedings of the 1992 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1992a, 96-121; De Maria, William, “Mediation and adjudication: friends or foes at the Administrative Appeals Tribunal” (1992b) 20 *Federal Law Review* 276-292; De Maria, William, “The Administrative Appeals Tribunal: legal parasitism and the death of mediation” (1991) 21 *Queensland Law Society Journal* 109-117. See also Dwyer, Joan, “Overcoming the adversarial bias in tribunal procedures” (1992) 20(2) *Federal Law Review* 252-275, at 259 to 261.

¹⁵ Carney, Terry, “Re-mixing ‘access’, ‘advocacy’, ‘empowerment’ and ‘protection’? A case for a specialised division of labour in guardianship, mental health and disability services adjudication?” (2001) 5(2) *Newcastle Law Review*, forthcoming in 2004.

¹⁶ See, for instance, Daley, above n 5, at 75. See also “Specialist tribunals project” (1990) 25 *Admin Review* 54-57; O’Neill, above n 11.

¹⁷ Harris, Michael, “There’s a new tribunal now: review of the merits and the general administrative appeal tribunal model” in Harris, Michael and Waye, Vicki (eds), *Australian studies in law: administrative law*, Federation Press, Sydney, 1991, 188-220, at 188.

¹⁸ *Ibid.*, at 188 and 218 to 220.

decision-makers who are less inclined to take into account the special circumstances of particular industries.¹⁹ In other words, there are suggestions that specialist tribunals are better able to focus on the particular needs and circumstances of a small number of stakeholders, and avoid making decisions that put ‘big picture’ considerations ahead of the demands of a specific jurisdiction.²⁰

A number of overseas commentators have considered the relative merits of specialist versus generalist tribunals, including those that operate in Australian jurisdictions. South African and Canadian academics have pointed to the Commonwealth AAT as an example of an effective generalist tribunal,²¹ as did the Leggatt Committee in its review of the tribunal system in the United Kingdom.²²

Several studies of specialist tribunals in the United Kingdom, in particular, mental health review tribunals, have highlighted the advantages and difficulties associated with establishing and maintaining effective specialist tribunal models. While specialist tribunals with multi-member panels are said to provide benefits such as expertise and increased efficiency,²³ such benefits can be outweighed by sloppy practices or badly drafted legislation that results in unfairness.²⁴ The fact that the legislative framework within which specialist mental health review tribunals operate has been amended several times in unsuccessful attempts to eradicate such problems²⁵ suggests that any model of

¹⁹ Romeyn, Jane, *Centralised and specialist tribunals: the influence of structure on arbitral decision-making in Australia*, Industrial Relations Research Centre, Sydney, 1982, at 1.

²⁰ *Ibid.*, at 18 and 57 to 58.

²¹ Corder, H. and Maluwa, T., “Administrative justice in Southern Africa: background and some issues” in Corder, H. and Maluwa, T. (eds), *Administrative justice in Southern Africa*, University of Cape Town, Cape Town, 1997, 6, at 15; Ison, Terence, *The Administrative Appeals Tribunal of Australia: a study paper prepared for the Law Reform Commission of Canada*, Law Reform Commission, Canada, 1989 — cited in Creyke, above n 3, at 65.

²² Leggatt, Sir Andrew, *Tribunals for users: one system, one service*, the Stationery Office, London, 2001, at Part II, Individual tribunals, the Australian example, paragraphs 1.18, 2.5 and 3.

²³ As Richardson and Machin point out, without expert members mental health review tribunals would be ill-fitted to their task — Richardson, Geneva and Machin, David, “Judicial review and tribunal decision making: a study of the Mental Health Review Tribunal” (2000) *Public Law* 494-514, at 110.

²⁴ For instance, Perkins found that the bad habits of some medical members in professing ‘expert’ opinions on the appropriate outcome of cases resulted in unfairness, as did the complex way in which legislative criteria were drafted — see Perkins, Elizabeth, *Decision-making in mental health review tribunals*, Policy Studies Institute, London, 2002, at 124 to 125.

²⁵ See, for example, Peay, Jill, *Tribunals on trial*, Clarendon Press, Oxford, 1989, at 10 to 11. Peay explains how research into the 1959 legislation informed crafting of the *Mental Health Act 1983* (UK), which tried to overcome problems such as lack of transparency in the way medical members went about their work, only to fail. Perkins

tribunal — specialist or generalist — will have difficulty surmounting the flaws that can arise in some contexts.

At a more theoretical level Creyke has considered the relative benefits of “government-wide versus specialist-jurisdiction tribunals”,²⁶ and whether tribunal co-location would be a more appropriate model than amalgamation of a series of separate, specialist tribunals.²⁷ Creyke’s concept of ‘co-location’ puts forward a new way of structuring tribunal systems that is something of a compromise between the specialist and generalist tribunal models. Features of co-location could include the sharing of facilities, such as library services and research staff, or sharing of technology, office space and registry staff.

The potential benefits of co-location include greater economy in the use of resources, improved support for members, better cross-fertilisation of ideas and consistency of approach, heightened awareness of administrative review, and improved access to review.²⁸ It seems likely that some of the benefits of a single structure — such as greater visibility and accessibility — can be achieved through a co-location model. However, it is argued that other benefits — such as improved normative impact, consistency of process and the adoption of improvements following cross-fertilisation of ideas — can only be maximised through amalgamation.²⁹

Moreover, a co-location model is less likely to deliver the additional benefits that amalgamation can bring, such as reducing complexity, increasing coherence and

raises similar questions in relation to the most recent proposals to amend the mental health legislative framework in the United Kingdom — Perkins, above n 24, at 129 to 133.

²⁶ Creyke, above n 3.

²⁷ Creyke, Robin, “The state of the ART”, a paper presented at *Current issues in the tribunals and courts*, conference by the Australian Institute of Administrative Law, Sydney, 9 March 2001.

²⁸ “Specialist tribunals project”, above n 16, at 54 to 55.

²⁹ The assumption is that benefits such as consistency and the normative impact will be maximised when decision-makers in one department are aware of significant administrative law decisions involving other portfolios. In this regard, note the findings from a recent study conducted by Creyke and McMillan, that around 30% of officers surveyed considered their agencies were “very effective” or “partially effective” in keeping them informed of “administrative law developments arising from decisions in which another agency was involved” — Creyke, Robin and McMillan, John, “Executive perceptions of administrative law — an empirical study” (2002) 9(4) *Australian Journal of Administrative Law* 163-190, at 188. This figure would arguably increase if appeals from different agencies were heard by a single tribunal.

independence, and the development of “an administrative law jurisprudence across tribunals on matters of common interest”,³⁰ including questions of procedure. While the concept of co-location warrants further attention, a closer examination of this issue will not necessarily provide answers regarding the competing merits of specialist versus generalist models, or the way in which amalgamations that are already taking place should be approached.

Creyke addresses the former question — the relative merits of specialist versus generalist tribunals — by exploring the arguments for and against each model in light of the objectives of tribunals. The objectives mentioned include consistency, accessibility, independence, efficiency, fairness and the importance of adequate resourcing.³¹ Her tentative conclusion is that “not only is a single tribunal structure desirable, but it is also feasible”.³² Similarly, the Leggatt Committee considered that a generalist tribunal model would enhance qualities such as coherence, accessibility and the stature of tribunals.³³

In contrast, Nick O’Neill has emphatically rejected the amalgamated tribunal model, and favours the retention of specialist bodies in light of the need of tribunals performing different functions to be different from each other.³⁴ According to O’Neill:

Unity brought about by merger or amalgamation brings not only diseconomies of large scale but the very real risk of stifling the development of tribunals.³⁵

As this brief exploration of the relevant literature demonstrates, much of the discussion regarding the advantages and disadvantages of generalist versus specialist tribunals has

³⁰ Creyke, above n 3, at 72.

³¹ *Ibid.*, at 68 to 73.

³² *Ibid.*, at 73.

³³ *Ibid.*, at 69.

³⁴ O’Neill, above n 11, at 7 and 15. See also Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on the jurisdiction and operation of the Administrative Decisions Tribunal*, NSW Parliament, Sydney, 2002, at 29.

³⁵ O’Neill, above n 11, at 15. Stephen Legomsky has explored the question of specialisation at a similar level of abstraction, looking in particular at the advantages and disadvantages of adjudication by specialists. Yet while thoroughly examining the issue of specialisation in law from a variety of angles, this work does not aim to compare the relative merits of specialist and generalist decision-making bodies. Rather, the focus is on assessing the desirability of specialised adjudication in a range of contexts. See Legomsky, Stephen, *Specialised justice: courts, administrative tribunals, and a cross-national theory of specialisation*, Clarendon Press, Oxford, 1990, at 5 to 6.

focused on comparing existing examples of either type of model. For example, there is some discussion about the merits of the AAT compared to specialist tribunals such as the SSAT. Debate over specialist versus centralised tribunal systems in the industrial relations field has tended to focus on the implications of either model for decision-making in a particular jurisdiction, rather than a higher level consideration of models *per se*.

Apart from Creyke's thoughtful commentary on specialist, co-located and amalgamated tribunal models, the conceptual question of which model of tribunal is preferable has received relatively little attention.³⁶ As Robin Handley argued in 1996:

No attempt had been made to collect information about tribunals across Australia, nor does there seem to have been any attempt to identify the range of appropriate tribunal models which could be utilised to achieve a specific objective.³⁷

Part of the reason for this may be that the growing trend to amalgamate specialist tribunals has only become apparent in recent years.³⁸ Thus, most commentators have tended to focus on developments in a particular jurisdiction, rather than theorising generally about the merits of different models.

Whatever the reasons, in light of recent developments it is timely for a more comprehensive consideration of the relative merits of generalist versus specialist tribunal models. Alternatives to either model, such as co-location, also require more detailed consideration. Such an analysis is central to the broader question of whether governments should amalgamate tribunals in the first place.

As mentioned, this thesis does not seek to engage directly with this broader question. However, it is arguable that a rigorous analysis of different tribunal models would also shed light on the narrower, more pressing question of *how* amalgamations should proceed. The following discussion therefore outlines the nature of the issues that would

³⁶ Harris expressly declined to address this question in his article on the features that an effective generalist administrative tribunal should possess — Harris, above n 17, at 191 to 192.

³⁷ Handley, Robin, "Research note: collecting information about tribunals" (1996) *AIAL Forum No 6*, 37-44, at 37.

³⁸ While the Administrative Review Council proposed an ART at Commonwealth level as early as 1995, the NSW ADT and VCAT were not established until 1997 and 1998 respectively. Reports recommending amalgamation in the United Kingdom and WA were not finalised until 2002.

need to be explored and the types of research conducted to enable an evaluation of different tribunal models to proceed. More specifically, after briefly comparing the characteristics of generalist and specialist models, it suggests how criteria for evaluating tribunal performance might be derived in light of similar work already undertaken in relation to courts. While there is some relevant thinking about tribunals that might be built upon in this regard, a number of difficult questions remain to be addressed.

Although this discussion raises more questions than it answers, the examination is useful in highlighting the broader context within which the question of *how* to amalgamate tribunals arises. At the same time, it also demonstrates why the pursuit of the broader question (*whether* to engage in amalgamation) is beyond the scope of this thesis.

What are the characteristics of each model?

There has long been recognition of the distinction between generalist and specialist tribunal models in policy debates and recommendations about tribunal reform. This much is apparent from commentary about the advantages and disadvantages of different types of tribunals. While not detailed enough to answer the question of whether governments should amalgamate, the following examination builds upon the conclusions drawn in Chapter 1 by reinforcing the proposition that the characteristics of generalist and specialist tribunal models can be pinpointed and, therefore, measured. A brief overview of each model also informs discussion about the elements that should be present in order to create a successful amalgamated tribunal.

The specialist tribunal model

As long ago as 1957, the Franks Committee expressed misgivings over the *ad hoc* proliferation of smaller, specialist tribunals. The concerns often expressed about specialist tribunals include a perception that they cause unnecessary duplication of functions leading to wasted expense; that a complex web of tribunals applying practices and procedures which differ from jurisdiction to jurisdiction makes tribunal decision-making a more convoluted process for repeat players; and that specialist

tribunals have difficulty maintaining independence from the stakeholders whose interests their decisions affect.³⁹

On the positive side, specialist tribunals are commonly associated with concepts such as grass-roots accessibility, non-legal culture and process, informality, speed and specialist expertise.⁴⁰ In addition, some commentators see positive aspects about the closer relationship between specialist tribunals and their stakeholders. For instance, in the case of administrative tribunals this has been seen to lead to better understanding of departmental processes and policy, and greater potential to exert a normative impact on lower level decision-making.⁴¹

Other benefits of the specialist tribunal model include the fact that members often bring relevant expertise to a tribunal, which assists in the development of a pervasive corporate knowledge.⁴² In addition, specialist tribunals are able to develop practices and procedures, such as hearing procedures or client service procedures, specifically suited to the needs of their applicants. For instance, tribunals operating in jurisdictions such as migration can focus on developing policies and procedures for the use of interpreters on a

³⁹ For instance, many commentators have expressed concerns over the perceived expense of RRT review — McKinnon, Michael, “Illegal immigrants pose the question: do we act like good global citizens or do we send ’em home?”, *Northern Territory News*, 31 August 2000; McKinnon, Michael, “Delaying tactics”, *Courier Mail*, 17 November 1999; Harris, Tony, “Here to stay”, *Financial Review*, 30 August 2000; Maiden, Samantha, “\$169,000 to fly asylum seekers: ‘leaders’ of Hedland riots among them”, *The Advertiser*, 24 January 2001; Barton, Mairi, “Boat people push system ‘to collapse’”, *The West Australian*, 1 May 2000; McKinnon, Michael, “Ruddock to sink court actions by boatpeople”, *Courier Mail*, 15 March 2000; Reed, David, “Lawyers attack brake on refugee tribunal appeals”, *The West Australian*, 29 January 2000. Similar concerns have been expressed over the perceived independence of that tribunal — Harris, above n 39; Buggins, Anne and Cowan, Sean, “Minister eyes new facilities to hold illegal immigrants”, *The West Australian*, 11 February 2001; Haigh, Bruce, “Inhumane approach to victims shames us”, *The Australian*, 22 June 2000; Clennell, Andrew, “Libs’ \$520-a-day part-timers”, *Sydney Morning Herald*, 19 June 2001. More generally, see Wade, Jan, Victorian Attorney-General, “Second Reading Speech for the *Victorian Civil and Administrative Tribunal Bill 1998*”, Victoria, *Legislative Assembly Debates*, 9 April 1998, 972-975, at 974; Whelan, Paul, Minister for Police, “Second Reading Speech for the *Administrative Decisions Tribunal Bill 1997*”, NSW, *Legislative Assembly Debates*, 29 May 1997, 9602-9606.

⁴⁰ See, for instance, Williams, Daryl, Commonwealth Attorney-General, “Second Reading Speech for the *Administrative Review Tribunal Bill 2000*”, Australia, *House of Representatives Debates*, 28 June 2000, 18404-18407.

⁴¹ Bayne, Peter, “The proposed Administrative Review Tribunal — is there a silver lining in the dark cloud?” (2000) 7(2) *Australian Journal of Administrative Law* 86-99, at 89.

⁴² This was reinforced by research conducted for the purpose of completing coursework requirements at the University of Sydney — see, for instance, NGO representative 3 at paragraph 30. The references to interview subjects correspond to the descriptions of subjects set out in Bacon, Rachel, *Perceiving the Refugee Review Tribunal: a politico-legal kaleidoscope*, Canberra, 2001, unpublished.

regular basis.⁴³ This would be less relevant for tribunals dealing primarily with English-speaking applicants. Such targeted initiatives could be frustrated by competition for resources within a generalist tribunal whose divisions serviced a range of applicants with differing needs.

In relation to efficiency, it could be argued that specialist tribunals, being unconstrained by potentially ill-fitting procedures, are better able to offer streamlined and efficient services in the context of the matters before them. A good example of this is the way in which the SSAT operates using two- and three-member panels as an integral feature of its decision-making process. It is widely assumed that multi-member panels are more expensive and time-consuming to operate because each decision necessitates paying the salaries of up to three members rather than one, and involves committee-style discussion rather than decisive individual action. However, there is evidence indicating that the SSAT actually operates more efficiently — makes decisions more quickly and makes fewer errors — than tribunals which operate using only single member panels.⁴⁴ In contrast the AAT (the only generalist tribunal at Commonwealth level) is widely perceived as being expensive to run despite the fact that it makes far greater use of single member panels.⁴⁵

On the other hand, it is generally acknowledged that the costs involved in supporting a system of self-sufficient, specialist tribunals will be higher than the resources required to operate a single generalist tribunal. This is because the establishment of separate bodies involves the duplication of infrastructure — such as administrative, corporate and information technology support — which could be shared by a single tribunal.

⁴³ See, for instance, Nygh, Peter, RRT Principal Member, *Directions under s 420A relating to the application of efficient processing practices to the conduct of reviews by the Tribunal*, RRT, Sydney, 20 January 2000, at 4.

⁴⁴ At a basic level, the data provided in the 2002–2003 annual reports for the AAT, MRT, RRT and SSAT indicate that the SSAT makes more decisions more efficiently than the other three Tribunals. Specifically, in this period the AAT finalised 10,434 matters with an annual budget of \$28,739,000 (*Administrative Appeals Tribunal, 2002–2003 Annual report*, AAT, Sydney, 2003, at 16 and 111); the RRT finalised 6,251 matters with an annual budget of \$19,820,000 (*Refugee Review Tribunal, Annual report 2002–2003*, RRT, Sydney, 2003, at 16 and 23); the MRT finalised 9,714 matters with an annual budget of \$20,379,000 (*Migration Review Tribunal, Annual report 2002–2003*, MRT, Sydney, 2003, at 14 and 22); while the SSAT finalised 9,762 matters with an annual budget of \$13,014,672 (*Social Security Appeals Tribunal, Annual report 2002–03*, SSAT, Melbourne, 2003, at 13 and 56). While the AAT was the only Tribunal to finalise a greater number of matters, the SSAT had a significantly lower budget than this Tribunal.

Drawing on this discussion, the types of features which can be said to characterise the specialist tribunal model are:

- accessibility;
- a smaller, ‘boutique’ style of agency with proportionately higher start up costs;
- identification with, and provision of services appropriate to, the particular clientele of the tribunal;
- procedures and an approach that suit the needs of applicants or parties — in many cases, an informal, non-legalistic approach;⁴⁶
- specialist knowledge and expertise;⁴⁷ and
- closer association with relevant stakeholders.

A number of these features equate to those identified in Chapter 1 as significant characteristics distinguishing tribunals from courts. One of the main functions of specialist tribunals is to provide a more accessible, less formal court alternative which is capable of delivering specialist services suited to the needs of the jurisdictions in which they operate.

The generalist tribunal model

Generalist tribunals are perceived to have a number of features that distinguish them from specialist tribunals. For instance, they are seen to make more efficient use of resources as they can utilise economies of scale. There are also suggestions that larger tribunals, which are resourced to perform a wider range of functions, have resources at their disposal which can be used to develop and implement cost-saving initiatives.⁴⁸ Others

⁴⁵ See, for example, Leon, above n 3, at 1; Newman, above n 3; Burgess, above n 3; Williams, above n 3.

⁴⁶ McMillan, John and Todd, Robert, “The administrative tribunals system: where to from here?” in Argument, Stephen (ed), *Administrative law: are the States overtaking the Commonwealth?*, proceedings of the 1994 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1996, 116-130, at 121. However, note Genn’s warning in relation to the goal of informality — that while specialist tribunals purport to act in an informal manner, the nature of their decision-making task is often necessarily complex and legalistic. Genn has described the impression of informality given by many specialist tribunals as “misleading”. This, in turn, may lead to outcomes which are less than “just”. See Genn, above n 11, at 400 to 401, 403 and 409.

⁴⁷ McMillan and Todd, above n 46, at 121.

⁴⁸ See, for instance, comments by VCAT Senior Member 2 at paragraphs 107 to 113. These issues are further explored in the context of the qualitative research presented in Chapter 11.

have suggested that larger tribunals have the flexibility to adapt a wider range of procedures to suit the circumstances of particular cases.⁴⁹ These features arguably enable generalist tribunals to operate in a more efficient, streamlined way, although this potential may not be realised in every case.

Generalist tribunals also tend to be associated with greater independence as they are removed from the influence of any one particular stakeholder group.⁵⁰ This perception of independence contributes, in turn, to perceptions that larger tribunals are more effective in delivering justice and fairness than their specialist counterparts. However, in contrast to specialist models, generalist administrative tribunals are seen by some to be so removed from primary level decision-makers as to lack some understanding of the processes and policies that were applied in reaching the decisions under review.⁵¹ Similar concerns could be raised about generalist tribunals with court-substitute or professional disciplinary functions.

In addition, generalist tribunals tend to be associated with greater legalism and formality, and members who are skilled and trained in procedure rather than the substantive issues arising in matters before them.⁵² Perhaps inevitably, given their larger size, generalist tribunals are also more likely to be characterised by a greater degree of bureaucratisation than smaller, specialist tribunals. A commonly recurring criticism of generalist tribunals such as the Commonwealth AAT is that they have developed a culture and approach which is overly formal and ‘court-like’.⁵³ Most generalist tribunals have relatively standardised procedures and practices which are applied — sometimes inappropriately —

⁴⁹ McMillan and Todd, above n 46, at 121.

⁵⁰ For instance, no subject interviewed for this thesis expressed concern over the independence of the NSW ADT or VCAT. This can be contrasted to the significant concerns expressed in relation to the independence of specialist tribunals such as the Commonwealth RRT — see the discussion in Chapter 1.

⁵¹ Bayne, above n 41, at 89.

⁵² See, for example, *ibid.*, at 91.

⁵³ Williams, above n 3. See also Swain, above n 4, at 44, 45 to 46 and 221; De Maria (1992a), above n 14, at 100 to 102; De Maria (1992b), above n 14; Dwyer, above n 14, at 259 to 261.

in different types of matters.⁵⁴ On the other hand, standardised procedures can contribute to values such as fairness and consistency.

In summary, the types of features which can be said to characterise the generalist tribunal model are:

- independence;
- a more formal, bureaucratised and less personal approach to decision-making;
- standardised or streamlined, and perhaps more formalised, practices and procedures;
- generalist knowledge and expertise in procedure rather than subject-matter; and
- economies of scale and a more effective use of resources.

Compared to the specialist tribunal model described above, the generalist tribunal model has fewer features distinguishing it from courts. However, the specialist tribunal, generalist tribunal and court models are situated at different points on a spectrum in terms of characteristics such as independence, formality, accessibility, specialisation, and an emphasis on efficiency versus fairness and justice.⁵⁵ In other words, the generalist tribunal model is located part way along the spectrum that has informal, non-legal specialist tribunals at one end and courts at the other.

As argued above, this brief examination of the characteristics of each model reinforces the proposition put forward in Chapter 1: that there is something inherent in the nature of ‘tribunal’ which can be defined and measured. Moreover, this discussion goes further in suggesting that different tribunal models can be articulated with sufficient precision to enable them to be compared and assessed.

⁵⁴ See, for example, the range of procedures set out in the AAT Act. Many of these are applied in matters coming before the Tribunal under some 395 statutes — Administrative Appeals Tribunal, above n 44, at 8. Only a minority of Acts conferring jurisdiction on the AAT contain provisions regulating the procedures to be applied by the Tribunal in conducting administrative review.

⁵⁵ Peay, above n 25, at 221 to 223; Perkins, above n 24, at 123; Kendall, Arun, “Non-Lawyers and administrative law II” in Cole, Kathryn (ed), *Administrative law and public administration — form vs substance*, proceedings of the 1995 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1995, 313-321, at 318 and 320, cited in Swain, above n 4, at 10.

This justifies further examination of the question whether a generalist, amalgamated tribunal is more appropriate than a series of smaller, specialist tribunals in a given set of circumstances. While not the primary focus of this thesis, further discussion of this issue will assist in refining and clarifying the underlying assumptions about the objectives of tribunals articulated in the Introduction. As the second part of this Chapter will demonstrate, distilling these assumptions contributes to the development of a hypothesis that can be used in assessing the effectiveness of tribunal amalgamations.

The following discussion therefore goes on to consider how criteria might be developed for use in evaluating the effectiveness of different tribunal models.

Which tribunal model is more effective?

It is certainly not immediately apparent which model of tribunal is preferable and should be pursued by governments. At first glance, it seems the best approach would be to choose the model that was most appropriate in a given set of circumstances, in light of the needs of the stakeholders involved. However, a major difficulty with this approach is that there is no existing framework or set of objectives which can be applied in determining which model would be most effective in a particular set of circumstances. To date, little work has been done on exploring ways in which the effectiveness or performance of different tribunal models, or even individual tribunals, can be evaluated or assessed.

Work in other areas, such as the evaluation of court performance, indicate the types of avenues that can be pursued in order to develop a framework or set of objectives that is relevant to tribunals. However, a more targeted approach is required, as the types of factors used to evaluate court performance will be different to those used to assess tribunals. Work that is specific to tribunals has commenced. For example, the Administrative Review Council (ARC) has consulted about and formulated views on the objectives that merits review tribunals should strive to achieve. However, the following discussion demonstrates that more needs to be done to address the challenges posed by the task of evaluating tribunals and tribunal models.

Frameworks for evaluating court performance

A significant amount of attention has been paid in recent decades, especially in the United States, to the question of how to measure the performance of courts.⁵⁶ While the focus of this research is on measuring the performance of individual courts, the approaches adopted can be drawn on in considering how to approach the evaluation of different curial or tribunal models. In particular, the work done in relation to courts demonstrates the importance of having an agreed set of objectives or principles against which the functions of a body can be assessed.

In 1990 the US National Center for State Courts published a set of 22 standards to be applied in trial courts in the United States. These standards were developed on the basis of the following five objectives that courts should strive to achieve:

1. access to justice
2. expedition and timeliness
3. equality, fairness and integrity
4. independence and accountability
5. public trust and confidence.⁵⁷

These objectives have been drawn on by researchers in Australia who have attempted to devise a set of standards and benchmarks for evaluating the performance of Australian courts.

Mohr, Gamble, Wright and Condie, in a project focusing on local courts in NSW, used these objectives as the basis for developing a set of standards for court performance.

⁵⁶ Colbran, Stephen, "Judicial performance evaluation: accountability without compliance" (202) 76(4) *Australian Law Journal* 235-249, at 236; Mohr, Richard; Gamble, Helen; Wright, Ted; and Condie, Brendan, "Performance measurement for Australian courts" (1997) 6(3) *Journal of Judicial Administration* 156-170, at 159; Sallmann, Peter, "Court performance standards: an Australian perspective" (1991) 65 *Australian Law Journal* 195-204; McDonald, Lawrence, "Measuring administrative justice — lessons from the Report on Government Services" in Creyke, Robin and McMillan, John (eds), *Administrative justice — the core and the fringe*, proceedings of the 1999 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1999, 138-147, at 143; Neave, Marcia, "In the eye of the beholder — measuring administrative justice" in Creyke, Robin and McMillan, John (eds), *Administrative justice — the core and the fringe*, proceedings of the 1999 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1999, 124-137, at 131.

⁵⁷ National Center for State Courts, *Trial court performance standards desk reference manual*, NCSC, at http://www.ncsconline.org/D_Research/TCPS/TCPSDeskRef.pdf, accessed on 3 January 2004. These standards have been endorsed by judicial associations throughout the United States, and have been relied upon as a model by countries around the world — *ibid.*, at 1.

These standards are intended to function as criteria by which a court's performance may be judged to be conforming to the five objectives listed above. Benchmarks were then developed which sought to define observable or measurable events which could indicate whether a court was conforming with the various standards.⁵⁸ For example, one of the standards developed in relation to the objective 'access to justice' was "all have access regardless of their cultural background".⁵⁹ The benchmarks devised to measure performance against this standard included the delivery of training in serving clients from non-English speaking backgrounds; liaison with communities; and the development of relevant service delivery methods.⁶⁰

A different approach can be seen in the work of Glandfield and Wright, who have developed a numerically-based method for assessing court performance. Their 'model key performance report' is based on four measures, namely, backlog of cases, overload of cases, clearance ratio (that is, the ratio of new applications to finalisations) and attendance index, which measures the number of cases in which there has been more than the benchmark number of attendances by parties. All of these measures are aimed at providing a numerical picture of the outputs of courts in terms of numbers of cases, and the resources that a court has used in achieving those outputs.⁶¹

A number of commentators have criticised this approach as overly simplistic. For instance, Mohr, Gamble, Wright and Condie argue it is not enough to measure what is 'measurable'; rather, a performance measurement system for courts must also assess what is important:

Hence, we must assess not only cost, but also accessibility; not only speed, but also fairness; not only accountability, but also independence.⁶²

⁵⁸ Mohr, Gamble, Wright and Condie, above n 56; Condie, Brendan; Gamble, Helen; Mohr, Richard; and Wright, Ted, *Client services in local courts: standards and benchmarks*, Centre for Court Policy and Administration, Wollongong, 1996.

⁵⁹ Mohr, Gamble, Wright and Condie, above n 56, at 162.

⁶⁰ *Ibid.*, at 162 to 163.

⁶¹ Glandfield, L. and Wright, E., *Model key performance indicators for NSW courts*, Justice Research Centre, NSW, 2000.

⁶² Mohr, Gamble, Wright and Condie, above n 56, at 158.

Similarly, Colbran has questioned the work of Glandfield and Wright on the basis that “the wider goals of fair process or just outcomes are *assumed* to be givens”, rather than being tested or measured (emphasis added). Colbran implicitly endorses the views expressed by Chief Justice Gleeson regarding court performance measurement, that:

Crude measures of performance, based upon turnover of cases, regardless of their length or complexity, or based upon comparisons between courts, regardless of their comparative workloads and resources, are clearly inappropriate. Their principal attraction is to people who prefer to ignore the complexity of the business with which the courts must deal.⁶³

Thus, there is continuing debate over how the task of measuring court performance should be approached. Nonetheless, the critical point to take from this research is the importance — and the difficulty — of establishing an agreed set of principles or objectives from which measures of effectiveness can be derived.

The beginnings of a framework for evaluating tribunals

The importance placed on establishing the basic objectives or goals of a system before it can be measured can be seen in the work of Mashaw in evaluating the adequacy of bureaucratic decision-making processes in the United States:

A person evaluating the adequacy of the disability decision process must take seriously the basic goals of bureaucratic administration — rationality and efficiency.⁶⁴

A similar approach has been endorsed by the Australian National Audit Office (ANAO) in relation to assessing the performance of public sector agencies in an Australian context. According to the ANAO:

Developing performance information involves identifying the objectives of the program or activity, the separate components or stages in the process to achieve the objectives, and the relationship between them.⁶⁵

In relation to tribunals, this approach has been advocated by members of the Tribunals Research Program who have worked on developing a set of “standards and indicators”

⁶³ Colbran, above n 56, at 243.

⁶⁴ Mashaw, Jerry, *Bureaucratic justice*, Yale University Press, New Haven, 1983, at 103.

⁶⁵ Australian National Audit Office, *Performance information principles*, ANAO, Canberra, 1996, at 5.

for use in evaluating existing tribunals.⁶⁶ According to Goldring, Handley, Mohr and Thynne:

An evaluation should begin by identifying the tribunal's stated or unstated purposes and asking what it actually does to achieve those objectives.⁶⁷

While the work of this group is the most advanced to date, there have been other attempts to formulate the objectives of tribunals. For example, in the 1950s the Franks Committee in Britain stated that: "the function of tribunals and inquiries should be to ensure openness, fairness and impartiality".⁶⁸ The Committee also identified cheapness, accessibility, informality, expedition and expertise as qualities that are particular to tribunals, as opposed to courts.⁶⁹

More recently the ARC, during its review of Commonwealth merits review tribunals, formed the view that the overall objective of the federal tribunal system is to ensure that all administrative decisions of government are correct and preferable.⁷⁰ In seeking to meet this objective, the ARC considered that a system of merits review tribunals should have several specific objectives, namely:

- providing review applicants with the correct and preferable decision in individual cases;
- improving the quality and consistency of agency decision making — there are two main ways this can be achieved:
 - by ensuring that particular review tribunal decisions are, where appropriate, reflected by agencies in other similar decisions (referred to in this report as the 'normative effect');⁷¹ and

⁶⁶ Handley, above n 37, at 42; Goldring, John; Handley, Robin; Mohr, Richard; and Thynne, Iain, "Evaluating administrative tribunals" in Argument, Stephen (ed), *Administrative law and public administration: happily married or living apart under the same roof?*, proceedings of the 1993 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1993, 160-190, at 172.

⁶⁷ Goldring, Handley, Mohr and Thynne, above n 66, at 173.

⁶⁸ Partington, Martin, "Taking administrative justice seriously: reflections on the Australian Administrative Appeals Tribunal" in McMillan, John (ed), *The AAT — twenty years forward*, Australian Institute of Administrative Law, Canberra, 1998, 134-153, at 145.

⁶⁹ *Id.*

⁷⁰ Administrative Review Council, *Better decisions: a review of Commonwealth merits review tribunals*, AGPS, Canberra, 1995, at 11.

⁷¹ See also Bayne, Peter, "Disputes about tribunals" (1990) 64 *Australian Law Journal* 493-497, at 497; Mathews, Justice Jane, "Future directions" in Bayne, Peter (ed), *Administrative Appeals Tribunal — AAT essays 1976-1996*, Administrative Appeals Tribunal, Brisbane, 1996, 19-26, at 25; Skehill, Stephen, "Future directions in administrative law" in Cole, Kathryn (ed), *Administrative law and public administration — form vs substance*, proceedings of the 1995 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1995, 332-338, at 335; Swain, above n 4, at 14; Creyke, above n 3, at 80.

- by taking into account review decisions in the development of agency policy and legislation;⁷²
- providing a mechanism for merits review that is accessible (cheap, informal and quick), and responsive to the needs of persons using the system; and
- enhancing the openness and accountability of government.⁷³

These reflect the objectives that governments should strive to achieve in establishing or reforming tribunal systems. In relation to individual tribunals, the ARC recommended that all tribunals have the statutory objective of providing review that is fair, just, economical, informal and quick.⁷⁴ This recommendation was a reflection of the objectives that the Franks Committee had identified for tribunals,⁷⁵ and of statutory objectives which already existed for the MRT, RRT and SSAT.⁷⁶ For instance, the *Migration Act 1958* (Cth) sets out the RRT's objectives as follows:

Refugee Review Tribunal's way of operating

- 420. (1)** The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.
- (2)** The Tribunal, in reviewing a decision:
- (a) is not bound by technicalities, legal forms or rules of evidence; and
 - (b) must act according to substantial justice and the merits of the case.

Although neat, compact and widely accepted, this statutory formulation does not reflect other important objectives proposed by the ARC. Further refinement and debate could be expected in the course of settling on an agreed formulation of the objectives of tribunals.⁷⁷ Other objectives that would need to be explored include providing an alternative to the adversarial judicial system in order to relieve the burden on courts,⁷⁸

⁷² This particular objective appears to be directed towards decision-makers in agencies rather than tribunals, and its achievement would therefore be outside the direct control of tribunals.

⁷³ The Council considered that independence, coherence and efficiency are important attributes which contribute to achieving the objectives listed above, rather than objectives in their own right — Administrative Review Council, above n 70, at 11.

⁷⁴ *Ibid.*, at 15 to 16.

⁷⁵ Specifically, the Franks Committee had said that tribunals should be independent, accessible, prompt, expert, informal and cheap — see Leggatt, above n 22, at An Overview, paragraph 3.

⁷⁶ The relevant statutory provisions referred to by the ARC in 1995 were s 1246 of the *Social Security Act 1991* (Cth) (see now s 140 of the *Social Security (Administration) Act 1999* (Cth)); and ss 353 and 420 of the *Migration Act 1958* (Cth).

⁷⁷ For instance, Partington has argued that the key functions of tribunals identified by the Franks Committee should be revisited in a contemporary context — Partington, above n 68, at 145 to 148.

⁷⁸ Swain, above n 4, at 21, citing Edelman, Peter, "Institutionalising dispute resolution alternatives" (1984) 9(2) *The Justice Journal* 134-150, at 135.

bringing specialist expertise to decision-making,⁷⁹ encouraging consistency,⁸⁰ providing a system of review that is respected, autonomous and independent,⁸¹ providing a “safeguard to ensure the proper and reasonable exercise of discretion by government”,⁸² being professional, flexible and responsive,⁸³ and fostering participation, equity and a healthy relationship between citizens and government that benefits “society as a whole”.⁸⁴ Consideration may also need to be given to the use of terms such as ‘cost-effective’ rather than ‘cheap’, and ‘relaxed formality’ rather than ‘informality’.⁸⁵

This exploration would need to take into account the different types and functions of tribunals listed in Chapter 1.⁸⁶ In addition, it would be useful to examine and compare the consideration given to these issues in overseas jurisdictions such as the United Kingdom.⁸⁷ A proposed list of objectives should then be scrutinised and tested in light of the differing needs and expectations of the various stakeholder groups with an interest in tribunal decision-making.

Despite the involved nature of this process, the fact that there appears to be general agreement about the desirability of at least some goals suggests the task of devising an

⁷⁹ Swain, above n 4, at 33 and 14, citing Sahara, H., *Administrative law and tribunals*, Eastern Law House, Calcutta, 1987, at 227 to 228.

⁸⁰ Goldring, Handley, Mohr and Thynne, above n 66, at 179.

⁸¹ Creyke, above n 3, at 82; Swain, above n 4, at 14, citing Sahara, above n 79, at 227 to 228; Sayers and Webb, above n 9, at 38 to 39.

⁸² Coghlan, Anne, “Can review bodies lead to better decision-making?” (1991) 66 *Canberra Bulletin of Public Administration* 128-135, at 128. See also Creyke and McMillan, above n 29, at 167; Tomasic, Roman, “Administrative law reform — who benefits?” (1987) 12(6) *Legal Service Bulletin* 262-266, at 263 to 264; Swain, above n 4, at 15.

⁸³ Fleming, above n 10, at 3.

⁸⁴ Sayers and Webb, above n 9, at 39; Partington, Martin, “Restructuring administrative justice? The redress of citizens’ grievances” (1999) 52 *Current Legal Problems* 173-199, at 183 to 184; Wikeley, Nick, “Burying Bell: managing the judicialisation of social security tribunals” (2000) 63(4) *Modern Law Review* 475-501, at 494.

⁸⁵ Partington, above n 68, at 147.

⁸⁶ The three types of tribunals examined in Chapter 1 were administrative review tribunals that are responsible for reviewing government decisions, professional disciplinary tribunals which hear charges against professionals working in various disciplines, and ‘court-substitute’ tribunals which provide an alternative decision-making mechanism to courts. See O’Neill, above n 11, at 5.

⁸⁷ See, for instance, Leggatt, above n 22.

agreed set of tribunal-specific objectives or principles is achievable.⁸⁸ This proposition is reinforced by the work of the Tribunals Research Program.⁸⁹

Further challenges to be addressed

The next step in developing a framework for assessing the effectiveness of tribunals would be to devise tools of evaluation or standards against which the achievement of these objectives could be assessed. However, there are a number of challenges that would need to be overcome before such a framework could be completed and implemented. As well as outlining the nature of these challenges, the following discussion highlights why this task is beyond the scope of this thesis.

Conflicting and elusive objectives

This thesis argues that decision-making bodies like courts and tribunals are often expected to meet contradictory or conflicting objectives. For example, the objectives of being fair and just on the one hand can often conflict with requirements to be economical and quick. As Mashaw has stated:

Changes that unambiguously increase the system's capacity to realize one or more of these values without sacrificing others are obviously desirable. Beyond these easy cases (should any exist), evaluative analysis can only weigh as carefully as possible the trade-offs among goals that are inherent in current processes or proposals for reform.⁹⁰

A way of negotiating and weighing competing objectives would need to be devised in order to develop a comprehensive framework for the evaluation of tribunal performance.

In addition, as researchers working in the area of court performance have demonstrated, there are considerable difficulties associated with measuring objectives such as fairness, justice, accessibility and informality. As well as quantitative measures of performance, qualitative measures would need to be designed which adequately capture the presence or

⁸⁸ Note that submissions received by the ARC in response to a discussion paper proposing objectives for tribunals similar to those listed above generally agreed with the objectives put forward — Administrative Review Council, above n 70, at 10.

⁸⁹ Goldring, Handley, Mohr and Thynne, above n 66; Handley, above n 37.

⁹⁰ Mashaw, above n 64, at 103.

absence of these elusive qualities.⁹¹ The discussion below indicates the type of research that would need to be conducted in order to address these challenges.

Variables in jurisdiction and function

Even if agreement were reached regarding a set of objectives and standards which could be used in assessing the performance of one particular tribunal or class of tribunals, the task of comparing the merits of abstract models raises a further set of difficulties. More specifically, this would require an evaluator to take into account the impact of variables in jurisdiction and function.

Variables in jurisdiction are important as there is some interaction between the type of jurisdiction within which a tribunal operates and the practices and procedures which that tribunal develops. For example, a tribunal operating in a social welfare or guardianship jurisdiction is likely to adopt more informal, less adversarial processes than a tribunal hearing tax appeals. This proposition is borne out by the examination of the different procedures used by the SSAT as compared with the AAT in Chapter 2. Likewise, research into mental health review tribunals in the United Kingdom indicates that a tribunal operating in a jurisdiction such as mental health is likely to develop an empathetic way of operating, but may not place enough emphasis on qualities such as fairness.⁹²

In relation to function, even tribunals which operate within the same jurisdiction (such as the social security tribunals operating in the United Kingdom during the 1970s) may adopt different or complementary approaches. While tribunals reviewing decisions involving national insurance were quite formal and 'legal' in their approach, those dealing with supplementary benefit appeals were informal and non-legalistic. The latter tribunals were designed to administer the large number of discretions existing under the supplementary benefits scheme, and their operation was characterised by informality,

⁹¹ The methodology adopted by Perkins in a study of mental health review tribunals in the United Kingdom included reviewing tribunal decision-making through non-participant observation, documentary analysis, and interviewing tribunal members. On the basis of detailed research along these lines, Perkins was able to draw some conclusions about the fairness of decision-making in these specialist tribunals. See Perkins, above n 24, at 3, 13 and 124 to 129.

private hearings, lack of legal representation and failure to give reasoned decisions based on published principles.⁹³

The discussion in Chapter 1 demonstrated that tribunals performing functions as diverse as administrative review, ‘court-substitute’ decision-making and professional discipline functions share common features. Nonetheless, within these parameters, there is little doubt that the function a tribunal performs influences the way in which it operates.⁹⁴ Differences in function encourage, and to some extent necessitate, differences in approach, meaning that tribunals which perform different types of tasks may emphasise some characteristics over others.⁹⁵

The influence of jurisdiction and function on individual tribunals poses challenges to those seeking to evaluate the effectiveness of specialist versus generalist tribunal models. This would not be a barrier to assessing the effectiveness of abstract models in the context of particular circumstances, as the nature of the jurisdiction and the functional requirements of a decision-making body could be taken into account. However, the difficulty of making uncontextualised generalisations about either model raises questions about the usefulness of attempts to compare them. These issues would need to be carefully considered in the design of a framework or set of objectives for evaluating and comparing tribunal models.

Multiple constituencies with conflicting priorities

Another significant challenge is posed by the need to take into account the different, sometimes conflicting, views of stakeholder groups about the operation of tribunals.⁹⁶ In this thesis, the term ‘stakeholder’ is “used to denote those with an interest in the substance of what is being examined”.⁹⁷

⁹² *Ibid.*, at 123 to 124.

⁹³ Farmer, J. A., *Tribunals and government*, Sweet and Maxwell, London, 1974, at 86.

⁹⁴ *Id.*

⁹⁵ *Ibid.*, at 183.

⁹⁶ See, for example, Mashaw, above n 64, at 103.

⁹⁷ Goldring, Handley, Mohr and Thynne, above n 66, at 165.

Generally speaking, there are a variety of stakeholders interested in the performance of tribunals. These include government (politicians as well as bureaucrats), parties and their representatives, courts, community organisations, the public, and members and staff of tribunals.⁹⁸ There are likely to be a number of tensions between the views of these groups.⁹⁹ For instance, in relation to administrative tribunals, there is a potentially irreconcilable tension between the interests of government and applicant stakeholders. On the one hand, governments often expect tribunals to operate with speed, economy and efficiency, to satisfy the public's demand for an effective, accessible avenue of appeal, and to acknowledge government policy and refrain from overturning too many of its decisions.¹⁰⁰ In contrast, applicants are presumably interested in tribunals making fair and just decisions in the context of individual cases, without undue delay and cost. It is not difficult to envisage cases where these objectives would conflict.

While there may be agreement between these two constituencies about the general objectives that tribunals should strive to achieve, such as speed and justice, it is arguably impossible to strike a balance between competing objectives like these which keeps both sets of stakeholders happy all of the time.

An example of conflicting interests between the general public and applicant stakeholder groups was encountered by Jill Peay in her study of mental health review tribunals in the United Kingdom. The main function of these tribunals was to safeguard against improper admission of patients under Britain's then *Mental Health Act 1959*, as well as unduly

⁹⁸ *Ibid.*, at 165. While specialist tribunals generally have a more limited range of stakeholders than generalist tribunals that hear matters in a number of jurisdictions, the categories of stakeholder listed here are likely to be relevant in relation to any type of tribunal.

⁹⁹ For a discussion of the conflicting interests of different stakeholder groups regarding the performance of courts, see Baker, R., "The new courts administration: a case for a systems theory approach" (1974) 52 *Public Administration* 285-302, at 296 to 297. The differing values that come to the fore in the three models of administrative justice developed by Mashaw reinforce the proposition that perceptions of effectiveness will vary according to perspective — see Mashaw, above n 64, discussed in Wikeley, above n 84, at 499.

¹⁰⁰ There are suggestions that reviewing agencies will inevitably come to find an 'error rate' in the decisions they review which strikes a delicate balance between justifying their existence and not becoming too much of a nuisance to government. Following his study of the activities of Ombudsmen and his experience as Commonwealth Ombudsman in Australia, Pearce has suggested that most agencies see this balance as being struck with an error rate of around 30% — comments by Pearce, Dennis, speaking at *Administrative law: problem areas — reflections on practice*, conference by the Australian Institute of Administrative Law, Canberra, 3–4 July 2003. See also Pearce, Dennis, "The Commonwealth Ombudsman: present operation and future developments" in Taylor, John; Pearce, Dennis; and Saunders, Cheryl, *Unchaining the watch-dogs: paper no. 7*, Department of the Senate, Canberra, 1990, 33-62, at 47 and 53.

protracted detention.¹⁰¹ In theory, mental health review tribunals were not charged with the responsibility of achieving the difficult balance between individual interests (that is, the interests of patients in not being detained) and societal interests (the interests of society in not risking harm from potentially dangerous patients). Rather, their role was to focus on the individual cases before them. In practice, however, Peay found that tribunals frequently attempted to achieve a satisfactory balance, even though this was almost impossible to achieve:

In theory ... tribunals are not charged with achieving the difficult balance between individual and societal interests. Rather, they constitute one element (with a patient-primacy orientation) in a dynamic package of mental health legislation which has been designed to accommodate both sets of interests. But in practice, tribunals frequently attempt to achieve just such a satisfactory balance and thereby encounter a series of irresolvable dilemmas.¹⁰²

The fact that many stakeholder groups will have different needs and expectations in relation to the objectives of tribunals will make it difficult to develop widely accepted measures of effectiveness. While it may be possible to take into account the views of more than one constituency, in light of the tensions between different groups it would be impossible to consider the effectiveness of specific tribunals or tribunal models from the perspective of all stakeholders simultaneously. As organisational theorists have pointed out:

... judgements of effectiveness are based on the values and preferences individuals hold for a certain organisation. The trouble with these values and preferences, however, is that they vary, and they are often contradictory among different constituencies.¹⁰³

Thus, the basic question in any formulation of effectiveness is ‘effectiveness for whom’?¹⁰⁴ A recent paper by Fleming argues that this question has not been thoroughly explored by a majority of tribunals.¹⁰⁵

¹⁰¹ Peay, above n 25, at 3.

¹⁰² *Id.* These findings were reinforced by Perkins’ study of mental health review tribunals — see Perkins, above n 24, at 127.

¹⁰³ Cameron, Kim, “Effectiveness as paradox: consensus and conflict in conceptions of organisational effectiveness” (1986) 32(5) *Management Science* 539-553, at 541.

¹⁰⁴ Denison, Daniel, *Corporate culture and organisational effectiveness*, John Wiley and Sons, New York, 1990, at 36.

¹⁰⁵ Fleming, above n 10, at 4.

One possible way to address this issue would be to research and analyse the needs and expectations of as many stakeholder groups as possible, in order to come up with a balanced compilation of objectives. In relation to applicants, for instance, the advantages and disadvantages of generalist and specialist tribunals would need to be explored from all relevant angles. Some of the issues raised may include the accessibility of each type of tribunal, the up-front costs involved (including the costs of necessary representation), the layout of hearing rooms, the relevance and perceived fairness of decisions, and the ability of generalist versus specialist tribunals to adopt procedures that take into account the needs of their users.¹⁰⁶

Clearly the interests of applicants will not always align with those of other stakeholder groups. For instance, in relation to the retention of specialisation versus greater uniformity in procedure, the needs of repeat players will often be different to those of applicants. Whereas repeat players, such as lawyers who appear across a number of jurisdictions, would no doubt appreciate the adoption of uniform procedures, this arguably makes little difference to unrepresented individual applicants. Most applicants appear before one tribunal, once. It will therefore make no difference whether other divisions or tribunals use the same or similar procedures, as long as those procedures are accessible and comprehensible.¹⁰⁷

A comprehensive analysis of stakeholder views would be a resource-intensive undertaking. However, the value of this task is that the extent to which tribunals are able to balance the interests and needs of all of their constituencies is itself an informative measure of effectiveness. Essentially, such an approach would reflect the strategic constituencies or stakeholder model of effectiveness that is described in organisational theory literature.¹⁰⁸ A key measure of organisational effectiveness according to this model is whether “all strategic constituencies are at least minimally satisfied”,¹⁰⁹ or

¹⁰⁶ Creyke, Robin, *The procedure of the federal specialist tribunals*, Centre for International and Public Law, Canberra, 1994, at 1. See also Genn, above n 11, at 410.

¹⁰⁷ More detailed analysis of the priorities of different stakeholder groups in relation to tribunals is set out in Goldring, Handley, Mohr and Thynne, above n 66, at 169 to 170.

¹⁰⁸ Denison, above n 104, at 36 to 37; Cameron, above n 103, at 542.

¹⁰⁹ Cameron, above n 103, at 542.

whether an organisation succeeds in integrating diverse interests.¹¹⁰ Cameron considers this model to be useful when stakeholders “have powerful influence on the organisation, and it has to respond to demands”.¹¹¹

The application of this model would be especially useful in measuring the effectiveness of tribunals in light of the fact that their stakeholders often have divergent, sometimes conflicting, interests in outcomes and processes. A useful focus of research in the application of this theory would be the extent to which each stakeholder group is kept happy by a sample of specialist and generalist tribunals. The results of this research could then be analysed for outcomes that indicated which model of tribunal was more effective in performing particular kinds of functions. Using stakeholder satisfaction as a measure of effectiveness in this way would be consistent with Cameron’s theory that highly effective organisations tend to behave in paradoxical or contradictory ways in order to satisfy conflicting expectations.¹¹²

Further research

The above discussion highlights a number of avenues of further research that would need to be pursued in formulating a framework or set of objectives which could be applied in answering the broad question: are generalist tribunals more effective than specialist tribunals? While there are a number of challenges to be confronted, there are indications that these difficulties could be overcome. Moreover, it seems generally accepted that this area of study is worthwhile.¹¹³ As demonstrated in Chapters 2 and 3, the need is particularly pressing in light of the extent to which tribunal reform continues to be pursued. The following discussion examines the specific directions in which future research could usefully be taken.

As argued above, one of the ways in which researchers can begin to develop a framework for measuring tribunal effectiveness would be to devise a set of principles or objectives

¹¹⁰ Denison, above n 104, at 36.

¹¹¹ Cameron, above n 103, at 542.

¹¹² *Ibid.*, at 550.

¹¹³ See, for example, Neave, above n 56, at 124; Colbran, above n 56; Sallmann, above n 56.

for tribunals that are internationally accepted. This would be consistent with the approach taken by those in Australia working on developing performance measures for courts.¹¹⁴ This work should build on the discussion of the objectives of Commonwealth merits review tribunals, for instance, by paying systematic regard to the different types of tribunals operating throughout Australia and overseas. This work could also include testing proposed objectives against the views of various stakeholder groups to gain as comprehensive a picture as possible of the goals that tribunals ought to pursue.

Work would then need to be done on devising ways in which the performance of different tribunals or types of tribunal could be measured in terms of the objectives identified. For example, a range of indicators or measures could be developed which are adapted to the activities that tribunals undertake, and which seek to link those activities back to the framework of tribunal-specific principles or objectives. The application of these indicators could involve a series of case studies, assessing the performance of a range of operating tribunals. Again, a comprehensive approach would take into account the requirements and expectations of a range of stakeholder groups.

Additional ways of evaluating the effectiveness of tribunals may include examining their performance against indicators such as cost, efficiency and productivity. The concepts of economy and efficiency refer to the cost-effectiveness of tribunals for applicants, government and the community, as well as the speed and efficiency of the processes by which individual matters are resolved. Such an approach would involve detailed examination of budget statements and workload statistics, and a comparative assessment of whether performance against these indicators had improved over time.

However, this approach would not necessarily provide a holistic picture of tribunal performance. While efficiency and productivity are important features of the tribunal system, productivity measures do not adequately capture information about other important features such as fairness and justice, independence, accountability, consistency, accessibility, informality, specialisation and normative impact.

¹¹⁴ See Mohr, Gamble, Wright and Condie, above n 56.

The limitations of an ‘efficiency’ approach to performance evaluation are widely acknowledged. On the basis of studies he had conducted, one researcher into performance measurement techniques concluded that conventional measures of performance such as profitability and financial market measures are unsatisfactory indicators of excellence:

Perhaps this should not come as a surprise, since the above measures of performance have at least three major limitations:

- they assume that a single performance criterion can assess ‘excellence’;
- they focus only on outcomes to the exclusion of ... processes ...; [and]
- they ignore the claims of other stakeholders besides the stockholder.¹¹⁵

In a public sector context, Mashaw has described cost–benefit analysis as “a joke” when applied to evaluate the social morality or “rightness” of particular proposals.¹¹⁶

Thus, measures of the effectiveness of tribunals should take into account the extent to which a tribunal operates in a manner that is fair, just, and accessible, as well as quick and cost-effective.¹¹⁷

An assessment of performance against these factors would require data from a wide range of sources and studies.¹¹⁸ For instance, quantitative and/or qualitative research would need to be undertaken, perhaps with both one-off as well as repeat users of tribunals, in order to explore whether tribunal decisions were perceived to be fair and processes accessible. Possible additional studies would include evaluating the conduct of hearings in order to assess the informality and accessibility of tribunal procedures,¹¹⁹ and conducting comprehensive analyses of written decisions in order to ascertain the fairness and justice of outcomes. Such studies may involve attending dozens of tribunal hearings

¹¹⁵ Chakravarthy, Balaji, “Strategic performance” in Holloway, Jacky; Lewis, Jenny; and Mallory, Geoff (eds), *Performance measurement and evaluation*, Sage, London, 1995, 252-275, at 263.

¹¹⁶ Mashaw, Jerry, “Small things like reasons are put in a jar: reason and legitimacy in the administrative state” (2001) 70 *Fordham Law Review* 17-35, at 33.

¹¹⁷ See Baker, above n 99, at 297 for similar comments in relation to monitoring the performance of courts.

¹¹⁸ Goldring, Handley, Mohr and Thynne, above n 66, at 171.

¹¹⁹ See, for example, Swain, Phillip, “Critical or marginal? The role of the welfare member in administrative review tribunals” (1999) 6 *Australian Journal of Administrative Law* 140-154; Swain, above n 4, at i.

and evaluating the written reasons delivered in a sizeable sample of matters in order to ‘reality test’ the perceptions of applicants and other stakeholder groups.¹²⁰

In addition, it may be appropriate to undertake qualitative and quantitative research with other stakeholders of tribunals in order to gain a well-rounded picture of their perceived and actual performance. This may involve collecting data from constituencies such as politicians, bureaucrats, courts and the general public.¹²¹ Importantly, research examining the normative impact of administrative decision-making (including by administrative tribunals) has already been conducted by Creyke, McMillan and Pearce using mainly quantitative research methods.¹²² It is argued that tribunal members and staff would provide a unique ‘insider’ perspective to balance the data gathered from external stakeholders.

Overall, the number and variety of studies required in order to evaluate the performance of just one tribunal against a comprehensive range of indicators is beyond the scope of this thesis. Given the size of the task of providing a holistic picture of the effectiveness of tribunals, not to mention different tribunal models, it would be reasonable to seek to chip away at this problem one study at a time.

¹²⁰ The approach taken by Peay in her study of mental health review tribunals in the United Kingdom was to conduct semi-structured interviews with tribunal users, officers whose decisions were being reviewed, and tribunal members; to observe a number of tribunal hearings in different locations; and to analyse case files held at two different tribunal locations. See Peay, above n 25, at 23 to 24. A similar approach was adopted by Richardson and Machin in their study of the relationship between law and tribunal decision-making. Specifically, this research involved examining all judicial review cases involving mental health review tribunals since the introduction of the relevant legislation; examining tribunal files in two tribunal offices; observing 50 tribunal hearings; and conducting interviews with patient representatives, tribunal members and tribunal staff. See Richardson and Machin, above n 23, at 495. See also Richardson, Geneva and Machin, David, “Doctors on tribunals: a confusion of roles” (2000) 176 *British Journal of Psychiatry* 110-115, at 110 to 112. The approach adopted by Perkins in her study of mental health review tribunals was to review tribunal decision-making through non-participant observation, documentary analysis, interviewing tribunal members, and studying what happened to patients once they were discharged. This latter study was undertaken using data collected from two samples — one of which was constituted by patients discharged by the Tribunal, the other being constituted by patients discharged by primary decision-makers (Responsible Medical Officers) — see Perkins, above n 24, at 3 and 13. See also Genn, above n 11, where the author presents the results of research on tribunals that involved “quantitative analysis of 4000 tribunal case files, observation of 500 tribunal hearings, and interviews carried out with” a number of stakeholder groups (at 393).

¹²¹ Similar research methods were proposed by members of the Tribunals Research Program. Specifically, Handley and others advocated a methodology comprising “a master list of data” about tribunals; a “search list of public documents”; “observation of tribunal hearings and viewing of premises”; “questions for tribunal management”; “a questionnaire for tribunal members”; and “questions for stakeholders” — Handley, above n 37, at 39 to 40; Goldring, Handley, Mohr and Thynne, above n 66, at 187 to 188.

¹²² Creyke and McMillan, above n 29, at 163.

Yet while the need is certainly pressing, the eagerness with which governments around Australia and overseas are pursuing policies of amalgamation casts doubt on the relative urgency of this task. More specifically, in light of current developments, a more practical course of action is to provide a comprehensive analysis of *how* amalgamation should be approached. This results of such an analysis could be put into immediate use by policy-makers in a number of common law jurisdictions.

In developing a hypothesis that can be used to predict and assess the effectiveness of particular amalgamation proposals, the following discussion draws on the above exploration of the objectives that different tribunal models should strive to achieve.

HOW SHOULD AMALGAMATION OF TRIBUNALS BE APPROACHED?

The research undertaken for this thesis is designed to answer the less explored, but equally important, question — how should tribunal amalgamation be approached in order to achieve an *optimal* amalgamation. This is not a question about whether government decisions to pursue amalgamation are intrinsically worthwhile or beneficial for stakeholders. Rather, it is about how government decisions to amalgamate should be implemented. In other words, the question addressed is not what makes an ‘effective tribunal’, but what makes an ‘effective amalgamation’.

In researching and gathering data on this question, this thesis inevitably sheds some light on whether a generalist or specialist tribunal model is more capable of meeting particular objectives. For instance, the information gathered about the impact of amalgamation on the operation of specialist tribunals informs discussion about the benefits of that model, and the types of circumstances in which it operates most effectively. Yet rather than provide definitive answers in this regard, the intention is to provide a comprehensive analysis of amalgamation that can be used to develop a *methodology for predicting and measuring the effectiveness of amalgamations* that is grounded in theory, legal analysis and first-hand experience. This is arguably the first time such a task has been attempted.

The primary benefit of focusing on the amalgamation process itself is that it provides a way of differentiating between good and bad amalgamations. This, in turn, gives

policy-makers some indication of what to pursue and what to avoid when designing and implementing amalgamation processes. As such, this study “aims at developing knowledge of causal relationships in order to manipulate and control variables for the sake of accomplishing certain outcomes”.¹²³ In other words, one of the primary objectives of this thesis is to produce knowledge that increases the potential for optimal outcomes to be attained in future amalgamation processes.¹²⁴

Unlike the above discussion of different tribunal models, there is very little existing literature that can be drawn on in examining the effectiveness of tribunal amalgamations. Thus, the hypothesis developed in the second part of this Chapter draws laterally on organisational theory literature, and is informed by the original research presented in Chapters 6 to 11 of this thesis.

The drafting of the Commonwealth ART Bill provides a useful starting point from which to explore the legal issues associated with amalgamation. In addition, the fact that the NSW and Victorian Governments decided to pursue policies of amalgamation at the same time provides a unique opportunity to compare the success or otherwise of two different attempts at amalgamation in two different contexts. The examination of these amalgamation experiences undertaken in Chapters 6 to 11 provides valuable data that can be used in testing and applying the methodology of effective amalgamation developed below.

How should effectiveness be defined and measured?

The task of developing a methodology for predicting and measuring the effectiveness of amalgamations raises the difficult question of how to define and measure effectiveness in this context.

¹²³ Alvesson, Mats, *Understanding organisational culture*, Sage, London, 2002, at 8.

¹²⁴ *Ibid.*, at 10. See also Peay, above n 25, at vi.

Defining effectiveness

The Webster dictionary definition of ‘effective’ is “producing a desired result”.¹²⁵ The desired result of a tribunal amalgamation has two interconnected components, namely, an amalgamation process that is planned, orderly and efficient, and a process that produces a good outcome: an effective amalgamated tribunal. This can be distinguished from other definitions of effectiveness, such as ‘the delivery of a project on time, within budget’.

In relation to the second component of this definition it is assumed that, while not inevitable, an effective process is more likely to result in an effective amalgamated tribunal. It is acknowledged that, in taking outcomes into account in evaluating the effectiveness of an amalgamation process, assumptions are made about what constitutes an effective amalgamated tribunal. As stated earlier, this thesis does not purport to develop and apply a comprehensive definition of effectiveness that can be used in measuring the performance of individual tribunals or tribunal models. The discussion in the first part of this Chapter demonstrated why such an undertaking is beyond the scope of this thesis.

Instead, conclusions about the effectiveness of the outcomes of an amalgamation process are drawn upon the basis of a ‘working definition’ of tribunal effectiveness. This definition is informed by the values enunciated in the Introduction to this thesis. To recap, an effective amalgamated tribunal is assumed to be one which is accessible and efficient, and which delivers just or correct outcomes that are arrived at via appropriate, integrated processes. In addition, it is assumed that an effective amalgamated tribunal will strive to implement continuous improvements that enable it to better meet these objectives.

It is acknowledged that this interim definition is no substitute for the rigorous, comprehensive definition of tribunal effectiveness argued for above. Nonetheless, in the context of this thesis, information gathered on the operation of the ADT and VCAT is

¹²⁵ Quoted in Van de Ven, Andrew and Ferry, Diane, *Measuring and assessing organizations*, John Wiley and Sons, New York, 1980, at 27. This is similar to the definition of ‘effectual’ in the shorter Oxford English dictionary, which is “producing the intended result, effective” — Brown, Lesley (ed), *The new shorter Oxford English dictionary*, Clarendon Press, Oxford, 1993, at 786.

analysed and assessed on the basis of these assumptions. It is argued that these assessments are valuable in evaluating the amalgamation processes undertaken in each State, and the success of different approaches.

Measuring effectiveness

The way in which effectiveness should be measured is more difficult. It is this second question that has been the subject of extensive discussion and debate in the literature on organisational effectiveness. There is general acknowledgement that defining effectiveness is not an easy undertaking, and a number of authors have commented on the subsequent disarray and lack of cohesion in the field of organisational studies.¹²⁶ However, the difficulty of the task has not deterred numerous authors from attempting to develop models or frameworks that can be used in measuring organisational effectiveness. As the following discussion demonstrates, this thinking — informed by the qualitative research presented in Chapters 7 to 11 — provides valuable insight into the question of how to evaluate different approaches to amalgamation.

The various models of effectiveness developed by organisational theorists include:

- the ‘stakeholder model’, which assumes that an organisation is effective if it succeeds in integrating diverse interests and satisfying all of its constituencies, even if these interests conflict;
- the ‘natural systems’ model, which takes the equilibrium of the organisation as a system, and the extent to which it can adapt and acquire resources from its environment, as primary measures of effectiveness; and
- the ‘goal attainment’ model, which equates effectiveness with the attainment of specific goals.¹²⁷

¹²⁶ Cameron, above n 103, at 539; Quinn, Robert and Rohrbaugh, John, “A spatial model of effectiveness criteria: towards a competing values approach to organisational analysis” (1983) 29(3) *Management Science* 363-377, at 363.

¹²⁷ See, for example, Cameron, above n 103, at 542; Denison, above n 104, at 36 to 37; Quinn and Rohrbaugh, above n 126, at 364.

Another approach to assessing performance that is more familiar to Australian agencies in a public sector context is the task of developing key performance indicators (KPIs) to measure the effectiveness of an agency's core processes. The ANAO has identified four key elements to be taken into account in the performance measurement process: inputs, processes, outputs and outcomes. The ANAO advises public sector agencies to measure their performance by identifying their objectives and the strategies by which they are to be achieved, and to consider their effectiveness in light of the outcomes achieved.¹²⁸ It recommends that quality be measured as well as efficiency (outputs produced in light of inputs received).¹²⁹

Thus, there is no one generally accepted way of evaluating effectiveness. However, there are undoubtedly commonalities among the types of criteria that authors have identified in the course of constructing different models and ways of evaluating effectiveness.¹³⁰ The challenge in this thesis is to draw on relevant elements found in a variety of models, approaches and frameworks, and on the qualitative data collected, in order to construct an appropriate methodology for evaluating the effectiveness of tribunal amalgamations.

The first thing to recognise before embarking on this task is that many of the frameworks and models put forward by organisational theorists have been developed on the basis of studies of private sector organisations as opposed to agencies operating in the public

¹²⁸ Australian National Audit Office, above n 65, at 3 to 8.

¹²⁹ *Ibid.*, at 9 to 10. See also Walsh, who argues there are four general categories of KPIs, namely, quantity, quality, time and cost, and that the measures of each of these categories can be expressed as efficiency, effectiveness and activity — Walsh, Paul, "Performance measurement: a new paradigm" (1995) November, *Directors' Forum* 29, 31, 33, at 31.

¹³⁰ For instance, the factors that Van de Ven and Ferry examined in developing and applying their "Organization Assessment Instruments" are reflective of the factors that most authors take into account when assessing the effectiveness of organisations. These factors are:

- the overall context and structure of an organisation;
- the context and design of organisational units;
- the context and design of jobs within the organisation;
- the external relationships that are formed by units within the organisation; and
- the inter-organisational field — that is, the relationships and networks that are formed between organisations.

Van de Ven and Ferry, above n 125 — see, in particular, the table of contents at page xvii.

sphere.¹³¹ This means much of the literature on evaluating effectiveness needs to be translated so that it can be applied in a government context, while some concepts may not be applicable at all. In addition, it will be necessary to take into account the unique position of tribunals within government itself. More specifically, tribunals are expected to operate as an alternative to courts, while at the same time offering a more rigorous, independent mechanism of decision-making than that provided by the executive.¹³² A number of issues will therefore arise in the course of evaluating a tribunal amalgamation process that have not been addressed in the literature on the effectiveness of private corporations. It is argued that any gaps that arise are largely filled by the qualitative data gathered about the operation of the ADT and VCAT.

The second thing to consider is that the task at hand is to evaluate the effectiveness of a process, rather than organisations *per se*. Obviously the outcome of an amalgamation process is an organisation — an amalgamated, generalist tribunal. The effectiveness of the organisation that is produced will be an indicator of the success or otherwise of an amalgamation process. However, the effectiveness of an amalgamated tribunal will not be the only indicator of the effectiveness of the process. Conversely, the effectiveness of the process by which it was established will not be the only indicator of an effective generalist tribunal. Bearing this in mind, it will be necessary to focus on indicators of effectiveness that are relevant to processes, not just the performance of organisations. Again, the qualitative data collected for this thesis counters many of the difficulties posed by the literature in this regard.

In light of these qualifications, it is arguably inappropriate to focus on any one model of organisational effectiveness in order to construct a methodology for measuring the effectiveness of amalgamations. This reinforces the validity of the approach suggested above, namely, to analyse a range of relevant models with a view to choosing measures of effectiveness that are most applicable to the problem addressed in this thesis, informed

¹³¹ See, for instance, Baker who noted that organisational theorists have not paid much attention to court administrations as “they mostly prefer institutions which can be fairly simply described as logical hierarchies clearly responsible to defined authorities” — Baker, above n 99, at 286.

¹³² *Cf* Perkins, above n 24, at 5.

by the major themes emerging from the qualitative data presented below. The following discussion sets out the most relevant indicators of effectiveness drawn from a wide range of relevant models, data and approaches, and explains how they can be applied in evaluating a tribunal amalgamation process.

Relevant measures of effectiveness

One of the indicators of effectiveness commonly referred to in the literature is the suitability of an organisation to its environment. The assumption is that environmental factors are significant determinants of effectiveness, and that organisations must have the capacity to adapt to their environments in order to survive. In addition, it is argued that the related concept of level of demand for an organisation's services or products can be translated in a public sector context as meaning the level of demand from a number of stakeholder groups including parties, government and the general public. Of these three groups, it is the level of demand from government that is the most powerful influence on the design and continued existence of a tribunal. Political demand, or the degree of political commitment to a particular amalgamation process, is seen as especially relevant in this regard.

This suggests that, in the case of amalgamation, the relationship between the mechanics of the process itself and the legislative environment in which it occurs is a relevant indicator of effectiveness.¹³³ This proposition is reinforced by the qualitative data presented in Chapters 6 to 10.

Issues to be addressed in measuring performance against this indicator would include the appropriateness of the parameters set by legislation — in other words, whether the intentions behind the legislative proposal could be achieved via an amalgamation process. In terms of the level of demand or the level of political commitment to the amalgamation, relevant issues to be examined include whether the proposal enjoys sufficient support and

¹³³ This proposition is consistent with comments by Richardson and Machin, that the complex context within which tribunals operate must be appreciated when conducting research in relation to tribunals — Richardson and Machin, above n 23, at 514.

momentum to make it viable, and the sufficiency of the resources available to implement it.

The design of organisational structures and processes is another central theme running through the literature on organisational effectiveness, and one that emerged strongly in the qualitative data. While not featuring as an indicator of effectiveness in any particular model, there is a general consensus that any examination of effectiveness needs to consider the appropriateness of an organisation's systems, processes and relationships.¹³⁴ Various studies in the field of organisational literature highlight the importance of retaining and facilitating the sharing of corporate knowledge throughout an organisation;¹³⁵ avoiding the possibility of disjunction and decreased interaction between members of an organisation;¹³⁶ initiating improvements in processes;¹³⁷ and improving efficiency and reducing costs.¹³⁸

In the case of tribunal amalgamation, there are two important elements to consider — first, the design of the amalgamation process itself and second, the design of the amalgamated tribunal. In relation to process, the way in which the amalgamation is planned and implemented will be a significant indicator of effectiveness. Factors to consider include the transitional arrangements that are put in place and how well these are communicated to participants. Also relevant is the comprehensiveness of the amalgamation proposal and related planning activity — for instance, whether the planning took into account all relevant aspects of the process, or whether it was simply a plan to create an 'empty box' and fill in the blanks at a later stage. In other words, the extent to which there was a focus on means as well as ends will be relevant. The motivations behind an amalgamation process may also be relevant here.

¹³⁴ These features are considered to have a significant impact upon the ability of organisations to gather and process information, organise production, and adapt to changing circumstances as required. See, for instance, Van de Ven and Ferry, above n 125, at 8 to 9.

¹³⁵ *Ibid.*, at 24.

¹³⁶ Pheysey, Diana, *Organizational cultures: types and transformations*, Routledge, London, 1993, at 43 to 44.

¹³⁷ *Ibid.*, at 43 to 44; Van de Ven and Ferry, above n 125, at 24.

¹³⁸ See, for example, Denison, above n 104.

In relation to the amalgamated tribunal itself, relevant factors to consider include the degree of disjunction in a newly-amalgamated tribunal — for instance, whether its constituent parts share information, organisational culture and approach; or whether it operates merely as a sum of its separate parts. Also relevant is the way in which registry and members are organised and what processes have been put in place to enhance information flow.

Another commonly identified indicator of effectiveness is the ability of an organisation to balance the integration and differentiation of competing values and to satisfy the interests of all of its constituents, even when these interests conflict.¹³⁹ This approach assumes that an effective organisation is one which has the capacity to respond to competing constituency preferences, and to behave in paradoxical ways in order to meet these competing expectations. This measure of effectiveness is particularly pertinent in light of the expectation that tribunals will provide an alternative to formal, curial processes of decision-making, while at the same time displaying qualities that are expected of independent decision-making bodies such as fairness, accountability and status. As expressed by Perkins:

It is clear, however, that tribunals are based on compromise. The process of the courts is elaborate, slow and costly in order, it is argued, to deliver the highest standard of justice. Tribunals provide a quicker more accessible justice and undoubtedly some of their problems arise from the need to balance the quality of process against convenience.¹⁴⁰

As discussed above, tribunals are required to meet the demands of a number of different stakeholder groups, in particular, government, users, the general public, and members and staff. In relation to amalgamation specifically, a process that was perceived as effective would need to satisfy the demands of government, which may include costs savings, increased efficiency, and the development of new initiatives such as performance management of members. In contrast, the interests of members and staff are likely to include the minimisation of upheaval caused by the transition, and a resulting tribunal

¹³⁹ See, in particular, Quinn and Rohrbaugh, above n 126. This approach is consistent with Cameron's discussion of the ability of organisations to deal with paradox — see Cameron, above n 103, at 550. This theoretical proposition is borne out by the findings in Perkins' study of mental health review tribunals published in Perkins, above n 24. See also Peay, above n 25, at 224.

¹⁴⁰ Perkins, above n 24, at 123. See also Swain, above n 4, at 26 and 29.

which is cohesive and characterised by a supportive organisational culture. This theme emerged strongly from the qualitative data. Other interests may include increased opportunities for promotion, professional development and training. Also relevant would be the interests of users in standards being maintained or improved during, and following, amalgamation.

Finally, leadership and organisational culture are factors that have been identified as important in measuring the effectiveness of organisations. Leadership has been referred to as something which “influences the construction of reality” within an organisation,¹⁴¹ and a factor that is intricately bound up with organisational culture.¹⁴² This suggests that perceptions of members and staff regarding the effectiveness of leadership in the transition from specialist to generalist tribunal is an important indicator of an effective amalgamation process, as is the cohesiveness of a new tribunal’s culture.

What are the elements of an optimal amalgamation?

This discussion of the factors commonly used in measuring organisational effectiveness highlights the types of features of an amalgamation process and an amalgamated tribunal that need to be examined in assessing whether a particular amalgamation has been successful. The approach proposed in this thesis is to measure the effectiveness of an amalgamation process by reference to six key factors drawn from the analysis of relevant measures outlined above. It is argued that the six elements of successful tribunal reform are:

- *A sound legislative foundation* — the legislation establishing an amalgamated tribunal needs to ensure the tribunal will have appropriate independence,¹⁴³ powers, processes, membership and structure.

¹⁴¹ Alvesson, above n 123, at 114 to 115.

¹⁴² Pheysey, above n 136, at 155.

¹⁴³ Creyke has identified independence as one of the key pre-requisites to implementing successful changes to a system of tribunals — Creyke, above n 3, at 73. Both legislative and non-legislative arrangements clearly impact on the degree of independence displayed by tribunals. This important issue is therefore considered in the context of several different elements, particularly: legislation (which includes an examination of the qualifications of tribunal members); political commitment (which includes an examination of funding arrangements for tribunals

- *Strong political commitment* — those responsible for proposing and planning an amalgamation need to provide appropriate funding and support for this process and for the amalgamated tribunal that is created.¹⁴⁴
- *Cohesive organisational structure* — the structures put in place when an amalgamated tribunal is established need to be appropriate, integrated and flexible.
- *Flexible and appropriate processes and procedures* — the processes and procedures adopted in the new tribunal need to capitalise upon the opportunities provided by amalgamation, as well as being appropriate, efficient and able to balance the needs of a range of stakeholders.
- *Integrated organisational culture* — an organisational culture which fosters communication and high morale will assist members and staff to identify with a newly-amalgamated tribunal and implement initiatives that will improve its performance.
- *Strong leadership* — effective leadership plays an important role in ensuring a smooth transition from specialist to amalgamated tribunal.¹⁴⁵

As stated above, an ‘effective’ amalgamation process is taken to be one that is planned, orderly and efficient, and that produces a good outcome. The six elements set out above can be used in measuring the extent to which this has been achieved. These elements are said to constitute the *ingredients* of successful tribunal reform. In other words, the task of measuring the effectiveness of an amalgamation involves ascertaining whether all the necessary ingredients are present in the correct proportions.

and the status given to an amalgamated tribunal); and organisational structure (which includes an examination of features of the relationship between an amalgamated tribunal and relevant government agencies).

¹⁴⁴ The importance of adequate funding for tribunals is highlighted in Perkins, above n 24, at 133 and Creyke, above n 3, at 73.

¹⁴⁵ Several of these elements — namely, legislation and the processes, procedures and structure of tribunals — were identified as central to the fairness of tribunal decision-making in Perkins’ study of mental health review tribunals in the United Kingdom. See Perkins, above n 24, at 123.

It is argued that the objectives more commonly associated with tribunals (such as fairness, justice, accessibility, efficiency, speed, informality, independence and accountability) are incorporated within these six elements. For instance, a sound legislative foundation must establish a tribunal that is independent and accessible in order to avoid subverting the *raison d'être* of the body it creates. Similarly, processes will not be appropriate unless they balance the requirements of fairness and justice on the one hand, and efficiency, speed and informality on the other. In addition, the concept of strong political commitment is seen as including a commitment to establishing a tribunal that is independent and accountable.

Thus, all six elements are multifaceted, and there are numerous factors that will need to be taken into account in evaluating the effectiveness of an amalgamation process in relation to each one. However it is argued that, broadly speaking, all of these elements fall into the categories of:

1. *law* (legislation);
2. *context* (political commitment);
3. *organisation* (structure and process); and
4. *people* (culture and leadership).

It is around these four essential ingredients of optimal tribunal reform that the material presented in the remainder of this thesis is organised.

CONCLUSIONS

The discussion in this Chapter highlights that the growing trend in common law jurisdictions to amalgamate tribunals is occurring in the absence of comprehensive research into its effects. One question this trend raises is whether there is any net gain to be had from government decisions to pursue policies of amalgamation. In other words, is a generalist, amalgamated tribunal more effective than a series of separate, specialist tribunals?

The answer to this question is not straightforward. An examination of the literature in relation to measurement of court performance indicates that the task of devising an

accepted set of objectives for the performance of tribunals, and then measuring different tribunal models against these objectives, is an involved one. While discussion of these issues suggested several lines of inquiry that could usefully be undertaken, this task is beyond the scope of this thesis. Instead, this thesis focuses on the less explored, but arguably more pressing, question of how an amalgamation process should be approached. In other words, in light of the fact that government decisions to amalgamate are proceeding, it seeks to show how a successful amalgamation can be achieved.

The question that arises is how to measure the success or effectiveness of an amalgamation process. An analysis of the models and approaches that have been used to evaluate effectiveness in the field of organisational theory — informed by the qualitative data presented in subsequent Chapters — provides a useful basis for devising a set of factors which must be considered in this context. These factors include the legislative environment and level of commitment to an amalgamation, the design of the process and its outcomes, whether the amalgamation meets competing interests, and whether participants perceive there to have been sufficient leadership and management of the amalgamation process.

Thus, the analysis undertaken in the remainder of this thesis proceeds on the premise that there are six requisite elements of an amalgamation process — namely, legislation, political commitment, organisational structure, process and procedure, leadership and organisational culture. These key elements constitute the four essential ingredients of optimal tribunal reform: law, context, organisation and people. The analysis of the data presented in Chapters 6 to 11 demonstrates that consideration must be given to all four ingredients if an amalgamation process is to succeed.

CHAPTER 5: RESEARCH DESIGN

As the previous discussion has highlighted, little work has been done that would assist policy-makers to predict or control the implementation of government decisions to amalgamate tribunals. While organisational theory literature points to the types of factors that will be important in ensuring successful reform, the hypothesis developed in Chapter 4 is necessarily informed by issues that are specific to tribunals and their effective operation.

In developing the hypothesis that law, context, organisation and people are the key ingredients of optimal tribunal reform, there has been a valuable interplay between theory and research. Before going on to analyse the research presented in Chapters 6 to 11, it is important to first explain the way in which data were collected and interrogated in order to develop the central ideas presented in this thesis.

QUALITATIVE RESEARCH METHODS

The data presented in this thesis were collected using qualitative research methods. Qualitative method is a well-established and powerful research technique which has been applied to explore a variety of subject matter in a wide range of disciplines and fields.¹ Among the strengths of qualitative research method is its ability to look at the richness and complexity of *relationships* within a system or culture; focusing on deeper *understanding* of phenomena (rather than making exact predictions about the people or organisations studied); and developing *models* to explain what occurred in the setting from which data were collected.² Qualitative research is more flexible and responsive to the research site being studied, entailing *ongoing* analyses of the data, from the time collection begins, to the time the results are finally interpreted and presented.³

¹ Denzin, Norman and Lincoln, Yvonna, "Introduction: entering the field of qualitative research" in Denzin, Norman and Lincoln, Yvonna (eds), *Strategies of qualitative inquiry*, Sage, London, 1998, 1-34, at 2.

² Janesick, Valerie, "The dance of qualitative research design" in Denzin, Norman and Lincoln, Yvonna (eds), *Strategies of qualitative inquiry*, Sage, London, 1998, 35-55, at 42 to 43.

³ *Id.*

While qualitative research techniques have long been used in the social sciences, commentators have argued this methodology has been misunderstood and neglected by lawyers:

There has been empirical research on law for at least 80 years, although there has not been very much of it. ... The vast bulk of writing about the law posits theories without testing them empirically. ... “The relative paucity of empirical work” in law “is perhaps unique among the policy-oriented disciplines, of which law is and ought to be the pre-eminent example.”⁴

While less commonly used in conducting legal research,⁵ the examples mentioned throughout this thesis indicate the growing number of studies undertaken by legal scholars using qualitative research methods.⁶ This thesis benefits from that trend, and from the growing acceptance of qualitative research as a useful method of inquiry in legal circles.

Despite this growing acceptance, there remain pockets of academic and disciplinary resistance to qualitative research methods. For instance, concerns have been expressed about the rigour of the methodologies adopted by qualitative researchers, and about the appropriateness of generalising on the basis of opinions expressed by biased or self-motivated interview subjects.⁷

Qualitative researchers have argued such resistance reflects an uneasy awareness that the traditions of qualitative research stand in opposition to many of the assumptions underpinning the positive sciences (such as physics, chemistry and economics).⁸ For

⁴ Schuck, Peter, “Why don’t law professors do more empirical research” (1989) 39 *Journal of Legal Education* 323, at 329, cited in Neumann, Richard and Krieger, Stefan, “Empirical inquiry twenty-five years after *The Lawyering Process*” (2003) 10 *Clinical Law Review* 349-397, at 351.

⁵ Neumann and Krieger, above n 4, at 351.

⁶ For example, see the way in which qualitative research methods were used in the study by Terry Carney and Gaby Ramia of contemporary employment services — Carney, Terry and Ramia, Gaby, *From rights to management: contract, new public management and employment services*, Kluwer Law International, London, 2002. See also the study by Roger Magnusson of privacy and health care issues that was based on data obtained by confidential interviews with 69 interviewees — Magnusson, Roger, “Privacy, confidentiality and HIV/AIDS health care” (1994) 18(1) *Australian Journal of Public Health* 51-58, at 51.

⁷ For instance, in the 1960s it was thought by many sociologists that qualitative research was not capable of adequate verification — Strauss, Anselm and Corbin, Juliet, “Grounded theory methodology: an overview” in Denzin, Norman and Lincoln, Yvonna (eds), *Strategies of qualitative inquiry*, Sage, London, 1998, 158-183, at 162.

⁸ Denzin and Lincoln, above n 1, at 7.

instance, qualitative researchers argue that “Objective reality can never be captured”,⁹ and that qualitative research is not “value-free”.¹⁰ Rather:

Qualitative research is endlessly creative and interpretive. The researcher does not just leave the field with mountains of empirical materials and then easily write up his or her findings. Qualitative interpretations are constructed.¹¹

This approach can be contrasted to more traditional methods of scientific inquiry which assume that “‘truth’ can transcend opinion and personal bias”, and that scientific research is value-free and objective.¹²

However, this does not mean that theories developed on the basis of interpretative qualitative methods are unsound or less valuable than those based on quantitative methods.¹³ Rather, it highlights the importance of explaining and applying the safeguards that are used to ensure rigour in the conclusions drawn from any particular study. As some commentators have argued, “methodology is what makes the research credible”.¹⁴

Ways to ensure rigour

The literature on qualitative research methods points to the variety of safeguards used by qualitative researchers to ensure the credibility and validity of their data. The most pertinent safeguards, most of which have been applied in this thesis, include:

- data triangulation — in other words, studying the same phenomenon using a variety of methods, such as empirical materials, interview subject perspectives and observers;¹⁵
- identifying the researcher’s own biases and ideology (as set out in the Introduction to this thesis), as well as the theoretical approach underlying the interpretation of data;¹⁶

⁹ *Ibid.*, at 4; Strauss and Corbin, above n 7, at 171.

¹⁰ Denzin and Lincoln, above n 1, at 25; Janesick, above n 2, at 41.

¹¹ Denzin and Lincoln, above n 1, at 29 and 30.

¹² *Ibid.*, at 7.

¹³ Strauss and Corbin, above n 7, at 171.

¹⁴ Neumann and Krieger, above n 4, at 378.

- being explicit about the parameters of the research, the perspectives of the subjects interviewed, the purpose of the study, and what is and is not being measured;¹⁷
- adopting systematic coding procedures — this helps ensure rigour in the conclusions that are drawn by protecting the researcher from accepting any subjects' views on their own terms;¹⁸
- maintaining an audit trail that records the data collected, the way in which they were sorted, reduced and analysed, and the way in which subsequent theories were constructed;¹⁹ and
- ensuring the data collected are adequate and appropriate.

In relation to this final point, the meaning of 'adequate' and 'appropriate', as applied in this thesis, is explained by Janice Morse as follows:

In qualitative research, *adequacy* refers to the amount of data collected, rather than to the number of subjects, as in quantitative research. Adequacy is attained when sufficient data have been collected that saturation occurs and variation is both accounted for and understood.²⁰

...

Appropriateness refers to the selection of information according to the theoretical needs of the study and the emerging model. Sampling occurs purposefully, rather than by some form of random selection from a purposefully chosen population, as in quantitative research. In qualitative research, the investigator samples until repetition from multiple sources is obtained. This provides concurring and confirming data, and ensures saturation (emphasis in the original).²¹

All of these safeguards were adopted in the course of developing this thesis, except the first. In relation to data triangulation, while it was beyond the scope of this thesis to collect statistical or quantitative data to fully verify or test the qualitative data collected

¹⁵ Denzin and Lincoln, above n 1, at 4; Janesick, above n 2, at 44.

¹⁶ Janesick, above n 2, at 41.

¹⁷ Cameron, Kim, "A study of organisational effectiveness and its predictors" (1986) 32(1) *Management Science* 87-112, at 93.

¹⁸ Strauss and Corbin, above n 7, at 161 and 173.

¹⁹ Morse, Janice, "Designing funded qualitative research" in Denzin, Norman and Lincoln, Yvonna (eds), *Strategies of qualitative inquiry*, Sage, London, 1998, 56-85, at 77.

²⁰ *Ibid.*, at 76.

from tribunal members and staff, a range of other data have been drawn on to test and refine the insights and interpretation of the interview data. These include published papers, de-briefing feedback from the organisations studied,²² seminar discussions, informal conversations and international perspectives. Assiduous attention has been devoted to this because, as Creyke and McMillan have cautioned:

There is always a danger that an opinionated or colourful comment by an individual respondent will attract undue attention and it is important therefore to maintain a focus on the aggregated statistical outcomes.²³

Given the range of measures taken to ensure rigour of analysis, it is argued that the results of this research ‘paint a picture’ of the amalgamation experience within the ADT and VCAT.²⁴ While elements of this picture are necessarily interpretive, qualitative research methodology endorses the drawing of inferences on the basis of layered responses that are consistently repeated. Moreover, the conclusions drawn from this study are more likely to be reliable in light of the other safeguards adopted.

As well as being rigorous about the way in which data are collected and interpreted, the limitations of qualitative research findings need to be understood. For instance, the conclusions drawn from any particular study are provisional — they should be capable of further elaboration and qualification. In addition, the theories constructed are temporally limited because historical changes in thinking, ideology and perception will affect their validity.

In the context of this thesis, conclusions drawn about the effectiveness of the ADT and VCAT reflect the situation as it existed at the time data were collected. The findings do not purport to comment on the ongoing effectiveness of either Tribunal or their potential for future development. As a related point, it should be recognised that each empirical

²¹ *Id.*

²² For instance, when it was hypothesised that ‘known malcontents’ were disproportionately recruited by the sampling frame applied to draw the ADT interviewees, and that those with more favourable attitudes had been excluded, a cross-check was undertaken which revealed that none of the so-called ‘negative’ members had been part of the study, while at least two of the ‘positive’ members had been included. More generally, comments provided by ADT management about the author’s findings have been taken into account in re-drafting this thesis.

²³ Creyke, Robin and McMillan, John, “Executive perceptions of administrative law — an empirical study” (2002) 9(4) *Australian Journal of Administrative Law* 163-190, at 164.

²⁴ *Id.*

inquiry can answer only one or a few questions, and that the answerable questions are often narrow ones.²⁵ In this case, the qualitative research was designed to explore whether all the necessary ingredients of optimal tribunal reform were present in NSW and Victoria at the time the amalgamations in those States took place.

The data collected were then used to test and inform the construction of the theory of optimal amalgamation outlined in Chapter 4, using the grounded theory methodology described in the following section.

GROUNDING THEORY METHODOLOGY

As stated above, qualitative researchers do not simply report the viewpoints of the people or organisations studied. Rather, they assume the further responsibility of interpreting the data collected.²⁶ The approach taken to interrogating the data presented in this thesis draws upon the standard ‘grounded theory’ approach to analysing qualitative data:

Grounded theory is a general methodology for developing theory that is grounded in data systematically gathered and analysed. Theory evolves during actual research, and it does this through continuous interplay between analysis and data collection. A central feature of this analytic approach is “a general method of [constant] comparative analysis”.²⁷

In other words, theory is generated and developed through back and forth interplay between ‘interpretive ideas’ and data collected from interview subjects and other sources.²⁸ This interplay continues until saturation occurs — that is, until the researcher reaches a sense of completeness and no further knowledge can be generated by continuing to interrogate the data.

In this thesis, a deliberate choice was made to take an iterative approach to the collection and analysis of the data, and the development of theories and explanations regarding the

²⁵ Neumann and Krieger, above n 4, at 374.

²⁶ Strauss and Corbin, above n 7, at 160.

²⁷ *Ibid.*, at 158 to 159.

²⁸ *Ibid.*, at 162.

elements that contribute to an optimal amalgamation.²⁹ It is said that the adoption of such an approach enables researchers to develop theory of greater conceptual density. In particular, commentators have argued this approach is appropriate when examining processes and conceptualising what happens under certain conditions:³⁰

Insofar as theory that is developed through this methodology is able to specify consequences and their related conditions, the theorist can claim predictability for it, in the limited sense that if elsewhere approximately similar conditions obtain, then approximately similar consequences should occur.³¹

As mentioned, a key objective of this thesis is to enable policy-makers to better predict and control the consequences of the amalgamation processes they embark on.

PARAMETERS OF THE RESEARCH

The aim of the following discussion is to explicitly set out the parameters of the research undertaken for this thesis.

From whose perspective is effectiveness judged?

Tribunals have a range of stakeholders with often conflicting interests. Thus, data could be collected from a variety of sources including users such as parties, their representatives or, in the case of tribunals conducting administrative review, decision-makers whose decisions are being reviewed. Another option would be to gather data from members and staff of tribunals who have experienced amalgamation processes first-hand, or from government policy-makers and politicians who have a role in deciding how an amalgamation will be designed and implemented.³²

²⁹ A similar approach was taken by Perkins in her study of mental health review tribunals in the United Kingdom — see Perkins, Elizabeth, *Decision-making in mental health review tribunals*, Policy Studies Institute, London, 2002, at 20.

³⁰ Strauss and Corbin, above n 7, at 161 and 169.

³¹ *Ibid.*, at 169.

³² Peay's study of mental health review tribunals in the United Kingdom similarly acknowledged the range of stakeholders with an interest in the performance of those tribunals. Peay chose to set fairly wide parameters for her research by collecting data from three groups of stakeholders — namely, patients, Responsible Medical Officers (the officers whose decisions are reviewed) and Tribunal members. See Peay, Jill, *Tribunals on trial*, Clarendon Press, Oxford, 1989, at 23 to 24. Similarly, in studying the procedures and outcomes in four types of tribunal in the United Kingdom, Genn undertook interviews with tribunal chairs and members, legal and lay representatives, presenting officers from government departments, and tribunal users — Genn, Hazel, "Tribunals and informal justice" (1993) 56 *Modern Law Review* 393-411, at 393.

While each of these groups may have some interest in an amalgamation process as opposed to the performance of an amalgamated tribunal, their relative levels of interest shift in these circumstances. For instance, while users may have an interest in a tribunal continuing to perform during a transitional time and the level of service not dropping following amalgamation, they are arguably not key stakeholders in an amalgamation process itself. The same may be said of the general public.

In relation to government stakeholders — both politicians and bureaucrats — this group has a vested interest in the outcome of an amalgamation, particularly as it would have been their decision to amalgamate in the first place. However, while the outcomes of an amalgamation would be of concern to this constituency — in particular, whether it achieved cost savings and was not overly unpopular — members of this group may not be intimately involved in, or affected by, the way in which the process is carried out.

For these reasons, the focus of the research undertaken for this thesis is the perceptions of tribunal members and staff. The justification for choosing this group is that its members have had the opportunity to experience the process and consequences of amalgamation first-hand. No other constituency, not even policy-makers responsible for overseeing the process, have as much direct involvement or personal investment in an amalgamation process. In other words, members and staff are the constituency most directly affected by the way in which an amalgamation is carried out. Moreover, in many instances, members of this group of stakeholders are in a position to make direct comparisons between the way in which the former specialist and newly-amalgamated tribunals operate. This provides some insight into whether tribunal reform has resulted in improvements.

Thus, in this thesis, the question of the effectiveness of tribunal amalgamations is explored from the viewpoint of those within the system, not the consumer standpoint. This approach could be expected to avoid some of the methodological contaminants in taking data from users — for instance, that a win will often be translated to mean ‘the system works well’.³³

³³ A similar approach was adopted by Swain in his study of the role of the welfare member in the SSAT and Victorian Mental Health Review Board — see Swain, Phillip, *Challenging the dominant paradigm: the*

Timeframe

In terms of timeframe, the first few years following the creation of the ADT and VCAT was the optimal time at which to collect these data — a time when each Tribunal had had several years in which to establish practices and procedures and to develop an institutional culture of its own. At the same time, the amalgamations were recent enough for there to be a number of interview subjects with a relatively fresh memory of the amalgamation process, and an understanding of its impact on the operation of the smaller, specialist tribunals that were replaced.

THE TYPE OF DATA SOUGHT

A number of qualitative research techniques can be used for collecting empirical data, ranging from interview to direct observation.³⁴ As stated by Denzin and Lincoln:

Qualitative research involves the studied use and collection of a variety of empirical materials — case study, personal experience, introspective, life story, interview, observational, historical, interactional, and visual texts — that describe routine and problematic moments and meanings in individuals' lives.³⁵

The data presented in this thesis have been gathered from two main sources: a study of written materials, and qualitative research comparing the recent amalgamations in NSW and Victoria.

An analysis of the ART Bills

A review of primary and secondary written materials assists in the construction of a methodology for predicting and measuring the effectiveness of amalgamations. In particular, primary material such as the legislation establishing generalist tribunals can be analysed in order to demonstrate the types of features that should and should not be included in the enabling statutes of amalgamated tribunals.

contribution of the welfare member to administrative review tribunals in Australia, 1998, unpublished, at 73. The difficulties in collecting data from individual applicants have been acknowledged by Handley — Handley, Robin, “Research note: collecting information about tribunals” (1996) 6 *AIAL Forum* 37-44, at 40.

³⁴ Denzin and Lincoln, above n 1, at 29.

³⁵ *Ibid.*, at 3.

The Commonwealth Government's *Administrative Review Tribunal Bill 2000* (Cth) and *Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000* (Cth) set out in some detail the powers, functions and responsibilities of the proposed ART and the rights of applicants appearing before it. An evaluation of this legislation and relevant commentary is undertaken in Chapter 6, the aim being to pinpoint those aspects of an enabling statute which assist or undermine the process of establishing an amalgamated tribunal. Comparisons are made with other legislative instruments where relevant, including the *Administrative Decisions Tribunal Act 1997* (NSW), the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the *Administrative Appeals Tribunal Act 1975* (Cth) and legislation establishing a number of specialist merits review tribunals.³⁶ It becomes apparent from this analysis that legislative proposals which are perceived to be regressive or impractical may result in the derailment of an amalgamation process altogether.

Beyond this, there is little secondary material on which to base an analysis of amalgamation processes. The limitation of relying upon written materials alone derives from the lack of studies and conceptual thinking on these issues.

Qualitative research into amalgamation in NSW and Victoria

To complement this approach, qualitative research has therefore been gathered comparing the design, planning and implementation of an amalgamation process in two separate jurisdictions.

The research design adopted was to interview subjects with a range of perspectives on, and experience in, the recently established ADT in NSW and VCAT in Victoria. These two tribunals were chosen as fruitful objects of study as they were established in similar ways, for similar purposes, at approximately the same time.

It is acknowledged there were some differences in the rationale behind, and design of, the amalgamation in each State. For instance, one of the key outcomes of the establishment

³⁶ The statutes establishing the SSAT, and the MRT and RRT are most relevant in this context — see the *Social Security (Administration) Act 1999* (Cth) and the *Migration Act 1958* (Cth) respectively.

of the ADT was the creation of an administrative review jurisdiction that had not existed previously in NSW. This can be contrasted to the situation in Victoria, where an already established AAT was included in the amalgamation process. Nonetheless, in light of their overarching similarities, it is argued that the data collected can be used to compare the creation and operation of the amalgamation experience in two different States, and to draw inferences from this comparison about the way in which a successful amalgamation should be approached.

Data were gathered from members and staff comparing the operation of the ADT and VCAT with that of the smaller, specialist tribunals which were amalgamated, and exploring the experience of the amalgamation itself. The data sought were perceptual ratings of effectiveness. That is, the study examines the perceptions of subjects about the amalgamation process rather than seeking data that would supposedly be more ‘objective’, such as quantitative information measuring the time and cost of various processes.³⁷ While the collection of qualitative data gives prominence to the subjective perceptions of subjects, the advantage of exploring perceptions rather than statistical data is that the information collected provides a rich, contextualised picture of the experience of amalgamation from an ‘insider’ perspective. As Peay points out:

... even quantitative research requires interpretation of the data obtained. Or, as Claude Bernard’s aphorism that ‘One only needs statistics when one doesn’t understand causation’ implies, a quantitative approach should arguably be perceived as a method of last resort.³⁸

The adoption of a qualitative method allowed the author to interact with subjects and question them more extensively on issues that were of concern to them. This interactive approach enabled further exploration of the underlying assumptions or expectations behind the opinions expressed by each subject.³⁹

³⁷ A similar approach was adopted by Perkins in her 2002 study of mental health review tribunals in the United Kingdom. Specifically, Perkins adopted an ‘ethnographic’ methodology wherein “quantification and statistical analysis” play a subordinate role at most — see Perkins, above n 29, at 14.

³⁸ Peay, above n 32, at 25.

³⁹ Wherever possible, face-to-face interviews were conducted in preference to interviews by telephone. This better enabled the researcher to establish a rapport with interview subjects, and to adjust the focus and style of the interview to best suit the preferences of the subject being interviewed. While some telephone interviews were conducted, this method is nonetheless regarded as having some advantages of its own, in particular, that it

Approach to data collection

A semi-standardised set of interview stimulus questions was produced for the purposes of this study⁴⁰ and, generally speaking, each interview covered the full range of issues outlined in those questions.⁴¹ The issues addressed in each interview included:

- the background and experience of each interview subject;
- whether the interview subject was working in a specialist tribunal that was amalgamated to form part of the ADT or VCAT, and whether the subject had any apprehensions regarding the amalgamation when it was announced;
- how the amalgamation in each State was planned and managed;
- interview subjects' perceptions about the level of political commitment to the amalgamation;
- the importance of the role of President and others in ensuring a successful amalgamation;
- how the ADT and VCAT are presently structured, the procedures that are used, and the way in which different divisions or lists operate (including the extent to which members are cross-appointed between divisions or lists, workload, the number of part-time members in each Tribunal, and the role of registry);
- the organisational culture that has evolved since amalgamation, and the degree to which procedures and personnel are shared across divisions or lists;
- the extent to which specialisation was retained;
- the advantages, if any, that amalgamation brought (including professional development for members, exposure to new methods, greater flexibility and efficiency in using resources, and increased visibility and funding);

encourages subjects to stay focused on the topic at hand — Fielding, Nigel and Thomas, Hilary, “Qualitative interviewing” in Gilbert, Nigel, *Researching social life*, Sage, London, 1993, 123-144, at 130.

⁴⁰ A typical sample of the questions asked in each interview is included at Appendix A. The approach adopted by the author could be described as falling between the semi-standardised and non-standardised interview types, as described by Fielding and Thomas — Fielding and Thomas, above n 39, at 124.

⁴¹ As in Perkins' study of mental health review tribunals in the United Kingdom, which involved 24 interviews with tribunal members, interviews lasted from between 30 and 60 minutes and were recorded and transcribed with the subjects' permission. See Perkins, above n 29, at 20.

- the disadvantages, if any, that the amalgamation brought (including loss of specialisation, decreased interaction among members, decreased visibility and increased cost);
- the extent to which the amalgamation was treated as an opportunity to set standards, explore new procedures or implement new initiatives; and
- generally, whether interview subjects perceived the amalgamation in each State as successful, and whether a generalist tribunal is more or less effective than a series of specialist tribunals.⁴²

These topics can be classified into two broad sets of questions. The first series of questions was designed to elicit information about the planning and implementation of the amalgamation in each State, and to produce a snapshot of the structure and operation of the Tribunals that were created. In other words, these questions explored how the ADT and VCAT had been established and what they looked like at the time data were collected.⁴³

The second set of questions was designed to explore the implications of amalgamation in NSW and Victoria. Subjects were asked about their perceptions of the effectiveness of Tribunal decision-making before and after the amalgamation and what, if anything, had been gained or lost. The object of these questions was to explore the types of elements that need to be present in order to achieve an optimal amalgamation.

An examination of the creation of the ADT and VCAT, and the way in which each amalgamation was approached, highlights a surprising degree of difference between the approach to, and outcomes of, amalgamation in each State.

⁴² The order in which these issues were addressed, and the extent to which each was discussed, varied from interview to interview. Interviews were conducted in a flexible manner, enabling the author to adjust the focus and style of each interview to best suit the preferences and concerns of the subject being interviewed. This approach was based on an assumption that better quality data would be obtained by allowing subjects a degree of flexibility in the way they expressed their views. This “non-standardised” approach to data collection has been endorsed as eliciting “rich, detailed materials that can be used in qualitative analysis” — Fielding and Thomas, above n 39, at 123 to 125.

⁴³ Interviews were conducted with subjects in NSW and Victoria during 2001 and 2002.

Choosing interview subjects

Interview subjects did not ‘self-select’. Rather, subjects were selected for interview on the basis that they brought different traits and perspectives to the sample of tribunal members and staff interviewed. As the qualitative research literature states, maximum variety sampling is the process of deliberately selecting a heterogeneous sample and observing commonalities in their experiences. It is a useful method of sampling when exploring abstract concepts, as significant shared patterns of commonalities can be identified and tested.⁴⁴

An attempt was made to obtain data from a cross-section of perspectives within the ADT and VCAT in order to gain a more comprehensive picture of the experience of amalgamation and the operation of each Tribunal. Interviews were conducted with samples of members from a range of divisions and lists⁴⁵ within each Tribunal. For instance, some interview subjects were chosen from ‘high-volume’ divisions or lists which hear large numbers of matters, while others were chosen from divisions or lists which hear fewer matters. Some subjects were chosen from divisions or lists which hear matters involving technical legal questions, while others were approached because they worked in divisions or lists where the determination of matters tends to require specialist, non-legal knowledge, such as social work skills,⁴⁶ professional legal skills⁴⁷ or surveying and building skills.⁴⁸

These interviews were complemented by interviews with senior staff and senior members in each Tribunal and, in one instance, with a senior member in a NSW Tribunal that had not been amalgamated to form part of the ADT. Subjects were approached on the basis that they had characteristics, qualifications or experience differentiating them from other subjects interviewed.

⁴⁴ Morse, above n 19, at 73 to 74.

⁴⁵ As explained above, the ADT is divided into ‘divisions’ which reflect the jurisdictions of the specialist tribunals that were amalgamated to form the ADT. Similarly, VCAT is divided into ‘lists’.

⁴⁶ These skills are used by members in the Guardianship List of VCAT.

⁴⁷ Members of the Legal Services Division of the ADT are required to possess legal qualifications in order to carry out their function.

⁴⁸ A number of members in the Planning List of VCAT use these skills.

A total of 27 interviews were conducted with 12 subjects from Victoria and 15 from NSW.⁴⁹ In order to collect data from subjects with the diversity of experience and skills required to form a representative sample, interviews were conducted with the following range of subjects:

- Senior registry staff of the ADT and VCAT — these interview subjects were approached on the basis that they had detailed knowledge of the processes and procedures employed by the two Tribunals, and of the administrative running of each registry. In particular, the subjects interviewed had knowledge of whether the transition from specialist to generalist tribunal had placed an onerous burden on registry staff, and whether more or less resources were required to operate the registry of a generalist tribunal. Subjects in this category were also chosen on the basis that they had previously worked in a capacity where they had assisted in the planning and implementation of the amalgamation in each State.⁵⁰
- Senior members within the ADT and VCAT who were responsible in some way for the management of the Tribunal or particular divisions or lists — these subjects were approached on the basis that they would provide insight into the experience of managing the amalgamation process and/or various elements of the operation of the ADT and VCAT. Of particular interest was the experience of these subjects in implementing new procedures or standards within particular divisions or lists or across each Tribunal as a whole. These subjects provided useful insight into whether the balance struck between uniform and specialised procedures was successful in the experience of different divisions or lists. In addition, these subjects were in a position to discuss the challenges involved in establishing a new organisation with an evolving culture of its own, and in

⁴⁹ As mentioned above, a more comprehensive breakdown of the interviews conducted for this thesis and the relevant characteristics of each interview subject are contained in Appendix B.

⁵⁰ Two interviews were conducted with subjects in this category — one in NSW and one in Victoria (ADT Registry Staff Member 1; VCAT Registry Staff Member 1).

ensuring that the amalgamated Tribunals improved upon the specialist bodies they had replaced.⁵¹

- Members of the ADT and VCAT who:
 - worked in different divisions or lists of each Tribunal — it was expected that data from a cross-section of members would give some insight into whether members in different parts of each Tribunal felt their division or list had been advantaged or disadvantaged by the amalgamation, and whether the amalgamation had resulted in improvements across the board. Interviews were conducted with members from the Equal Opportunity, Legal Services, Community Services and General Divisions in the ADT,⁵² and with members from the Anti-Discrimination, Guardianship, Planning, Residential Tenancies, General, Civil Claims, Credit, Occupational and Business, and Retail Property Lists in VCAT.⁵³
 - did and did not have legal qualifications — both subject groups were interviewed in order to give a more balanced view of the difficulties or benefits experienced by members in an amalgamated Tribunal. In light of the inevitable intrusion of legal questions into tribunal decision-making processes, the assistance and support experienced by non-legal members was of interest, as were different perspectives on the cultures which had developed in each amalgamated Tribunal (for instance, whether it was predominantly legal or non-legal, and whether the specialist skills of non-legal members were valued).⁵⁴

⁵¹ Five interviews were conducted with senior members — two in NSW and three in Victoria (ADT Senior Member 1 and ADT Senior Member 2; VCAT Senior Member 1, VCAT Senior Member 2 and VCAT Senior Member 3).

⁵² Several of these members also sat from time to time on the Appeal Panel of the ADT.

⁵³ It should be noted that a number of VCAT members interviewed were cross-appointed and therefore had experience in sitting on more than one list.

⁵⁴ A total of four out of 13 ADT members interviewed (including senior members) were non-legal members. A total of six out of 11 VCAT members interviewed did not have legal qualifications.

- were appointed on a part-time or full-time basis — an attempt was made to interview a combination of part-time and full-time members in order to obtain a more comprehensive picture of the culture of both Tribunals from these different perspectives.⁵⁵
- had and had not worked in the specialist tribunals which were amalgamated — this was expected to give some insight into whether people who had worked in the tribunal system for some time thought an amalgamated tribunal was better or worse than the previous scheme of separate, specialist tribunals. These interviews were balanced against the opinions of members coming into the system fresh, who were less likely to have preconceived ideas about whether the changes were a good or bad idea.⁵⁶
- are of different genders — as well as minimising the risk of gender biases in interview results, this approach was adopted in order to give a more balanced insight into the culture of the two Tribunals.⁵⁷
- Senior members of specialist tribunals which were not amalgamated to form part of a larger, amalgamated Tribunal — one interview was conducted with a senior member of a NSW Tribunal that was one of a number of significant specialist tribunals not amalgamated to form the ADT. This subject was expected to provide insight into the process of amalgamation, and the merits of specialist versus generalist tribunals, from an ‘outsider’ perspective — that is, from the perspective of an independent specialist tribunal that was operating effectively. It was considered unnecessary to collect equivalent data from Victoria given the comprehensive scale of the amalgamation in that State.

⁵⁵ Note, however, that only two ADT members are appointed on a full-time basis. Therefore, it was not possible to interview a representative sample of full-time and part-time members appointed to the ADT. In relation to VCAT, six subjects interviewed (including senior members) were full-time and six were part-time.

⁵⁶ Those interview subjects who had not previously worked in a specialist tribunal which had been amalgamated to form the ADT or VCAT were ADT Member 1, ADT Member 6, ADT Member 9, ADT Senior Member 1, ADT Registry Staff Member 1, VCAT Member 3, VCAT Senior Member 2 and VCAT Senior Member 3.

⁵⁷ A total of 13 interview subjects were female and 14 were male.

Approach taken to interrogating the data

Interview transcripts were coded using the qualitative research computer software program *Nvivo*.⁵⁸ ‘Coding’ is the tool used in this program to bring together data passages that seem to belong to the same category.⁵⁹ Categories were developed and refined by the author on the basis of recurring issues or themes that emerged from the data, or were derived from key concepts commonly referred to in the literature on tribunals.⁶⁰

For example, in order to make sense of comments about the impact of amalgamation on the operation of tribunal decision-making in each State, relevant parts of transcripts were coded according to the types of objectives often associated with tribunals — accessibility, accountability, specialisation, and fairness and justice. Similarly, to gain a picture of the operation of the ADT, NSW transcripts were coded according to a range of categories that can be used to describe the structure and operation of tribunals. These categories included member profiles, registry performance, registry structure, workload, tribunal culture and the role of the President. Victorian transcripts were coded separately, using the same categories to create a comparable picture of VCAT.

This process enabled retrieval of all data coded at a particular category, for both Victoria and NSW.⁶¹ Categories were grouped and re-grouped as themes and patterns emerged from the coded data. The computer software enabled categories (or ‘nodes’) to be grouped and rearranged in relation to one another, according to the data they contained.

⁵⁸ A list of the codes used in organising the data collected for this thesis is set out at Appendix C.

⁵⁹ Richards, Lyn, *Using Nvivo in qualitative research*, Qualitative Research, Bundoora, 1999, at 55.

⁶⁰ *Id.*

⁶¹ *Id.*

An ongoing process of grouping and re-grouping was undertaken during the data collection and analysis processes.⁶² This enabled the construction of higher level theories, grounded in the data, about the cause and effect of particular elements of a tribunal amalgamation process. As one commentator has put it:

As the analysis proceeds, the researcher develops working models that explain the behaviour under study. As the analysis continues, the researcher can identify relationships that connect portions of the description with the explanations offered in the working models.⁶³

In presenting the data in Chapters 6 to 11 of this thesis, the empirical assertions made are supported by direct quotations from interviews.⁶⁴ This demonstrates the way in which various elements of the theory of optimal tribunal reform that this thesis develops are supported by specific pieces of data.

An analysis of the data reveals a spread and depth of views regarding the merits of amalgamating tribunals, while at the same time highlighting the range of consequences that different approaches to amalgamation bring. In particular, there are a surprising number of differences between the amalgamation experiences in NSW and Victoria. Detailed exploration and analysis of these differences provides guidance on how to ensure that the necessary ingredients of optimal tribunal reform are present in the context of any amalgamation process.

CONCLUSIONS

This thesis takes advantage of the unique research opportunity that was provided when two amalgamation proposals were implemented in NSW and Victoria at approximately the same time. The adoption of a qualitative research method has enabled data to be collected and interrogated in a way that informs the development of a methodology of effective amalgamation. This approach is particularly valuable in the context of this thesis, as little research had been conducted previously into the benefits and disadvantages of particular approaches to tribunal amalgamation.

⁶² *Ibid.*, at 61.

⁶³ Janesick, above n 2, at 44.

⁶⁴ *Id.*

There are limitations on the scope of this study. For instance, the objective is to collect data from only one constituency of an amalgamation process: members and staff of amalgamated tribunals. While this stakeholder group can arguably provide greater insights than any other group, the picture drawn is not as well-rounded as it could be. In addition, the data collected give a snapshot picture of how well each amalgamated Tribunal was functioning immediately following the amalgamation process — in this case, five years after amalgamation. The study does not focus on future performance, and the data collected are not intended to be a reliable indicator of future effectiveness.⁶⁵

That said, the approach adopted in this thesis has a number of benefits. Most significantly, the studies outlined above capitalise on the insights to be gained from comparing three amalgamation proposals (the Commonwealth ART, the NSW ADT and VCAT) that were undertaken during the same period. The data collected has a depth and quality that would not have been achieved had a different approach been adopted. In particular, it paints a clear picture of the consequences that different attitudes to amalgamation can bring, and the factors that contribute to successful and unsuccessful processes.

The value of this approach is borne out by the analysis of the ART proposal in Chapter 6, and the qualitative data presented and interrogated in Chapters 7 to 10. Most relevantly, these analyses illustrate how a solid legislative foundation contributes to a successful amalgamation, as does a supportive context, an integrated organisation, and dedicated people.

⁶⁵ For instance, there are indications from developments that have occurred subsequent to the research conducted for this thesis that the ADT is becoming more successful over time.

CHAPTER 6: LAW — AN ANALYSIS OF THE ART BILL

The proposition developed in Chapter 4 is that optimal tribunal reform has four essential ingredients: law, context, organisation and people. It is argued that all of these ingredients must be present in the correct proportions if an amalgamation process is to realise the maximum potential benefits it can provide. The purpose of this Chapter is to begin to test and apply this hypothesis by using it to analyse the amalgamation proposal outlined by the Australian Government in the *Administrative Review Tribunal Bill 2000* (Cth) (ART Bill) and the *Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000* (Cth) (CTP Bill).

One of the strongest points to emerge from a review of the ART's legislative foundation is the number of impediments it contained to the creation of an amalgamated tribunal that was effective and well-regarded. It will be argued that the Government's legislative proposals were premised on closer ministerial and departmental involvement in tribunal review, a reduction in the ability of the ART to conduct *de novo* review, and the creation of a tribunal in the image of the bureaucracy. Such legislation was never likely to result in reform that improved upon the tribunal system already in place. Thus, the following analysis highlights the importance of a sound legislative foundation in achieving an amalgamation which commands the respect and confidence of stakeholders (that is, an 'effective' amalgamation).

In addition, the significant amount of comment and debate that was generated in response to the ART proposal is indicative of the types of features of an amalgamated tribunal that will or will not receive support from stakeholders. In exploring the elements of an optimal amalgamation, it is therefore informative to consider the specific aspects of the ART proposal that attracted opposition, particularly given the general support for the concept of amalgamation at federal level. This analysis demonstrates the necessity of attaining a certain level of stakeholder comfort with the detail of an amalgamation proposal.

These propositions are reinforced by a briefer, but nonetheless revealing, analysis of the enabling statutes that created the ADT in NSW and VCAT in Victoria. The juxtaposition of these three pieces of legislation highlights the flaws in the ART and CTP Bills and, in contrast, the potential for the *Administrative Decisions Tribunal Act 1997* (NSW) (ADT Act) and *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (VCAT Act) to pave the way for effective amalgamations.

While the focus of this Chapter is on law and the potential of the ART and CTP Bills to provide a solid basis for an optimal amalgamation, this analysis is undertaken with reference to all six elements outlined in Chapter 4 (legislation; political commitment; organisational structure; processes and procedures; organisational culture; and leadership). Inevitably these elements overlap in their application. For instance, legislation may make provision for the structure and processes of an amalgamated tribunal, just as the statutory processes and procedures adopted within an amalgamated tribunal may be indicative of organisational culture. Other areas of overlap are highlighted in the analysis of the qualitative data set out in Chapters 7 to 11. The fact that many elements are embedded and reflected in the legislation that was drafted to give effect to the ART proposals enables judgements about the adequacy of the legislation to be made on these bases.

POLITICAL COMMITMENT TO ESTABLISHING A VIABLE ART

This thesis argues that the Government's amalgamation proposal, as encapsulated in the ART and CTP Bills, was indicative of a lack of political commitment to establishing a viable generalist tribunal that was more effective than the specialist tribunals it would have replaced.

Most notable was the narrow scope of the amalgamation and the fact that the Veterans' Review Board (VRB) was not included in the proposal. It seems clear that the VRB was omitted for political reasons, owing to the influence of veterans' lobby groups.¹ There

¹ See, for example, Senate Legal and Constitutional Legislation Committee, *Inquiry into the provisions of the Administrative Review Tribunal Bill 2000 and the provisions of the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000*, Senate Printing Unit, Canberra, 2001, at 88 to 89. See

was certainly no suggestion that the exclusion of the VRB would improve the operation of an ART, or that there were significant policy reasons for maintaining the VRB as a separate specialist tribunal. On the contrary, the VRB performs essentially the same function as the four other Tribunals that were to be amalgamated.

This illogical departure from the considered amalgamation proposal put forward by the ARC cast some doubt on the Government's claim that its ART legislation was a genuine attempt to improve the quality of Commonwealth merits review.² The Labor Party and Democrats argued that the exclusion of the VRB was an acknowledgement by the Government that its proposal represented a downgrading of the existing tribunal system.³ Other commentators argued that the omission of the VRB would have undermined the potential of the ART to streamline and improve the efficiency of the existing system of Commonwealth merits review.⁴

In addition to the limited scope of the proposal, the way in which the ART's relationship with portfolio departments and ministers was to be structured raised questions about the Government's commitment to implementing positive tribunal reform. Sainsbury has pointed to five conditions that must be met in order to demonstrate a tribunal's independence. These are:

- (i) the appellate decision-makers should not have any connection with the department or office responsible for initial decisions;
- (ii) the relevant department should not appoint the decision-makers;
- (iii) nor should it train them;
- (iv) nor provide them with advice or other assistance;
- (v) nor administer the appeals system.⁵

also Williams, Daryl, Commonwealth Attorney-General, "Second Reading Speech for the *Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000*", Australia, *House of Representatives Debates*, 12 October 2000, 21407-21411, at 21408.

² Williams, Daryl, Commonwealth Attorney-General, "Second Reading Speech for the *Administrative Review Tribunal Bill 2000*", Australia, *House of Representatives Debates*, 28 June 2000, 18404-18407, at 18405 and 18407.

³ Senate Legal and Constitutional Legislation Committee, above n 1, at 81.

⁴ Davidian, Alison, "Reform or regression? The Administrative Review Tribunal Bill" (2001) 12(1) *Polemic* 47-52, at 47.

⁵ Sainsbury, Roy, "Internal reviews and the weakening of social security claimants' rights of appeal" in Richardson, Geneva and Genn, Hazel, *Administrative law and government action*, Clarendon Press, Oxford,

The range of features of the ART proposals that would have contravened these principles indicated a lack of political support for the creation of a viable amalgamated tribunal.

As discussed in Chapter 2, it was proposed that the six divisions of the ART operate as distinct administrative and management units, being charged with the responsibility of negotiating funding agreements with the relevant portfolio departments whose decisions they reviewed.⁶ This was seen as contrary to the general rule that “tribunal funding should not be provided for within the budget of an agency whose decisions form all or a large proportion of the tribunal’s workload”.⁷ As stated by the Senate Legal and Constitutional Legislation Committee in its inquiry into the ART and CTP Bills: “The stated object of th[is] rule is to strengthen perceptions of independence amongst tribunal users”.⁸

Moreover, it was proposed that portfolio ministers be given the responsibility of recommending appointments of ART members to relevant divisions, as well as the power to issue directions regarding the review functions of the ART.⁹ These proposals were inconsistent with the widely recognised principle that the “best guarantee of impartiality comes from a clear distinction” and separation between decision-makers, policy-makers and tribunals.¹⁰ Collapsing these distinctions in the foundational legislation of an amalgamated tribunal would have been problematic.

1994, Chapter 12, at 300, quoted in Wikeley, Nick, “Burying Bell: managing the judicialisation of social security tribunals” (2000) 63(4) *Modern Law Review* 475-501, at 480.

⁶ Leon, Renée, “Reform of federal merits review tribunals — the Government’s position”, a paper presented at *Administrative law and the rule of law: still part of the same package?*, conference by the Australian Institute of Administrative Law, Melbourne, 18 June 1998, at 3.

⁷ Senate Legal and Constitutional Legislation Committee, above n 1, at 22, referring to recommendation 78 of Administrative Review Council, *Better decisions: a review of Commonwealth merits review tribunals*, AGPS, Canberra, 1995.

⁸ Senate Legal and Constitutional Legislation Committee, above n 1, at 22.

⁹ Leon, above n 6, at 4 and 7; Pidgeon, Sue, “Amalgamating Commonwealth Tribunals: the Government’s accountability through the proposed Administrative Review Tribunal”, paper presented at *Managing service provider liabilities and accountability*, conference, Sydney, February 1999, at 8.

¹⁰ Lord Chancellor’s Department, *Consultation paper*, March 2003 at www.lcd.gov.uk/consult/leggatt/leggattresp.htm, accessed on 7 July 2003, at paragraphs 16 to 18; Goldring, John; Handley, Robin; Mohr, Richard; and Thynne, Iain, “Evaluating administrative tribunals” in Argument, Stephen (ed), *Administrative law and public administration: happily married or living apart under the same roof?*, proceedings of the 1993 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1993, 160-190, at 177.

Another feature of the ART Bill that raised similar issues was the fact that, not only were portfolio ministers given power to issue directions regulating the practice and procedure of the ART, but it was the directions issued by ministers, rather than the President of the Tribunal, which prevailed in the event of any inconsistencies.¹¹ If used, this arrangement would have had serious implications for the operation of different divisions and the perceived independence of the ART as a whole; it was arguably an intrusion of the political into what is supposed to be an independent review process. This was particularly problematic as there was no requirement in the ART Bill for ministers to consult with the President, executive members or anyone else before issuing directions to the Tribunal. Whether or not this would have occurred in practice, the absence of any such requirement in the legislation compounded the perception of the ART's lack of independence and raised the prospect of fragmenting and complicating the administration and procedures of the ART.¹²

This feature of the proposed legislation suggests that the Government was attempting to recreate the ART in the image of a government department that is responsive to the expectations of its minister.¹³ The result may well have been an ART which did not enjoy public trust or confidence.¹⁴ As stated by the Victorian Bar:

... the Ministerial power is so inconsistent with the independence of the ART that it compromises any prospect of an independent and reputable review system.¹⁵

These concerns prompted the majority of the Senate Committee reviewing the ART and CTP Bills to recommend that ministers be required to consult with the ART President before issuing directions.¹⁶

¹¹ Clause 161(6) of the ART Bill.

¹² Senate Legal and Constitutional Legislation Committee, above n 1, at 34.

¹³ Davidian, above n 4, at 48, 49 and 51.

¹⁴ The importance of independence to the public's acceptance of a tribunal is highlighted in Fleming, Gabriel, "Tribunal independence: maintaining public trust and confidence", a paper presented at the *Sixth AIJA tribunals conference*, conference by the Australian Institute of Judicial Administration, Sydney, 5-6 June 2003, at 7.

¹⁵ Senate Legal and Constitutional Legislation Committee, above n 1, at 33, citing *Submission 49*, The Victorian Bar Inc, at 5.

¹⁶ Senate Legal and Constitutional Legislation Committee, above n 1, at 36.

Similar concerns arose in relation to provisions regarding the qualifications of members appointed to the ART. A perturbing aspect of the ART proposal was the suggestion that qualifications for ART membership be similar to those of the primary decision-makers whose decisions are reviewed.¹⁷

While the jurisdiction-specific nature of qualification requirements may have allayed concerns regarding loss of specialisation, it raised others. In particular, in constituting a tribunal whose task was to review and improve departmental decisions, there seems little point in appointing members who have the same qualifications or skills as primary decision-makers.¹⁸ As a review tribunal, the ART's role would have been different to that of departments — it would not have heard every matter, and it would invariably have spent more time on each decision. In addition, its decisions would have been subject to scrutiny by the Federal Court, which imposes specific obligations on tribunals regarding their decision-making procedures and methods. Members of the same calibre as primary decision-makers would have been more likely to make the same mistakes, and to lack skills necessary to the review process.¹⁹

This policy standpoint was the subject of significant criticism, not least due to the likely loss of members with generalist legal skills.²⁰ These difficulties would have been compounded by the proposal that, as now, members should be appointed for terms of three to five years only. This had the potential to militate against the consolidation and retention of corporate knowledge within the ART. Many of these measures were aimed at reinforcing the policy that Tribunal members should be regarded as administrative

¹⁷ Leon, above n 6, at 5.

¹⁸ Harris, Michael, "There's a new tribunal now: review of the merits and the general administrative appeal tribunal model" in Harris, Michael and Waye, Vicki (eds), *Australian studies in law: administrative law*, Federation Press, Sydney, 1991, 188-220, at 200; Creyke, Robin and McMillan, John, "Executive perceptions of administrative law — an empirical study" (2002) 9(4) *Australian Journal of Administrative Law* 163-190, at 183 to 184.

¹⁹ Previous amalgamation proposals have been criticised for failing to recognise the importance of having members with generalist legal qualifications — see, for example, Todd, Robert, "The structure of the Commonwealth merits review tribunal system" in Cole, Kathryn (ed), *Administrative law and public administration — form vs substance*, proceedings of the 1995 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1995, 33-38, at 34.

²⁰ See, for example, Brennan, Sir Gerard, "The mechanism of responsibility in government", a paper presented at *The 1998 Sir Robert Garran Oration*, conference by the Institute of Public Administration, Hobart, 25 November 1998, at 2; Senate Legal and Constitutional Legislation Committee, above n 1, at 41 to 42; Davidian, above n 4, at 49.

decision-makers, not ‘quasi-judges’.²¹ They seemed to represent an attempt by Government to foster an egalitarian, performance-based culture among members of the new Tribunal, similar to that which is promoted in the Australian Public Service. While this may have improved the ART’s understanding of departmental processes, it would have made it harder for members to distinguish their role and function from that of departmental officers. In short, the scheme as proposed was open to the objection that it was merely a duplication of departmental processes.

Similar comments can be made about the fact that the ART Bill would have enabled the CEO to arrange for staff from other departments to work in the Tribunal. There is a possibility that staff would have been deployed from portfolio departments at times of increased workload, with fewer staff being retained at other times. These kinds of arrangements could have been division-specific, or not utilised at all, depending on the decisions made by the CEO. This provision, depending on how it was used, had the potential to broaden the knowledge base and increase the normative impact of the ART. Such arrangements have traditionally been used by the SSAT, a Tribunal which has maintained numerous links with the Department of Family and Community Services. Alternatively, such a provision could have added to the perception that various divisions of the ART lacked independence.²²

Thus, the legislation establishing the ART did much to strengthen links between the Tribunal and portfolio departments, thereby weakening its perceived independence. This aspect of the ART and CTP Bills attracted widespread criticism from stakeholders, and was arguably a significant factor in the legislation being blocked in the Senate.

²¹ Williams, Daryl, Commonwealth Attorney-General, “A step towards better administrative law”, *Canberra Times*, 22 May 1998, 11.

²² Note that significant concerns have been expressed in relation to the secondment of officers to the RRT from the Department of Immigration and Multicultural and Indigenous Affairs. This arose as an issue in evidence given to the Senate Legal and Constitutional Committee inquiring into the operation of the RRT — see, for instance, Senate Legal and Constitutional Committee, *A sanctuary under review: an examination of Australia’s refugee and humanitarian determination processes*, Senate Printing Unit, Canberra, 2000, at paragraph 5.20. See also Wikeley, Nick, “Decision-making and appeals under the *Social Security Act 1998*” (1998) 5 *Journal of Social Security Law* 104-117.

Interestingly, a number of commentators endorsed the suggestion that the ART create and maintain closer links with portfolio departments. For instance, among the Australian Law Reform Commission's proposals in *Review of the federal civil justice system: discussion paper 62*²³ was a recommendation that tribunals develop closer ties with portfolio departments:

Proposal 12.8. Close policy consideration should be given to the means to provide the most appropriate 'bridge' between review tribunals and the agencies whose decisions are subject to review, to enable investigative assistance to be given by the agency to the tribunal and to provide a conduit for the normative effects of decision making. The options include (i) executive members appointed to tribunals (ii) departmental presenting officers attached to the tribunal (iii) tribunal/agency liaison committees or officers.²⁴

Similarly, Bayne has argued that improved links between the ART and portfolio departments would have improved the Tribunal's ability to have a normative impact on departmental decision-making.²⁵ He argued this would have enabled specialist divisions to gain expertise, knowledge, and understanding of departmental processes and pressures, thereby improving the ART's ability to make policy choices and grasp the practical ramifications of particular decisions.²⁶

While improved normative impact is a worthwhile goal, it should not be pursued at the expense of other objectives. This could blur the distinction between tribunals and the executive and risk undermining their very role and function. Given that one of the justifications advanced for the creation of the ART was an enhanced perception of independence for existing Commonwealth Tribunals — and given the dire need of the RRT and MRT in this regard — the proposal to strengthen links between the ART and portfolio departments was problematic. Not only did this constitute a missed opportunity to redress the perceived lack of independence of existing specialist Tribunals but, more

²³ Australian Law Reform Commission, *Review of the federal civil justice system: discussion paper 62*, AGPS, Canberra, 1999. See also Australian Law Reform Commission, *Managing justice: a review of the federal civil justice system*, AGPS, Canberra, 2000, at Chapter 9.

²⁴ Australian Law Reform Commission, 1999, above n 23, at Chapter 12. See also recommendation 122 from Australian Law Reform Commission, 2000, above n 23, at 657.

²⁵ Bayne, Peter, "The proposed Administrative Review Tribunal — is there a silver lining in the dark cloud?" (2000) 7 *Australian Journal of Administrative Law* 86-99, at 89; Bayne, Peter, *Tribunals in the system of government: papers on Parliament, no. 10*, Senate Publishing Unit, Canberra, 1990, at 11. See also Lord Chancellor's Department, above n 10, at paragraph 18.

²⁶ Bayne, above n 25, at 94.

seriously, it undermined the potential of the ART to sustain the effectiveness and independence of the AAT whose work it would have subsumed.

As stated by Robert McClelland, Shadow Attorney-General:

... we are concerned that it [the amalgamation as proposed] actually draws on the worst aspects of the current specialist tribunals and incorporates those worst aspects into the new tribunal.²⁷

Concerns over funding arrangements

An effective way of dispelling a perceived lack of independence would have been to place responsibility for funding the ART with one department, namely, the Attorney-General's Department.²⁸ This would have increased the perception of distance between portfolio ministers and the various divisions of the ART, and would have strengthened the notion that the ART was a cohesive whole. However, in relation to funding arrangements, the Explanatory Memorandum to the ART Bill stated that the ART would be funded through the running costs of the departments whose decisions it reviewed. Essentially, these departments would purchase review services from the Tribunal.

It is arguable that such an arrangement would have acted as an incentive for departments and agencies to improve the quality of their decisions in order to reduce review costs. On the other hand, the link between the quality of decisions and the incidence of appeals is not clear-cut. Moreover, in the absence of any guarantees to the contrary, there was scope for decision-making departments to place pressure on the ART regarding the cost of 'review services', and for those costs to be lowered at the expense of the quality of ART decision-making. Indeed, there was a clear danger that departments would be self-interested in not providing the new ART with sufficient funds — either to run down

²⁷ McClelland, Robert, Shadow Commonwealth Attorney-General, speaking at *Seminar: administrative law in transition — the proposed Administrative Review Tribunal*, Australia, Senate Legal and Constitutional Legislation Committee, 25 October 2000, *Hansard*, at L&C 41.

²⁸ In the United Kingdom, the decision to establish the proposed new Tribunals System and Tribunals Service under the auspices of the Lord Chancellor's Department (now the Department of Constitutional Affairs) has been welcomed as a way of improving the real and perceived independence of tribunals — Adler, Michael, "The slow road to tribunal reform" 12(1) (2004) *Benefits* 13-20, at 15 and 18.

the quality of administrative review, or to save money in their own budgets.²⁹

In addition, the Government's focus on the ART as a way of reducing the amount of money spent on administrative review could have given rise to funding issues at a later stage. That is, any unexpected blow-out in the forecast expenditure on the new Tribunal could well have resulted in a shortfall of funds for operational aspects such as staff and member training, or case management systems. The suggestion that divisions of the ART would not even have been co-located due to the expense of implementing these arrangements highlights the dangerous degree of emphasis placed on achieving budgetary savings.³⁰

The qualitative research presented in Chapters 7 to 11 demonstrates that such a scenario would have impacted adversely upon the effectiveness of the ART and the quality of its decision-making, had the Tribunal been established.³¹ While funding issues are not reflected in the ART and CTP Bills themselves, it is argued that the legislative basis for an amalgamated tribunal must be brought forward in conjunction with adequate financial and political support for the proposal.

Questionable motivations behind the proposed reforms

In light of the numerous concerns expressed about the scope and nature of the Government's ART proposals, it is difficult not to question the motivations behind the amalgamation and the way in which the ART and CTP Bills were drafted.

As demonstrated in Chapter 1, preventing or streamlining the *ad hoc* development of administrative tribunals has often been a significant motivating factor behind proposals

²⁹ Davidian, above n 4, at 48.

³⁰ Creyke, Robin, "Tribunals: divergence and loss" (2001) 29(3) *Federal Law Review* 403-425, at 419.

³¹ A number of commentators have identified funding arrangements and transparent appointment processes as central to the independence of tribunals — see, for example, Dawson, Paul, "Tenure and tribunal membership" (1997) 4 *Australian Journal of Administrative Law* 140-156. See also Nicholson, Justice Alistair, "Address to the first world congress on family law and children's rights", Sydney, 6 July 1993, at 18, cited in Swain, Phillip, *Challenging the dominant paradigm: the contribution of the welfare member to administrative review tribunals in Australia*, 1998, unpublished, at 18; Fleming, above n 14, at 7; Glass, Helen, "Victorian tribunals and their operations" (1994) 68 *Law Institute Journal* 837-838, at 838.

for reform.³² However, the federal jurisdiction has not seen the same burgeoning and uncontrolled growth of tribunals as has been complained about in the States, and as concerned the Franks Committee in the 1950s.

Alternatively, the amalgamation could be seen as an exercise in cost-cutting and service reduction.³³ The Government itself argued that generalist tribunals are cheaper and more efficient to run — members can be used interchangeably, and rented premises and facilities can be shared, as can Presidents and senior members.³⁴ Cynics may argue that the Government saw amalgamation as a way of reducing expenditure on tribunals rather than improving their ability to operate effectively. While these two goals are not necessarily incompatible,³⁵ they had the potential to be in the context of the ART proposal. Specifically, it could be argued that a significant driving force behind the amalgamation was the desire to shed jobs, reduce members' salaries, outsource information technology and library services, and save on accommodation and registry costs — regardless of the impact this may have had on the quality of ART decision-making.

However, some of the Government's proposals were not reconcilable with purely economic motives. Initially there would have been considerable expense associated with name changes, set up and relocation costs, staff movements and educating clients about the change to an ART. Meanwhile, there would have been the ongoing expense of providing a complex administrative or registry structure that was capable of servicing a number of divisions with quite different administrative needs.

Moreover, an analysis of the ART legislation reveals that a number of the proposed reforms were inconsistent with an efficiency-dominated approach. Proposals to restrict

³² See, for example, the Franks Committee Report — Committee on Administrative Tribunals and Enquiries, *Report of the Committee on Administrative Tribunals and Enquiries*, HMSO, London, 1957.

³³ This was suggested by a number of stakeholders commenting upon the merits of the ART Bill — see the summary in Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on the jurisdiction and operation of the Administrative Decisions Tribunal*, NSW Parliament, Sydney, 2002, at 9.

³⁴ Williams, above n 2, at 18405.

³⁵ Partington, Martin, "Restructuring administrative justice? The redress of citizens' grievances" (1999) 52 *Current Legal Problems* 173-199, at 191.

the introduction of new evidence into ART hearings, to enable portfolio ministers to introduce practice directions in different divisions without prior consultation with the Tribunal, and to require each division to separately negotiate funding allocations with their respective departments — all had the potential to increase cost and complexity. As well as not enhancing the delivery of jurisdiction-specific merits review that was fair, just, informal, economical and quick, it is argued that these proposed reforms were inconsistent with an efficiency-dominated approach.

Similarly, it could be argued that the Government's emphasis on inquisitorial procedures in the ART was not necessarily consistent with increased speed and efficiency due to the resources required to undertake the task of "fact-gathering".³⁶ There is also doubt over the compatibility of inquisitorial processes and a preference for single-member panels.³⁷ In addition, while the provision of appeal rights from tribunal decisions has been identified as a significant cause of increased legalism, expense and delay,³⁸ this issue was not addressed in the Government's ART proposals.³⁹ These factors indicate ideological motivations that were in potential conflict with other stated objectives.

It is arguable that the potential advantages of an ART were not realised due to the Government's preoccupation with addressing perceived problems regarding the operation of the AAT. Many of the problems with the current system that were promoted as justification for the amalgamation were relevant solely to the AAT and had little to do with the performance of the smaller, specialised Tribunals. For instance, there was a focus on not necessarily having a judge as President of the ART with a view to making the new Tribunal more accessible and less formal.⁴⁰ However, the AAT is the only Commonwealth Tribunal to have a judge as its president or Principal Member. Similarly, the Government emphasised the need for a diverse range of members, many without legal

³⁶ Harris, above n 18, at 217.

³⁷ Wikeley, above n 5, at 495.

³⁸ Harris, above n 18, at 201 to 202.

³⁹ While it could be argued that the Government is seeking to address this issue in other ways, failure to raise the question of appeal rights in the context of the ART proposal is surprising in light of the purported emphasis on budgetary savings and the Government's apparent readiness to put forward other proposals that were politically sensitive.

⁴⁰ Pidgeon, above n 9, at 5.

qualifications, for the same reasons. Again, the AAT is the only tribunal perceived as being dominated by legal members.

The focus on reducing the ‘excessive legalism and formality’ of existing tribunals is a comment which, if it applies to any Commonwealth tribunal, applies solely to the AAT. Moreover, improving the ability of ART divisions to maintain contacts with portfolio departments is not a relevant concern for the specialist Tribunals which already have regular departmental contact at a number of levels. On the contrary, those Tribunals are more concerned about maintaining a perception of independence from primary decision-makers in light of their close relationships with departments.

This might suggest that, far from there being an adequate level of political commitment to creating an independent, generalist tribunal, the ART was in part designed to bring the AAT down to the level of the lowest common denominator. Cynics may argue that the ART proposal was an attempt to weaken those aspects of the Commonwealth merits review system that the Government did not like, under the guise of redressing legalism and formalism. It would be no surprise to learn that Government prefers the migration tribunal model to the more court-like AAT model, given the former’s perceived lack of independence, the fact that the Principal Member is not required to be a Federal Court judge, and the fact that legal representation is not permitted as of right.⁴¹

In contrast to the Government’s focus on the AAT, there is no evidence that the ramifications of amalgamation for the specialist Tribunals were considered. This may have been a reflection of the fact that the AAT, as the peak merits review Tribunal at federal level, a generalist Tribunal, and one of the largest Tribunals in Australia, has a high profile and a prominent presence in the administrative law community. Yet in rectifying perceived problems with the AAT, the ART proposals would have further undermined the independence of its specialist divisions, and their ability to operate in a manner that was fair and just (as well as informal, economical and quick).

⁴¹ This was arguably implicit in evidence presented to the Senate Legal and Constitutional Legislation Committee by the Attorney-General’s Department — see Senate Legal and Constitutional Legislation Committee, above n 1, at 44.

Overall it appears that a variety of sometimes competing motivations manifested themselves in the Bills that were drafted to establish the ART. It is argued that this goes some way to explaining the most fundamental flaws found in the scope of the Government's proposal. In particular, the illogical exclusion of the VRB and the decision to increase links with portfolio departments could not have contributed to optimal tribunal reform. The fact that this should have been obvious to policy-makers indicates that the task of developing a sound legislative foundation for the ART was undermined by a lack of political commitment.

ORGANISATIONAL STRUCTURE OF THE ART

The ART was intended to have a divisional structure, with executive members heading each division. Its enabling statute envisaged a degree of divergence in the way that different divisions would have carried out their roles. In particular, the divisional structure contained in the ART Bill provided significant scope for provisions in consequential legislation to impact upon the operation of each division. Any analysis of the ART proposal would therefore be incomplete without consideration of the CTP Bill.

Among other things, the CTP Bill provided for alternative procedures and processes to apply in different divisions of the ART. For instance, the Bill contained a large number of provisions ensuring that the Immigration and Review Division (IRD) would operate in a manner quite distinct from other divisions of the ART. Clause 343B of the CTP Bill indicated the unique way in which the IRD would have been expected to function:

343B Application of the Administrative Review Tribunal Act

The following provisions of the *Administrative Review Tribunal Act 2000* do not apply to the review by the Tribunal of a decision to which this Part applies:

- (a) the definition of *core provision* in section 6;
- (b) section 7;
- (c) the notes below the headings to Parts 2 and 3;
- (d) Parts 4 to 10.

In other words, the IRD was not expected to adopt the practices and procedures applicable in other ART divisions.

There is a question whether the significant potential for divergence between different

divisions within the ART was appropriate given the similarities of the tasks carried out by the four Tribunals that were to be amalgamated. This thesis argues that a balance should be struck between retention of specialisation and the introduction of consistent standards. In retaining specialisation to the extent envisaged, it is possible the ART would have functioned as a series of co-located specialist tribunals — operating out of the same premises, but applying few uniform practices and procedures. While this may be more appropriate in jurisdictions where tribunals perform distinct functions, such as administrative review of government decisions and the determination of disputes between citizens, it is not appropriate in a generalist tribunal where all divisions are carrying out the same type of function.

One of the consistent justifications given for the loose structure of the proposed ART was that it would enable its divisions to maintain those specialist features important to their pre-amalgamation operation. However, in the case of the ART legislation, the Government may have taken this too far. In particular, the special treatment afforded to the IRD left it open to the charge of deliberately treating applicants in the migration jurisdiction less favourably than applicants in other jurisdictions. This led some commentators to describe the structure of the ART as “fragmented, not coherent”.⁴²

Ultimately, the question whether the structure outlined in the ART Bill would have struck an appropriate balance between the retention of necessary specialisation and the promotion of uniform standards and procedures is a moot one, given the degree of discretion built into the legislation in relation to practice directions. Nonetheless, there are a number of more specific structural features worth noting in the context of evaluating the adequacy of the ART’s legislative foundation.

As noted in Chapter 2, the Government indicated there would be a presumption against multi-member panels operating across divisions of the ART. In practice, this provision would have impacted most upon the conduct of reviews in the social security

⁴² Creyke, above n 30, at 410.

jurisdiction.⁴³ The presumption against multi-member panels in the ART meant that the Income Support Division (which was to subsume the functions of the current SSAT) would have had less capacity than its predecessor to carry out its function effectively, informally and efficiently.⁴⁴ Similar concerns were expressed about the fact that amalgamation would have resulted in the loss of an initial tier of review in the social security jurisdiction. It has been argued that a separate right of appeal to the AAT from its decisions enables the SSAT to operate more quickly and informally than it otherwise could.⁴⁵

This raised questions about whether the Income Support Division would have operated as efficiently as the SSAT has done. The SSAT works in a particularly high volume jurisdiction.⁴⁶ On a *pro rata* basis it makes more decisions per year than any other Commonwealth tribunal, and its practices and procedures have developed accordingly.⁴⁷ The abandonment of specially developed procedures such as multi-member panels could have led the ART to be less efficient than the specialist Tribunals it replaced. This would have been ironic in light of suggestions that the Government's preference for single member panels and restrictions on second-tier review was motivated largely by budget

⁴³ As explained in Chapter 2, the SSAT was previously always constituted by two or three members in reviewing decisions made under the social security law until the passage of the *Social Security (Administration) Act 1999* (Cth), which came into effect on 20 March 2000.

⁴⁴ The benefits that multi-member panels are said to bring include greater expertise and accountability, more effective assessments of credibility, and greater consistency of decision-making — see Administrative Review Council, above n 7, at paragraphs 3.50 to 3.52. See also Swain, above n 31, at 229; Chenoweth, Rieteke and Huck, Jill, "Tribunal triptychs and emerging variations on a theme: multi-member and multi-disciplinary tribunal panels", a paper presented at *Administrative law: the essentials*, conference by the Australian Institute of Administrative Law, Canberra, 5–6 July 2001.

⁴⁵ Senate Legal and Constitutional Legislation Committee, above n 1, at 38 to 39; Carney, Terry, "Welfare appeals and the ARC report: to SSAT or not to SSAT — is that the question?" (1996) 4 *Australian Journal of Administrative Law* 25-36, at 31. See also Swain, above n 31, at 41 and 237; Disney, Julian, *Reforming the administrative review system — for better or for worse, for richer or for poorer: law and public policy paper no. 6*, Centre for International and Public Law, Canberra, 1996, at 28; Chenoweth and Huck, above n 44.

⁴⁶ In the financial year 2003–2003, the SSAT finalised 9,762 matters — Social Security Appeals Tribunal, *Annual report 2002–03*, SSAT, Melbourne, 2003, at 13.

⁴⁷ As noted in Chapter 4, in 2002–2003 the SSAT made more decisions than the MRT and RRT, and only marginally fewer decisions than the AAT. While the AAT was the only Tribunal to finalise a greater number of matters, the SSAT had a significantly lower budget than this Tribunal — Administrative Appeals Tribunal, *2002–2003 Annual report*, AAT, Sydney, 2003, at 16 and 111; Refugee Review Tribunal, *Annual report 2002–2003*, RRT, Sydney, 2003, at 16 and 23; Migration Review Tribunal, *Annual report 2002–2003*, MRT, Sydney, 2003, at 14 and 22; Social Security Appeals Tribunal, above n 46, at 13 and 56.

considerations.⁴⁸

The existence of second-tier internal review within the ART would arguably have improved the quality and consistency of decision-making in the migration jurisdiction, where applicants currently have access to only one layer of merits review. A similar initiative introduced in the NSW ADT has been reported as producing worthwhile results.⁴⁹ However, any positive benefit in this regard was negated by the fact that, in addition to the restrictions on access described in Chapter 2, the provisions establishing second-tier review in the ART were expressly excluded in relation to decisions of the Immigration and Refugee Division.⁵⁰

It is likely that other structural provisions in the ART legislation could have resulted in more positive changes. For instance, there was provision in the ART Bill for members to be rotated between divisions.⁵¹ Members would have been chosen, in part, for their ability to perform functions in several divisions of the new Tribunal.⁵² There are arguments for and against such a proposal. On the one hand, the potential for specialisation in members' training and skills may have been reduced if they were required to hear matters in a range of areas. This could have led to a reduction in the capacity of divisions to retain the specialist features that currently exist in the smaller Tribunals.

On the other hand, such an initiative would have offered greater professional development opportunities to members, and enabled experience and knowledge to be shared across divisions. This could have led to a cross-fertilisation of ideas and a more cohesive organisational culture in the new Tribunal. The positive results yielded by the

⁴⁸ In the Government's view, multi-member panels "are being used unnecessarily, increasing cost and delays" — Leon, above n 6, at 8. See also Senate Legal and Constitutional Legislation Committee, above n 1, at 89.

⁴⁹ The President of the ADT has suggested that "the creation of the internal appeal tier has been of some benefit to parties, and the decisions of the Appeal Panel have been regarded as reasonably persuasive" — O'Connor, Judge Kevin, "Recent developments and procedural matters in the Administrative Decisions Tribunal", a paper presented at a seminar by the Australian Institute of Administrative Law, NSW Chapter, Sydney, 27 November 2000, at 4.

⁵⁰ Clause 343B of the CTP Bill.

⁵¹ Clause 16 of the ART Bill.

⁵² Williams, above n 2, at 18405.

deliberate policies of VCAT management to rotate Deputy Presidents between lists and to cross-appoint members wherever possible are clear from the qualitative research presented in Chapters 7 to 11.

Overall, experience in other jurisdictions suggests that this element of the Tribunal's organisational structure would have been an improvement upon existing arrangements. However, this aspect of the ART's legislative foundation was overshadowed by the problematic provisions discussed above.

Staffing structure of the ART

In general, the provisions of the ART Bill would have given Tribunal management a fair degree of latitude to structure staffing arrangements in the way they saw fit. For instance, while not specifically addressed in the ART or CTP Bills, it appears the legislation would have given ART management the flexibility required to make appropriate arrangements for the provision of research staff. The presence of in-house research staff would have been vital if the non-adversarial, inquisitorial framework of the RRT was to have been maintained within the new Immigration and Refugee Division.⁵³ Moreover, any suggestion that this function be contracted out to DIMIA would have raised issues about the independence of the IRD. Likewise, in a model where members would not have had the assistance of advocates to draw their attention to recent case law and other relevant material, it would have been important for members to have access to high quality legal research services.

As discussed in Chapter 2, there was also significant scope for the CEO of the ART to engage consultants to perform various services within the Tribunal. Concern was expressed that consultants conducting inquiries would have been given significant powers to control the scope of an inquiry, for instance, by summoning witnesses, conducting hearings, and determining inquiry practice and procedure.⁵⁴ This would have occurred in

⁵³ The qualitative data gathered for this thesis suggest that the absence of research staff places additional strain on members. See, in particular, ADT Member 4 at paragraphs 113 to 117.

⁵⁴ Clauses 112, 113, 114 and 117 of the ART Bill. See also Senate Legal and Constitutional Legislation Committee, above n 1, at 15 and 56.

the absence of controls such as a requirement to comply with the rules of procedural fairness,⁵⁵ and the more subtle influence that the culture of an organisation can exert over its employees. Moreover, as Creyke has pointed out, consultants appointed to the ART would not have been bound by the code of conduct or performance agreements in the same way as ART members.⁵⁶ Nonetheless, assuming these provisions would have been used responsibly, the flexibility that the ART Bill provided in relation to staffing matters would probably have enhanced the operation of the Tribunal.

As for registry functions, it seems each division would have shared the resources of a single ART Registry. In light of the degree to which the CTP Bill incorporated the diverse practices and procedures developed in the specialist Tribunals to be amalgamated, setting up the ART Registry would have posed significant challenges for the new Tribunal. The extent to which the IRD would have retained specialist practices and procedures currently used by the RRT and MRT in reviewing decisions under the *Migration Act 1958* (Cth) was particularly problematic. As stated by Dr Nygh, then Principal Member of the RRT:

... whoever inherits the position ... of executive member of the ART will have an interesting function in trying to meld, if he or she were to try it at all, those two different streams [immigration and non-immigration] into a single body. That is going to be quite a challenge.⁵⁷

Specifically, there would have been a substantial increase in complexity if applications for review in the many different jurisdictions administered by the ART necessitated processing in relation to different time limits, notification procedures, costs orders, disclosure provisions and so on. The difficulties faced by a single ART Registry in developing streamlined procedures in the face of so many differing demands would have led to greater inefficiency and higher cost, at least in the short-term.

⁵⁵ Senate Legal and Constitutional Legislation Committee, above n 1, at 56.

⁵⁶ Creyke, Robin, speaking at *Seminar: administrative law in transition — the proposed Administrative Review Tribunal*, Australia, Senate Legal and Constitutional Legislation Committee, 25 October 2000, *Hansard*, at L&C 26.

⁵⁷ Nygh, Peter, RRT Principal Member, speaking at *Seminar: administrative law in transition — the proposed Administrative Review Tribunal*, Australia, Senate Legal and Constitutional Legislation Committee, 25 October 2000, *Hansard*, at L&C 47. See also Creyke, above n 30, at 420.

The more that existing statutory schemes were maintained, the greater the chance that registry staff would have been called on to perform a wide range of tasks, with the attendant risks of administrative error and loss of efficiency. This complexity would be greatly exacerbated in the event that portfolio ministers decided to issue a range of practice and procedure directions under cl 161 of the ART Bill. The potential for different divisions to operate in quite distinct ways no doubt contributed to Dennis Pearce's view that the proposed ART would not really be a single tribunal at all, not even an amalgam, but more of a "conglomerate".⁵⁸

ART management would have been required to address these challenges when considering the structure, training and resources of the new ART Registry. For example, reception staff would need to have been suitably trained and skilled to handle a range of applicants whose understanding of Australian institutions would be limited. They would also have needed a broad knowledge of the workings of the numerous Commonwealth agencies whose decisions the Tribunal had jurisdiction to review. Refugee applicants would also have required special consideration in view of the particular privacy obligations owed to them. While confidentiality issues were addressed in the Bill,⁵⁹ practical realities such as the physical layout of registry reception would also have required consideration. The extra workload created by appeals to the second-tier of the ART also had administrative implications for an ART Registry.

The resultant complexity could have led to a higher incidence of administrative error by registry staff, and the subsequent expense of rectifying mistakes or having to re-determine matters overturned on judicial review. Ultimately, in light of the apparent resistance to streamlining procedures across divisions operating within the ART, it may have been necessary for management to adopt a multi-registry structure similar to that adopted by VCAT. Thus, the way in which foundational legislation is drafted can have

⁵⁸ Pearce, Dennis, speaking at *Seminar: administrative law in transition — the proposed Administrative Review Tribunal*, Australia, Senate Legal and Constitutional Legislation Committee, 25 October 2000, *Hansard*, at L&C 64.

⁵⁹ Clauses 151 and 152 of the ART Bill.

significant practical ramifications which need to be addressed when structuring an amalgamated tribunal.

PROCESSES AND PROCEDURES OF THE ART

The creation of the ART provided the Government with an opportunity to draft an ART Bill that contained the best procedural aspects of the enabling statutes that currently confer jurisdiction on Commonwealth merits review tribunals. In a handful of cases this potential was realised. As a practical example, the ART Bill contained provisions relating to withdrawals and the slip rule.⁶⁰ While similar provisions currently exist in the AAT Act, the absence of equivalent provisions in the *Migration Act 1958* (Cth) has often created practical difficulties for the RRT and MRT. Thus, the amalgamation provided an opportunity for all four Tribunals to benefit from positive features in the others' enabling statutes, and for legislators to make additional improvements in light of the experience of the AAT in conducting administrative review over the past 25 years.

Unfortunately, in the majority of instances this did not eventuate. Rather, as described earlier, there was a focus in the ART legislation on maintaining the processes and procedures currently applied by the different specialist Tribunals. In particular, the CTP Bill provided that — in the case of the IRD — all of the procedural provisions contained in the ART Bill were to be replaced by provisions in the *Migration Act 1958* (Cth). As stated by Dr Nygh:

... only Part 1, preliminaries, Part 2, establishment, structure and membership of the tribunal, and Part 3, administration of the tribunal, will apply to the IRD. ... All other matters — therefore, the manner in which the Immigration Review Division operates — will continue to be governed as they are now by the provisions of the *Migration Act 1958* ...⁶¹

In many ways, it seems the Government's focus in drafting the ART and CTP Bills was not to improve the performance of existing Tribunals, but to maintain the status quo. This had significant implications for the balance struck between the retention of specialist processes and procedures and the imposition of consistent standards across divisions.

⁶⁰ Clauses 127 and 138 of the ART Bill.

⁶¹ Nygh, above n 57, at L&C 47.

Specifically, the legislative regime establishing the ART would have encouraged different divisions to operate in distinctly different ways.

Some may argue that a divergence in practice and procedure between divisions would have allowed the continued development of specialist features that currently enable the SSAT, MRT and RRT to operate effectively in their own jurisdictions. On the other hand, it could be argued that a more holistic approach and the imposition of a greater number of consistent procedures would have enabled the ART to have the best of both worlds. That is, different divisions could have developed and applied specialist procedures as necessary, as well as adopting uniform procedures that sought to capture the most successful elements of existing practice and procedure.

The benefits of adopting at least some standard procedures across divisions would have included greater consistency for repeat users, an enhanced ability to publicise and create awareness about ART processes, and the setting of performance benchmarks that could apply across the Tribunal as a whole. In addition, the adoption of some uniform procedures would have made it easier for members to be cross-appointed to different divisions, thereby enhancing their professional development and the cross-fertilisation of knowledge and ideas. This thesis argues that a compromise should be found between adopting uniform practices and procedures, and maintaining all of the different procedures currently found in specialist jurisdictions.

In relation to the ART, such a compromise would have involved bringing certain, non-essential procedures in jurisdictions such as migration, into line with those in other jurisdictions. For instance, the imposition of a 28-day time limit within which applications for review must be lodged, and the preclusion of extensions of time, do little to enhance the ability of the RRT or MRT to make the correct or preferable decision in the matters before them. While these provisions may help the Government achieve its political objectives in relation to migration, to maintain them in the transition to an ART would have undermined the objectives of promoting a more streamlined and efficient system of merits review.

Overall, it is argued that the legislation establishing the ART erred on the side of maintaining the status quo or downgrading existing practices. The ART and CTP Bills therefore failed to strike an appropriate balance between the retention of necessary specialisation and the introduction of improved, uniform standards. As such, the Government missed a unique opportunity to raise the procedural standards of all four Tribunals to the level of the highest common denominator. This is particularly disappointing as, unlike amalgamated tribunals operating at State level, the challenge posed to legislators responsible for implementing the ART proposal were not as great. In particular, the ART would not have been required to address issues associated with the marrying of functions as disparate as administrative review and the determination of disputes between citizens.

More positive comments can be made about the degree of discretion that the ART would have been able to exercise in determining its own processes and procedures. The ART Bill provided for a mixture of procedures and processes, some of which were fixed in legislation, others of which would have been developed and regulated by the ART itself in response to its needs. There were advantages in the fact that the ART's procedures were to be partly codified in legislation and partly determined at its own discretion. If they had been applied consistently, procedures laid down in the ART Act would have been publicly known, easily accessible and consistent across jurisdictions. This would have benefited 'repeat players' who may have represented applicants across a range of divisions. As far as one-off users were concerned, the ART's ability to frame its own procedures at a divisional level meant that divisions could have been more responsive to the specific needs of applicants.⁶²

While the ART Bill was well-drafted in this regard, it should be remembered that cl 161(6) would have enabled portfolio ministers to issue practice and procedure

⁶² A number of witnesses giving evidence to the Senate Legal and Constitutional Legislation Committee in the course of its inquiry into the ART and CTP Bills were concerned that the legislation left too many "important procedural matters to the discretion of the Tribunal therefore providing the applicant with no certainty about how the review will be conducted" — Senate Legal and Constitutional Legislation Committee, above n 1, at 51. However, these concerns are rejected by the author on the basis that they are founded on the arguably remote possibilities that, firstly, an ART would develop an attitude that was 'anti-applicant' and that, secondly, this would influence the exercise of its discretion in matters before the Tribunal. Moreover, any attempt to address such concerns would sacrifice the potential for flexibility in ART matters.

directions to various divisions of the ART, overriding the President's directions in the event of any inconsistency. There was therefore potential for ministerial directions to restrict the ART's discretion, for instance, to prevent it from allowing applicants access to representation under cl 105.⁶³ Misuse of provisions such as these by ministers could have undermined the effective operation of an ART. Also of concern in this context was cl 129, which would have enabled the Tribunal to end a review if a participant failed to comply with practice directions.

In addition to the general comments that can be made about the way in which the ART legislation dealt with practice and procedure, the ART Bill contained a number of specific procedural provisions that warrant closer examination.

Treatment of 'new evidence' and the scope of review

The merits review tribunals established to date at Commonwealth level have all had the power to conduct *de novo* review of administrative decisions. However, cl 124 of the ART Bill would have enabled the ART to request that a decision-maker reconsider their decision in light of new information which had come to light after the primary decision had been made, or at any other time. There would also have been scope for the President or portfolio ministers to issue practice and procedure directions requiring matters to be referred back to departments in certain circumstances.⁶⁴ If used irresponsibly, this procedure could have fundamentally changed the face of Commonwealth merits review. In essence, it meant that reviews may no longer have been conducted on a *de novo* basis.

Ultimately, application of the 'new evidence rule' would have either discouraged parties from presenting all relevant evidence to the Tribunal, or resulted in a 'ping-ponging' effect with matters going from department to ART and back again whenever new evidence was introduced. This would have been likely to cause confusion among applicants, and to have significantly prolonged the review process, thereby increasing

⁶³ This provision was the subject of strong criticism from the Law Council of Australia — see Williams, Daryl, Commonwealth Attorney-General, speaking at *Seminar: administrative law in transition — the proposed Administrative Review Tribunal*, Australia, Senate Legal and Constitutional Legislation Committee, 25 October 2000, *Hansard*, at L&C 5; Trimmer, Anne, President of the Law Society, *ibid.*, at L&C 29.

⁶⁴ Clause 124(2)(c) of the ART Bill.

cost.⁶⁵ Indeed, considerable time may have been spent determining whether or not this discretion should have been exercised, particularly as there can often be difficulties in determining just what factual material was before a primary decision-maker. This would have added a layer of complexity to administrative review which would have been especially confusing for disadvantaged applicants, such as those with an intellectual disability or those from different educational or linguistic backgrounds.

Clause 124 was not a core provision, and perhaps would not be used in the migration jurisdiction in light of Government concerns that delay may advantage some applicants. However, the operation of a provision like this in areas such as social security had the potential to disadvantage applicants by prolonging and complicating the review process. While the aim may have been to encourage applicants to give all relevant information in their possession to primary decision-makers, many applicants using the system honestly may simply have given up in frustration. Similarly, it is difficult to see the rationale behind cl 125, which enabled the Tribunal to ask the primary decision-maker to reconsider a decision “at any time when it is conducting the review”. This would simply have duplicated the review process.

Similar concerns were expressed about cl 93 of the ART Bill which would have enabled the Tribunal to “limit the questions of fact, evidence and the issues it considers” in a review.⁶⁶ It seems the purpose of this provision was to make the review process more efficient. However, as pointed out by Creyke, this provision was “contrary to the very concept of merits review”.⁶⁷

One of the principal aims of the Commonwealth merits review system is to encourage accountability and consistency in government decision-making. It is difficult to see how procedural provisions such as these would have advanced these objectives.

⁶⁵ See Senate Legal and Constitutional Legislation Committee, above n 1, at 55; Creyke, above n 56, at L&C 25. Note also that a provision originally included in the *Social Security (Administration) Bill 1999* (Cth), which provided that matters should be referred back to a primary decision-maker where an applicant had no reasonable excuse for not raising an issue at the outset, was defeated in the Senate.

⁶⁶ Creyke, above n 56, at L&C 25.

⁶⁷ *Id.*

Whether representation is permitted in hearings

Another procedural feature of the ART Bill that was the subject of significant criticism was the way that it dealt with representation of parties before the Tribunal. Clause 105 provided that parties could choose someone to represent them, provided the Tribunal agreed and the practice and procedure directions did not prohibit it.

As with the VCAT Act, these proposals tapped into existing debate over whether legal, or indeed non-legal, representation encourages tribunals to adopt a more formal approach to administrative review, or whether representation actually enables matters to be conducted more efficiently and cost-effectively. On the one hand, the Government argued that representation before tribunals encourages the kind of ‘excessive legalism’ that it has criticised in relation to the operation of the AAT.⁶⁸ Others have argued that, rather than allowing applicants to have legal representation, it is better to ensure tribunal procedures are sufficiently accessible, informal and user-friendly so that applicants can negotiate them without any need to resort to representation.

On the other hand, while the aim of developing user-friendly procedures is widely endorsed,⁶⁹ it has been argued that representation can facilitate the objective of quick and cost-effective merits review in matters involving complex legislative schemes and technical knowledge.⁷⁰ In addition, many arguments against representation fail to address the needs of some applicants, such as those from non-English speaking backgrounds or those with a mental illness, who may be disadvantaged without representation. An obvious benefit of ‘repeat player’ representatives is that they are

⁶⁸ This is clearly implied in comments by government officials about the need to reduce “undue legalism and formality” — Leon, above n 6, at 5. See also Pidgeon, above n 9, at 5 and 7.

⁶⁹ See, for instance, Swain, above n 31, at 106; Disney, Julian, *Current issues in social security law*, Centre for International and Public Law, Canberra, 1994, at 8; Horsburgh, Michael, “Social Security Appeals Tribunal” (1983) 36(4) *Australian Social Work* 15-22, at 19; Goodman, Helen, *Decision outcomes on de facto relationship appeals*, Master of Social Work Thesis, University of Melbourne, 1992, unpublished, at 146, cited in Swain, above n 31, at 107.

⁷⁰ For instance, it was generally agreed by participants at a conference in the United Kingdom in 2000 that representation makes cases significantly easier to hear — see *Towards a more coherent system of tribunals*, research seminar presented by the Centre for the study of Administrative Justice, Faculty of Law, University of Bristol, 2 November 2002, at record of proceedings, paragraph 144. See also Senate Legal and Constitutional Legislation Committee, above n 1, at 61.

familiar with the processes used by a tribunal.⁷¹ Perhaps more importantly from the applicant's point of view, they understand what information is relevant, and what points need to be made in order to get a primary decision overturned.⁷² Research conducted in the AAT and in the United Kingdom indicates that applicants with representation are far more successful than unrepresented applicants.⁷³ As reported by Genn:

An analysis of the effect of representation on the outcome of hearings established that, in all four tribunals [studied], the presence of a skilled representative significantly and independently increased the probability that a case would succeed.⁷⁴

Whether administrative review processes are actually conducted more efficiently and quickly when representation is available will vary from jurisdiction to jurisdiction, as will the appropriateness of representation. However, this in itself highlights the inappropriateness of a blanket presumption against representation. At least in some divisions, it is questionable whether such a presumption would have been consistent with the ART's obligation to provide merits review that was fair, just, economical and quick. According to the Law Council of Australia:

... there is a strong public interest argument in seeking to maintain the right of representation. In many cases, representation is a means of redressing the power and resource imbalance implicit in an appeal by the individual citizen against the state. ... Without the assistance of a lawyer to put concisely the issues at hand, it will often take a court or tribunal longer to hear the application of an unrepresented litigant.⁷⁵

Thus, the fact that practice directions could prohibit representation, combined with the fact that portfolio ministers could issue practice directions which prevailed over those issued by the Tribunal, remained a cause for concern among commentators. In addition, the requirement that the presiding member agree to the presence of representatives arguably threw an unnecessary obstacle in the path of more vulnerable applicants.

⁷¹ Sayers, Michael and Webb, Adrian, "Franks revisited: a model of the ideal tribunal" (1990) 8 *Civil Justice Quarterly* 36-50, at 40.

⁷² Genn, Hazel, "Tribunals and informal justice" (1993) 56 *Modern Law Review* 393-411, at 404.

⁷³ Senate Legal and Constitutional Legislation Committee, above n 1, at 61 to 62; Genn, above n 72, at 398 and 400.

⁷⁴ Genn, above n 72, at 400.

⁷⁵ Trimmer, above n 63, at L&C 29.

Depending on the views of the particular member concerned, this requirement could have been difficult to meet.

Without the opportunity to observe how these provisions were applied in practice, it is impossible to conclude that there would have been a danger of the ART inappropriately excluding representation. Nonetheless, despite a degree of flexibility in the drafting of cl 105, it is argued that what amounted to a requirement to seek leave to be represented placed an inappropriate onus on applicants.

Once again, an analysis of the practical implications of the ART and CTP Bills highlights the necessity of giving careful thought to the way in which provisions included in foundational legislation will be implemented in practice.

ORGANISATIONAL CULTURE OF THE ART

The main objects of the ART Bill were set out in cl 3. These included independence, accessibility, and the provision of merits review that was fair, just, economical, informal and quick. In addition, cl 90 would have required the ART to comply with the rules of procedural fairness in reviewing decisions. Thus, at a rhetorical level, a reasonable balance was struck between the objective of providing merits review that is informal and cost-effective on the one hand and, on the other, the obligation to conduct reviews in a manner that is fair and just. While these objectives can be challenging for tribunals to reconcile in practice, there is often a healthy tension involved in attempting to do so.

However, upon delving deeper into the legislation it seems clear that, in creating the new ART, the Government was attempting to redress what it saw as the ‘excessive legalism of the AAT’. The unstated (arguably untested) assumption was that a merits review tribunal which adheres to formal legal processes such as procedural fairness or the rules of evidence, is less efficient and ‘user-friendly’ than a tribunal which operates on a more informal basis. There was also an implicit view that the adoption of an informal, proactive role is more consistent with the objectives of merits review. It seems the Government saw the task of tribunals as finding the correct or preferable decision in an

environment which allows an applicant to be involved in the process, and which does not contain those safeguards which engender a court-like atmosphere.

The emphasis on informality and non-legalism throughout the Government's ART proposals was reflected in the ART legislation.⁷⁶ Relevant features of the Bills included the presumption against legal representation in ART hearings, the fact that members would have been treated more like high level bureaucrats than judicial officers,⁷⁷ and cl 90 and 91 which encouraged informality and disappplied the rules of evidence. Provisions such as the absence of a requirement for members to possess legal qualifications also reflected the Government's view that tribunal members should see themselves as administrative decision-makers, not 'pseudo-judges'. These developments could have been expected to impact upon the institutional culture that developed within the ART, for instance by encouraging greater informality.

Despite the Government's overarching emphasis on 'de-legalising' administrative review, a number of provisions in the ART legislation suggest the ART would have had a more adversarial approach to merits review than the specialist Tribunals it replaced.⁷⁸ For instance, there were provisions relating to the joinder of third parties whose interests were affected by a decision,⁷⁹ the behaviour of decision-makers participating in the review,⁸⁰ the power to make consent orders,⁸¹ the power to strike matters out for non-appearance,⁸² and so on. Admittedly many of these clauses were not core provisions, and would have been replaced by jurisdiction-specific provisions regulating the operation of divisions such as the IRD. However, it is at least arguable that the ability of some divisions to adopt court-like practices and processes would have influenced the

⁷⁶ Creyke, above n 30, at 411.

⁷⁷ Note, in particular, the performance measurement regime for members established in the ART Bill — see Part 2, Division 3 of the ART Bill.

⁷⁸ A similar argument has been made by Creyke — Creyke, above n 30, at 416.

⁷⁹ Clause 84(1)(d) of the ART Bill.

⁸⁰ Clause 94 of the ART Bill.

⁸¹ Clause 109 of the ART Bill.

⁸² Clause 128 of the ART Bill.

organisational culture of the ART as a whole. The issue of departmental representation deserves particular examination in this context.

Departmental representation

Clauses 84 and 85 of the ART Bill reflected an intention that decision-makers participate in matters before the ART unless they declined to be involved or unless an agency head made a general statement that staff of their department would not participate in reviews. While these were not core provisions, any suggestion that decision-makers be represented in tribunal hearings raises questions regarding the operational culture of an administrative tribunal.

The participation of decision-makers in hearings evokes images of adversarial, court-like proceedings and downplays the inquisitorial, investigative role that merits review tribunals are intended to adopt. At a more practical level, departmental participation has the potential to disadvantage applicants and undermine attempts to foster a ‘user-friendly’ organisational culture. One of the concerns is that repeat players have the ability to present a better case than unrepresented applicants, as they are familiar with the procedures and processes used. In contrast, most applicants are in a weak and vulnerable position when it comes to the tribunal setting, and lack the specialist knowledge of subject matter and process that departmental advocates develop.

Clauses 84 and 85 of the ART Bill were consistent with current practice in the AAT, where decision-makers from a range of departments are routinely represented by lawyers or departmental advocates. This can be contrasted with the practice in the SSAT, MRT and RRT where decision-makers do not participate in reviews.

The assumption that decision-makers would have been involved in merits review in at least some divisions of the ART is particularly surprising in light of the Government’s emphasis on reducing ‘excessive legalism’. Any increase in departmental representation would probably have led to the development of a more adversarial, legalistic culture in the new ART. Decision-makers may not have sought to participate in matters before all divisions of the Tribunal. However, in the absence of legislation that encouraged

otherwise, the amalgamation of tribunals like the AAT with less formal tribunals such as the SSAT could have been expected to result in an increased level of formality and legalism across the board.

This development may even have encouraged agencies in jurisdictions such as social security to seek to be represented where this had previously been restricted by portfolio legislation.⁸³ For instance, the fact that review in the Income Support Division would have been the last line of merits review in most matters (in light of the restrictions on second-tier review) meant that social security cases could have become more thoroughly contested than they are at present.⁸⁴ Legislative provisions such as these would certainly have hindered the Government's aim of creating an informal review culture.

At best, this proposal indicated a lack of commitment to improving those aspects of the Commonwealth merits review system that the Government itself had identified as problematic. At worst, it suggests that the process of drafting the ART legislation was captured or at least influenced by portfolio departments who were reluctant to forego current practices such as participation in tribunal review. Either way, this suggests a costly disregard for the importance of law in achieving a viable amalgamation.

Provisions relating to the appointment and conditions of members

The ART Bill contained provisions relating to the management of members' performance which went beyond anything contained in existing legislation.⁸⁵ There was a statutory obligation for each member to enter a written performance agreement with the President or an executive member of the ART, as well as a requirement to establish a code of conduct to apply to the performance of members' duties. Failure to comply with a

⁸³ Former s 1265(2) of the *Social Security Act 1991* (Cth) provided that the department may only make written submissions to the SSAT. Note that this provision was replaced by s 156 of the *Social Security (Administration) Act 1999* (Cth), which allows departmental representation before the SSAT. See also Creyke, Robin, *The procedure of the federal specialist tribunals*, Centre for International and Public Law, Canberra, 1994, at 65.

⁸⁴ Similar concerns were reported in McMillan, John and Todd, Robert, "The administrative tribunals system: where to from here?" in Argument, Stephen (ed), *Administrative law: are the States overtaking the Commonwealth?*, proceedings of the 1994 Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1996, 116-130, at 129.

⁸⁵ Clauses 24 to 28 of the ART Bill.

performance agreement or the code of conduct could have resulted in removal from office.

The proposed introduction of a performance management scheme for ART members tapped into a long-standing debate over the appropriateness of reviewing the performance of independent statutory decision-makers.⁸⁶ One of the issues often raised is whether those reviewing the performance of tribunal members could inadvertently or deliberately influence the outcomes of decisions made by individual members.⁸⁷ In relation to the ART, some argued the introduction of a performance management system marked a dramatic shift in the status of Tribunal members. Performance review under threat of serious sanction was seen as problematic.⁸⁸ This view was no doubt influenced by the fact that members would have been appointed for three- to five-year terms and, particularly in divisions such as the IRD, would have been exposed to political pressure concerning the outcomes of decisions.⁸⁹

As well as compromising the perception that ART members were independent,⁹⁰ there was a perceived risk that some members would feel pressured to conform to departmental, ministerial or institutional expectations about ‘set aside rates’.⁹¹ A number

⁸⁶ Similar debates have taken place in relation to the measurement of judicial performance — Partington, Martin, “Access to justice: re-forming the civil justice system of England and Wales” (2001) 30(1) *Common Law World* 115-133, at 130.

⁸⁷ Senate Legal and Constitutional Legislation Committee, above n 1, at 27, citing *Transcript of evidence*, National Welfare Rights Network, at 107; Mullan, David, “Where do tribunals fit into the system of administration and adjudication? A Canadian perspective” in Creyke, Robin (ed), *Administrative tribunals: taking stock*, Centre for International and Public Law, Canberra, 1992, 1-20, at 18.

⁸⁸ Senate Legal and Constitutional Legislation Committee, above n 1, at 27 to 28, citing *Submission 51*, Community and Public Sector Union, Victorian Branch, at 3. (Note that the author developed material for inclusion in this submission in 2000.)

⁸⁹ See, for example, “Ruddock’s Threats to Refugee Body” in *Canberra Times*, 27 December 1996; Clennell, Andrew, “Libs’ \$520-a-day part-timers” in *Sydney Morning Herald*, 19 June 2001; Haigh, Bruce, “We need a refugee policy for our times” in *Sydney Morning Herald*, 13 October 2000.

⁹⁰ Note that, in some circles, there is already a perception that the independence of members in existing Commonwealth tribunals is subject to question. The RRT has been a particular focus for comment in this regard. See, for example, Kneebone, Susan, “Refugee Review Tribunal and the assessment of credibility: an inquisitorial role” (1998) 5 *Australian Journal of Administrative Law* 78-96; Harris, Tony, “Here to stay”, *Financial Review*, 30 August 2000; Buggins, Anne and Cowan, Sean, “Minister eyes new facilities to hold illegal immigrants”, *The West Australian*, 11 February 2001; Haigh, Bruce, “Inhumane approach to victims shames us”, *The Australian*, 22 June 2000; Clennell, above n 89.

⁹¹ The term ‘set aside rates’ refers to the number of decisions that are overturned by an administrative tribunal on review.

of AAT members expressed concern that these reforms would “reduce the quality and independence of the review process ... thereby bringing the new tribunal into disrepute”.⁹² There was a concern that, in finding a way to deal with the occasional ‘problem member’, the ART Bill risked undermining the status and independence of the Tribunal as a whole. It is argued that issues of under-performance or incompetence should be dealt with by improving selection processes, rather than by reducing the conditions of members which have traditionally safeguarded them against undue influence.

These concerns were no doubt compounded by the way in which the ART Bill as a whole was perceived to impact upon the status of ART members. Rather than being likened to judges, whose independence is guarded by statutory protections against removal from office and certain forms of legal action, the conditions of members under the proposed ART legislation were more like those of high-level public servants.

On the other hand, others have argued it is somewhat simplistic to assume that performance management of members impacts adversely on their independence as decision-makers. The assumption underlying this argument is that the performance of members can be reviewed in a way that does not engage at all with the substance of their decisions. More specifically, members can be given feedback on the way in which they conduct reviews and deal with applicants, and the quality and timeliness of their decisions, without any comment being passed on the outcomes of their decisions. As such, some would see the introduction of performance management as a welcome development that could address the inappropriate behaviour of some tribunal members that otherwise goes unchecked.⁹³ Indeed, a number of Commonwealth tribunals have already implemented performance management systems that enable valuable feedback to be provided to members.⁹⁴

⁹² Dwyer, Joan *et al*, “Letter to the editor”, *Canberra Times*, 2 June 1998.

⁹³ There were significant concerns expressed about the behaviour of a minority of RRT members in the research conducted by the author for the purpose of completing coursework requirements at the University of Sydney — see, for instance, NGO representative 2 at paragraphs 16 to 18, 22 and 24 to 26; Community worker 1 at paragraphs 82 to 84.

⁹⁴ Existing tribunals with performance management processes include the MRT, the RRT and the SSAT — Tongue, Sue, MRT Principal Member, speaking at *Seminar: administrative law in transition — the proposed*

The challenge is to establish a system of performance management that is transparent and responsibly managed. An appropriate system of performance review would need to have been managed from within the ART, without any external involvement. There would be an inherent danger of government influence — or perceptions of government influence — if departments or ministers were involved in such a process.⁹⁵

Overall, while controversial, it is argued that an appropriate performance management system has the potential to contribute to improved tribunal performance by enabling division heads to better deal with serious under-performance problems. The potential dangers associated with managing members' performance within an ART may have been avoided if Tribunal management had adopted a responsible approach to the task, and worked in other ways to engender an organisational culture wherein ART members prided themselves on their independence.⁹⁶ This may have been a way of reducing formality within the ART while maintaining the Tribunal's independence. Of course, the viability of any performance management scheme would have depended on an absence of ministerial involvement in the process.⁹⁷

In terms of leadership, the fact that the President of the new ART would not necessarily have been a judge was the subject of some debate. Some argued this represented a downgrading of the status of the new Tribunal as compared to the AAT, whose President is required to be a Federal Court judge.⁹⁸ There was concern that ART decisions would have had less normative impact or precedent value than those of the AAT if its President did not enjoy the same status.⁹⁹ Others, including the Government, have argued that the

Administrative Review Tribunal, Australia, Senate Legal and Constitutional Legislation Committee, 25 October 2000, *Hansard*, at L&C 63; Senate Legal and Constitutional Legislation Committee, above n 1, at 28.

⁹⁵ The Law Council of Australia has expressed similar concerns — see Senate Legal and Constitutional Legislation Committee, above n 1, at 31.

⁹⁶ There is support for this proposition in the qualitative data set out in Chapters 7 to 11.

⁹⁷ Senate Legal and Constitutional Legislation Committee, above n 1, at 31 to 32.

⁹⁸ Section 7 of the AAT Act. It has been argued that judicial status engenders a higher “degree of public confidence unmatched by the other branches of government” — Harris, above n 18, at 196.

⁹⁹ More generally, Harris has argued that the appointment of tribunal members with judicial skills can preserve a tribunal from a “decline in relevance” — *ibid.*, at 193.

alleged court-like character and formality of the AAT is encouraged by the fact that its President holds judicial office.¹⁰⁰

The qualitative research presented in Chapter 9 highlights the importance of leadership in facilitating an effective transition from specialist to amalgamated tribunal. While this does not necessarily mean that the ART would have been disadvantaged by not having a judge as President, the new Tribunal certainly required a President with a status befitting its role as the pinnacle of the Commonwealth administrative review system. This gives some weight to the argument that its President ought to have had judicial status. Moreover, this may have made it easier for the ART to have a normative impact on departmental decision-making, and for the President to establish uniform practice directions and deliver authoritative decisions in high profile or controversial matters.¹⁰¹ It has been said that the judicial status of the AAT's President assisted that body to become an "established and respected feature of the institutional landscape" soon after it was created.¹⁰²

In addition, one of the widely accepted benefits of having a judge as President is said to be the sense of independence and immunity from political influence this status carries.¹⁰³ As well as enabling ART management to constitute the Tribunal with judicial officers in particularly sensitive or controversial matters, having a judge as President would arguably have led to the development of a more independent organisational culture within the new Tribunal. Thus, the uncertain status of the ART's President undermined the ability of the ART legislation to improve the independence of vulnerable specialist Tribunals like the RRT and MRT, and to raise the status of the ART as a whole.

It seems this aspect of the ART proposal was another attempt by Government to engender an informal culture within the ART by reducing the level of its independence. The

¹⁰⁰ However, Harris has argued there is no "empirical evidence" to support this claim — *ibid.*, at 194.

¹⁰¹ *Ibid.*, at 193 to 194.

¹⁰² Administrative Review Council, *Review of Commonwealth merits review tribunals — discussion paper*, AGPS, Canberra, 1994, at 75.

¹⁰³ Creyke, above n 30, at 413.

experience of amalgamated tribunals such as the ADT and VCAT suggests such attempts were misguided and unnecessary, to say the least.

How ADR and pre-hearing procedures would have been used in the ART

The Government's ART proposal envisaged that departments would be represented before the ART on a regular basis. As departmental representation tends to make the review process more formal and adversarial, ART members may have sought to rely upon ADR techniques to a greater extent. This would have been consistent with current practice in the AAT. However, far from encouraging the use of ADR, there were not even provisions in the ART Bill giving the Tribunal an express power to conduct mediation, neutral evaluation or other ADR techniques, apart from conferences.¹⁰⁴ Terms such as 'mediation', 'conciliation' and 'early neutral evaluation' were not mentioned in the Bill, let alone defined.¹⁰⁵

This may have reflected the Government's intention that the ART operate in a less formal manner than the AAT currently does, rendering ADR processes less relevant. Indeed, ADR techniques are arguably incorporated into the very manner in which the less formal specialist Tribunals conduct their hearings. However, as discussed above, certain features of the ART had the potential to generate a more formal, legalistic culture than that characterising the specialist Tribunals it replaced. In an environment where the ART would have been the last line of merits review, and where departmental decision-makers would often have participated in reviews, it would have been almost impossible for each division to retain the informality that characterises the operation of the existing tribunal system. It is argued that these two features would have overridden the influence of the many specialist features retained in the ART Bill.

¹⁰⁴ This can be contrasted with the provisions in the ADT and VCAT Acts dealing with a range of ADR techniques.

¹⁰⁵ The definition of ADR processes is often ambiguous or contentious. For instance, the term 'mediation' is used in a variety of senses and "has yet to develop a coherent theoretical base and set of core features" — Evans, Rhonda, *Revised draft policy — assisted resolution in the tribunal — further issues for consideration*, AAT, Sydney, 1997, unpublished, at 2. See also Boule, Laurence, *Mediation: principles, process, practice*, Butterworths, Sydney, 1997.

In these circumstances, the absence of an emphasis on conferences and other ADR techniques to assist parties to prepare and settle cases could have proved problematic. This is especially so in circumstances where representation of applicants may have been restricted. Ironically, the absence of any emphasis on ADR processes in the ART legislation may have resulted in review processes in the ART becoming more adversarial and court-like.

While there were other interesting provisions included in the ART Bill, many were not core provisions. The fact that there were so many ‘non-core provisions’, and so much scope for practice directions to operate in specific divisions, makes it difficult to envisage how each division of the ART would have operated in practice. However, on the basis of the analysis conducted above, it can be concluded that the ART Bill was an interesting, if somewhat schizophrenic, mix of adversarial and inquisitorial, formal and informal. While any discussion of the culture this legislation would have engendered is speculative, it is likely the ART would have had a difficult time adjusting to the range of roles and responsibilities that were envisaged in its foundational statutes.

To draw out the lessons for policy-makers from the ART experience as a whole, the next section of this Chapter summarises the key pitfalls to be avoided in the construction of legislation that is intended to facilitate an optimal amalgamation. This will be followed, in Chapters 7 to 11, by an analysis of the ADT and VCAT amalgamations which highlights the importance of context, organisation and people in achieving optimal tribunal reform.

A BARGAIN BASEMENT APPROACH TO AMALGAMATION — THE IMPORTANCE OF LAW

It is argued the discussion in Chapter 6 validates the hypothesis that a sound legislative basis is a key ingredient of a successful amalgamation. An analysis of the ART and CTP Bills reinforces the fact that the legislation establishing an amalgamated tribunal needs to give it the independence, powers, processes, membership and structure it needs to operate effectively. While other factors are equally important, an amalgamation proposal that is founded upon flawed legislation will be troubled from the start.

At first glance, the ART and CTP Bills enabled an appropriate balance to be struck between the retention of specialisation and the introduction of improved processes. Specifically, the concept of ‘core’ and ‘non-core’ provisions, along with the retention of some specialist provisions for particular divisions,¹⁰⁶ had the potential to enable the ART to retain those specialist processes and procedures that enhance the conduct of administrative review in particular jurisdictions, while at the same time encouraging the application of uniform practices across divisions.

However, the above analysis of the CTP Bill indicated that an appropriate balance was not struck. This was particularly so in relation to the Immigration and Refugee Division, where none of the compromises required to achieve a balance between specialisation and consistency were made. Specifically, the Government failed to rethink several procedures contained in the *Migration Act 1958* (Cth) which do not enhance the ability of the RRT or MRT to review decisions in a way that is fair, just, informal, economical and quick, but which fulfil other political objectives. If procedures relating to time limits, extensions of time, costs and lodgment of applications had been brought into line with provisions in other jurisdictions, the objective of amalgamating without losing beneficial specialist features would have been more easily achieved. As suggested, the way in which the ART and CTP Bills were drafted smacked of DIMIA having a significant degree of influence over the crafting of the ART proposal.¹⁰⁷

Moreover, a number of significant problems have been identified which would have undermined the ART’s ability to conduct administrative review in accordance with the objects outlined in cl 3 of the ART Bill. Some of the Government’s original proposals which had caused concern, such as a presumption against multi-member panels, the ability to refer matters back to primary decision-makers where new evidence arose, and funding arrangements with portfolio departments, were provided for in the Bill.

In addition, the Bill contained a number of problematic provisions not previously foreshadowed by Government. In particular, these included the ability of portfolio

¹⁰⁶ See, in particular, the CTP Bill.

¹⁰⁷ See also Creyke, above n 30, at 419.

ministers to issue directions to ART divisions which would have overridden directions issued by the ART President or executive members. Provisions such as these had the potential to compromise the independence and influence of the new Tribunal, and inhibit its ability to maintain the AAT's position as a role model at the forefront of administrative review.

There was potential in the creation of an ART to allay concerns regarding the independence of the specialist Commonwealth Tribunals. A larger 'super-Tribunal' could have remained financially and administratively removed from portfolio departments, and marshalled greater political strength and influence owing to its size and cohesiveness. Once unified under the umbrella of a much larger, generalist tribunal, many of the current concerns relating to the independence of existing specialist Tribunals could have been made redundant.

However, this potential was not realised in the ART proposals. On the contrary, the ART and CTP Bills contained provisions which, if enacted, would have had an adverse impact on the independence and/or efficacy of ART divisions, particularly in areas such as social security and migration. In circumstances where members would have been appointed for three- to five-year terms and at times exposed to political pressure over the outcomes of decisions,¹⁰⁸ the lack of initiatives designed to reinforce the independence of ART divisions was a significant disappointment.¹⁰⁹

Stakeholder reaction to the legislation establishing the ART

This assessment of the ART proposals is reinforced by the largely negative reaction of stakeholders to the ART and CTP Bills. When first announced, the Government's plans caused consternation among community organisations, public commentators and tribunals themselves.¹¹⁰ In August 1998 Justice Jane Mathews, then President of the

¹⁰⁸ See, for example, "Ruddock's Threats to Refugee Body", above n 89; Clennell, above n 89; Haigh, above n 89.

¹⁰⁹ Similar concerns have been expressed by David Mullan in the Canadian context — Mullan, above n 87, at 9.

¹¹⁰ Conroy, Paul, "Tribunal plan gets a mixed reception", *The Age*, 30 January 1998; Kingston, Margo, "Tribunal merger plan gains new foe", *Sydney Morning Herald*, 20 May 1998; Dwyer, above n 92; Mathews, Justice Jane, "Whither (wither!) the Administrative Appeals Tribunal", a paper presented at *AIAL twilight seminar*, seminar by the Australian Institute of Administrative Law, Sydney, 5 August 1998.

AAT, gave a speech to the NSW Chapter of the Australian Institute of Administrative Law arguing that:

... the proposed amalgamation constitute[s] such a downgrading of the merits review system as to fundamentally threaten the quality and independence of external merits review.¹¹¹

A similar degree of criticism was leveled at the ART and CTP Bills on their release, with many commentators expressing concerns about the problematic features examined above. The Taskforce established by the WA Government to put forward a detailed proposal for the establishment of an amalgamated tribunal in that State noted the trenchant criticism of the following features of the proposed ART:

- Government ministers exercising undue influence over appointment of members, thus compromising the independence of the tribunal;
- compromising the independence of the tribunal by making its various divisions (taxation, social security, etc) financially dependent on the relevant decision making Commonwealth departments;
- downgrading the status of the President from judicial status and abolishing the requirement that the President be legally qualified;
- subjecting members to strict performance requirements under peril of removal, again potentially affecting their independence and impartiality;
- unduly restricting resource to second tier review;
- unduly restricting access to legal representation;¹¹² and
- limiting first tier appeals in some instances to quick single member appeals on the papers to avoid expense.¹¹³

Perhaps the most repeated criticism was the potential for the executive to be involved in the operation of the ART at a number of stages of the review process.¹¹⁴ As articulated by the Senate Legal and Constitutional Legislation Committee:

A principal concern is that the Bill created a tribunal that will have an ethos or culture that is essentially *of* the executive rather than *as an adjunct to* the executive (emphasis in the original).¹¹⁵

¹¹¹ Mathews, above n 110, at 8.

¹¹² The Senate Legal and Constitutional Legislation Committee noted in its report on the ART and CTP Bills that the absence of an automatic right for applicants to present their case orally was a significant departure from the current operation of the AAT — see Senate Legal and Constitutional Legislation Committee, above n 1, at 14.

¹¹³ Administrative Review Tribunal Taskforce, *Western Australian Civil and Administrative Review Tribunal Taskforce report on the establishment of the State Administrative Tribunal*, Perth, May 2002, at 44 to 45.

¹¹⁴ See, for instance, O'Connor, Justice Deidre, speaking at *Seminar: administrative law in transition — the proposed Administrative Review Tribunal*, Australia, Senate Legal and Constitutional Legislation Committee, 25 October 2000, *Hansard*, at L&C 10; Cooney, Senator B., *ibid.*, at L&C 20; Pearce, Dennis, *ibid.*, at L&C 64.

In this regard, concerns were expressed about ministerial involvement in appointments;¹¹⁶ the proposed funding arrangements;¹¹⁷ the ability of ministers to issue directions overriding those issued by the ART President; the possibility that a tribunal would be reconstituted if a member failed to follow a direction;¹¹⁸ the requirement to have the agreement of ministers for cross-appointments to be made;¹¹⁹ and the ability to remove members for failure to comply with the code of conduct or performance agreements.¹²⁰ Labor and the Democrats were also very critical of the proposed ART's lack of independence from government.¹²¹

Some commentators pointed out that existing specialist Tribunals, such as the SSAT, continue to perform well despite operating under a number of the constraints that were intended to apply in the ART.¹²² Others took the view that the ART should seek to adopt the best, rather than the worst, elements of the existing tribunal system.¹²³ Moreover, Sandra Koller pointed out that, in order to have credibility with users, a tribunal system “not only has to be utterly scrupulous, utterly transparent and utterly independent but also has to be *seen* as such (emphasis added)”.¹²⁴

Particular concerns were also expressed about restrictions on the use of multi-member panels in the ART Bill,¹²⁵ and the loss of two-tier external review in jurisdictions such as

¹¹⁵ Senate Legal and Constitutional Legislation Committee, above n 1, at 21, referring to *Transcript of evidence*, Mr Peter Johnston, at 2. See also *ibid.*, at 82.

¹¹⁶ This concern was compounded by the absence of any objective, published criteria to be used in the selection of members. See Senate Legal and Constitutional Legislation Committee, above n 1, at 22 and 24 to 25.

¹¹⁷ Trimmer, above n 63, at L&C 28; McClelland, above n 27, at 39.

¹¹⁸ Cronin, Katherine, speaking at *Seminar: administrative law in transition — the proposed Administrative Review Tribunal*, Australia, Senate Legal and Constitutional Legislation Committee, 25 October 2000, *Hansard*, at L&C 28; McClelland, *ibid.*, at L&C 41; Senate Legal and Constitutional Legislation Committee, above n 1, at 22.

¹¹⁹ Carstairs, Margaret, speaking at *Seminar: administrative law in transition — the proposed Administrative Review Tribunal*, Australia, Senate Legal and Constitutional Legislation Committee, 25 October 2000, *Hansard*, at L&C 23.

¹²⁰ McClelland, *ibid.*, at L&C 40.

¹²¹ Vines, Greg, *Report of the review of administrative appeal processes*, Office of the State Service Commissioner, Hobart, 2003, at 26.

¹²² Carstairs, above n 119, at L&C 22 to 23.

¹²³ McClelland, *ibid.*, at L&C 39; Greig, Senator Brian, *ibid.*, at L&C 57.

¹²⁴ Koller, Sandra, *ibid.*, at L&C 44.

¹²⁵ Carstairs, *ibid.*, at L&C 24; Creyke, *ibid.*, at L&C 34; Koller, *ibid.*, at L&C 33; Greig, *ibid.*, at L&C 57.

social security.¹²⁶ Others questioned whether the proposal would save administrative costs to the extent envisioned by government, despite this being a primary motivation behind the proposals.¹²⁷ One stakeholder concluded that:

This Bill does not do what it was supposed to do, which was just amalgamate. It does something worse: it gets rid of the rights of administrative review for ordinary, disadvantaged people.¹²⁸

This rejection of the ART legislation was particularly stark given the general acceptance among stakeholders of the *concept* of amalgamation at federal level.¹²⁹ For instance, the National Welfare Rights Network said:

We saw many favourable things in *Better Decisions* that we hoped would be included in this bill. But when we received the bill it did not contain those things. In fact, what it contained was, sadly, a diminution of the rights of our clients.¹³⁰

The minority report of the Senate Legal and Constitutional Legislation Committee concluded that, while there was general support for the amalgamation recommendations contained in the ARC's *Better Decisions* report, the ART and CTP Bills as drafted represented "a very loose and inadequate adaptation" of those recommendations.¹³¹ In the minority's view, the Bills failed to strike an appropriate balance between the introduction of consistent standards and the retention of necessary specialisation. Creyke described the ART envisaged in the legislation as "conceptually muddy".¹³²

The overwhelmingly negative reaction to the proposed ART legislation highlights the importance of getting the law right in order to have a chance of securing stakeholder support for an amalgamation proposal.¹³³ The ART experience demonstrates that a sound statutory foundation is a necessary hurdle that cannot be bypassed in an amalgamation process. In this case, attempts by the Government to do so resulted in the ART and CTP

¹²⁶ Senate Legal and Constitutional Legislation Committee, above n 1, at 21.

¹²⁷ O'Connor, above n 114, at L&C 9; Trimmer, *ibid.*, at L&C 27; Senate Legal and Constitutional Legislation Committee, above n 1, at 21.

¹²⁸ Koller, above n 124, at L&C 46.

¹²⁹ Senate Legal and Constitutional Legislation Committee, above n 1, at 21, 82 and 93.

¹³⁰ *Ibid.*, at 93, citing from *Transcript of evidence*, National Welfare Rights Network, at 103.

¹³¹ *Ibid.*, at 93.

¹³² Creyke, above n 30, at 419.

¹³³ See also *ibid.*, at 425.

Bills being blocked in the Senate. This meant that the potential benefits of amalgamation at federal level, including a larger pool of members, cross-fertilisation of ideas, and greater consistency of decision-making, were not realised.¹³⁴

Despite its fate, the ART experiment provides useful guidance to policy-makers about the types of things that should be avoided in future amalgamation processes. Most importantly, this Chapter demonstrates that the legislative foundation for an amalgamated tribunal must reflect a strong (ideally bipartisan) political commitment, as well as sound organisational structures and procedures, if an amalgamation is to succeed. The results of the above analysis indicate that, even with the best will in the world, ART management would have had an uphill battle in developing the organisational structures, processes and institutional culture required to establish the ART as an independent, effectual merits review Tribunal.

THE LEGISLATIVE FOUNDATIONS OF THE ADT AND VCAT

As an analysis of the ART and CTP Bills demonstrates, it is essential that the legislative foundation of an amalgamated tribunal give the organisation the independence, powers and processes it needs to operate effectively. This proposition is reinforced by a brief comparative analysis of the legislation that was drafted to establish the ADT in NSW and VCAT in Victoria. Generally speaking, both statutes avoid the pitfalls that were apparent in the Commonwealth legislation, and contain features that contributed to an effective amalgamation process in each State.

The basic structure of the legislation establishing the ADT and VCAT was explored in Chapter 2. Each statute is relatively similar in design. In particular, both Tribunals were established to make ‘original jurisdiction’ decisions determining disputes between citizens and professional discipline matters, as well as to conduct administrative review. Both the ADT Act and the VCAT Act contain similar requirements regarding the qualifications of members, the application of generalist procedures, and the ability of

¹³⁴ Swain, above n 31, at 39; Kenny, Susan, “Review of Commonwealth merits review tribunals” (1996) 7 *Public Law Review* 69-73, at 72.

each Tribunal to regulate its own procedure. In addition, both statutes encourage the use of ADR techniques such as mediation.

More importantly, neither statute suffers from the range of defects that were identified in the ART and CTP Bills and were subjected to such vehement criticism by stakeholders. For instance, whereas the role of portfolio ministers featured prominently in the ART legislation, the only equivalent role for ministers provided for in the VCAT Act is in relation to appointments and removal of members from office.¹³⁵ Similarly, the ADT Act provides for the involvement of ministers in relation to the appointment of members and assessors.¹³⁶

While both Acts enable ministers to certify that a particular policy was in place at the time a reviewable decision was made,¹³⁷ this is a far cry from provisions in the ART Bill that would have enabled portfolio ministers to issue overriding practice directions to that Tribunal. Admittedly s 57 of the VCAT Act — which does not permit VCAT to decline to apply government policy even where this would produce an unfair outcome — appears overly inflexible. However, there is no suggestion that this provision has impacted upon the success of the amalgamation process in Victoria.

Perhaps the only provisions in either statute to have caused practical difficulties are those in Schedules to the ADT Act relating to ministerial involvement in the appointment and cross-appointment of members to ADT divisions. The qualitative research presented in Chapters 7 to 11 indicates that the resulting lack of freedom of the ADT President to cross-appoint members in response to the Tribunal's immediate needs has proved problematic.

Yet overall, the fact that the ADT and VCAT Acts provide for relatively low levels of ministerial involvement in the day-to-day operation of each Tribunal has undoubtedly

¹³⁵ See Part 2, Division 1 of the VCAT Act in relation to appointments, and Part 2, Division 2 in relation to the removal of members from office.

¹³⁶ See Chapter 2, Part 2 and Part 5, Division 1 of the ADT Act. In relation to removal of members from office, cl 5 of Schedule 3 to the Act provides that Tribunal members have the same protection and immunities as a Judge of the Supreme Court of NSW.

¹³⁷ Section 57 of the VCAT Act; s 62(2) of the ADT Act.

contributed to the absence of concern regarding their independence from government. This stands in contrast to the widespread concerns expressed about the independence of the proposed ART.

Other features of the ART legislation that were regarded as particularly problematic are not replicated in either the ADT or VCAT Acts. These include provisions relating to new evidence, the absence of a requirement that the ART's President hold judicial office, and the performance management of members. Indeed, in contrast to the Commonwealth proposal, members of the ADT and VCAT are afforded the same legislative protection from dismissal as judges.¹³⁸ Moreover, the subsequent operation of each Tribunal demonstrates that an appropriate balance was struck in each State Act between the retention of specialisation and the introduction of uniform procedural standards. This can be contrasted to the concerns expressed regarding the excessive retention of specialisation in the Immigration and Refugee Division of the ART.

In addition to avoiding its pitfalls, the ADT and VCAT Acts went much further than the ART legislation in capitalising upon the lessons to be learned from the experience of established tribunals such as the Commonwealth AAT. For instance, it is argued that the legislation establishing the ADT drew on the experience of the AAT in relation to the ADR procedures it has developed over the years. The ADT Act's treatment of ADR is innovative and features several new techniques not previously provided for in tribunal legislation. Part 4, Chapter 6 of the Act is dedicated to the definition and implementation of certain ADR processes, including mediation and neutral evaluation. There is also provision for the ADT to use assessors to conduct inquiries and assist members in hearings.¹³⁹ The decision to give ADR a central place within the statutory scheme establishing the ADT was arguably influenced by the AAT's growing reliance upon these processes.

In addition, both the NSW and Victorian statutes were drafted in consideration of case law from the 1970s and early 1980s defining the role and function of the Commonwealth

¹³⁸ See s 143 of the VCAT Act and cl 5 of Schedule 3 to the ADT Act.

¹³⁹ Chapter 2, Part 5 of the ADT Act.

AAT. For instance, s 63(1) of the ADT Act specifies that the ADT's role is to decide "what the correct and preferable decision is having regard to the material then before it". This provision incorporates the fundamental principles of the *Drake* case.¹⁴⁰ Similarly, s 50 of the VCAT Act states that the functions of VCAT on review include "all the functions of the decision-maker", and that a decision by the Tribunal "is deemed to be a decision" of the original decision-maker.

In addition, decisions such as *Sullivan v Department of Transport*,¹⁴¹ dealing with aspects of natural justice, are reflected in provisions such as s 73(4) of the ADT Act, which requires the ADT to take all reasonable measures to ensure that parties understand the nature of assertions made in proceedings, and the legal implications of those assertions. The Tribunal is also required to explain any aspect of its procedures or rulings upon request.¹⁴²

While legislators in NSW and Victoria took advantage of the lessons to be learned from the experience of more established tribunals such as the AAT, the same cannot be said of the ART and CTP Bills.¹⁴³

Statutory provisions governing the operation of the ADT and VCAT were not raised as significant issues in the qualitative research presented in this thesis. However, there were one or two subjects who perceived that the new Acts had brought some benefits. For instance, VCAT Member 2 commented on the benefits of streamlining processes and procedures under one Act,¹⁴⁴ while VCAT Member 3 commented favourably on the procedures contained in the VCAT Act:

Q. Do you think the VCAT Act has an influence in how the Tribunal operates — the fact that there's a number of alternative dispute kind of procedures that are under the Act?

¹⁴⁰ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409.

¹⁴¹ (1978) 20 ALR 323.

¹⁴² Section 73(4)(b) of the ADT Act.

¹⁴³ Creyke, above n 30, at 417.

¹⁴⁴ VCAT Member 2 at paragraphs 209 to 215.

A. Yes. And it does give us a lot of power to deal with things procedurally, probably more so than under the individual Acts so we can and do rely upon the VCAT Act for a number of things.¹⁴⁵

The fact that there was little other comment about the way in which the ADT and VCAT Acts were drafted indicates that the legislative foundation of each Tribunal did not hinder members and staff in carrying out their roles. Overall, it seems safe to conclude that the legislation establishing each Tribunal created a solid foundation for the development of effective super-Tribunals.

CONCLUSIONS

As this discussion demonstrates, a great deal can be said about the merits or otherwise of an amalgamation proposal by examining the legislation that is drafted to give it effect. In this case, the details of the ART and CTP Bills reveal that the opportunity to significantly improve the Commonwealth system of merits review was missed. In part this was due to the apparent reluctance of some elements of Government to relinquish favourable aspects of the merits review process, and to create an independent administrative review tribunal. The considerable flaws in the ART legislation and its subsequent fate highlight the importance of a sound legislative basis in creating positive, let alone optimal, tribunal reform. Moreover, the ART experience highlights the importance of a degree of stakeholder acceptance in progressing an amalgamation proposal through to implementation.

The briefer analysis of the ADT and VCAT Acts revealed that both statutes contained important features that the ART legislation lacked. As well as building on the practices developed over time by well-established tribunals, legislators in each State avoided the pitfalls that led to the failure of the ART and CTP Bills. As a result, there is a general consensus that the NSW and Victorian Tribunals both commenced operation with a solid legislative foundation.

Despite this level playing field, the qualitative research presented in Chapters 7 to 11 reveals significant differences in the outcomes of amalgamation in each State. In short,

¹⁴⁵ VCAT Member 3 at paragraphs 155 to 157.

there is a widespread perception that the amalgamation in Victoria has been far more successful than that in NSW. This points to the importance of factors in addition to law that are essential in successfully implementing an amalgamation proposal, namely: context, organisation and people.

The remaining Chapters of this thesis therefore examine the role of these ingredients in achieving an optimal amalgamation. What this Chapter has shown is that paying detailed attention to all or any of these factors will not assist if the legislation on which an amalgamation is premised is incapable of sustaining an independent, effective tribunal. In the case of the ART, it seems that legislation with the potential to sustain such a tribunal was corrupted by political considerations.

CHAPTER 7: CONTEXT — VCAT AND THE ADT COMPARED

As previous Chapters have demonstrated, there is a distinct lack of understanding of the implications of amalgamation for the performance and effectiveness of tribunals. More particularly, there has been little consideration of the elements that need to be present in order to ensure the successful implementation of amalgamation proposals. The purpose of the research presented in the next four Chapters is to begin to fill this gap by analysing data collected about the amalgamation processes recently undertaken in NSW and Victoria, as experienced by members and staff. This research is intended to inform an assessment of the likely outcome of other proposed amalgamations, such as the State Administrative Tribunal in WA or the unified Tribunals System in the United Kingdom.¹

The theoretical framework and methodology used in collecting data were outlined in Chapters 4 and 5. The description of the research design in Chapter 5 highlighted that, while relevant data could be gathered from a range of stakeholder groups using a variety of methods, the focus of this study is on the subjective perceptions of members and staff, many of whom had first-hand experience of the amalgamation process in each jurisdiction. In terms of content, data were collected in relation to the six elements that are essential to the success or otherwise of an amalgamation process:

- legislation;
- political commitment;
- organisational structure;
- process and procedure;
- organisational culture; and
- leadership.

As argued above, these six elements constitute the necessary ingredients of optimal tribunal reform: law, context, organisation and people. The importance of law was

¹ While there are obvious differences between the jurisdictions in which various amalgamated tribunals will operate, much of the qualitative data collected focus on aspects of the amalgamation processes in NSW and Victoria that will be applicable, at least to some extent, across the board. For instance, it is argued that the lessons

reinforced in Chapter 6 by a detailed analysis of the flaws in the ART and CTP Bills and the fatal consequences this had for the Commonwealth ART proposal. It was demonstrated that a solid legislative foundation is essential to the construction of an effective amalgamated tribunal. The comparative lack of concern generated by the statutes establishing the ADT and VCAT demonstrates that both Tribunals began life with a relatively strong legislative foundation.

It is therefore surprising that the overwhelming picture to emerge from the qualitative data from NSW and Victoria is of two amalgamation processes that had distinctly different outcomes. More specifically, whereas the ADT was perceived to be little more than a sum of its parts, VCAT emerged as a cohesive, integrated organisation with a strong institutional culture. This is important, as it is by examining and comparing the points of divergence between the amalgamation experiences in Victoria and NSW that reasons might be found to explain those differences. This provides valuable insight into the factors which must be present if an amalgamation process is to be successful.

The compelling conclusion is that the link between legislation and outcomes is complex, and a range of other factors impact on the success or otherwise of an amalgamation process. In other words, a thoroughly considered and well-drafted enabling statute is no guarantee of a successful amalgamation process or a functional amalgamated tribunal. Rather, there needs to be an awareness of context, organisational structure, organisational culture, and the role of individuals in making an amalgamation process a success.

Building on the analysis of legislation in Chapter 6, the purpose of this Chapter is to present outcomes of the research conducted for this thesis that relate to *context*. The ensuing discussion demonstrates that a degree of political commitment is a vital component of an effective amalgamation.

learned about political support, organisational change, institutional culture and leadership are not jurisdiction-specific.

THE IMPORTANCE OF CONTEXT

As discussed in Chapter 4, many organisational theorists have identified the suitability of an organisation to its environment or context as an important indicator of effectiveness. The assumption is that contextual factors will have a significant impact on an organisation's ability to fulfil its potential. In this thesis it is argued that the political context — in particular, the level of commitment by politicians and bureaucrats to creating an independent, functional tribunal — is a key ingredient in the success of an amalgamation process.

Such support or commitment can be measured by the way in which an amalgamation is conceptualised — that is, whether a proposal to amalgamate is comprehensive and includes all significant tribunals in a jurisdiction, or whether fewer, smaller tribunals are amalgamated. It is argued that an amalgamation that is logical and significant in scope indicates a serious commitment by government to establishing a viable amalgamated tribunal. In contrast, a proposal that unjustifiably excludes relevant tribunals indicates a process that has been corrupted by other motivations such as political expediency.

In addition, ensuring that amalgamated tribunals have appropriate procedures, powers and personnel demonstrates a commitment to establishing new organisations which are effective and viable. This is particularly so as giving an amalgamated tribunal sufficient independence and powers to review government decisions is not necessarily popular with decision-makers and portfolio ministers.

Government commitment can also be measured by the extent to which an amalgamated tribunal is funded and resourced. In addition to the adequacy of human resources and funding on a 'per matter' basis, the size of an amalgamated tribunal's budget will inevitably be proportional to the scale of its operations. This means that a larger tribunal which hears more matters will have a larger budget, along with all the attendant opportunities for economies of scale and flexible allocation of resources that this brings. In contrast, a smaller tribunal with a smaller workload is likely to have a smaller budget and less flexibility to expend resources on developing and implementing new initiatives. Once again, the *scale* of an amalgamation is an important element of a government's

commitment to the process. In turn, the degree of this commitment will impact significantly on the overall success of a proposal.

The qualitative data presented below reveal that one of the most striking differences between the creation of the ADT in NSW and VCAT in Victoria is the perceived level of political commitment to the amalgamation in each State. The strong support given to the amalgamation process in Victoria was conspicuously absent in NSW.

This has a number of consequences. In general, lack of political commitment can undermine the ability of a newly-amalgamated tribunal to realise its full potential. In particular, it affects the pride that is felt in belonging to the organisation, as well as the status and influence of a new tribunal. The data also reveal there is a critical mass in terms of the size and extent of an amalgamation proposal, and subsequent levels of resourcing, without which the potential benefits of amalgamation cannot be fully realised. In many ways, the workload and profile of each Tribunal reflect the extent to which the ADT and VCAT are regarded as important features of the legal landscape in each jurisdiction.

The following discussion describes the nature and scope of the amalgamation in each State and the commitment to each Tribunal's success, before going on to analyse the range of consequences this had for each Tribunal.

THE NATURE AND SCOPE OF THE AMALGAMATION PROPOSAL IN EACH STATE AND THE COMMITMENT TO ITS SUCCESS

There were significant differences between the nature and scope of the amalgamation proposals in NSW and Victoria. The amalgamation in Victoria was a wholesale amalgamation in the sense that all significant tribunals in Victoria were included in the proposal. In contrast, when the ADT commenced operations on 1 October 1998 it comprised just four Divisions: the Community Services Division; the Equal Opportunity Division; the General Division; and the Legal Services Division.² The scope of each

² Schedule 1 to the *Administrative Decisions Tribunal Act 1997* (NSW) (ADT Act). As mentioned in Chapter 3, the intention was that the jurisdiction of the ADT would be expanded progressively over time.

amalgamation largely determined the workload of each Tribunal, with the ADT having a caseload of 674 in 2000–2001 in contrast to VCAT’s caseload of 91,482 for the same period. The size of each Tribunal’s budget is proportionate to its caseload.³

The qualitative research set out below indicates the amalgamation in Victoria is the better model for policy-makers to follow. However, it is instructive to first examine the NSW experience in some detail, as this illustrates many of the traps to avoid when designing an amalgamation proposal. In particular, the ADT experiment highlights the importance of strong political support from the beginning of an amalgamation process.

A key problem with the NSW proposal is the fact that the NSW Government’s commitment to expanding the jurisdiction of the ADT progressively over time has not been met. According to a recent NSW Parliamentary inquiry into the operation of the ADT:

... the original impetus that led to the merging of tribunals and the establishment of the ADT has since declined, and ... there seems to be no apparent intention to proceed with a systematic integration of existing tribunals into the ADT, as foreshadowed in the Minister’s second reading speech on the original ADT legislation.⁴

Not only has there been a failure to bring further specialist tribunals under the ADT umbrella but, also, government departments have been reticent in proposing that the ADT be given jurisdiction to review administrative decisions in their portfolios.⁵ As one ADT subject noted:

There’s a parliamentary inquiry going into us at the moment as required under the Act after a period of time and it’s certainly the way any of the hearings were conducted — the expectation will be that the recommendation will be that agencies need to review the kind of work that they’re sending here. The way that the legislation is set up is that there has to be a specific right. It’s not like — there’s no general right to review any administrative decision that is made. So

³ As noted in Chapter 3, in 2000–2001 the ADT had a budget of around \$1.9 million, whereas VCAT’s budget for the same period was nearly \$20 million. It should be noted that the size of the ADT’s workload grew by 10% in 2002–2003 — Administrative Decisions Tribunal, *Annual report 2002–2003*, ADT, Sydney, 2003, at 5. While this indicates that the outlook for the ADT’s future is positive, this thesis focuses on the way in which the initial amalgamation process was managed and how this impacted upon the ADT’s early operation.

⁴ Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on the jurisdiction and operation of the Administrative Decisions Tribunal*, NSW Parliament, Sydney, 2002, at 42.

⁵ Ellis, Elizabeth, “Promise and practice: the impact of administrative law reform in New South Wales” (2002) 9(3) *Australian Journal of Administrative Law* 105–124, at 108 to 109.

departments have to more or less amend their own legislation to create rights, and that sort of reform process doesn't seem to have happened.⁶

The above-mentioned Parliamentary inquiry considered that expanding the jurisdiction of the ADT would elevate its prominence and status,⁷ however, this recommendation has not been fully acted on. While the ADT was given jurisdiction to hear appeals from the NSW Guardianship Tribunal from February 2003,⁸ no other tribunals have been brought into the ADT structure. In fact, the creation of the ADT appears to have been overtaken by other developments. Most particularly, the amalgamation of the Residential Tenancies Tribunal and the Consumer and Fair Trading Tribunal to form the new Consumer, Trader and Tenancy Tribunal — the CTTT — has taken place as a completely separate development in NSW.⁹ As the Parliamentary inquiry suggested, this lack of impetus has the potential to hinder the ADT's ability to “achieve optimum efficiency and effectiveness”.¹⁰

In addition, there continues to be strong opposition from existing tribunals in NSW to being amalgamated to form part of the ADT. The view expressed by a Senior Member in a separate NSW Tribunal was that there was no reason to amalgamate more tribunals in NSW:

The new CTTT is just developing and the way it's going from what I hear is that it's developing very well and I know that the Mental Health Review Tribunal which has a new president and deputy president is really moving on. It's always been a satisfactory body, it's going to be a much better body. We can co-operate over the things ... [such as] ... common training — there are some areas of common training but ... it's not all the same thing. We all need, there are specialised subject matters we need to look at and I'm sure the CTTT does and the person who heads the Mental Review Tribunal we can agree about, we can have training about the quality of evidence ... stuff that we can share, general concepts of procedural fairness that we can share, but we all need to, and this is one of the important things about tribunals, and it's — the judges recognise it — is that we need to develop our procedures to meet our special needs.¹¹

⁶ ADT Registry Staff Member 1 at paragraphs 67 to 71.

⁷ Committee on the Office of the Ombudsman and the Police Integrity Commission, above n 4, at 42.

⁸ Administrative Decisions Tribunal, above n 3, at 4.

⁹ Administrative Decisions Tribunal, *Annual report 2001–2002*, ADT, Sydney, 2002, at Chapter 1.

¹⁰ Committee on the Office of the Ombudsman and the Police Integrity Commission, *Parliamentary inquiry into the jurisdiction and operation of the Administrative Decisions Tribunal: discussion paper*, NSW Parliament, Sydney, 2001, at 12, cited in Ellis, above n 5, at 109.

¹¹ Separate NSW Tribunal Senior Member at paragraph 111.

Opposition to amalgamation has existed for some time in NSW. For example, the President of the NSW Guardianship Tribunal has consistently resisted any suggestion that the Guardianship Tribunal become part of the ADT. To paraphrase his view, this would have constituted the ‘tail wagging the dog’.¹² The opposition to further amalgamations may be strengthened by perceptions of the current success or otherwise of the ADT experiment. Either way, the fact that there continues to be vocal opposition to further enlarging the size and scope of the ADT suggests that the political commitment to creating a true ‘super-Tribunal’ in NSW was initially weak, and that it may now take some time to eventuate.

Another factor which indicates a lower level of political commitment to the reforms in NSW than in Victoria is the lack of authority given to ADT management to manage the Tribunal’s personnel and day-to-day operations. For instance, the ADT has limited power to determine the size and composition of its own membership. As explained below, these decisions remain with various portfolio departments in NSW. At the time research was conducted, similar arrangements were in place with regard to the appointment and termination of staff. Nor did Tribunal management have the authority to implement a performance management system for members.

Moreover, the sense that the new organisation has a physical or conceptual core was absent at the ADT. At the time of conducting research, the ADT did not occupy a significant physical space. Its offices and hearing rooms took up less than two floors of one building, and members were not provided with offices on site. Rather, the ADT’s part-time membership was expected to draft decisions at home or at locations provided by other workplaces.

Finally, rather than appoint a dedicated President who could take responsibility for consolidating and strengthening the ADT during the difficult transition from specialist to generalist tribunal, the Government appointed a part-time President who had other

¹² See, for instance, O’Neill, Nick, “Tribunals — they need to be different”, a paper presented at the *Fourth AIJA tribunals conference*, conference by the Australian Institute of Judicial Administration, Sydney, 8 June 2001, in which the author rejects any suggestion that specialist tribunals in NSW should be amalgamated, on the basis that this would produce “diseconomies of scale” and stifle specialist development — at 15.

responsibilities as President of the then Fair Trading Tribunal. (However, it should be noted that, since the amalgamation of the Fair Trading Tribunal with the Residential Tenancies Tribunal in 2002, Judge O'Connor has been able to take up the position of ADT President on a full-time basis.¹³) ADT Senior Member 2 did consider the situation was better than it could have been, as the Government had at least appointed a judge as President of the ADT:

People would not have thought the Government was taking this at all seriously if they didn't appoint a judge to head it. They would have thought well why are they bothering, what's going on here, even though of course, in some ways it's just the status of that person. Sure other people could have done equally as good a job, but I think the status itself is important in ensuring that we have credibility, that the Government is taking us seriously.¹⁴

Nonetheless, the appointment of a 'part-time' President during the ADT's difficult transitional period indicates a lack of commitment by Government to creating a viable, effective amalgamated tribunal.

The implications of these arrangements for the procedures and culture of the ADT are explored in more detail in Chapters 10 and 11. At this stage, it suffices to point out that the absence of a physical space for ADT members to work in, the appointment of a part-time President, and the fact that almost all members are still part-time, highlights a distinct lack of political commitment to ensuring the ADT succeeded as an organisation. It seems that co-location without amalgamation — where there was a 'core' of full-time members and greater opportunities for interaction — may have been more successful than the current ADT model. These features are certainly significant in explaining the lack of momentum in the NSW reforms.

The apparent lack of concern by Government over whether or not the ADT developed into an effective amalgamated Tribunal — and the converse experience in Victoria — is further demonstrated by the qualitative data gathered on this issue.

¹³ Administrative Decisions Tribunal, above n 9, at Chapter 1.

¹⁴ ADT Senior Member 2 at paragraph 239.

Perceptions about the level of government commitment

The overwhelming perception of members and staff in NSW was that the level of political commitment to establishing and maintaining the ADT was inadequate. There was a sense that those responsible for the amalgamation had not put enough thought into what the ADT would look like once it was established, and how its future would be secured. For instance, ADT Member 1 commented on the lack of vision associated with the creation of the ADT:

A. An ideal ADT would be one in which there was considerable thought beforehand about what it is trying to do, where it fits in the scheme of tribunals, where it fits in relation to the administrative/judicial/court substitute sort of range or whether it has bits of all those three together in which case there are guidelines. There's an understanding of where you would fit and you can articulate it and it is known by all the members and it's known by the public as well.

Q. And you feel that hasn't happened?

A. Well there are attempts to do it. I mean it's early days still and it's started at the wrong end. It was created as a sort of empty box. A bit like a new folder on a computer where you opened it and there's nothing there you know, and things have to be dropped into it rather than starting with something, and creating something from it.

...

Really I think it was set up in the way that you would set up a court and with the same sort of thinking about it rather than saying what is this for, why are we here? Are we here because we were set up, or are we here because we're trying to resolve disputes or make decisions without penalty of the legal process and we're set up to respond to the community's need for these kinds of services. So I come from that background of thinking about why you have these institutions rather than the idea that you have the institution and then you sort of squash it and twist it to try and make it fit into something that's what the legal community thinks that it needs.¹⁵

This approach left some subjects with a sense that the ADT had been created more as an empty shell than a substantial organisation which was expected to contribute something positive to the NSW legal system. Other comments by ADT subjects suggest that, while members and staff were given plenty of notice of the changes,¹⁶ there was a lack of planning and consultation by those responsible for implementing the amalgamation. The perception of ADT Member 1 was that the ADT had been put together as “a sort of a grab bag where you throw all the bits and hope that somehow they'll all rub off on each other

¹⁵ ADT Member 1 at paragraphs 31 to 39.

¹⁶ ADT Member 8 at paragraphs 297 to 303; ADT Member 7 at paragraphs 67 to 73.

and you'll get a really good service".¹⁷ ADT Member 4 commented on the lack of consultation that had taken place in the lead up to the amalgamation, and the fact that errors had been made as a result.¹⁸

This sense of a lack of vision and commitment to the ADT at a political level was reinforced by a perception that the Government now had other priorities and that, once the ADT had been created, the political spotlight had shifted elsewhere. The creation of the CTTT was cited by a number of subjects as a pertinent example of the Government's lack of commitment to bolstering the ADT. As one ADT Senior Member commented:

... there was a suggestion at one stage the Fair Trading Tribunal would be — might be — rolled into the ADT. Now, that hasn't happened. See, they've gone off in another direction. Just recently there's been a decision to create a Tribunal which merges the Fair Trading Tribunal and the Residential Tribunal.¹⁹

A number of ADT subjects also referred to the Government's lack of commitment to progressively expanding the Tribunal's jurisdiction over time.²⁰

One subject considered that the lack of momentum and political commitment to the ADT may be a consequence of errors in judgment rather than design, as well as subsequent neglect by government. More specifically, ADT Registry Staff Member 1 suggested that any assumption that government departments would volunteer to have their decisions subjected to review had been flawed:

Q. Was there the hope that having the one big body with the profile perhaps that a larger organisation would have — was there the hope that that would generate some momentum?

A. I think so. I think the problem is that there's probably no one driving it — that sounds terrible but I think the expectation that it [would] somehow 'self-happen' hasn't happened and it does need some actual push [by] departments to say, whether it comes from Cabinet or however it happens, that thou will review and almost perhaps in the opposite direction, you should justify why your decisions

¹⁷ ADT Member 1 at paragraph 63.

¹⁸ In this context ADT Member 4 referred to a number of instances of overlap, and in some cases inconsistency, between the provisions of the *Anti-Discrimination Act 1977* (NSW) and the provisions of the ADT Act — at paragraphs 63 to 73 and 135 to 141.

¹⁹ ADT Senior Member 1 at paragraph 27.

²⁰ ADT Member 1 at paragraphs 67 and 107 to 109; ADT Senior Member 1 at paragraph 27; ADT Registry Staff Member 1 at paragraph 45. See also O'Neill, above n 12, at 3; Committee on the Office of the Ombudsman and the Police Integrity Commission, above n 4, at 42.

shouldn't be going rather than merely the offering up on a platter the ones that you would like reviewed.²¹

...

Q. You were mentioning before that it doesn't seem like there's anybody pushing the thing. Do you expect that to change over time, that there may get to be this momentum as a recognition or a profile grows?

A. I don't think that, I think it takes something to drive it.²²

There was a perception among a minority of ADT members that the Government's commitment to making the ADT a success would continue, and that its situation would improve over time. ADT Senior Member 1 commented:

Look, the real point of this in a sense — the major political point of this Tribunal at this stage is the sense that it exists, and it does bring together a number of reasonably high profile jurisdictions into a single Tribunal structure. And I think if it's perceived to be operating successfully it will be given additional jurisdictions.²³

However, the views expressed by this subject were not echoed by others. Rather, there was a distinct lack of optimism about how the ADT would improve or develop over time, and what could be achieved in the future. ADT Member 1 considered that the NSW Government had seen the ADT as a “quick fix” — in other words, that they'd created it and then simply moved on.²⁴ These comments reinforce the general perception held by ADT subjects, that there was a distinct lack of ‘after-sales service’ in the creation of the ADT and a sense of neglect at the political level.

This was compounded by a sense that the creation of the ADT had not gone very far in altering the ‘tribunal landscape’ in NSW. Many interview subjects considered that “not much had changed” since the amalgamation.²⁵ ADT Member 10's view was that things were basically the same as they were before.²⁶ When asked about the differences between the Equal Opportunity Tribunal and the Equal Opportunity Division within the

²¹ ADT Registry Staff Member 1 at paragraphs 73 to 75.

²² *Ibid.*, at paragraphs 89 to 91. See also ADT Senior Member 1 at paragraph 195.

²³ ADT Senior Member 1 at paragraphs 19 to 21. See also ADT Member 4 at paragraph 125, who indicated that the policy intention was to follow the VCAT model — that is, to be “just one super-Tribunal”.

²⁴ ADT Member 1 at paragraphs 107 to 109.

²⁵ ADT Member 10 at paragraph 66.

²⁶ *Id.*

ADT, ADT Member 5's overall impression was: "As it's turned out there has been no change whatsoever to the way the EOD goes about its business."²⁷ Indeed, there was a general perception that the ADT is something of a facade, behind which a number of organisations continue to function as they did prior to amalgamation. This suggests that, in practice, the way in which the ADT operates is not very different from the concept of 'co-location', as articulated by commentators such as Creyke.²⁸

These perceptions led a number of subjects to question the rationale behind the amalgamation. For instance, ADT Member 10 commented:

I think the Tribunal worked better as a specialist tribunal, and there was no reason to change it. I think you have some bureaucrat sitting there whose job is to change everything on a regular basis, just for the sake of change. There was nothing wrong with the way the Tribunal was operating, and there was no reason to change it. It was operating very well.²⁹

ADT Member 8 expressed similar views:

I think the things that have happened as far as improvements in our procedures probably would have happened anyway. I don't really see it as a good idea. I think things have been just put together for bureaucratic purposes, not for any purpose to do with the function of the bodies. That's my view.³⁰

Other ADT subjects considered the amalgamation had been proposed for purely economic reasons, or to reduce proliferation.³¹ ADT Member 4 articulated the perception that the motivating factor behind the establishment of the ADT was to cut costs:

Q. What do you think were the motivations towards moving to an ADT?

A. Efficiency. Structural efficiency. To a manager, on the outside looking in and saying we've got three and half people in Castlereagh Street, we've got two and a half people in Liverpool Street, we've got one person over in O'Connell Street, we're running three different computer systems and, you know, post offices boxes

²⁷ ADT Member 5 at paragraph 45. This comment does not acknowledge the procedural improvements that have been adopted within the Equal Opportunity Division post-amalgamation (these are explored in more detail in Chapter 10). See also ADT Member 6 at paragraphs 69 to 71, who perceived that the ADT operated more as the sum of its parts, with different divisions operating relatively autonomously, rather than as a single organisation.

²⁸ Creyke, Robin, "The state of the ART", a paper presented at *Current issues in the tribunals and courts*, conference by the Australian Institute of Administrative Law, Sydney, 9 March 2001.

²⁹ ADT Member 10 at paragraphs 88 to 90.

³⁰ ADT Member 8 at paragraph 319.

³¹ ADT Member 1 at paragraph 175.

and the rest of it — put them all in one place and I've got no doubt that it was as crude as that.³²

Overall, there was certainly no sense among NSW subjects that, in establishing the ADT, the Government was implementing its vision of an organisation that would streamline the State's tribunal system and significantly improve the accountability of administrative decision-making.³³ The disillusionment and frustration which some subjects expressed suggests the Government's rhetoric heralding the establishment of the ADT did not match the reality. In other words, there was a perception that the promised 'super-Tribunal' for NSW had not been delivered.

The experience in Victoria was markedly different. Members and staff of VCAT perceived that there was an initial commitment to creating a viable, effective tribunal, and some kind of vision behind its implementation. Indeed, there was a widespread, almost unanimous, perception that the Victorian Government was committed to giving VCAT the legislation, powers, resources, people and facilities it needed in order to succeed. This perception was articulated by VCAT Senior Member 2:

Q. One other thing I'm interested in is whether you think there was ... a political commitment to making VCAT a success?

A. There certainly was at the time of its creation and I would have to say that — look the first thing is it should be remembered that it was a Labor Government that set up the AAT in 1984. It was a Liberal Government that set up VCAT but there was pretty close to unilateral, I mean there was a very small debate on the VCAT Bill about a couple of sections — so I would say that there's bipartisan support for the proposal and we were certainly well supported by the previous Attorney-General — and to some degree it was her baby I suppose, it was her project so she certainly supported us well. But I've got no complaints about ... it [government support] has continued, and I think that's because there's a bipartisan view that it's working, and that it's appropriate.³⁴

³² ADT Member 4 at paragraphs 123 to 125. See also ADT Member 1 at paragraph 67; ADT Member 2 at paragraph 61; ADT Member 3 at paragraphs 131 to 133; and ADT Member 7 at paragraphs 291 to 293.

³³ Whelan, Paul, Minister for Police, "Second Reading Speech for the *Administrative Decisions Tribunal Bill 1997*", NSW, *Legislative Assembly Debates*, 29 May 1997, 9602-9606, at 9603; Committee on the Office of the Ombudsman and the Police Integrity Commission, above n 4, at 18.

³⁴ VCAT Senior Member 2 at paragraphs 163 to 169. See also Kellam, Justice Murray, "Developments in administrative tribunals in the last two years" (2001) 29(3) *Federal Law Review* 427-436, at 429.

Similar comments were expressed by VCAT Member 6.³⁵

In addition, the experience of VCAT subjects was that the implementation of the amalgamation had occurred in a relatively planned and structured way. VCAT Registry Staff Member 1, in explaining how the amalgamation was planned and executed, noted that a fair amount of resources had been put into the planning process:

So we did a BPR — a business process review. Outside consultants came in and made a recommendation — went through the place and looked at the whole business review, [and] made recommendations which we put into place.³⁶

In addition, VCAT Member 5 noted there had been extensive consultations in the lead up to the transition from specialist to generalist tribunal:

I mean it was clearly taking shape over quite a long period of time and there was a lot of discussion (as I understand it) between the people who were drafting the legislation and the people who were the heads of the various boards and tribunals and so on to try and make sure everything was taken into account to bring it together, so yes it was a planned process but equally, yes, we didn't know what to expect once we actually all got here, but I think it was handled fairly well in the sense that when we first came here, it was sort of bringing together geographically before you necessarily had the structure around you, so when we first came here we were the Anti-Discrimination Tribunal still.³⁷

This praise was certainly not universal, and some subjects commented on the disarray that characterised the early stages of the transition to an amalgamated tribunal.³⁸ However, the weight of evidence indicates that those responsible for the amalgamation within Government had accepted at least some degree of responsibility for the manner in which it was undertaken. While relevant ministers and departmental staff may not have been involved in the details of the planning process, it appears they at least ensured there were people and resources available to carry the process through in an orderly and considered manner.

³⁵ VCAT Member 6 at paragraphs 355 to 357. See also VCAT Member 2 at paragraph 227, who commented on the level of commitment that the then Victorian Attorney-General (Jan Wade) had displayed towards the implementation of VCAT.

³⁶ VCAT Registry Staff Member 1 at paragraph 51.

³⁷ VCAT Member 5 at paragraph 95. Supportive comments were also made by VCAT Member 8 at paragraphs 23 to 25.

³⁸ VCAT Member 4 at paragraph 117.

VCAT subjects also perceived that care had been taken in the way improvements were made following the establishment of the Tribunal, and that management was committed to ensuring that VCAT continues to develop and improve over time:

I mean it's an intelligent process of change because it's not the situation you often see in bureaucratic restructures where you actually throw out, and the information is all in that head and silly you, you've chopped off the head before you realised you were going to lose the information and then you re-hire it for six times the amount just to get it back, the head back in there. It's all been managed extremely well in that regard.³⁹

These comments can be contrasted with perceptions held by ADT subjects regarding the level of commitment to the amalgamation in NSW and the future success of the ADT.

Overall, the strong impression given by subjects was that, while the ADT and VCAT both had the advantage of a strong legislative foundation, there were significant differences in the levels of support for each process. In particular, there was a sense that the specialist tribunals constituting the ADT had been thrown together with little care or consideration.⁴⁰ A lack of political commitment to the amalgamation process was seen as a key factor in this outcome.

In contrast, VCAT subjects considered that a fair amount of care and consideration had gone into the construction of that Tribunal. It is argued that the comprehensive scope of the reforms in Victoria — and the implementation of the amalgamation in line with a well-constructed 'vision' — demonstrates the Victorian Government's commitment to the success of amalgamation in that State.

THE IMPACT OF CONTEXT ON THE ADT AND VCAT

The data presented above highlight the differing levels of support in NSW and Victoria for the success of the amalgamation process in each State. This had a variety of consequences. For instance, the research suggests a direct correlation between perceptions of political commitment and vision, and the sense of pride held by members

³⁹ VCAT Member 5 at paragraph 143. See also VCAT Member 4 at paragraph 185.

⁴⁰ This impression was echoed by the recent Parliamentary inquiry into the operation of the ADT — Committee on the Office of the Ombudsman and the Police Integrity Commission, above n 4, at 47.

and staff in the operation of the ADT and VCAT. Similar comments can be made about the perceived status and influence of each Tribunal within government.

In addition, the data reveal that the magnitude of an amalgamation proposal — in other words, the size and scale of the tribunal that is created — is significant in determining whether a proposal has sufficient ‘critical mass’ to realise the potential benefits that amalgamation can bring. Closer examination of these consequences highlights the strong influence that the context of an amalgamation proposal will have on its ultimate success or failure.

Sense of pride in the ADT and VCAT

The qualitative research reveals a stark contrast between the ADT and VCAT in the level of pride that members and staff felt at belonging to each organisation. It is argued that an amalgamation process is more likely to be considered worthwhile if it is perceived to be a serious attempt by government to improve the existing tribunal system.

The comparative lack of pride and inspiration felt by ADT members and staff was exacerbated by a perception that the ADT was not considered to be very important or to have much influence with government. The perception of political abandonment did not appear to be a focus of concern for ADT members who had come from small, specialised tribunals which had never received much government attention or support in the past. Nonetheless, with all subjects interviewed, there was no sense that the Government considered the ADT to be a fine achievement or a successful model for others to follow. Indeed, any perception that the ADT was ‘going places’ was noticeably absent, as was a sense of pride in belonging to the organisation.

In contrast, the overwhelming impression given by VCAT subjects was of a creative energy and optimism about the establishment of VCAT, and a sense that the organisation was an improvement upon the bodies it replaced. The subjects interviewed considered they were taking part in the process of creating an effective new organisation with a shared vision and culture. The comments of some subjects indicated the inspiration they felt about the changes that had taken place, and the future possibilities:

It is really like the people's place. It is like that. I mean it's not much chop as a building to look at, but sometimes that's great in that it's just another building in the street, and people are coming and going all the time.⁴¹

VCAT Member 3 commented:

Well I think the amalgamation suits everybody. That's not to say if some tribunal did have a specialist way of doing things — I mean they probably thought that was the best way to deal with things — but then I think it's better having all together. We can see which is the best way and the VCAT Act ... and I don't know what they were like under individual Acts because they might have had limitations. Like you were saying we can now offer mediation, so there are certain extra things that we can offer. We've got much more, greater flexibility of procedure so, and I think it's better for practitioners coming down here to have some understanding.⁴²

The significance of these data is twofold. First, the degree to which members and staff of an amalgamated tribunal are positively engaged and committed to making the new organisation a success is an indicator of the level of political commitment to an amalgamation process. More specifically, it demonstrates the extent to which an amalgamation proposal can be said to reflect a shared vision of beneficial tribunal reform.

Secondly, as the data below about organisational culture will highlight, an organisation whose members are satisfied and committed to its success will be more effective than one whose members are indifferent or negative. Thus, it is argued that VCAT is more successful than the ADT in part because its members and staff have a greater degree of pride in its work and a more personal investment in its success.

⁴¹ VCAT Member 1 at paragraph 213.

⁴² VCAT Member 3 at paragraph 185.

Status and influence

A further consequence of the different levels of political commitment to amalgamation in NSW and Victoria is the divergent perceptions of the status and influence of each Tribunal. Whereas VCAT subjects had the sense they were involved in something that was important for Victoria, NSW subjects tended to have the opposite impression about their role within the ADT. This is arguably a strong indicator of the success of an amalgamation process. That is, an amalgamated tribunal that is formed to become the peak ‘court alternative’ in a particular jurisdiction should have a proportionate degree of status and influence.

The VCAT experience indicates that the scale of an amalgamation process will have an impact on the status of the tribunal that is established. For instance, a larger tribunal with a higher caseload and bigger budget will find it easier to raise issues directly with relevant government departments and ministers. As noted by VCAT Senior Member 2:

The head of a little tribunal doesn’t have that push, doesn’t have the access. ... It might take six months to see the head of the department, I don’t know, but it’s changed in that regard.⁴³

In turn, greater status or influence with government will better enable an amalgamated tribunal to address issues involving politicians or policy-makers.

The nature of its relationship with government is another significant indicator of the influence and status of an amalgamated tribunal, and its degree of independence. There were some similarities between the types of external relationships established by the ADT and VCAT, and the ways in which these were managed. For instance, both Tribunals had well-established relationships with departments whose decisions they reviewed. While the Attorney-General in each State bears primary responsibility for the funding and legislation governing VCAT and the ADT, other portfolio ministers are involved to some degree. In relation to VCAT, for instance:

The responsible Minister’s the Attorney but obviously the Planning Minister has a significant interest in what we do; the Minister for Consumer Affairs has a

⁴³ VCAT Senior Member 2 at paragraph 49. See also Justice Kellam’s comment that the former separate tribunals “had real difficulty in communicating with the government of the day” — Kellam, above n 34, at 431.

significant [interest] in what we do; and the Minister for Fair Trading has a similar interest in what we do, so we have other departments.⁴⁴

VCAT Senior Member 2 considered there was a fair amount of consultation and co-ordination between VCAT, the Attorney-General's Department and other portfolio departments in relation to relevant matters.⁴⁵ Similarly, while responsibility for the ADT falls primarily within the NSW Attorney-General's portfolio, other departments have input — for instance, in relation to the appointment and cross-appointment of members.⁴⁶ In addition, there was a strong sense from both ADT and VCAT interview subjects that government did not attempt to interfere with the decision-making function of either Tribunal, or significantly impinge on its independence.⁴⁷

Aside from these similarities, a number of differences emerged regarding the extent of government involvement in the management of each Tribunal, and the subsequent control that each had over its own operations and the implementation of innovative administrative arrangements.

The impression given by ADT subjects was that the ability of the Tribunal to determine its administrative structures and processes was restricted by the extent to which Government was involved in the day-to-day running of the Tribunal. The nature of the relationship between the ADT and the NSW Attorney-General's Department was explained by ADT Registry Staff Member 1 as follows:

The ADT is not under the *Public Sector Employment and Management Act 2002* a separate department or entity so that while we're an independent statutory body in terms of the tribunal functions, [the Registrars] also answer to the department in relation to budget issues, staffing issues so that, and that's the way that all of Attorney-General's courts are set up, so that as the executive officer/registrar you've got this twofold kind of reporting line, you know, answer to the President for certain things and to the department for other things, and there's actually a specific part in our Act that was built in to cater for that structure which I think would probably be unique to anywhere else I think. ... It's an amendment early on in the piece. Yes, here we go: s 25(2) or (1). "The President is to direct the business of the Tribunal. The President is to facilitate the adoption of administrative practices in the conduct of the business of the Tribunal." So there's

⁴⁴ VCAT Senior Member 2 at paragraph 177.

⁴⁵ *Ibid.*, at paragraph 185.

⁴⁶ ADT Registry Staff Member 1 at paragraphs 139 to 143.

⁴⁷ See, for example, *ibid.*, at paragraph 41.

this kind of idea, you know, there's an interaction between the department in relation to administrative activity.⁴⁸

In relation to this relationship, ADT Member 1 commented:

A. Well the President does have responsibility, but he doesn't have power if you like and it's tricky because he's appointed by the Minister ... by the Attorney-General so if he's dealing with say the Minister for Fair Trading or the Minister for Housing or Community Services or whatever else it is he has no right if you like to be [responsible], it would have to be between the Attorney-General and those other Ministers. You get into political things, you get deficient management, which isn't necessarily related to a rational analysis of what's needed for a particular tribunal.

Q. So that structure can really hamstring the process?

A. Yes. That's the simple thing that I've always said that structure can facilitate or it can absolutely get in the way.⁴⁹

While ADT management has reported having regular meetings with the heads of relevant NSW government departments, there remained a perception among ADT subjects that their Tribunal does not have a great deal of influence with government, or as much administrative autonomy as its members and staff would like.

In contrast, the overwhelming impression held by Victorian subjects was that VCAT is responsible for its own management and operations. Indeed, there was a perception that, unlike the ADT, VCAT had significant clout with government. For instance, VCAT Senior Member 2 noted the ease with which the President could liaise with relevant ministers and heads of departments as required.⁵⁰

It is argued that the nature of these relationships with government had implications for the ability of each Tribunal to implement effective administrative arrangements. This, in turn, impacted upon the sense of pride that members and staff felt in the work of their respective Tribunals. Just as importantly, the relative status and influence of the ADT and VCAT appeared to have a bearing upon the ability of each organisation to address problems or issues that arose at a political or departmental level. All of this indicates the

⁴⁸ *Ibid.*, at paragraph 17.

⁴⁹ ADT Member 1 at paragraphs 113 to 117.

⁵⁰ VCAT Senior Member 2 at paragraphs 49 and 173. The validity of this perception is reinforced by the fact that the President of VCAT had negotiated a memorandum of understanding with the Victorian Attorney-General regarding the appointment and reappointment of members on the basis of merit — Committee on the Office of the Ombudsman and the Police Integrity Commission, above n 4, at 36.

extent to which government had been prepared to commit to establishing an independent organisation that would be effective as a fourth arm of government whose role is, in part, to review executive action.

Thus, the evidence presented so far demonstrates the positive consequences that flowed from the fact that the context in Victoria was conducive to a successful amalgamation process, and the difficulties caused by the political climate in NSW. The important contribution that context makes to an effective amalgamation is further reinforced by analysing the consequences of the scale of the amalgamation in each State in terms of the efficiencies and improvements that resulted.

Critical mass and economies of scale

It is argued there is a ‘critical mass’ in terms of the size, scale, workload and resources of an amalgamated tribunal at which point innovation, efficiencies and improvements are more likely. The qualitative data strongly suggest that an amalgamated tribunal is more likely to succeed if it is established on a scale that engenders a sense of importance and a sufficient caseload. The consequences of taking a half-hearted approach to the scope of an amalgamation are highlighted by the experience of the ADT. There was a perception among NSW subjects that the ADT had a relatively insignificant workload, and consequently little influence and status. It is argued that the existence of the opposite perception in Victoria is largely attributable to the scale of the amalgamation in that State.

In the case of NSW, the ADT experience suggests that amalgamation is more likely to be successful if a comprehensive approach is taken from the very beginning. It could be argued that, if the newly-amalgamated CTTT, the Guardianship Tribunal and the Mental Health Review Board were included in the amalgamation, the development of new initiatives to improve the ADT’s performance would have gathered momentum, resulting in significant improvements. At the very least, the ADT would have been perceived as a greater force on the NSW political–legal landscape, including by political decision-makers. Unfortunately, the scale of amalgamation in NSW has remained small, and there are no signs of subsequent amalgamation on the horizon.

There are also indications that, if an initial proposal is inadequate, the amalgamated tribunal that is created is less likely to be regarded as successful, leading to greater opposition from other tribunals to subsequent proposals for progressive amalgamation. This pattern has potential implications for the progressive amalgamation model proposed by the Leggatt implementation team in the United Kingdom; momentum may stall as it appears to have done in NSW.

The experience in Victoria indicates that the initiative is more easily seized if all significant tribunals are included in an amalgamation, resulting in a larger body with a greater workload, a larger budget and, therefore, more influence with government. The evidence suggests that VCAT had a better start in life because it was perceived by its members and staff, and apparently by the Government, to be important. Moreover, there is no doubt that the resources available to VCAT as a larger organisation enabled it to capitalise on the solid legislative foundation provided by the VCAT Act.

Data collected from some VCAT subjects suggest that the process of amalgamation can go “too far”, and that there is a point beyond which the size of an organisation will result in the loss of specialist features in some jurisdictions. According to VCAT Member 7:

A. My personal view is there’s a balancing act where you can get too big and you can get inefficient again and I think VCAT is about approaching that.

Q. And what kind of, in what kind of ways does it get inefficient again? What do you think causes that?

A. One of the inefficiencies is the inability to have the expertise, secondly there can be time-lags although they try to cover that. The bigger you get (I know this from my own experience with my own law firm) the more you have to delegate things to other people, so you eventually end up with having somebody sort of a full-time manager, where you probably didn’t need that in smaller tribunals. It’s a natural growth syndrome and there’s nothing special about VCAT. It’s just one of those things that bureaucrats breed bureaucrats.⁵¹

⁵¹ VCAT Member 7 at paragraphs 183 to 187.

Another consequence that VCAT Member 7 referred to was the fact that members of a larger tribunal would be less likely to be specialists in matters arising in smaller jurisdictions with low caseloads.⁵²

This suggests there is a delicate balance to be struck in terms of the size and scale of an amalgamation proposal. However, the data collected for this thesis consistently emphasise the dangers of an over-cautious approach, rather than one which is over-zealous. The evidence is that, unless significance is attached to the process, there is far less momentum to create a vibrant new organisation, and less opportunity to implement initiatives and improvements associated with economies of scale. The factors that must be considered in striking an appropriate balance, and the implications each has for the success or otherwise of an amalgamation process, are explored in more detail under the following headings.

Workload

The workload of each Tribunal is a direct consequence of the scale of the amalgamation in each State. A number of implications flow from the small workload of the ADT. In particular, there is not the same ‘critical mass’ in terms of resources in the ADT as there is in VCAT. The data indicate that the ADT’s perceived lack of status and influence derives from the fact that, despite the amalgamation, it is still a small organisation with a relatively small budget.⁵³ It is also arguable that the ADT’s size and status have contributed to the lack momentum in its ongoing development.

The NSW Government’s policy of progressively expanding the scope of the ADT’s jurisdiction suggests it was sensitive to the impact that low workload would have on its operation and future development. The intention was that further tribunals would be amalgamated and departments would volunteer to make increasing numbers of their decisions subject to administrative review once the ADT was created. However, as noted

⁵² O’Neill expressed similar views in O’Neill, above n 12, at 14 to 15. The challenges involved in striking an appropriate balance between setting consistent standards and the retention of necessary specialisation within an amalgamated tribunal are explored in more detail in Chapter 11.

⁵³ Separate NSW Senior Tribunal Member 1 at paragraph 111.

above, this has not occurred. It is generally acknowledged that this has limited the potential of the ADT to develop into a model tribunal for NSW.⁵⁴

In contrast, the data from Victoria highlight the ways in which a larger caseload leads to other advantages in terms of budget and influence. VCAT's 'critical mass' in this regard allows its management to move resources around as the need arises, and to develop new initiatives aimed at improving the Tribunal's operations — in other words, to take advantage of the economies of scale that are available in a larger organisation. A concrete example is the fact that a higher workload means more staff, and more staff means greater capacity to get through the day-to-day work with fewer resources, leaving more resources to be channeled into improving existing practices. As stated by VCAT Senior Member 2:

A. Well I think there is a critical mass. I think a place like this — I mean we've got a CEO, a principal registrar, three senior registrars, a listing coordinator — we've got a fairly heavy bureaucratic, high level think-tank. Now if you're a small organisation you've got your CEO who might be running around absolutely flat chat trying to deal with budget, paying people, making sure the cars have petrol, that sort of thing, whereas here [management] can take someone out and say here's a project, drop everything else, here's your project for three months and [we] want an answer. So I think there's a critical mass in that sense. I mean if [management] want a business case prepared for some issue to get more money from government we can sit down — I mean we did one several weeks ago, three of us basically took ourselves out full-time and we did this, produced this business case.

Q. So you've got that flexibility?

A. Yes, with a big organisation.⁵⁵

As well as greater potential to take advantage of economies of scale, the size of a tribunal's operations is arguably proportionate to its degree of influence and independence. This, in turn, impacts upon the extent to which a newly-amalgamated tribunal is able to set its own direction and implement its own initiatives. This proposition is reinforced by evidence linking VCAT's size and influence to the number of innovative developments emanating from that Tribunal. According to VCAT Senior Member 2:

A. I mean basically our position has been this — we've re-engineered the thing and now we're turning around and saying, ok well what's the next project. An

⁵⁴ Committee on the Office of the Ombudsman and the Police Integrity Commission, above n 4, at 42.

⁵⁵ VCAT Senior Member 2 at paragraphs 109 to 113.

operation as big as this you turn around and say all right, well now we're at stage one — what's stage two, what's stage three, and I think involved in that is re-analysing what you're doing, where you're going.

Q. So a continuous improvement approach?

A. Yes. I think that's a lot easier in a large organisation.⁵⁶

Thus, the size and scale of the amalgamation in Victoria has better enabled VCAT to take advantage of the economies of scale that amalgamation can bring, and to allocate resources to the development of new initiatives and improvements. This has been significant in enabling the amalgamation in Victoria to reach its full potential.

Level of resources/funding

The relevance of funding to the effectiveness of an amalgamation process is twofold. Firstly, the adequacy of the resources made available to a newly-amalgamated tribunal is a significant indicator of the degree of political commitment to an amalgamation process, and will have a direct bearing on the effectiveness of the tribunal that is created. The assumption is that a tribunal that is inadequately resourced is less able to operate effectively. Secondly, the relationship between the size of a new tribunal's budget and its ability to implement new initiatives reinforces the proposition that the scope of an amalgamation proposal impacts directly upon its success.

While most subjects did not feel qualified to comment on the level of funding provided to each Tribunal, no-one suggested that the level of resources provided to their respective Tribunals affected their abilities to perform their roles. In relation to the ADT, Senior Member 1 commented that the ADT was “relatively well off compared to [the] Fair Trading [Tribunal]”.⁵⁷ VCAT Senior Member 2 considered that, as well as the resource benefits deriving from economies of scale, VCAT had access to more resources than its predecessor tribunals.⁵⁸ In general, the lack of serious concern over funding issues suggests that, roughly speaking, each Tribunal is adequately resourced to deal with its caseload.

⁵⁶ *Ibid.*, at paragraphs 101 to 106.

⁵⁷ ADT Senior Member 1 at paragraph 243.

Having said that, a number ADT subjects did comment about resource-related issues. While not suggesting that resources were inadequate, there were some comments about the distribution of funds within the ADT and associated complaints about cost-cutting measures that had been taken since amalgamation. These comments suggest that some specialist tribunals amalgamated to form the ADT had benefited financially from the merger, whereas others consequently had fewer resources. For instance, Registry Staff Member 1 commented:

Q. Is there a sense that there are more resources being part of a bigger organisation than perhaps these little tribunals were getting, or ... ?

A. I suspect that there's a mixed bag in response to that. I think some of them probably had a lot of money and others of them had not a lot of money and so there are probably some areas that think that they've got a lot better things than they had and some of them would think ... I suspect there's probably a more equitable sharing of resources.⁵⁹

There were indications that the amalgamation had impacted negatively on the level of resourcing of the Community Services Division. The following exchange took place with ADT Member 7:

Q. Do you get a sense of any changes in efficiency?

A. No. Not that I can see. Within the Community Services Division — no.

Q. So there haven't been extra resources or anything?

A. I actually consider it has diminished. There were more resources previously.⁶⁰

In addition, opinions were expressed by a number of subjects associated with the Legal Services Division, to the effect that previously available funding had been redistributed throughout the ADT as a whole. For instance, ADT Member 11 stated:

A. Well over a period of time what has happened is that the ... a lot of the funding for the Tribunal comes from the legal profession. That funding that was provided to the Legal Services Tribunal went across to the Division. That funding is used to support other work of that Tribunal.

Q. So that funding is not kept within the Division?

A. No, it's not.⁶¹

⁵⁸ VCAT Senior Member 2 at paragraph 59. For example, VCAT Registry Staff Member 1 noted that VCAT has around 42 hearing rooms at its disposal — paragraph 279.

⁵⁹ ADT Registry Staff Member 1 at paragraphs 257 to 259.

⁶⁰ ADT Member 7 at paragraphs 223 to 229.

⁶¹ ADT Member 11 at paragraphs 47 to 51.

There was a perception that the services available to members of this Division had been reduced accordingly. ADT Member 10 noted that there used to be court officers in the Legal Services Tribunal, but there were none at the ADT.⁶² Similarly, ADT Member 11 noted that resources to fund member meetings were no longer available.⁶³ ADT Member 9 commented that hard copies of transcripts were no longer available, and that the reason for this change was “purely financial”.⁶⁴ Another subject noted that funding for social functions had been reduced:

A. A lot of it's cost cutting too because there was a Christmas function but that has gone. Well it's now just an add-on to a meeting in December whereas formerly there was an evening out, then that got cut back to an evening in and it's now cut back to an add-on to the meeting.

Q. So it's like an economy drive?

A. Yes.⁶⁵

It should be noted there are different perspectives regarding the impact of amalgamation upon the Legal Services Division. In particular, there is a view that changes to the former Legal Services Tribunal were overdue and that the amalgamation enabled appropriate improvements to be made. Similar comments have not been expressed in relation to the Community Services Division.

Other ADT subjects considered there were greater resources post-amalgamation. For instance, ADT Member 4 commented that:

I think that the Equal Opportunity Tribunal you would have to say that we're better off as having resources now. It is a better run better resourced tribunal than the EOT was.⁶⁶

Similar comments were made by ADT Member 2, also associated with the Equal Opportunity Division.⁶⁷

⁶² ADT Member 10 at paragraph 28.

⁶³ ADT Member 11 at paragraphs 169 to 175.

⁶⁴ ADT Member 9 at paragraphs 209 to 223. See also ADT Member 11 at paragraph 111. Similar comments were made by ADT Member 5 in relation to the Equal Opportunity Division at paragraph 57, and by ADT Member 8 at paragraphs 199 and 379 to 383.

⁶⁵ ADT Member 8 at paragraph 63. ADT management has noted that these decisions were taken in accordance with the NSW Premier's Guidelines governing all NSW agencies, including courts.

⁶⁶ ADT Member 4 at paragraph 33.

⁶⁷ ADT Member 2 at paragraph 61.

While it seems that amalgamation in NSW resulted in a redistribution of resources, no subject argued that funding levels impacted adversely upon the quality of ADT decision-making. Similarly in Victoria, there was no suggestion that the level of funding available to VCAT was inadequate.

Rather than adequacy of funding, the relevant point of divergence between the ADT and VCAT concerned the extent to which each Tribunal was able to use its available resources to develop and implement new initiatives. The extent of the amalgamation in each State had a significant impact upon the resources each Tribunal had at its disposal — both in terms of the size of its budget and the flexibility to move resources around in a targeted manner. Different levels of funding are required for organisations with different workloads, the inevitable consequence being that an amalgamated tribunal of VCAT's size will have a larger budget than a Tribunal like the ADT.

In NSW, there was no indication that amalgamation had increased the ability of the tribunal system to use resources more effectively. Indeed, a number of subjects commented on the absence of initiatives that would have assisted members in their decision-making roles — initiatives which apparently had not eventuated due to a lack of resources. For instance, one subject commented on the unavailability of research resources within the ADT:

I think the quality of decision-making would be greatly assisted if there were greater resources — I mean there are literally none. Nought. Nil. There is no library to speak of, there is a couple of old books on a shelf, and every so often to do a bit of a ... or even just an update on recent cases in other jurisdictions — it's all very much on your own time. It's OK but I think the work of the Tribunal would be improved if you had access to it.⁶⁸

In relation to VCAT, on the other hand, there was an overwhelming sense that efficiencies had been gained by amalgamating, largely as a result of greater flexibility in the distribution and use of resources. VCAT Member 5 commented:

Oh definitely — there are resource differences. I mean, resources in the sense of the number of people available and resources in terms of just the space and so on. In terms of the numbers of matters that might be going on — in a day in Anti-Discrimination, like today, there will be two members probably doing directions hearings and I think there are three mediations going on. Where we

⁶⁸ ADT Member 9 at paragraph 239. Similar comments were made by ADT Member 4 at paragraph 121.

were located previously, because there could only be one hearing at a time, we really had only one hearing room and one other small room where you could have compulsory conferences, but you weren't geared up, set up for a number of mediations to take place and that sort of thing. So it's structural resources as well as human resources that make it possible for us to be doing so many different things at once.⁶⁹

Further examples of the ability of a large organisation to move resources around and develop new initiatives were given by VCAT Senior Member 2:

Well, we put in a pilot digital recording process that cost us about \$80,000 at that time. Now the old tribunals probably wouldn't have the funds to do that. We have put together an online application system for the Tribunal which is running in Residential Tenancies now. You can put your application in by computer. It cost well over a million dollars, that project. I doubt the Residential Tenancies Tribunal would have got that up and running by themselves ...⁷⁰

Overall, it seems clear that the scale of the amalgamation in Victoria and the relative size of VCAT's workload and budget contributed significantly to the greater success of the amalgamation process in that State. The ADT experience reinforces the importance of political commitment to the scope and scale of an amalgamation by highlighting what can happen if this 'critical mass' is not achieved. Perhaps the most obvious manifestation of the different approaches to amalgamation in NSW and Victoria is the extent to which each Tribunal succeeded in taking advantage of potential economies of scale and using its resources to initiate improvements.

CONCLUSIONS

No doubt it is possible for statutory bodies to operate effectively without overt political support. In addition, there were no strong indications in the qualitative data that the ADT is inadequately resourced to the extent that it cannot continue to provide an acceptable service to its users. Nonetheless, the compelling conclusion is that there was greater support for the amalgamation process in Victorian than in NSW.

The implications of an absence of political support for the ADT — and the converse situation in Victoria — manifested in a variety of ways. The different contexts within

⁶⁹ VCAT Member 5 at paragraph 43. See also VCAT Member 3, who noted there was a concentrated effort to put resources into reducing backlogs when VCAT first commenced — at paragraph 265.

⁷⁰ VCAT Senior Member 2 at paragraph 59.

which the ADT and VCAT were established certainly affected the status of each Tribunal and the pride felt by its members and staff. However, perhaps the most significant difference lies in the extent to which VCAT management was able to move resources around in order to develop new initiatives and improve on the legislative foundation provided the Victorian Government. The evidence is that the NSW Government's comparative lack of commitment to the ADT prevented it from developing in the same way, at least initially.⁷¹

As the discussion in remaining Chapters will show, the implications of the unsupportive context within which the ADT was created resonate throughout every aspect of its operation.

⁷¹ As mentioned in Chapter 5, this thesis does not purport to predict the performance of the ADT into the future. Indeed, it should be noted that the NSW Attorney-General's Department is currently conducting a review of the first five years of the ADT's operation. The final report may address some of the concerns raised about the Tribunal's early operations — *Administrative Decisions Tribunal*, above n 3, at 4.

CHAPTER 8: ORGANISATION — THE ADT AND VCAT COMPARED

The organisational structure of an amalgamated tribunal, and the processes and procedures put in place within that structure, are identified in Chapter 4 as important factors in the success or otherwise of an amalgamation process. More specifically, it is hypothesised that the structure of an amalgamated tribunal should facilitate cohesion and flexibility, and reduce the degree of disjunction that can arise within an organisation made up of several previously distinct entities. These goals can be reinforced by the processes and procedures that are adopted after amalgamation. In addition, tribunal management should capitalise on the opportunities an amalgamation process provides to set standards and initiate improvements in tribunal practices.

Organisational theorists have argued that the extent to which an organisation is able to accommodate the needs of a range of stakeholders is a measure of its effectiveness. While gathering data from different stakeholder groups was beyond the scope of this thesis, observations may nonetheless be made about the extent to which the processes and procedures adopted within VCAT and the ADT cater to different needs. For instance, it will be relevant to consider whether each Tribunal has struck an appropriate balance between retention of specialisation and consistency. This has a direct bearing on the ability of an amalgamated tribunal to adjust its procedures to meet the needs of different users, while at the same time encouraging a degree of consistency with the aim of reducing cost and complexity, capitalising on economies of scale, and facilitating the sharing of knowledge and experience. The benefits deriving from greater consistency are arguably of interest to member, staff and government stakeholders.

The qualitative research highlights a number of similarities between the organisational structures and processes that were adopted within the ADT and VCAT on amalgamation. As with the statutes establishing each body, this reinforces the proposition that there were sufficient similarities between both amalgamation processes, and the tribunals that were established, to enable valid comparisons to be made.

Yet once again, a more detailed examination reveals the impact that apparently minor differences can have on the ability of an amalgamated tribunal to realise its full potential. Specifically, the data demonstrate how the administrative arrangements put in place within the ADT and VCAT had significant implications for the operational effectiveness of each Tribunal. Relevant factors included the proportion of full-time to part-time members, practices relating to cross-appointment, the physical layout of each Tribunal, and the degree of procedural consistency across divisions and lists. The role of registry staff is also significant in this context, as is the ability and willingness of management to set standards and use resources in an efficient and flexible manner.

There are numerous ways in which these and other issues can be managed. As VCAT Senior Member 2 pointed out, building on the solid legislative foundation of a new tribunal is a complex task:

... there's a lot of management in a place this big, and I think much more so than a court. Well we have sessional members, large numbers of them, 140-odd sessional members; we have a very diverse jurisdiction; we have people sitting in hospitals, nursing homes; and of course we do planning which is ... very policy driven and very public. So there's a fair bit of management.¹

The following discussion demonstrates that the choices made by government and tribunal management in structuring the administrative arrangements of a newly-amalgamated tribunal are important. Ultimately, like its enabling statute and the context within which it is established, these choices will impact upon the capacity of an amalgamated tribunal to maximise the potential benefits that amalgamation offers.

ORGANISATIONAL STRUCTURE

There is a degree of similarity between the organisational structures of the ADT and VCAT. Both Tribunals are structured according to the different jurisdictions exercised by each body. This reflects the functions of the specialist tribunals that were amalgamated to form the ADT and VCAT. While most interview subjects demonstrated a sound understanding of the divisional structure of each Tribunal, there were very few comments for or against these arrangements. This indicates an almost unanimous

¹ VCAT Senior Member 2 at paragraph 9.

perception that the maintenance of distinct divisions or lists is a logical way to structure amalgamated tribunals that bring together a number of previously separate bodies.

A further element of the ADT's structure is the establishment of an Appeal Panel to conduct internal reviews of Tribunal decisions made at first instance.² A number of ADT subjects commented on the impact of this feature on the Tribunal's operations. Some expressed concern that the increased scrutiny had generated more appeals and encouraged members to take a more cautious approach to decision-making which, in turn, resulted in delay:

I wasn't around pre- the ADT, but I'm told that the number of appeals has gone up through the roof and people are much more wary. I know one member for example who always gave, or often gave *ex tempore* decisions and he now says I just wouldn't do it because it's just so easy to go to the Appeal Panel. If you want an appeal-proof decision you're better served I presume to write it, but that has its own problems because of the delay.³

Others considered the Appeal Panel merely duplicated the hearing procedures in place at first instance:

So you've a tribunal of equal status with another tribunal hearing appeals from it — a three-member tribunal hearing appeals from a three-member tribunal. I've never heard of that before. It doesn't make any sense. You don't get a three-member court being appealed against to a three-member court. It just doesn't happen.⁴

The intention behind the concept of an Appeal Panel was to facilitate the considered and consistent application of principles by ADT members, particularly in relation to complex questions of law.⁵ ADT management reports that these benefits have been delivered. The lack of similar comment by subjects may indicate that the work of the Panel did not impact much on the day-to-day considerations of ADT members — perhaps because of

² Appeals on questions of law are heard as of right, while leave must be sought to appeal to the Panel regarding the merits of a decision — Vines, Greg, *Report of the review of administrative appeal processes*, Office of the State Service Commissioner, Hobart, 2003, at 30.

³ ADT Member 9 at paragraph 207. Similar comments were made by ADT Member 5 at paragraphs 343 to 347, and paragraphs 357 to 365. As Sayers and Webb have argued: "One of the most important characteristics of tribunals should be their speed and the absence of *delay* (emphasis in the original)" — Sayers, Michael and Webb, Adrian, "Franks revisited: a model of the ideal tribunal" (1990) 8 *Civil Justice Quarterly* 36-50, at 42.

⁴ ADT Member 11 at paragraphs 99 to 103.

⁵ O'Connor, Judge Kevin, "Recent developments and procedural matters in the Administrative Decisions Tribunal", a paper presented at a seminar by the Australian Institute of Administrative Law, NSW Chapter, Sydney, 27 November 2000, at 4.

the degree of disjunction within the Tribunal (see below) or the lack of mechanisms in place to facilitate the co-ordinated sharing of information between members.

This is not to say that users of the ADT, or those responsible for monitoring the consistency and quality of ADT decisions, derive no benefit from the existence of an Appeal Panel. Rather, it highlights the importance of putting appropriate processes in place that will enable the structural features of an organisation to realise their full potential.

Registry structure

Another key structural feature of an amalgamated tribunal is its registry. The registry could be described as the engine-room of a tribunal. A well-structured administration with appropriate procedures in place will better enable an amalgamated tribunal to perform its decision-making functions effectively.

The data collected reveal that the size of a registry has implications for its ability to expend resources on improving existing processes and procedures and developing new initiatives. This is consistent with the conclusions reached above about the correlation between the size of a tribunal and the advantages it can derive from economies of scale. ADT Registry Staff Member 1 commented on the diversity of roles that staff members are required to undertake in a smaller registry:

The Registrar here has got kind of [two] roles I suppose. One is the executive officer function which in larger organisations would be a separate function in itself — so budget, human resources, those kind of roles. ... The second role again is what you'd consider more the traditional, legal Registrars' role — so [the Registrar has] certain kind of statutory functions under the Act that again in larger organisations would be a separate activity.⁶

The compelling conclusion is that there will be greater capacity for structuring a registry in the way that best meets the demands of its users if management has access to the resources of a larger tribunal.

⁶ ADT Registry Staff Member 1 at paragraph 5.

Despite their different sizes, the workflow of the ADT and VCAT Registries was organised in a similar manner. At the time of collecting data, the ADT Registry was moving from a process-based case management structure to a case-based system. That is, rather than having separate teams responsible for processing applications, organising hearings and filings, and processing decisions respectively, the ADT was moving towards a system where all stages of a matter would be dealt with by one team — at least at the ‘lower level’. This system was expected to provide greater flexibility in mobilising staff and resources to meet the needs of fluctuating workloads.⁷

At least some parts of the VCAT Registry have displayed a similar preference for multi-skilling:

A. ... we had a scenario for a while where we had — you would get all your applications in, and in the first instance you would give the applications to the people who knew how to process the individual type of matters. When they became more flexible, you could sprinkle them amongst people. And they would simply take charge of that file, see it through, while there were timeframes and certain things to be done, they would deal with those things. And we even went to the stage for a while — which we don’t do now — we even went to the stage where when the final order was made in relation to that matter it went back to that person and they would process the order as well.

Q. So a matter allocation?

A. In effect, yes. You would have a group of files — once you opened a file, you saw it through to the end.⁸

A significant part of the reason behind the adoption of multi-skilling was to encourage professional development among staff, and to take advantage of the flexibility this provides to managers.⁹

Q. So now, after that period of time, that transitional period is over, you’ve got that flexibility to move staff around?

A. That’s right, now what they do is they all do a little bit of everything. The person that manages this group of people is now able to give everybody a little bit of [everything] — three or four planning applications, a general application, an OBR [occupation and business regulation] application, a taxation ... and they are capable of processing them all.¹⁰

⁷ *Ibid.*, at paragraph 107.

⁸ VCAT Registry Staff Member 1 at paragraphs 75 to 79.

⁹ *Ibid.*, at paragraphs 221 to 223.

¹⁰ *Ibid.*, at paragraphs 69 to 71.

It seems the multi-skilling of registry staff within both Tribunals has resulted in greater job satisfaction and opportunities for staff, as well as greater flexibility for management in being able to deploy resources as required. This has improved the effectiveness of both registries in meeting the administrative needs of their respective Tribunals.

In relation to procedure, both registries face the challenge of striking an appropriate balance between the retention of necessary specialisation and the introduction of greater consistency. It is arguably difficult for a larger registry like VCAT's to retain necessary specialisation. In contrast, a smaller registry like the ADT's may find it hard to devote resources to initiatives that will streamline and improve the specialist processes inherited from the tribunals that were amalgamated. Either way, the ability of each registry to strike an appropriate balance is a reflection of its success in meeting the administrative needs of its users.

Despite its size, the VCAT Registry has retained a degree of specialisation. The decision to structure the registry into three separate parts has been significant in this regard. In relation to Guardianship applications, for example, VCAT Member 1 had observed a sensitivity on the part of Tribunal management to the specialist administrative needs of that jurisdiction. This subject cited the fact that the Guardianship List has its own Deputy Registrar as evidence of the fact that the special needs of this List are appreciated.¹¹

Another example of the retention of specialisation is the continuing operation of two different electronic case management systems within VCAT Registry — one for the Residential Tenancies List and a second system for the rest of the Tribunal. The rationale behind this duplication relates to the specialised needs of the Residential Tenancies List which has a caseload of approximately 70,000 applications per year.¹²

Clearly the ADT Registry does not have the luxury of structuring itself into separate parts to reflect the needs of various divisions. However, there were no indications in the data

¹¹ VCAT Member 1 at paragraphs 99 to 103.

¹² At the time of amalgamation, the former Residential Tenancies Tribunal had already begun developing a case management system that catered to its specific needs. For this reason it was considered more appropriate to maintain two separate systems — VCAT Registry Staff Member 1 at paragraphs 17 to 31.

that the specialist needs of divisions were not being met. On the contrary, it seems the primary challenge facing the ADT Registry was to find ways of streamlining and introducing new procedures, using the resources at its disposal. Despite these difficulties, the ADT Registry had managed to implement a number of positive reforms. These included the introduction of uniform documentation, such as standardised application forms,¹³ and time standards for decision-making.¹⁴

Overall, it seems the main difference between the two registries is their size and the level of resources at their disposal. It is argued that these factors enabled VCAT Registry to be marginally more effective than its ADT counterpart. The impact of size on the operation of each registry is further evidence of the proposition that an amalgamation that is larger in scope is more likely to produce economies of scale. Apart from this, there are significant similarities between the way the workflow of each registry is organised.

Member profiles

The constitution of an amalgamated tribunal's membership is another structural feature that has the potential to impact upon the effectiveness of its operations. This thesis argues that the management of a generalist tribunal must be vigilant in ensuring there are sufficient members with appropriate skills to hear matters across all of its jurisdictions.

The legislative requirements relating to the qualifications and appointment of members to the ADT and VCAT are substantially the same. Nor are there significant differences between the profiles of the members appointed to each Tribunal in practice. A further similarity is that the President of each Tribunal is a judge, and a number of Deputy Presidents appointed to head various divisions and lists are also judicial officers. VCAT Senior Member 2 referred several times to the importance of having the flexibility to list judicial members to hear matters which are politically controversial.¹⁵ This reinforces the impression given by both ADT and VCAT subjects, that each Tribunal was perceived to

¹³ ADT Senior Member 1 at paragraph 83.

¹⁴ *Ibid.*, at paragraph 129.

¹⁵ VCAT Senior Member 2 at paragraphs 17 to 25.

be independent. There was no suggestion that members were influenced by the fact that government bears ultimate responsibility for appointments.¹⁶

One subtle difference between the membership of the ADT and VCAT was the extent to which VCAT management had appointed members with unique expertise which was only required in a small number of matters. The following quote shows the emphasis that VCAT management placed upon getting a spread of members with specialist expertise, and the apparent success of this approach:

I guess we've got probably a dozen or more people here who have quite interesting mixed skills. For instance we have a barrister here who was a top level social worker in a hospital then did law and went to the bar. Now she is one — her work as a social worker was dealing with schizophrenic people and their families — so she's really valuable to us in Guardianship — you know she does a lot of the cases that involve people with schizophrenia and that sort of, she's got the legal skills but she's also got the social worker skills. But on other occasions you need specific, really quite specific expertise. For instance we have an accountant here who does Guardianship work. Now we do reviews of administration orders and if we're a bit suspicious or not happy about the state of administration we'll bring the accountant in and he'll go through the figures. Now that's a specialised skill but it's very valuable for us. Likewise we have a coastal engineer. We don't use him very often but if we get a planning case involving a marina or a pier or something like that he'll come and sit so that's a really specialised skill.¹⁷

The absence of similar observations in relation to the ADT may be a reflection of the fact that it does not deal with matters from as diverse a range of jurisdictions as VCAT. However, it may also reflect the fact that VCAT — as a larger Tribunal with more resources at its disposal — is more able to appoint and train members with specialist expertise, knowing they will not be called on to hear matters on a regular basis. This is another example of the way in which VCAT is better positioned than the ADT to take advantage of the economies of scale that amalgamation can bring.¹⁸

¹⁶ The fact that primary responsibility for each Tribunal resides with the Attorney-General of each State is arguably a significant factor in this regard. Compare the perceptions of stakeholders in relation to the Refugee Review Tribunal, whose members are appointed by the Minister for Immigration and Multicultural and Indigenous Affairs — see Bacon, Rachel, *Perceiving the Refugee Review Tribunal: a politico-legal kaleidoscope*, Canberra, 2001, unpublished; Kneebone, Susan, "Refugee Review Tribunal and the assessment of credibility: an inquisitorial role" (1998) 5 *Australian Journal of Administrative Law* 78-96; Harris, Tony, "Here to stay", *Financial Review*, 30 August 2000; Buggins, Anne and Cowan, Sean, "Minister eyes new facilities to hold illegal immigrants", *The West Australian*, 11 February 2001; Haigh, Bruce, "Inhumane approach to victims shames us", *The Australian*, 22 June 2000; Clennell, Andrew, "Libs' \$520-a-day part-timers", *Sydney Morning Herald*, 19 June 2001.

¹⁷ VCAT Senior Member 2 at paragraph 33.

¹⁸ Kellam, Justice Murray, "Developments in administrative tribunals in the last two years" (2001) 29(3) *Federal Law Review* 427-436, at 433.

FULL-TIME VERSUS PART-TIME MEMBERSHIP

One of the most significant organisational factors to emerge from the qualitative data is the importance of striking an appropriate balance between the proportion of full-time versus part-time members appointed to a newly-amalgamated tribunal. The evidence highlights the significant impact this factor has had on the extent to which the ADT and VCAT were characterised by disjunction and cohesion respectively.

There are differences between the ADT and VCAT in the proportion of members appointed on a part-time basis. In addition, there appeared to be a discrepancy in the frequency with which part-time members of each Tribunal would sit.

In relation to the ADT, only two of its members (including the President) were appointed on a full-time basis. There was evidence that, at the time research was conducted, the majority of part-time members did not sit very often:

Some people would be ... half their time would be here — there's a couple like that, not many. Not many have got that big slab — there would probably be only two or three in that category — others are very part-time — they might come in once a month. Others would come much less often than that, especially non-judicial members. Some of them would only come once or twice a year. They would only sit as frequently as that.¹⁹

The high proportion of part-time members appointed to the ADT can be partly explained by the particular requirements of the Legal Services Division. ADT Member 6 noted the difficulties in constituting the Tribunal to hear legal services matters in light of the intention behind the scheme that solicitors and barristers judge their peers. In other words, there are large numbers of members appointed to the Legal Services Division in order to avoid conflicts of interest and perceptions of bias. This subject noted it can actually be quite difficult to constitute Tribunals with members who do not know the professional charged.²⁰ Another ADT subject suggested there would not be enough work

¹⁹ ADT Senior Member 2 at paragraph 57.

²⁰ ADT Member 6 at 37 to 47. These views were reiterated by ADT Member 11 at paragraph 127, who noted the difficulty in finding part-time members who were available to hear matters. This often resulted in delay.

in most divisions to support full-time members, although there were differing views about this.²¹

Whatever the reasons, it is clear that the absence of a core of full-time members has had significant implications for the structure and operation of the ADT. Some of these implications are explored in more detail in Chapter 9, under the heading ‘organisational culture’. In terms of the Tribunal’s administrative arrangements, the absence of full-time members appears to have had a significant impact on the ability of ADT management to develop and retain corporate knowledge,²² organise member training,²³ initiate any kind of performance management system for members,²⁴ and promote consistency in decision-making.²⁵ Other subjects referred to the delay in finalising decisions which can occur when part-time members attempt to fit their ADT commitments around other full-time or part-time occupations.²⁶ ADT Senior Member 2 commented on some of these difficulties as follows:

A. ... well I can understand the rationale for having part-time members. It’s obviously cheaper than having full-time people appointed but I think we could have a couple more full-time people easily because the workload is there and I just think it makes it so much easier to manage and to ensure consistency and a high standard of decision-making when there’s fewer people doing it, whereas now we’ve got such diversity of people and what’s in one person’s head because of their experience isn’t in these other persons’ heads.

...

Q. What do you think the benefits are in having a large part-time membership?

A. Not many.

Q. Does it give you flexibility?

A. Well perhaps in the sense of non-judicial members where we sit with three people — now that’s in Equal Opportunity and in Appeal Panel matters and you

²¹ ADT Member 5 at paragraph 299. ADT Member 6 made similar comments at paragraph 35. Different views were expressed by ADT Senior Member 2 at paragraph 37.

²² ADT Senior Member 2 commented on the challenge of maintaining members’ skills when many would only sit once every six months or so — paragraph 219.

²³ ADT Registry Staff Member 1 commented on the difficulty of organising member training and receiving an enthusiastic response from members when most were part-time and did not sit very often — paragraph 205.

²⁴ ADT Senior Member 2 commented on the difficulty of implementing such a system when all members were part-time — paragraph 187.

²⁵ ADT Member 3 at paragraph 29 commented on the difficulty of ensuring consistency where almost all members are part-time and many do not sit on a regular basis.

²⁶ ADT Member 9 at paragraphs 79 and 83. ADT Registry Staff Member 1 commented on the difficulties that part-time members presented to staff when organising hearings — paragraph 123.

can say well I would like to sit with this person because they have particular expertise — they have a range of abilities there. But not, but that's not, you don't need as many part-time members as we've got to allow you to have flexibility and choice among for the different skills of people that are out there. I mean we've got, I don't know what the exact numbers are, it's somewhere on the website probably, but it's close to 200, something like 180, so I mean that's just crazy really and most of them are legal services members. And I'm not sure, I mean I think that's an historical thing, I'm not sure how it came about, but it just makes it unmanageable. It makes training and all that sort of ongoing thing extremely difficult, so if we want to ever get everybody together we've got 200 people or 150 people.²⁷

The suggestion that the lack of full-time members impacted upon the ADT's ability to facilitate consistency in approach is apparent in the following comments from ADT Member 4:

A. You might in one year [get] three or four decisions on a particular point, adopting completely different reasoning, and apparently in ignorance of each others' reasoning and that's because there's part-time members — we don't get training, we don't get updates, there's no professional development like that — we're just part-time members who are supposed to be doing it ourselves. And I suppose there are other ways to do it, but I have to say that a full-time member there has made such a difference because she knows all that is going on and I can go in and say look, I'm about to be refusing leave to appeal, do you know if anyone else has done it. And she knows. Otherwise I would have had to go looking through decisions myself and I confess I may have not even bothered.

Q. So there's this real co-ordinating role that comes from that?

A. Yes.²⁸

While this subject referred to inconsistency in the outcome of a small number of ADT decisions, this issue was not raised as a significant problem.²⁹ Rather, the concerns raised focused on the challenges involved in co-ordinating improvements in a decentralised environment. A lack of consistency in approach was apparent to non-legal members who have experience in sitting with a range of different legal members:

... because judicial members never sit with other judicial members — they always preside on their own inquiry — so as far as they're concerned the way their

²⁷ ADT Senior Member 2 at paragraphs 37 to 49.

²⁸ ADT Member 4 at paragraphs 105 to 109. Similar comments were made by ADT Member 8 at paragraphs 361 to 367; and ADT Senior Member 2 at paragraph 33. While this issue was commented on by VCAT Member 4 at paragraphs 299 to 303, there was no general sense among VCAT subjects that this was a particular problem for that Tribunal.

²⁹ ADT management has also commented on the efforts that have been made to avoid inconsistency in ADT decisions, including publishing a significant number of decisions on the internet, closely monitoring decisions for consistency, and ensuring that issues are addressed via the ADT's Appeal Panel.

inquiry proceeds is the way it's done. Only other lay members see that other inquiries proceed in sometimes fairly radically different ways ...³⁰

While there was generally no criticism of the quality of ADT decisions, subjects were concerned about a lack of co-ordination regarding the internal workings of the ADT. These concerns were no doubt exacerbated by the fact that many part-time members sat on an irregular basis.

Not all subjects considered that a predominantly part-time membership was a problem for the effective operation of the ADT:

Q. Do you think it would help if there were more full-time members in the ADT?

A. Not necessarily. I think that my experience is that a committed group of part-time members that feel that they are involved, that their decisions are being taken into consideration, that are being used, that [it's] not necessarily a problem to be a part-time Tribunal.³¹

In fact, ADT Member 8 considered there would be disadvantages in having non-legal members with specialist skills being appointed on a full-time basis — namely, the increased difficulty in maintaining those expert skills.³² Similarly, ADT Member 9 considered that a predominance of part-time members reduced the risk that users of the Tribunal would get a “sense” for the way in which particular members approached certain types of matters, thereby reducing the phenomenon of “jockeying” for certain members.³³

Overall, however, the majority of ADT subjects would have preferred to see more full-time members on the Tribunal. This view is summed up by ADT Senior Member 1 as follows:

Fairly obviously I think you're better off, even in a small Tribunal, like this, with a greater proportion of your resources being in a full-time category. I mean, you do need part-time members in these sorts of structures, but — and I don't think you want to go to exclusively full-time either. But it would be better for cohesion in

³⁰ ADT Member 8 at paragraph 371. Note that, while various measures had been adopted within the ADT for the purposes of promoting consistency in the outcomes of decisions — including the development of a members' manual, the publication of decisions and the use of the Appeal Panel — these initiatives appear not to have had a significant impact on the experience of some members at the time data were collected.

³¹ ADT Member 7 at paragraphs 307 to 309.

³² ADT Member 8 at paragraphs 173 to 179.

³³ ADT Member 9 at paragraph 67.

this place probably if it had two or maybe three full-time people, because you can certainly run two of them — two or three of them across General Division, Equal Opportunity, and probably Legal Services, then you could probably stick with part-time for Retail Leases.³⁴

Unsurprisingly, this issue was less pressing for VCAT subjects. As well as having a greater proportion of full-time to part-time members, there was greater emphasis within VCAT on encouraging sessional members to sit on a regular basis, unless they were specialist members appointed for the purpose of sitting on discrete types of matters. VCAT Senior Member 2 noted VCAT management's expectation that part-time members who sat alone would sit "in the territory" of one day a week.³⁵

For these reasons, there seemed to be greater interaction and collegiality among the sessional members of VCAT:

We're happy to be here part-time and we're not burdened by the politics of being here full-time. We come in here and we enjoy each other's company. Plus the 10 that are here every day that are different — they're not the same 10 so they'd be different. There's probably a List of 30 or 40 [in] Residential Tenancy and Civil Claims ... and we know each other.³⁶

A number of other subjects commented favourably on the collegiality and administrative support they received as sessional members of VCAT.³⁷ This appeared to be influenced by the fact that each of these members sat on a fairly regular basis.³⁸ Other reported benefits of part-time membership included the greater flexibility this gave VCAT management in terms of mobilising resources, as well as the increased opportunities to appoint members with specialist expertise.³⁹

It is argued that the benefits of sessional members were better able to be realised within VCAT because there was a core of full-time members and Deputy Presidents to help

³⁴ ADT Senior Member 1 at paragraph 161.

³⁵ VCAT Senior Member 2 at paragraph 149.

³⁶ VCAT Member 3 at paragraphs 89 to 93.

³⁷ VCAT Member 4 at paragraphs 23 to 41 and 103 to 105; VCAT Member 5 at paragraphs 161 to 163; VCAT Member 6 at paragraph 137; VCAT Member 8 at paragraphs 91 to 93.

³⁸ VCAT Member 4 at paragraph 273; VCAT Member 3 at paragraphs 95 to 97; VCAT Member 5 at paragraphs 79 to 87; VCAT Member 6 at paragraphs 103 to 109; VCAT Member 8 at paragraph 85.

³⁹ VCAT Senior Member 2 at paragraph 141. VCAT Registry Staff Member 1 also referred to the increased flexibility that part-time membership can provide — at paragraph 277.

drive initiatives and assist in the development of a cohesive, Tribunal-wide culture. The evidence demonstrates that the rapid rate at which VCAT developed into an integrated organisation could not have occurred without members and staff whose primary commitment was to VCAT. Indeed, a number of VCAT subjects spoke positively about the range of opportunities available for members and staff to interact and discuss common experiences, and to seek advice from more experienced or more senior members. Such opportunities would have been significantly reduced if most members were part-time.

Thus, the data collected suggest there is an important balance to be struck between the proportion of full-time versus part-time members appointed to a tribunal. Julian Disney has argued that:

... the appointment of part-time members can be of great benefit to a tribunal. It greatly broadens the pool of high-calibre lawyers, and more especially non-lawyers, who may be willing to seek and be suitable for appointment ... [and] reduces the risk of tribunals being dominated by members who have a relatively narrow background or become tightly focused on the internal life of their particular tribunal.⁴⁰

The VCAT experience certainly bears this out. However, the experience in NSW makes it clear that the benefits part-time membership can bring will be undermined without an adequate core of full-time members. The experience of both Tribunals highlights the importance of a core of full-time, or at least regular part-time, members who can promote interaction between members and staff and the flow of information throughout an amalgamated Tribunal. This, in turn, creates opportunities for management to promote a common vision and implement improvements throughout an amalgamated tribunal, as well as facilitating greater consistency in approach. These are some of the key reasons for amalgamating in the first place.

⁴⁰ Disney, Julian, *Reforming the administrative review system — for better or for worse, for richer or for poorer: law and public policy paper no. 6*, Centre for International and Public Law, Canberra, 1996, at 12, quoted in Swain, Phillip, *Challenging the dominant paradigm: the contribution of the welfare member to administrative review tribunals in Australia*, 1998, unpublished, at 223.

CROSS-APPOINTMENTS

Another distinction between the administrative arrangements in place in the ADT and VCAT is the number of cross-appointments made in each Tribunal. The practice of cross-appointing members is far more common in VCAT. It was noted in Chapter 7 that the ability of the ADT President to appoint members to more than one division was restricted in relation to divisions not falling within the Attorney-General's portfolio. Moreover, it seems the limited availability of many part-time members and the smaller number of jurisdictions covered by the ADT limited the ability of tribunal management to cross-appoint.⁴¹

There were fewer restrictions on VCAT management in this regard. A number of benefits, particularly in relation to cultural change, were deliberately sought by VCAT management through a policy of making cross-appointments wherever possible:

Q. In terms of how the Tribunal actually operates, I've spoken to a number of members, it seems like a number are actually cross-appointed to different lists in the Tribunal. Is that a deliberate policy?

A. Yes.

Q. What's the reason for that?

A. Cultural change. The benefit of ... well I would see that as the principal one. Shared cultures. I think a secondary but also important aspect is multi-skilling people and giving them job satisfaction I think that's really important, but the most significant reason is I think that it's very important for these places that have their own very individual cultures, some of which have been built up over 20 years, to experience different attitudes. I think that's happened.⁴²

A number of VCAT subjects reported positive experiences arising from VCAT's cross-appointment policy. For instance, VCAT Member 1 originally had reservations about the impact of cross-appointment to the Guardianship List, but was pleasantly surprised by the way in which cross-appointed members had adapted to the requirements of that jurisdiction.⁴³ The same subject cited examples of members subsequently

⁴¹ ADT Senior Member 2 at paragraph 219; ADT Senior Member 1 at paragraphs 163 to 169.

⁴² VCAT Senior Member 2 at paragraphs 119 to 125.

⁴³ VCAT Member 1 at paragraphs 43 to 51.

identifying guardianship-related issues when hearing matters in other lists.⁴⁴ Similar experiences were reported by VCAT Member 3:

I think that also sitting across lists helps you to identify maybe different personality types or different issues. You say I wonder if that could be a guardianship issue because sometimes in residential tenancies we get cases where we say I wonder whether the Office of Public Advocate can help out here or whether this is an issue for a guardianship order because especially in residential tenancy you get a lot of people who are ... elderly and people with disabilities and they can also come under the umbrella of the Guardianship List so I guess being in Guardianship you recognise the possibility of having this outside help for those people.⁴⁵

Other subjects simply referred to the enjoyment and satisfaction, and greater career opportunities, they derived from the challenge of sitting across a number of jurisdictions:

There's still plenty to learn. I'm certainly not in a position that, I mean, that's one thing with those cross-appointments to different tribunals too and having to deal with as many jurisdictions as I do is that you never get bored as you would doing the same thing over and over again. I think you get a bit stale [doing that].⁴⁶

While cross-appointment was far less frequent in the ADT, the benefits of cross-appointing members were nonetheless referred to by ADT subjects. In particular, subjects reported advantages such as greater member satisfaction, the breaking down of cultural barriers that arose upon the merger of a number of specialist tribunals, and updating members' skills by assisting them to sit more frequently. As articulated by ADT Registry Staff Member 1:

There are a number of Legal Services solicitors that when we got the Retail Leases we canvassed about whether they had retail lease experience. They have been cross-assigned, so there have been some quite successful things and I mean I think they've found it a bit more interesting. A lot of them have been on whatever tribunal they've been appointed to for 10 years and at least [it's] something a bit more interesting. Plus also because there's so many members that a lot of them weren't getting very much work because in terms of equitably handing this stuff out some members are lucky if they sit once a year which isn't very good for them and it isn't very good for us either in terms of them being familiar with what they are doing if they only sit so irregularly and the kind of mix of tribunals was quite different. The Community Services Tribunal was a very informal, round table, low [one level] thing whereas the Legal Services Tribunal sat like the Supreme

⁴⁴ *Ibid.*, at paragraph 123.

⁴⁵ VCAT Member 3 at paragraph 173.

⁴⁶ VCAT Member 4 at paragraph 257. Similar sentiments were expressed by VCAT Member 5 at paragraph 147. See also VCAT Senior Member 1 at paragraphs 115 to 129; VCAT Senior Member 3 at paragraph 73; VCAT Member 2 at paragraph 123.

Court and so the kind of resistance to being one tribunal was there and certainly cross-appointing of people has helped with that as well.⁴⁷

For these reasons, a number of ADT subjects commented that they would like to see a greater number of cross-appointments in the ADT.⁴⁸ While ADT Member 4 considered that members could get broader experience by sitting on tribunals other than the ADT,⁴⁹ the general consensus was that the ADT itself was limiting in this regard. In contrast, the policy of cross-appointing VCAT members wherever possible has resulted in greater member satisfaction as well as more effective organisational performance. This is another example of the way in which organisational structure can enhance or diminish the opportunities for an amalgamated tribunal to develop to its full potential.

SPATIAL ISSUES

An equally important factor to emerge from the data is the physical layout of a newly-amalgamated tribunal, and the extent to which members from different divisions or lists have access to shared spaces in which they can interact. The evidence demonstrates that a considerable amount of thought was given in Victoria to what needed to be done in order to construct an integrated tribunal, and the ways in which building layout could contribute to this outcome. In particular, mixing up the physical locations of members from the former specialist tribunals was used as a way of breaking down the cultural barriers that had arisen in the transition from specialist to generalist tribunal. VCAT Member 4's comments support this proposition:

A. Did you see the members' room on the sixth floor?

Q. I haven't seen that, no. Is that ...

A. Well that's our common room and there's a huge, long table and everyone in the Civil and Residential Lists sits there in the morning in between cases and stuff like that. So you can always convene what we call a, you know, convene a 'full bench' at any time. ... You know you might get a full bench and everyone's got a separate judgment on it, but all that shows you is that that is a grey area.⁵⁰

⁴⁷ ADT Registry Staff Member 1 at paragraph 143.

⁴⁸ ADT Member 1 at paragraph 157 to 159; ADT Member 3 at paragraph 45.

⁴⁹ ADT Member 4 at paragraph 81.

⁵⁰ VCAT Member 4 at paragraphs 113 to 117.

The experience of the amalgamation in NSW is an even clearer indication of the importance of spatial issues in establishing an integrated tribunal. When commenting on the disjunctive nature of the ADT a number of subjects noted that no part-time members had offices at the ADT premises.⁵¹ At the time research was conducted, there was only a members' common room for use by members sitting on a given day. Some subjects commented unfavourably on the apparent lack of interest in resourcing or rewarding members which this arrangement displayed. It was felt that interaction among ADT members would not improve while the vast majority of members were part-time and did not even have offices on the Tribunal's premises:

A. The fact is we are all part-time appointees with other incomes; we only ever go in in order to do our job. There's no physical facilities for us to stay there otherwise, there's no room. You've got to get out when you're finished.

Q. There's no offices or anything?

A. No, no. We've got a large table that we can all sit around, so there's ... there just isn't room to hang around if you wanted to. We all have other work to do, so yes, I think that's probably the major barrier. No matter how hard they try, you can't get past that.⁵²

The existence and arrangement of office space will not be a conclusive factor in determining whether or not an amalgamated tribunal will develop into a cohesive, integrated organisation. Nonetheless, the qualitative data indicate that factors such as the constitution of a tribunal's membership and the availability of spaces in which members can congregate will have an impact on the 'geography' of the daily operations of a tribunal. Attention should be paid to these details, as well as to other relevant factors such as the regularity of patterns of sittings, the amount of investment in collective training, the frequency of 'team' meetings and the degree of informal interaction. If this is done, a newly-amalgamated tribunal stands a far better chance of becoming more effective than the sum of its parts.

⁵¹ Note that this was the situation at the time data were collected. The author understands these issues have since been addressed.

⁵² ADT Member 4 at paragraphs 85 to 89. Similar comments were made by ADT Senior Member 2 at paragraph 199, and ADT Registry Staff Member 1 at paragraph 249.

IMPROVEMENTS IN PROCESSES AND PROCEDURES

The final element to explore in considering the contribution that organisation can make to the effectiveness of an amalgamation is the processes and procedures that are put in place within a new tribunal. In particular, the extent to which existing processes are improved or new initiatives developed is indicative of the success or otherwise of an amalgamation process.

The ADT and VCAT use a wide range of processes and procedures in carrying out their functions. However, the most pertinent example of the impact of amalgamation on the processes of each Tribunal are the subsequent developments that have taken place in relation to ADR. In many ways the ADR processes established within the ADT and VCAT following amalgamation are a microcosm of the extent to which the amalgamation in each State facilitated the introduction of improved practices. This, in turn, reflects the success of each amalgamation in achieving optimal tribunal reform.

Both the ADT and VCAT Acts emphasise the use of ADR processes. A number of subjects commented favourably on the level of emphasis placed on ADR in practice,⁵³ and the results that were being achieved as a consequence. Some ADT subjects noted the growth of mediation within the ADT. While an early study conducted in 2000 found that “pre-hearing processes, including ADR, did not feature strongly”⁵⁴ in the ADT, ADT Member 2 commented favourably on the more formalised use of mediation within the amalgamated Tribunal.⁵⁵ In addition, ADT Senior Member 2 commented on the benefits of case conferencing — a process which had been introduced post-amalgamation:

That’s been going on probably 18 months or so and it’s very successful, because rather than, we used to have directions where they were all lined up out the door waiting their turn, and they would be told, yes, 28 days to lodge points of claim, 28 points of defence, affidavits, da de dah, and these people would be going — what is it? And no chance to say this is really unfair and why didn’t they do this, so you

⁵³ See, for instance, ADT Member 1 at paragraph 47.

⁵⁴ Ellis, Elizabeth, “Promise and practice: the impact of administrative law reform in New South Wales” (2002) 9(3) *Australian Journal of Administrative Law* 105-124, at 116 and 117.

⁵⁵ ADT Member 2 at paragraphs 29 to 33. These comments were echoed by ADT Member 3 at paragraphs 159 to 169. In contrast, ADT Member 4 did not consider that the amalgamation had made any difference to the extent to which ADR was used in the Equal Opportunity Division — paragraph 145. Similar comments were made by ADT Member 7 in relation to the Community Services Division at paragraphs 395 to 401.

get no I mean many times whether it's equal opportunity or other matters, people haven't ever spoken face-to-face or haven't for years, so in getting to a case conference and you can get them talking to one another, so that can be quite useful. And so that's been a change.⁵⁶

While it apparently took some months or years for ADR developments within the ADT to gain momentum, positive outcomes were beginning to be achieved at the time data were collected for this thesis.

Even so, there was a significant difference between the extent of developments in NSW and the emphasis placed on the use of ADR processes within VCAT. A number of VCAT members commented favourably on the marked increase in the use of mediation within that Tribunal. For instance, VCAT Member 2 noted that mediation is “really starting to be a feature of VCAT, and also the unique thing about VCAT is that it's done in-house so it doesn't cost the parties any money.”⁵⁷ VCAT Member 5 commented on the success of mediation in the Anti-Discrimination jurisdiction, where ADR techniques had not been used in any formal sense prior to amalgamation: “mediation is proving to be extremely successful and so not as many matters are going on to hearings these days”.⁵⁸ VCAT Senior Member 3 described the benefits of the increased use of mediation within VCAT as follows:

A. But the fact of life here is that mediation is being used increasingly because it works. Users of VCAT like mediation; there are very, very few complaints about mediation. It saves, it is extremely cost-effective for two reasons. One is a matter can often be resolved at mediation which would take four or five days at a hearing, and secondly there's a considerable saving if a member does not need to write a written decision, and writing written decisions is very time-consuming.

Q. So this initiative has resulted in efficiencies which may not have otherwise been achieved?

A. Indeed. For example the cost of running the Anti-Discrimination List now would be way below the cost of running the Anti-Discrimination Tribunal — the pre-existing Anti-Discrimination List/Tribunal — because of the success of mediation over the last two to three years.⁵⁹

⁵⁶ ADT Senior Member 2 at paragraph 149.

⁵⁷ VCAT Member 2 at paragraph 99.

⁵⁸ VCAT Member 5 at paragraph 31. See also Kellam, above n 18, at 433. According to VCAT Member 6, the success rate of mediation in the Planning List was around 80% — at paragraphs 19 to 21.

⁵⁹ VCAT Senior Member 3 at paragraphs 121 to 125.

All the evidence suggests that the amalgamation in Victoria provided a number of specialist tribunals with an opportunity to trial and adopt ADR processes which they had not previously experienced. This had obviously led to improvements in a number of jurisdictions.

In contrast to the ADT, the data indicate that VCAT management took a more structured, considered approach to the use of ADR within VCAT. The perception of VCAT Senior Member 3 was that the amalgamation and the co-ordinated approach to the introduction of mediation had facilitated its adoption, whereas this may not have occurred in a smaller tribunal:

A. One advantage of this larger kind of tribunal is that an extremely important way of dealing with matters — that is mediation — has I think spread in various ways through the Tribunal. That process is not complete but it could not have occurred, certainly not in the same way and in the relatively short time that it has, had the pre-existing bodies remained separate.

Q. And why do you say that? What makes that difference?

A. Well because members talk to each other about how they're dealing with matters, because mediators talk about their work, because there's a mediation newsletter, because there's a principal mediator who is a focus for various kinds of discussions — for example inviting in-guest speakers — the profile if you like of mediation, mediation within this Tribunal has a profile. In some of the pre-existing bodies it had no profile. People working in lists where mediation has had no profile have had I think to ask themselves, "well does mediation have a role in this list?" In the Planning List for example, mediation has gone from two or three per week to about 15 to 20 per week in a short space. In the pre-existing Anti-Discrimination Tribunal there was no mediation. Cases, matters were continually being heard, and, as an aside, they were being heard by three-member panels. With VCAT the number of anti-discrimination cases going to hearing has dramatically fallen, very, very few cases go to hearing in the Anti-Discrimination List now. Almost all matters are referred to mediation, and mediation in the Anti-Discrimination List has about a 70% success rate, and then further matters settle after mediation and before the scheduled hearing date.⁶⁰

CONCLUSIONS

The above discussion highlights differences in the extent to which the management of each Tribunal took advantage of the opportunities that amalgamation afforded to improve existing practices and introduce new initiatives. This is not to say there were no procedural improvements in the ADT post-amalgamation — on the contrary, a number of ADT subjects commented positively on developments such as a members' manual,

greater administrative efficiency and the introduction of case conferencing. Rather, the difference lies in the degree to which amalgamation was used as an opportunity to overhaul existing practices. VCAT's experience in relation to ADR demonstrates the benefits that can be gained when Tribunal management takes a multi-faceted, strategic approach to the implementation of new procedures.

The developments in relation to ADR lend support to the more general proposition that VCAT was more successful than the ADT in conceptualising and capitalising upon a range of structural and procedural arrangements after amalgamation. Not only did the management of VCAT have more authority to determine the Tribunal's administrative arrangements, but they also had the resources to develop and implement new initiatives effectively. The comparative lack of control and resources available to ADT management appears to have significantly undermined its ability to build a strong organisational framework on the foundation of the ADT Act, at least in the initial years of its operation.

The consequences of this are particularly apparent when comparing the extent to which the ADT and VCAT set new standards and took advantage of the greater efficiencies that amalgamation can bring. These themes are further explored in Chapter 9. Yet before embarking on this discussion, it is important to first explore the fourth key ingredient in a successful amalgamation process: people and organisational culture.

⁶⁰ *Ibid.*, at paragraphs 105 to 109. These comments were echoed by VCAT Member 5 at paragraph 63.

CHAPTER 9: PEOPLE AND CULTURE — THE ADT AND VCAT COMPARED

One of the benefits of collecting data from members and staff of amalgamated tribunals is the opportunity this affords to gain insight into the role of organisational culture and people in the success or otherwise of an amalgamation process. The first part of this Chapter examines the data collected about the nature of the organisational culture that has developed within the ADT and VCAT after amalgamation. It describes the level of interaction between members, which is both a manifestation and an underlying cause of the different cultures that have developed within each Tribunal. More generally, it examines the degree of disjunction and cohesion that characterises the ADT and VCAT respectively.

The Chapter then goes on to analyse the key features of each Tribunal that have caused its culture to develop in a particular direction. These include the presence of a core of full-time members, the availability of common spaces within which members can congregate, and the emphasis that management has placed on introducing deliberate initiatives designed to achieve particular cultural outcomes. Finally, there is an examination of the role that people and leadership have played in success or otherwise of the amalgamation process in each State.

The proposition put forward in Chapter 4 was that an organisational culture which fosters communication and high morale will better enable a newly-amalgamated tribunal to capitalise upon the opportunities that amalgamation provides. More specifically, an amalgamated tribunal with a cohesive culture will be more effective in implementing new initiatives, encouraging appropriate consistency across divisions or lists, and gaining the commitment of members and staff to its success.

This proposition is borne out by the experiences of the ADT and VCAT. The research suggests that, while individual people can play a significant role in smoothing the transition from specialist to generalist tribunal, their absence is not necessarily fatal. However, careful attention must be paid to the nature of the organisational culture that

develops within an amalgamated tribunal. The central role this has played in VCAT's success, and the keenly felt absence of a cohesive organisational culture among ADT members, indicates the importance of this factor to a successful amalgamation process.

THE ORGANISATIONAL CULTURES WITHIN THE ADT AND VCAT

There are numerous features of an amalgamated tribunal that could be explored in order to gain insights into its organisational culture. In the context of this thesis, data have been collected about the level of interaction between the members of each Tribunal. As well, data have been collected about the degree of disjunction and cohesion that characterises their operation — in other words, the extent to which processes are integrated, and knowledge and ideas shared. An examination of these issues reveals significant differences between the organisational cultures that developed within each body post-amalgamation.

The data also highlight the interplay between the way in which an organisation operates, and its culture. In other words, features such as the level of interaction between members are both a manifestation and an underlying cause of the organisational culture within an amalgamated tribunal. This indicates that, far from being an inexorable given, organisational culture is something that, to some extent, can be controlled and engineered with positive effect.

Interaction between members

There was a contrast between the absence of any significant interaction between ADT subjects, and the collegiate atmosphere that had been fostered within VCAT. The perception of most ADT subjects was that there was a distinct lack of member interaction — both within and between divisions. According to ADT Member 4:

... because we're all part-time and we rarely see each other, and because judicial members never sit together, so you have no effective, you can't, you're not sharing the work in that way. You're only passing each other in the members' rooms. We're probably not getting as much benefit from being around differently thinking people. If I'm sitting in the members' room and the Legal Services Tribunal adjourns and they come in, we'll go up and say hello, but that's as close as it gets unless I'm friendly with them and in which case we chat about the weekend. So

there's ... I don't know whether that's a management ethos or a legacy of us all being part-time, but there's no real merger there.¹

ADT Member 5 expressed a similar view:

Q. What about other members? Do you find that you have much to do with other members in other Divisions?

A. No, nothing at all. They're all lawyers. Oh there's the Community Services people, but I've never ... I know one of them independently of this place, but there's no interaction whatsoever.²

Some subjects had even experienced a lack of appropriate interaction with registry staff and Tribunal management. ADT Member 7 was particularly concerned about the lack of contact with people from the ADT in any formal, administrative sense:

A. I actually was involved in a decision that was very, very controversial and very difficult and the decision was overturned and I found out because I met somebody in the street who told me.

Q. So it was overturned in the Appeal Panel or in the court?

A. In the Appeal Panel.

Q. And you didn't have communication?

A. I didn't have any communication from the Tribunal.³

In this subject's experience, there had been a lot more interaction among members and staff before the amalgamation.⁴ ADT Member 10 expressed similar views about the Legal Services Division:

There used to be a very cosy, collegiate atmosphere at the Legal Services Tribunal. I knew everyone, we got together and discussed issues. That doesn't happen now. There has been perhaps one meeting since we became a Division, where the whole Division has met and discussed issues. The same thing has happened in the Retail Leases Division — there has only been one meeting there since the Division began.⁵

Similarly, ADT Member 8 commented:

A. ... you had just more social interaction previously. And where are you, when you're in the members meeting room up here now, and if you've somebody from Legal Services, and somebody from Community Services you can't really have a big chat because they're working so you'd just disturb them because they're there

¹ ADT Member 4 at paragraph 81.

² ADT Member 5 at paragraphs 257 to 259.

³ ADT Member 7 at paragraphs 121 to 129.

⁴ *Ibid.*, at paragraphs 141 to 149.

⁵ ADT Member 10 at paragraph 68. ADT Member 8 expressed similar views at paragraph 59.

to work, whereas before you could chat more at lunch. In fact I think it was quite typical for members to just have a big full chat about the cases they'd been sitting on.

Q. But that doesn't happen so much now?

A. Not so much, no.⁶

ADT Member 9 noted there had been attempts in some divisions to facilitate greater interaction among members:

I mean there are some attempts made to get around it, like Meagan Latham who is the head of the Equal Opportunity Division, you probably know she's on the District Court, she organises these sort of 'regularish', but probably not regular enough, meetings of all the members to talk about some really common things about procedure and how things should be adopted and for example we've just spent a long time going through and getting everyone to say this is our approach to case conferences, this is what we do, this is the sort of material we're requiring ...⁷

However, while ADT Member 9 considered that these meetings provided a valuable opportunity to learn from other judicial members in the Equal Opportunity Division, this initiative had not been implemented in other divisions. ADT Member 11 was particularly critical of the lapse in member meetings in the Legal Services Division since the amalgamation.⁸

While decreased interaction among Tribunal members may well be inevitable when the number of members rises sharply as a result of amalgamation, this phenomenon was experienced much less by VCAT subjects. One or two VCAT members noted there had been less formal interaction among members since the amalgamation — in particular, because it was more difficult to organise members meetings and arrange training days with larger numbers of members. For instance, VCAT Member 2 noted that the Residential Tenancies List was only able to organise member meetings twice a year, whereas the former Tribunal had met every six to eight weeks.⁹ A similar change was

⁶ ADT Member 8 at paragraphs 391 to 395.

⁷ ADT Member 9 at paragraph 91.

⁸ ADT Member 11 at paragraphs 161 to 175.

⁹ VCAT Member 2 at paragraph 179.

reported in the Anti-Discrimination List, due to the increased number of members and the “sheer size of the place” after amalgamation.¹⁰

Aside from this, almost all VCAT subjects were overwhelmingly positive about the collegiate atmosphere that had been created within the Tribunal, and the benefits that flowed from this. The vast majority commented on the value of the informal interaction among members which they experienced on a regular basis, including with members from different lists. For instance, VCAT Member 2 commented:

A. See, we’re here co-located here with Domestic Buildings and also Anti-Discrimination — they’re also on the 6th floor, so quite a few people have got appointments also to Domestic Building and Anti-Discrimination and they’ll come and go. They might have a cup of tea in at Anti-Discrimination and then come across and have a cup of tea here.

Q. So do you find that there’s opportunity to discuss different members’ experience in different lists?

A. Oh yes, sure.

Q. And is that a good thing from your perspective? Are you able to learn from perhaps different procedures or different approaches of members in other lists?

A. Probably to some extent yes. Certainly if you’ve got a specific question you might discuss with a member who in answering that would bring — I mean everybody brings their lifetime experience don’t they to the problem. It’s very good to have people from a lot of different backgrounds I think.¹¹

A number of subjects referred to other benefits which flowed from the high level of interaction among members, including a greater degree of consistency in decision-making. This was perceived to be enhanced by the ability of members to gather and debate issues.¹² In VCAT Senior Member 3’s experience:

I think what I would refer to is the discussions that go on if you like behind the scenes between members who principally work in different lists. Say on an issue like costs where, if there’s a costs application at the end of an Anti-Discrimination List hearing, I can seek advice informally from a range of people across different lists, and I’ve done that, and it’s very helpful, so there may be a view which tends in a certain direction among people who generally work in the Anti-Discrimination List — there may be a different view about when it’s appropriate to make a costs

¹⁰ VCAT Member 5 at paragraph 67.

¹¹ VCAT Member 2 at paragraphs 75 to 83.

¹² VCAT Member 2 at paragraph 183; VCAT Member 6 at paragraph 129; VCAT Member 8 at paragraph 93; VCAT Senior Member 1 at paragraphs 87 to 91.

order from people who work in the General List. Now I think over time there's probably a useful convergence emerging on that issue. Convergence of ideas.¹³

VCAT Senior Member 2 considered that the opportunities to learn from other members' experience had increased considerably as a result of amalgamation, leading to improvements in the organisational culture of tribunals in Victoria generally:

I think too an isolated tribunal with a small number of people might have its own culture, but it might not be a very good culture, and I think in a large organisation there's more peer group pressure I think, but also the judges are here sitting with people quite regularly, so they're seeing very experienced judges mostly. ... I suppose between the judges [there is] 50 years experience here.¹⁴

Unlike the experience in NSW, there was certainly no indication that VCAT subjects felt isolated or lacking in support. VCAT Member 3's experience was consistent with the experience of most other subjects:

I find it quite enjoyable to have the interaction with the other members and we're all pretty good friends. I think we are. I enjoy exchanging views.¹⁵

VCAT Member 4 made similar comments:

... with very few exceptions, everyone gets along extremely well. If someone's unwell or their parents, if someone has a death in the family or something, there's always a whip-around, or a congratulation ... there's quite a cohesive supportive atmosphere.¹⁶

There was even a sense of collegiality between registry staff and members — something which can be rare in a tribunal context where there is often an 'us/them' division between members and staff. VCAT Registry Staff Member 1 felt that "we do operate as a single unit and that we have a single purpose and that we have a real family."¹⁷

The significant differences between the levels of interaction within the ADT and VCAT reflect a contrast between the organisational cultures that developed within each Tribunal following amalgamation. In relation to the ADT, it could be argued that the lack of

¹³ VCAT Senior Member 3 at paragraph 45. See also VCAT Member 3 at paragraphs 61 to 69.

¹⁴ VCAT Senior Member 2 at paragraphs 63 to 67.

¹⁵ VCAT Member 3 at paragraph 57.

¹⁶ VCAT Member 4 at paragraph 125. See also VCAT Member 5 at paragraph 159, who noted that members often shared experiences and views on a casual basis, over a cup of coffee. Similar comments were made by Registry Staff Member 1 at paragraph 143.

¹⁷ VCAT Registry Staff Member 1 at paragraph 143.

meaningful communication and contact between members reflects a disjunctive institutional culture which is itself a barrier to attempts to engender a more cohesive, supportive atmosphere. In VCAT, on the other hand, the existence of supportive and frequent interaction across lists is both a manifestation of the Tribunal's organisational culture, and a tool that management can use in implementing improvements. These conclusions are reinforced by the following, more detailed, analysis of the organisational culture that characterises each Tribunal.

The ADT as a disjunctive organisation

There is no doubt the ADT subjects interviewed perceived the ADT to be a disjunctive organisation — more a collection of individual divisions with their own cultures and practices than a cohesive organisation with a shared vision. This is highlighted by the lack of interaction between divisions, members and staff within the ADT, explored above. Lack of cohesion was the strongest feature to arise out of discussions with subjects about the organisational culture that existed within the ADT. Indeed, the majority of subjects had no sense of a Tribunal-wide culture being developed post-amalgamation.

Many ADT subjects used words such as “disparate”, “fragmented” or “a sum of its parts”¹⁸ to describe the way in which they perceived the Tribunal as a whole. In general, ADT Member 7 felt the ADT was more like a series of relatively autonomous parts than a cohesive body:

Q. When you think about the ADT as an organisation, do you have a sense that it's a unified kind of an organisation or ... ?

A. No, it doesn't feel like that at all.

Q. How do you perceive it?

A. No I perceive it like it a series of groups that are together for an administrative purpose, but that's it, right.¹⁹

¹⁸ See, for instance, ADT Member 6 at paragraph 69; ADT Member 10 at paragraph 72; ADT Member 1 at paragraph 17.

¹⁹ ADT Member 7 at paragraphs 211 to 217.

Similarly, ADT Member 4 commented:

Oh, we all operate separately. We have nothing, the divisions have very little to do with each other, and that, I don't know whether that's been a conscious decision or that's just how we've done it. I'm one of the few who sits across jurisdictions ...²⁰

ADT Member 1 considered that the ADT “is composed still of a number of sub-tribunals”.²¹ In support of this view ADT Member 1 referred to the fact that different portfolio ministers retain responsibility for appointment of members to particular divisions, and that there is no “overall minister for the Tribunal”.²²

A. It has a fragmenting impact. I think it's an impossible situation and I think it's got to stop.

Q. Yes, so ... would you say that it, does it feel relatively decentralised and not cohesive?

A. Not cohesive. There's a physical building and the judge, the President has sensitivity to these issues and understands the difficulties and is trying quite hard to effect that change in culture but it isn't easy to do.²³

Subjects often found it easier to describe the institutional culture of their particular divisions than to identify an institutional culture which existed Tribunal-wide. For instance, in relation to the culture of the Legal Services Division, ADT Member 6 remarked: “it's not as formalised and ritualised as the court is, but it's only a little bit downstream of a court.”²⁴ ADT Member 9 also commented on the different levels of formality between divisions:

They've got very different styles, all of the divisions, partly because ... well I suppose particularly the Equal Opportunity Division and the Community Services Division because they were very stand alone tribunals with very different styles and attitudes — on the issue of formality and how parties were dealt with in proceedings.²⁵

²⁰ ADT Member 4 at paragraph 29.

²¹ ADT Member 1 at paragraph 5.

²² *Id.*

²³ *Ibid.*, at paragraphs 17 and 25 to 27.

²⁴ ADT Member 6 at paragraph 91.

²⁵ ADT Member 9 at paragraph 31. ADT Senior Member 1 similarly referred to the necessary cultural distinction between the Legal Services Division and other divisions within the Tribunal — at paragraphs 117 to 119.

ADT Senior Member 2 made similar comments:

Legal Services for example is very much more formal than General Division even, and it varies among Tribunal members as to how formal they are, what style they've got. So I think we have, it does lead to a situation, amalgamation leads to a situation where you over time become more uniform among divisions in what you do, especially if you've got people sitting across divisions. But there are still very inherent, quite strong cultural values that people have from the old tribunals and they continue.²⁶

Another cultural distinction perceived to persist within the ADT was the distinction between legal and non-legal members.²⁷ One example given concerned the low level of participation of lay members in the Equal Opportunity Division, where a legalistic approach appeared to be dominant: "the culture in the Equal Opportunity Division was very much judicial was king."²⁸ In relation to the Community Services Division, ADT Member 7 commented: "I think that actually also I believe it [the ADT] is very much in the hands of the legal members who are the ones who are running the agenda".²⁹

It could be expected that the ADT will develop a more cohesive institutional culture over time. Indeed, some ADT subjects considered an institutional culture had begun to develop at the ADT, but that it was at a very formative stage:

Q. As it is do you get the sense that there is an institutional, an ADT institutional culture developing?

A. I think it's developing, but I certainly wouldn't regard it as well-developed at this stage. There are still differences between the various divisions, but yes, I think it's moving in that direction. I think having members sitting across divisions more would help that so, there's a bit of that goes on but I think it would have been better if there was more of that.³⁰

ADT Registry Staff Member 1 considered ADT management was conscious of the desirability of developing a cohesive Tribunal-wide culture, and that this had started to occur in some areas:

I think the Legal Services Division still would think they have a legal services culture. I suspect that the others, I would hope that the other divisions felt more

²⁶ ADT Senior Member 2 at paragraph 105.

²⁷ ADT Member 5 at paragraphs 313 to 319; ADT Member 8 at paragraphs 43 to 47 and 111 to 115; ADT Member 9 at paragraph 119; ADT Member 10 at paragraph 32.

²⁸ ADT Member 9 at paragraph 35.

²⁹ ADT Member 7 at paragraph 49.

³⁰ ADT Member 3 at paragraphs 43 to 45.

that they were part of one Tribunal than not. I think that certainly the staff by and large no longer feel that they're attached to any one particular spot.³¹

There even were one or two subjects who sat across a number of divisions, or who were involved in the management of the Tribunal, who were able to identify some elements of an 'ADT culture'. For instance, ADT Member 9 commented:

I wouldn't think that I'd put it as high as saying you know there's common vision. But some of the fundamentals are common — that it's accessible, that it's appropriately structured to allow self-represented litigants to participate or at least we're mindful of the problems they have in participation, that the language is user-friendly, so if you look at the material that goes out to people. We try to avoid directions, so we're dropping directions hearings across the board, so we're now talking about case conferences, planning meetings where you have intelligent discussions about what file and serve means. So that's a common practice which has been introduced across the Tribunal — the idea of decisions being a bit user-friendly ...³²

However, unlike the experience of VCAT subjects, any sense that the ADT was beginning to evolve into a cohesive organisation with its own culture had not permeated throughout the Tribunal at the time that data were collected — some four years after amalgamation. The powerlessness of ADT management to engender the development of a cohesive culture within the ADT is indicative of the significant degree of disjunction that continued to exist among its divisions.

VCAT: the importance of a strong institutional culture

The overwhelming evidence from Victorian subjects is that VCAT management succeeded in creating an organisation with a positive institutional culture which, in turn, engendered high morale throughout the organisation as a whole. This in itself is an important indicator of the effectiveness of VCAT, as organisational literature demonstrates that organisations which are under-performing tend to have unsatisfied staff.³³ In relation to tribunals, it is argued that high morale results in the retention of

³¹ ADT Registry Staff Member 1 at paragraph 241.

³² ADT Member 9 at paragraph 191.

³³ See, for example, Rosenbluth, Hal and McFerrin Peters, Diane, *The customer comes second*, HarperCollins, New York, 1992, in which the authors argue there is a strong link between staff morale and organisational performance.

members and staff, increased productivity and, consequently, a more functional organisation.³⁴

That VCAT succeeded relatively quickly in developing into a single organisation with a shared vision and culture is demonstrated by the fact that VCAT subjects were able to readily identify and describe its institutional culture. VCAT Senior Member 1 identified the dominant feature of VCAT's culture as being the desire "to provide the best service possible for the parties".³⁵ VCAT Member 4 emphasised the collegiate aspects of VCAT's institutional culture. This subject described VCAT as having a "cohesive supportive atmosphere" in which values such as gender equality were fostered:

Justice Kellam's been very upfront about wanting to achieve equal gender — so there's a lot of women. It's the most, in the terms of legal environments that I've worked in it's, you know, best from that point of view. I haven't met one chauvinist pig there in the whole of time I've been there and that's pretty rare for a legal institution.³⁶

According to this subject, VCAT was "just one of the nicest places I've ever worked".³⁷ VCAT Member 1 considered VCAT had become something more than simply the sum of its parts:

Q. Something I was really interested to see in the Annual Report actually, the most recent one, it was talking about VCAT evolving a culture of its own?

A. It has.

Q. How would you perceive that culture?

A. I called that — everybody seems to see it as the people's place — everybody, and not only that, this AIJA [Australian Institute of Judicial Administration] Conference says that there really is a sense of 'we're all members of VCAT. We're members of VCAT. We just sit in different lists, but we're all members of VCAT'.³⁸

³⁴ In the context of tribunals, it has been acknowledged that there are links between tribunal members' conceptions of their role, the tribunal's role, and the organisational culture of a particular tribunal. See, for instance, Allars, Margaret, "On deference to tribunals, with deference to Dworkin" (1994) 20(1) *Queens Law Journal* 163-212, at 206. See also Mullan, David, "Where do tribunals fit into the system of administration and adjudication? A Canadian perspective" in Creyke, Robin (ed), *Administrative tribunals: taking stock*, Centre for International and Public Law, Canberra, 1992, 1-20, at 9.

³⁵ VCAT Senior Member 1 at paragraph 79.

³⁶ VCAT Member 4 at paragraph 105.

³⁷ *Ibid.*, at paragraph 149.

³⁸ VCAT Member 1 at paragraphs 195 to 201.

The last part of this statement reflects the widespread perception that VCAT is a single organisation. VCAT Member 5 considered that, while this had taken some time to evolve, many now identified as members of VCAT rather than members of the individual lists within which they worked.³⁹ Interestingly, this did not appear to have occurred at the expense of appropriate cultural features that had developed within former specialist tribunals. For instance, far from losing its identity, subjects associated with the Guardianship List noted cultural improvements following the amalgamation, including the greater sense of security that members felt about the importance of their role.⁴⁰

VCAT Senior Member 3 considered that the high morale and satisfaction of members was enhanced by their ability to work in different lists throughout the Tribunal:

Q. I would be interested to see how you perceive the culture of VCAT, or how you perceive the organisation as a whole — whether you would see it as one single organisation?

A. Oh I certainly see it as a single organisation and the, I think probably one of the important things is the fact that people do work in different lists and can indicate that they wish to move to a particular list.⁴¹

In addition, there were indications that the profile of various lists had actually been enhanced by becoming part of VCAT. For instance, VCAT Member 5 noted that those Lists — such as Guardianship and Anti-Discrimination — which heard matters involving difficult social or human issues, were becoming known as the ‘human rights’ division of VCAT.⁴² Conversely, subjects associated with lists such as Planning, which had already developed a high, controversial profile, appeared relieved to be part of a bigger organisation that was headed by a judicial officer. For instance, VCAT Member 6 commented favourably on the role the VCAT President played in diffusing the impact on members of controversial planning matters:

A. He is a strong leader and supports his members and supports VCAT very strongly. A big help.

³⁹ VCAT Member 5 at paragraph 167. Similar comments were made by VCAT Senior Member 3 at paragraphs 63 to 65; VCAT Member 8 at paragraphs 137 to 149.

⁴⁰ VCAT Member 1 at paragraphs 143 to 147.

⁴¹ VCAT Senior Member 3 at paragraphs 63 to 65. VCAT Senior Member 1 also made positive comments about the ability of members to gain experience throughout the Tribunal, and the job satisfaction this provided — at paragraph 161.

⁴² VCAT Member 5 at paragraphs 147 to 151.

Q. Is that good for the independence of the tribunal do you think?

A. Yes because he won't stand for anyone telling him, whether it comes from councils or government. We're supposed to be independent.⁴³

Thus, the overwhelming impression from the data collected is that VCAT had quickly developed a strong, positive institutional culture which both enhanced its performance and made it a more enjoyable place to work.

However, it is clear that this organisational culture did not materialise by accident. The following discussion highlights the challenges posed by combining a range of established bodies with distinct cultures. More particularly, it demonstrates the efforts that can be made to combine the best features of those bodies to build a cohesive culture and approach that will optimise the effectiveness of the generalist tribunal that is created.

FACTORS INFLUENCING THE DEGREE OF DISJUNCTION AND COHESION

The significant differences between the organisational cultures that developed within the ADT and VCAT provide valuable material which can be analysed to pinpoint the factors that influence the degree of disjunction and interaction within an amalgamated tribunal. Such an analysis should prove useful to those implementing future amalgamation processes.

While ADT management has since pursued a number of initiatives that should yield positive results,⁴⁴ a number of lessons can be learned from the initial failure of the ADT to develop a cohesive organisational culture that facilitated communication between members. It is valuable to begin by exploring the reasons behind the retention of different divisional cultures and the subsequent disjunction within the ADT.

Some subjects considered different ADT divisions need to have distinct cultures because they perform distinct tasks — for instance, some divisions determine disputes between citizens, some hear professional discipline matters, while others review government

⁴³ VCAT Member 6 at paragraphs 209 to 213.

⁴⁴ These initiatives include the development of a members' manual and greater emphasis on induction training for new members.

decisions.⁴⁵ However, the VCAT experience casts doubt on claims that this necessitates the maintenance of distinct institutional cultures. Perhaps more accurately, ADT Senior Member 2 considered that part of the reason for the degree of disjunction in NSW was a lack of commitment to the ADT arising from the fact that a number of members had come from specialist tribunals whose ‘empires’ had been merged to form the new Tribunal:

So I think this is a phase while it’s still in the situation where we have people who were stand-alone heads of tribunals — they’ve lost something perhaps — and they may not embrace the idea as much as somebody coming in to this as the status quo.⁴⁶

There was also a suggestion that disjunction breeds disjunction. For instance, ADT Member 9 commented on the difficulty the President faced in drawing different divisions together and promoting a certain level of consistency throughout the Tribunal when individual divisions retained such strong cultures of their own.⁴⁷

While these factors no doubt contributed to the degree of disjunction within the ADT, it is arguable that the most significant factors of all were the absence of a core of full-time members appointed to the ADT, and the lack of shared physical spaces within which members could interact. These issues are explored in more detail under the heading below. This is followed by an examination of the lessons that can be learned from the VCAT experience. Of particular interest is the way in which deliberate initiatives can be used to encourage the development of organisational culture in specific directions.

A core of full-time members and the importance of shared space

A factor which a majority of ADT subjects referred to when discussing the disjunctive nature of the ADT was the absence of a core of full-time members who were physically located at the Tribunal’s premises. A number of subjects considered that the fact that all

⁴⁵ ADT Member 2 at paragraphs 137 to 147. See also ADT Member 4 who commented, “We are actually running at least three very, very different kinds of jurisdictions if you like” — at paragraphs 29, 41 and 45.

⁴⁶ ADT Senior Member 2 at paragraph 259. This subject thought these factors would become less significant over time.

⁴⁷ ADT Member 9 at paragraph 231.

but two ADT members are part-time had a significant impact on the level of interaction between members. For instance, ADT Member 3 commented:

Q. I was speaking to someone else who was saying that actually over 90% of ADT members are part-time. Does that have an impact on collegiality?

A. Oh I mean inevitably it must and I think the Tribunal could go a lot further in terms of developing collegiality than it has. I guess I'm making a relative comparison to what it was before. I'm saying I thought that that improved. But the fact that many members are part-time and don't sit that often, impacts I think on collegiality and also I think to a degree I think on consistency. I think as a general view it would be better to have fewer members sitting more often in the Division.⁴⁸

ADT Registry Staff Member 1 considered that the ADT's large part-time membership had the potential to generate something of a 'downward spiral' in terms of the development of a cohesive institutional culture:

I think it's kind of a circular thing that if you've so many members you can't expect us to be a priority with them because we're not offering them huge amounts of work and so they're not available because they've got to take on other things, so rather than having a core of full-time members and some specialists, what you've got is a whole lot of generalists who have got, some of them, two or three or four part-time tribunal memberships and they're trying to juggle their arrangements and it obviously has an affect on things like training and development and things like that.⁴⁹

That the absence of a 'core' of full-time members was keenly felt by a number of ADT subjects was highlighted by the number of subjects who commented favourably on assistance they had received from the Tribunal's one full-time Deputy President:

She's the only full-time member. She sits in three different Divisions — Community Services, General and Equal Opportunity. She has professional experience in both equal opportunity and community services and all of us turn to her. I mean she just gets us all the time with us streaming into her office "Nancy, can I run something by you", and she's endlessly patient and really good and that's probably an indication of what we're looking for. If there are more full-time members we'd gather around them because we're all part-time [indistinct]. That would be the biggest move towards spreading an ethos, is to have ... the larger the permanent presence ...⁵⁰

The tendency of members to gather around and rely on a 'core' of full-time members was reinforced by numerous other comments referring to Deputy President Hennessey as the

⁴⁸ ADT Member 3 at paragraphs 27 to 29. ADT Registry Staff Member 1 made similar comments at paragraph 249.

⁴⁹ ADT Registry Staff Member 1 at paragraph 205.

⁵⁰ ADT Member 4 at paragraph 93.

“heart and soul” of the Tribunal, and someone with whom other members could have much sought after professional interaction.⁵¹ The impression given by such comments is that the performance and culture of the ADT would be much improved by the appointment of more full-time members. Indeed, ADT Member 9 attributed the shortage of useful interaction between members to the fact that the ADT only has two full-time members, both of whom have significant caseloads and are also responsible for the administration of the Tribunal.⁵²

The importance of having a core of full-time members in building an integrated organisational culture was recognised by VCAT management:

A. I think you do need a full-time core and it’s got to be strong. It can’t be ... it sort of suits government to have a lot of sessionals and I think there’s a lot to be said for sessionals, but you still must have a full-time core that’s driving the place and that the sessionals are an addition by way of capacity and by way of expertise.

Q. What does that core of full-timers bring?

A. Back to the culture. I suppose there’s peer group review, whether it’s informal or otherwise, the fact that somebody can wander into somebody’s door and say I’ve got this problem, what do you think. I think there’s a more corporate approach to standards of decision-making to conduct. You can run seminars very easily for full-timers because they’ve got to attend. It’s compulsory basically. And I think to some degree they have more of a commitment to the corporate culture than somebody who drops in once a fortnight and who has other obligations.⁵³

While most VCAT subjects did not comment directly on the benefits that flowed from having a core of full-time members, the general impression given was that members and staff felt secure about the way in which the Tribunal was being managed. In other words, there was a strong sense that VCAT management was in charge and had a clear idea of the direction in which the Tribunal should develop. The fact that this vision had been successfully communicated to VCAT subjects in relation to a range of issues reinforces the perception of VCAT as a cohesive, integrated organisation. The powerlessness of ADT management to do the same in NSW, and the impact this had on the organisational

⁵¹ ADT Senior Member 1 at paragraph 203. See also ADT Senior Member 2 at paragraphs 35 to 37. ADT Member 9 said at paragraph 91: “I heavily rely on Nancy, mainly because I see her and she’s very much got an open door policy.”

⁵² ADT Member 9 at paragraphs 103 to 107.

⁵³ VCAT Senior Member 2 at paragraphs 141 to 145.

culture and security of its members, reinforces the importance of establishing an amalgamated tribunal that is self-directed and managed from within.

Another factor which contributed to the ability of VCAT management to inculcate the newly formed Tribunal with a shared vision and culture was the physical layout of its premises. The greater level of interaction among VCAT subjects was enhanced by the availability of common rooms in which members felt comfortable congregating and meeting, as well as the availability of sessional members' offices within the building.⁵⁴

In contrast, the evidence in relation to the ADT highlights that the absence of shared spaces discouraged members from meeting and sharing information. Moreover, there are indications that the lack of opportunities for ADT members to congregate and discuss shared experiences contributed to increased feelings of insecurity and uncertainty about the direction and purpose of the Tribunal. Thus, the data suggest that engineering the physical layout of a newly-amalgamated tribunal can be a powerful tool in influencing the direction in which its organisational culture develops.

Deliberate initiatives

In addition to structural factors such as part-time membership and office layout, the implementation of initiatives designed to encourage interaction between members and staff is important in establishing a cohesive organisation with a unifying culture. In Victoria, the development of informal networks among members and staff across the Tribunal was deliberately facilitated in a number of ways. For instance, VCAT management had made a concerted effort to develop a supportive, collegiate atmosphere when the Tribunal was first established. VCAT Member 5 noted the presidential members had organised a series of rolling meetings in order to meet members in different lists soon after the amalgamation took place.⁵⁵ In addition, a number of subjects

⁵⁴ VCAT Member 3 at paragraphs 75 to 85.

⁵⁵ VCAT Member 5 at paragraph 119.

commented favourably on the professional development days which had been attended by members throughout the Tribunal.⁵⁶

Other initiatives included mentoring sessions where members who were new to a particular list or process could observe the performance of more experienced members.⁵⁷ A conscious effort had also been made to physically locate the offices of members of former tribunals alongside members from other tribunals. For instance, members from other lists had been co-located with members from the former AAT in an attempt to redress the culture of superiority that threatened to develop within the General List. This had been done in an attempt to break down any cultural barriers that remained from the former specialist tribunals.⁵⁸ The comments of many VCAT subjects suggest this process was enhanced by the practice of cross-appointing members where possible,⁵⁹ as well as the policy of rotating Deputy Presidents on a regular basis.

Another way in which informal member interaction was facilitated within VCAT was through the appointment of a Principal Mediator. Various subjects noted the Principal Mediator's role in facilitating communication and information-sharing throughout different lists. There had also been opportunities for members to observe the way in which mediation was conducted by other members. The rapid increase in the use of mediation throughout VCAT is a pertinent example of the effectiveness with which management quickly facilitated informal contact and the building of networks between members with different skills and expertise post-amalgamation.⁶⁰ These initiatives contributed to the strong sense among subjects that VCAT was developing an organisational culture of its own.

⁵⁶ For example, VCAT Member 5 at paragraph 119; VCAT Member 4 at paragraph 237; VCAT Member 7 at paragraphs 113 to 115.

⁵⁷ VCAT Member 5 at paragraph 159.

⁵⁸ VCAT Senior Member 2 at paragraph 153.

⁵⁹ Similarly, Creyke has argued that the cross-appointment of members "leads to cross-fertilisation of practices" — Creyke, Robin, "Tribunals: divergence and loss" (2001) 29(3) *Federal Law Review* 403-425, at 409.

⁶⁰ VCAT Senior Member 3 at paragraphs 139 to 141.

ADT subjects reported an absence of such initiatives in NSW. For instance, ADT Member 10 considered there had been no useful initiatives in the Legal Services Division:

There aren't any opportunities to get together with other members to discuss significant issues or experiences. We don't get case notes or summaries or anything like that. This means I don't know what other members are doing in their decisions — if I want to find out I have to trawl through the internet.⁶¹

There was some acknowledgement that ADT management was constrained in their ability to facilitate greater interaction among members due to a lack of human resources, and lack of authority to control the appointment — even cross-appointment — of Tribunal members.

Nonetheless, comments made by a number of subjects indicated that members had an unmet need to involve themselves in activities, events or other initiatives that would facilitate greater interaction and flow of information. ADT-wide training days and regular divisional meetings were cited as examples of initiatives that would have provided much-needed opportunities for interaction:

Q. In terms of interaction between members ... are there any other get-togethers, for instance does the Division Head organise meetings of the Tribunal members?

A. No, the only experience of that that I've had would be two-fold. There is an annual conference organised by the ADT in which they present, have a full-day conference with papers presented that are very specific to the work of the Tribunal and they're very good and that does help you to meet other people. And I've found those pleasant and very helpful and it tends to make you feel a little bit easier about dealing with some of the other people because when you go to the Tribunal, you go to the members' room it's often full of people you've no idea who they are. You don't know what division they're from and finding the two that you're supposed to sit with and so forth is kind of a bit of an experience because it's such a part-time affair that you know, there is a certain awkwardness about that from time to time. So that just knowing who people are, whether you're going to sit with them or not, because people are going in and out of that same space, is rather handy ...⁶²

Overall, it is clear that VCAT was far more successful than the ADT in establishing itself as a cohesive organisation within which members and staff felt comfortable to interact, to learn from each other, and to experiment with new initiatives. In contrast, there was a

⁶¹ ADT Member 10 at paragraphs 72 and 100.

⁶² ADT Member 6 at paragraphs 49 to 51 and 61 to 63.

perception among some in NSW that a degree of collegiality, momentum and organisational effectiveness had been lost in the transition to an ADT. The lack of positive initiatives such as the organisation of regular members' meetings was an important contributing factor in this regard.

Yet perhaps the most significant factor was the differing degrees of thought, effort and resources that went into ensuring that each amalgamated Tribunal had the processes, culture and internal networks it needed to function cohesively as an organisation. In short, the establishment of a shared culture is something which requires work and attention, particularly within an organisation that is formed from the merger of separate bodies with their own distinctive approaches and customs.

PEOPLE AND LEADERSHIP

The importance of people

The next issue explored is the extent to which the appointment of highly skilled and motivated people assisted each Tribunal to make a successful transition from specialist to generalist body. The data collected from ADT subjects are 'value neutral' in this regard. There was no suggestion that the quality of members or staff contributed to the inability of that Tribunal to realise its potential following amalgamation.

However, the amalgamation experience in Victoria highlights the organisational benefits that can be derived from the appointment of skilled and motivated members and staff in appropriate roles. These benefits become apparent when combined with an institutional culture that facilitates the sharing of information and knowledge throughout an organisation.

A number of subjects commented on the importance of good people in the success of VCAT:

My concern when I first started there was I felt that the training was inadequate but I thought, and I still think, that the collegiality of the members and the generosity of experienced members was what saved them. Because I never had a

sense of, never felt concerned about asking somebody, running something by someone, it's very much an atmosphere where that is encouraged.⁶³

This subject also commented on the benefits of appointing quality staff in a range of areas throughout VCAT:

Well we've got a full-time librarian who will get anything. Like, you will say to her 'don't you have Sackville on the and she's says oh, and she had it there by the afternoon. She got it, you know she got it. The personality's really, people really make a difference.⁶⁴

VCAT Member 1 reported that concerns about the cross-appointment of members to the Guardianship List had not materialised, owing to the attitude and capacity of the members undertaking those appointments.⁶⁵ In this subject's view, this had been a significant factor in the successful transition of Guardianship from specialist tribunal to a List within VCAT:

Q. So how do think that your concerns weren't justified?

A. Because the people who do sit across lists, and almost every one of them was at the conference yesterday, from VCAT, mostly, not mostly in so far as their attitude to the legislation is, but mostly in so far as their appointments are, they get it right. They're very aware of the incapacity and the accountability process, and they are not gun-shy, they are not shy, ... to appoint somebody who is perhaps important in the world or aggressive towards the tribunal. They're not shy about that at all and their focus is the person with the disability.⁶⁶

The same subject made similarly positive comments about the calibre of the two Deputy Presidents who had worked in this List.⁶⁷

VCAT Member 3 spoke about the strong network that had developed among part-time members of the Tribunal, not least due to the fact that "We come in here and we enjoy each other's company".⁶⁸ Despite the large part-time membership of VCAT this subject's experience was that members "know each other".⁶⁹

⁶³ VCAT Member 4 at paragraph 117.

⁶⁴ *Ibid.*, at paragraph 379.

⁶⁵ VCAT Member 1 at paragraphs 43 to 51.

⁶⁶ *Ibid.*, at paragraphs 45 to 51.

⁶⁷ *Ibid.*, at paragraph 111.

⁶⁸ VCAT Member 3 at paragraph 89.

⁶⁹ *Ibid.*, at paragraphs 93 and 97.

The attitude of members and staff was crucial in ensuring that VCAT successfully negotiated the initial transitional period from specialist to generalist Tribunal. VCAT Registry Staff Member 1 noted the importance of management leading by example during that period:

It required a concerted effort, certainly from management. We got that from the President, the CEO, the Principal Registrar, the other Registrars, were all committed to putting in 120%, and they did, because you can't expect that of the staff unless you do it yourself. And it was really a matter of leading by example. A lot of people here could see that we were working very hard, you know, things like coming in and opening up the mail in the morning, rolling up your sleeves and making it happen. If there was a file missing we all dived in and searched for it; all that sort of stuff.⁷⁰

These comments highlight the importance of having people who can take responsibility for driving an amalgamation process — particularly in the initial transitional period when the whole organisation is in a state of flux.

The proposition that the appointment of good people can be a factor in establishing a tribunal following amalgamation is reinforced by the reliance VCAT subjects placed on the informal, personal networks that had developed within the Tribunal since its creation. The amalgamation in NSW indicates this factor will not be determinative of the success or otherwise of an amalgamated tribunal. However, the experience of VCAT subjects demonstrates the valuable role that people can play in shaping and driving an organisation in circumstances where its culture is conducive.

The importance of leadership

Similar comments can be made about the role of leadership in consolidating the potential gains to be had from amalgamation. While its absence is not fatal, the presence of strong leadership can make a valuable contribution.

The role of VCAT's first President (Justice Kellam) in setting the tone and fostering a positive, cohesive culture throughout the organisation was highlighted as extremely

⁷⁰ VCAT Registry Staff Member 1 at paragraph 215. See also VCAT Member 2 at paragraphs 235 to 239.

important by almost all VCAT subjects.⁷¹ VCAT Senior Member 3 noted that the organisation would be like a “rudderless ship” unless people at the top set the direction.⁷² In relation to Justice Kellam’s performance in this role, VCAT Member 1 commented:

A. He’s an excellent President, the President — I think he’s excellent.

Q. And that’s obviously very important to have someone very good managing?

A. It’s very important. And if you want it to work you’ll have to have it like that all the time.⁷³

VCAT Member 2 emphasised the importance of the President’s role in making VCAT a success:

A. The best thing they did I think was appoint Justice Kellam to be the head because he had such drive and vision to get it all up and running. John Ardley they appointed whose similarly [good] as a CEO — so they’ve appointed really good people.

Q. So do you think it’s important to have those good people heading the organisation as it goes through its transitional stage and becomes a new Tribunal?

A. Yes. I mean I don’t know. Had they appointed people who weren’t so committed to this I don’t know. It might have been quite different. But it’s worked well. Whatever’s happened here has worked well. It’s really worked well.⁷⁴

Similar comments were made by subjects associated with the Planning List:

It was decided by government that it would happen and they appointed a Supreme Court judge who came down and pulled it all together and Murray Kellam has done a terrific job. I don’t think anyone else would have done as good. He’s done a fantastic job.⁷⁵

In particular, VCAT members were strongly supportive of the President’s role in moving the organisation forward and setting its direction during the difficult transitional period from specialist to generalist tribunal. This had certainly made the transition to a generalist tribunal easier for others.

⁷¹ For example, VCAT Member 3 at paragraphs 247 to 253; VCAT Member 4 at paragraphs 135 to 137; VCAT Member 5 at paragraph 111; VCAT Member 8 at paragraphs 151 to 153; VCAT Senior Member 1 at paragraphs 55 to 59; VCAT Senior Member 3 at paragraphs 113 and 137. See also Creyke, above n 59, at 410.

⁷² VCAT Senior Member 3 at paragraph 137.

⁷³ VCAT Member 1 at paragraphs 179 to 183.

⁷⁴ VCAT Member 2 at paragraphs 235 to 239.

⁷⁵ VCAT Member 6 at paragraph 141.

From a registry perspective, VCAT Registry Staff Member 1 was impressed by the role the President had played in making VCAT a success:

Q. How important is the role of president? How important is it to have a good person like that as president in that transitional time?

A. He's driving the train. It's crucial because that energy, and if you like that attitude — at the outset will be the benchmark for everybody else. What he's done is, he's insisted on the senior registrars, the principal registrar and the chief executive officer being seen to be getting up here, we do this on a regular basis, we'll get in with the troops and open the mail — go down and serve on the counter on the ground floor. He's done it himself — the President has done it a number of times where he will go behind the counter of the ground floor and serve people, so it's a very, and that's what he's like anyway — he's got that sort of approach to those things, incredible energy and really committed to it and that rubs off on everybody else, so if the President's doing it the other members and the staff and so on, it's just all falling into place.⁷⁶

VCAT Member 4 also noted the efforts Justice Kellam had made to break down the cultural barriers that often exist between members and staff.⁷⁷ There is no doubt the President played a central role in setting the expectations and standards of behaviour that have emerged in VCAT post-amalgamation.

More generally, the personality and commitment of Justice Kellam were consistently identified as playing a vital role in the perceived success of VCAT. There were numerous examples of the willingness of the President to trial new procedures, and to encourage interaction between members and staff from different lists. In particular, the VCAT President was influential in encouraging the use of mediation throughout the Tribunal. The evidence suggests that the greater cohesiveness arising from increased interaction and a more unified organisational culture could not have been achieved to the same extent without Justice Kellam's directed leadership. The extent to which the President was able to control and influence these types of developments no doubt contributed to the ongoing momentum of VCAT following amalgamation.

The importance of a President's role in establishing a tribunal post-amalgamation is further highlighted by the unfavourable comments of ADT subjects about the restrictions

⁷⁶ VCAT Registry Staff Member 1 at paragraphs 153 to 155.

⁷⁷ VCAT Member 4 at paragraph 153. VCAT Registry Staff Member 1 highlighted the success of this approach when noting that registry staff were comfortable using the members as a resource when information was required in order to solve problems or answer queries — at paragraphs 131 to 139.

that were placed on Judge O'Connor in his role as ADT President. In particular, there was a sense among ADT subjects that the ability of the President to push for the development of the Tribunal was constrained by external factors, such as the scope of the amalgamation and the political commitment to its success. In relation to cross-appointments, for instance, it was pointed out that the ADT President had limited power to appoint or cross-appoint members to different divisions. Such factors arguably contributed to the powerlessness of the ADT President to work with the Tribunal as though it were a 'clean slate', and to implement new initiatives accordingly.

CONCLUSIONS

This Chapter describes one of the key differences to emerge from the research presented in this thesis — namely, the striking difference between the organisational cultures that developed within the ADT and VCAT following amalgamation. While the ADT continued to be characterised by disjunction and dissociation five years after its creation, Victorian subjects were unanimous in their praise for the integrated, collegiate atmosphere that had been engendered within VCAT.

The ADT experience highlights the importance of a core of full-time members and access to shared spaces in creating an organisation with a cohesive, integrated culture. Moreover, the experience of both Tribunals demonstrates that people and leadership can play an important role in consolidating a successful amalgamation, but that the absence of this element is not fatal.

The most significant thing to emerge from the data is the way in which management influenced the development of VCAT's organisational culture through the deliberate adoption of targeted initiatives. The ramifications of this and other factors for the success of amalgamation in each State are further explored in Chapters 10 and 11. Closer examination of these issues will provide valuable lessons to policy-makers responsible for implementing future amalgamation proposals.

CHAPTER 10: HOW TO ACHIEVE AN OPTIMAL AMALGAMATION — AUTHORITY TO MANAGE AND STANDARD SETTING

Chapters 7 to 9 demonstrate that, despite similarities in the legislation establishing the ADT and VCAT, there were significant differences in the extent to which each organisation displayed the features — such as a core of full-time members, widespread cross-appointments, shared physical spaces, and various procedural initiatives — which can enhance tribunal performance. Central to the success or otherwise of both amalgamations was a favourable context — specifically, commitment by government to constructing an organisation that had all the elements it needed to be effective. It is argued that the scope of the amalgamation in NSW, combined with the powerlessness of management to control the direction in which the Tribunal developed, hindered its advancement.

However, just as vital as sound legislation and a supportive context are the ways in which the opportunities provided by amalgamation are capitalised upon in the construction of an amalgamated tribunal. A majority of subjects considered that the willingness and commitment of VCAT management to experiment and implement new structural and procedural initiatives significantly improved the Tribunal's operation and made the amalgamation a more positive experience. Subjects also pointed to the importance of facilitating interaction between members and staff in developing a cohesive organisational culture.

Thus, the qualitative data reinforce the proposition that, in addition to law, the ingredients of context, organisation and people must be present in order to produce an effective amalgamation. However, the data also indicate that the ability of policy-makers and tribunal management to deliver the necessary ingredients of positive tribunal reform will be influenced by a more complex array of factors. Specifically, it suggests that the six constituent elements hypothesised in Chapter 4 as being crucial, will impact to varying degrees upon the success of an amalgamation process. The objective of Chapters 10 and

11 is to reflect on the experience of amalgamation in NSW and Victoria, with a view to further refining those elements that are *essential* to an optimal amalgamation process.

Specifically, the challenge is to identify with greater precision what elements of law, context, organisation and people — or their absence — were determinative of the outcomes of amalgamation in each State. A more reflective analysis of the data presented in Chapters 7 to 9 suggests that four elements are particularly important:

- *political commitment* — specifically, the extent to which tribunal management is given authority to set the direction of a newly-amalgamated tribunal;¹
- *processes and procedures* — specifically, the extent to which amalgamation is seen as an opportunity to set standards, and implement efficiencies and improvements;
- *organisational structure* — specifically, the balance that is struck between retention of necessary specialisation and greater consistency; and
- *organisational culture* — specifically, the degree of disjunction within each organisation.

These elements reflect the justifications often given for amalgamation proposals — that is, to improve existing tribunal systems; to achieve greater efficiencies; to create a cohesive organisation that is more effective than the sum of its parts; and to introduce greater uniformity in the operation of tribunals without compromising necessary specialisation. After summarising the success of the amalgamation in each State, the following discussion explores how each element can influence the extent to which an optimal amalgamation is achieved. It is hoped this further examination will better enable policy-makers to draw on the lessons to be learned from the amalgamation processes studied in this thesis.

¹ The assumption here is that political commitment to effective tribunal reform is required in order to create an autonomous, independent tribunal — in other words, a tribunal that is not hamstrung by ongoing government involvement. This is particularly important in relation to tribunals that have an administrative review function, or where governments have a policy interest in the outcome of particular classes of decisions.

OVERVIEW OF THE SUCCESS OF AMALGAMATION IN EACH STATE

The overarching point to emerge from the qualitative data is that the ADT was constructed with less care and fewer ‘building blocks’ than VCAT. If the creation of the ADT were compared to the construction of a building, it could be said that its foundation — that is, its enabling legislation — was carefully constructed. However, the remaining building blocks were either loosely connected or simply placed together rather than joined. Other important pieces — such as sufficient workload and full-time membership — were missing from the structure entirely.

The data relating to VCAT, on the other hand, are indicative of a tribunal that has been carefully constructed. The evidence suggests that considerable thought and resources were put into its planning and construction. In other words, VCAT management had a comprehensive set of building blocks at their disposal, as well as the capacity to design a sturdy structure. The strong impression is that the materials were joined together carefully to create a whole in which individual building blocks were still recognisable, but which was stronger than the sum of its parts. These propositions are supported by the overall perceptions of interview subjects, set out below.

Whether the amalgamation was an improvement in NSW

As the discussion of the qualitative data have consistently demonstrated, at the time data were collected there was a range of views among ADT subjects about whether the amalgamation in NSW had resulted in improvements. Generally speaking, ADT subjects fell into three categories:

- those who had experienced positive benefits as a result of amalgamation;
- those who had perceived no difference; and
- those who considered the amalgamation had had a negative impact.

A significant number of subjects associated with the Equal Opportunity Division were among those who had experienced benefits as a result of amalgamation. Examples cited by these subjects included the attainment of greater administrative efficiency in

processing matters,² the adoption of case conferencing,³ improvements in physical location and layout,⁴ and the creation of a members' manual which provided guidance on the procedures and practices to be applied in hearing and writing decisions.⁵

More generally, ADT Senior Member 1 considered that the creation of the ADT was a significant political achievement, and that it was working quite well.⁶ However, the following comments by ADT Member 4 are more representative of the less enthusiastic approval expressed by subjects in this category:

I wish we still had the identity we had, and I wish we still had, at the same time I wish we had more of a — your point about cross-fertilisation emerging, we got more value as members out of it, but sure, it works well. I wouldn't say go back to the way it was.⁷

The second category of subjects tended to point to some advantages and some disadvantages arising from the creation of the ADT. One of the most commonly cited advantages was the organisation of training for members.⁸ Disadvantages included cost-cutting and a decrease in interaction among members. The views of this category of subjects are generally reflected in the comments of ADT Members 2 and 6 who perceived that, overall, the amalgamation had made no real difference to the operation of their Divisions.⁹ Similarly, ADT Member 5 reported: “certainly I have not perceived any change in the matters we get, the way we hear them, or the quality of the outcomes.”¹⁰ ADT Member 8's view was also relatively representative:

I think the things that have happened as far as improvements in our procedures probably would have happened anyway. I don't really see it as a good idea.

² ADT Member 3 at paragraph 73; ADT Senior Member 2 at paragraph 243.

³ ADT Member 9 at paragraphs 119 and 211.

⁴ ADT Member 4 at paragraph 169.

⁵ ADT Member 3 at paragraph 109; ADT Member 4 at paragraphs 61 and 205; ADT Member 7 at paragraphs 343 to 353; ADT Member 8 at paragraph 131; ADT Member 9 at paragraphs 151 and 181 to 183.

⁶ ADT Senior Member 1 at paragraphs 19 and 205 to 209.

⁷ ADT Member 4 at paragraph 201.

⁸ ADT Member 8 at paragraph 159; ADT Member 9 at paragraph 211; ADT Member 5 at paragraph 275.

⁹ ADT Member 2 did not have a strong view either way about whether the amalgamation had been a good idea, as it had not had much impact — at paragraph 21. ADT Member 6 expressed similar views at paragraphs 109 to 111.

¹⁰ ADT Member 5 at paragraph 49.

I think things have been just put together for bureaucratic purposes not for any purpose to do with the function of the bodies. That's my view.¹¹

These comments indicate doubt among subjects as to whether the amalgamation had been worth the time, effort and resources taken to achieve it, in light of the benefits gained.¹²

The third category of ADT subjects were quite negative about the impact of the amalgamation, and would have preferred that it had not taken place. These subjects had generally been happy with the operation of the specialist tribunals with which they were associated previously, and had witnessed a decline in performance since the establishment of the ADT. These views were generally held by subjects associated with the Community Services and Legal Services Divisions. For instance, ADT Member 10 thought the Legal Services Tribunal had “worked better as a specialist tribunal, and there was no reason to change it.”¹³ ADT Member 7 considered that an amalgamated tribunal had “fantastic potential”, but that the ADT experiment had not been a success from a community services perspective, largely because the issues that were important in that jurisdiction had become subsumed and neglected within the larger Tribunal.¹⁴

The fact that ADT subjects held a range of views about whether the creation of the ADT was successful indicates that different divisions had quite different experiences of the amalgamation and the ongoing operation of the Tribunal. This, in turn, is indicative of the degree of disjunction that continued to exist within the ADT at the time data were collected — four years after its creation. While examples were given of initiatives that may improve the operation of the ADT over time, the data highlighted the consequences of failing to ensure that different specialist tribunals are appropriately integrated into a larger tribunal immediately following amalgamation.

The ADT experience suggests that, unless care is taken in addressing the challenges that inevitably arise, there is a tendency for an amalgamation to become something akin to

¹¹ ADT Member 8 at paragraphs 317 to 319.

¹² A possible explanation for these perceptions is that changes made within the ADT following amalgamation had not yet begun to impact on the day-to-day work of members at the time data were collected.

¹³ ADT Member 10 at paragraph 88. ADT Member 11 made similar comments at paragraph 47.

¹⁴ ADT Member 7 at paragraph 429.

‘dominance of the fittest’. This demonstrates the importance of an ongoing commitment — beyond the initial transition from specialist to generalist tribunal — to considering how a newly-amalgamated tribunal should be structured and staffed, and how its processes and culture should be developed.

Whether the amalgamation was an improvement in Victoria

The most striking feature of the data gathered from VCAT subjects was its consistency. Specifically, there was an almost unanimous belief that the creation of VCAT had been a resounding success and had improved the performance and effectiveness of tribunal review in most jurisdictions in Victoria. Almost every VCAT subject interviewed highlighted the central role VCAT management had played in this process. In addition, almost all subjects reported positive experiences associated with being a member or employee of VCAT.

A sample of the overall comments of VCAT subjects about whether the amalgamation was successful gives a sound indication of the general feeling that emerged from the qualitative data. According to VCAT Member 2:

Q. So do you think that the amalgamation was a good idea?

A. Yes. I’ve got nothing but praise for it really.¹⁵

VCAT Member 3 stated:

I don’t think that everybody agrees with Justice Kellam on every single thing he does but I think overall, everybody does agree that the amalgamation has worked in everybody’s best interests and things have worked out really well and I think generally people are happy.¹⁶

VCAT Member 6 stated:

Q. Do you think that having a bigger organisation like VCAT is better than having a series of specialist tribunals all off doing their own thing?

A. I reckon it is. Apart from saving in money because everybody’s got their own building and their own staff — everybody ultimately knows where to go. There’s

¹⁵ VCAT Member 2 at paragraphs 225 to 227.

¹⁶ VCAT Member 3 at paragraph 253.

one building, there's one organisation they can go to. It is far, far better I reckon.¹⁷

VCAT Senior Member 2 stated:

The benefits of amalgamation in my view are to keep specialised expertise still available in its stream but at the same time to provide the overall umbrella benefits of a large organisation with its own culture, its own discipline, its own processes. I think the advantages of amalgamation, I think they're really pretty obvious now.¹⁸

While not commenting generally, VCAT Senior Member 3 noted that improvements such as the increased use of mediation throughout VCAT “could not have occurred, certainly not in the same way and in the relatively short time that it has, had the pre-existing bodies remained separate.”¹⁹

In relation to smaller, more vulnerable lists such as Guardianship, the experience reported by VCAT Member 1 was a positive one. This subject had initially been sceptical about the impact that an amalgamated tribunal would have in this jurisdiction where the specialisation that had developed to meet the needs of users was important.²⁰ In particular, this subject was concerned that the importance and profile of the jurisdiction would be diminished and somehow subsumed — similar to the experience of the Community Services Division in the ADT.

Much to this subject's surprise, the amalgamation had had the opposite effect. That is, far from being subsumed, the Guardianship List was seen as having a special place within VCAT, and had retained much of its specialisation and accessibility. This subject also reported unexpected benefits from the amalgamation, for instance, the improved profile

¹⁷ VCAT Member 6 at paragraphs 375 to 377. See also VCAT Senior Member 1 at paragraphs 167 to 169; VCAT Registry Staff Member 1 at paragraph 143.

¹⁸ VCAT Senior Member 2 at paragraph 45.

¹⁹ VCAT Senior Member 3 at paragraph 105.

²⁰ Similar concerns had been expressed by other members of previously separate tribunals — Kellam, Justice Murray, “Developments in administrative tribunals in the last two years” (2001) 29(3) *Federal Law Review* 427-436, at 431.

of guardianship matters.²¹ VCAT Member 1 summed up the amalgamation experience as follows: “I think it’s fantastic. And I’m surprised”.²²

The positive experience of VCAT subjects was not completely unanimous. For instance, VCAT Member 8 considered the effectiveness of the Planning List was “about the same” as it had been before the amalgamation.²³ In addition, VCAT Member 7 considered that a degree of specialisation had been lost in one or two smaller jurisdictions as a consequence of amalgamation.

However, aside from these two experiences — which were not considered by the subjects concerned to be particularly negative — the consensus was that VCAT was an overwhelming success. Much of its success was perceived to be a consequence of the strong sense of vision that had been engendered and then acted on by VCAT’s leadership. The effective promotion of a sense of direction and achievement throughout the Tribunal indicates that significant thought and effort had gone into its construction following amalgamation. The resulting cohesion was demonstrated by what many subjects perceived to be VCAT’s strongest feature — its institutional culture. Thus, there was a perception that the opportunities which amalgamation can bring — such as implementing new initiatives and challenging the complacency of former specialist tribunals — had been seized with both hands.

The remainder of this Chapter seeks to further refine the reasons behind the outcome of each amalgamation by examining the factors that emerged most prominently from the qualitative data.

CONSTRAINTS ON TRIBUNAL MANAGEMENT

As demonstrated in Chapter 7, the degree of political commitment was central to the success or otherwise of the amalgamation processes in NSW and Victoria. Closer examination reveals that a key element of political commitment is the extent to which

²¹ VCAT Member 1 at paragraph 213.

²² *Ibid.*, at paragraphs 227 to 233.

²³ VCAT Member 8 at paragraphs 179 to 181.

tribunal management is given the autonomy to develop a newly-amalgamated tribunal. This outcome reinforces and refines the proposition put forward in Chapter 4 — that a supportive context is a necessary ingredient of optimal tribunal reform.

There were significant differences between the ADT and VCAT in this regard. Specifically, there was a perception among NSW subjects that the capacity of the ADT to determine its own administrative structures and processes was restricted by Government. In contrast, VCAT subjects were firmly of the view that the Tribunal was being managed from within, and that VCAT management was exercising a mandate to improve the performance and standing of tribunals in Victoria. The extent of these differences suggests this factor has significant implications for the outcome of an amalgamation process.

Numerous instances were identified of ADT management being constrained in their ability to make decisions about the management and operation of the Tribunal. A telling example is the lack of power the ADT President had in relation to staffing:

A. ... the Attorney-General's Department could sack a staff member but the President couldn't.

Q. Oh really! So the decisions on hiring and firing of staff ... ?

A. Come from the Department.

Q. In terms of selection processes for example, would the Department take care of that?

A. The Department ... the Department would. Often we would have the President on an interview committee. For instance if it was this position you would expect the President to sit on as a panel member but only as a panel member, if you know what I mean, and at a lower level he certainly wouldn't become involved. He doesn't have delegation in relation to hiring or firing or to expenditure of money ...²⁴

Another subject cited the limitations on the President's ability to cross-appoint members to different divisions as a pertinent example of the ADT's lack of organisational independence.²⁵ Rather than having sole responsibility for implementing these types of

²⁴ ADT Registry Staff Member 1 at paragraphs 25 to 33.

²⁵ The concept of 'organisational independence' refers to the administration and management of the Tribunal rather than its decision-making function. There was no suggestion in the data collected that ADT decisions were improperly influenced by government.

administrative arrangements, different portfolio departments had to be consulted before particular cross-appointments could be made:

A. I mean I couldn't give you numbers, but some of our divisions, only the Attorney has to concur to the appointment and the President can cross assign. Other divisions, for whatever reason, have to have input from the minister to which the original decision-making belonged, so Revenue Division — the Treasurer has to be consulted, in Community Services Division — the Minister for Community Services has to be consulted, so the cross-appointment into those Divisions ... is quite difficult to achieve.

Q. It's not a Tribunal managed thing?

A. No it's not something we can do, so we've got quite a few cross-appointments say between the General Division and Equal Opportunity in the judicial ... in AGD [Attorney-General's Department], yes, they're both ones that Judge O'Connor can simply do.²⁶

Thus, there was a perception that the involvement of government in this aspect of the ADT's operations hindered the efficient management of at least some divisions.

In contrast, the perception of VCAT subjects was that responsibility for administering their Tribunal lay solely with VCAT management and, in particular, with the President. For instance, VCAT Senior Member 1 commented:

... there's a bit of accountability for how you might run your lists and things like that, whereas before I suppose the only person you may have been responsible to was to your minister. I don't know how any of that worked because I was never in the situation to know but now you can talk to your President about things.²⁷

VCAT subjects mentioned a number of examples highlighting the ability of the President and senior management to organise VCAT's administrative arrangements as they saw fit, and to trial new initiatives. For instance, VCAT Registry Staff Member 1 described the level of involvement of the President and senior registry staff in planning the amalgamation and overseeing the transitional arrangements.²⁸ In this subject's view, the VCAT President had been "driving the train".²⁹ Other examples included the President's

²⁶ ADT Registry Staff Member 1 at paragraphs 139 to 143. The ADT President's relative lack of power in relation to the appointment and cross-appointment of members can be contrasted with the situation in some other NSW Tribunals, where senior members are more involved in appointment processes — see Separate NSW Tribunal Senior Member 1 at paragraphs 149 to 155.

²⁷ VCAT Senior Member 1 at paragraph 173.

²⁸ VCAT Registry Staff Member 1 at paragraph 59 onwards.

²⁹ *Ibid.*, at paragraph 155.

promotion of mediation within the Tribunal;³⁰ the policy of rotating Deputy Presidents between lists;³¹ the promotion of ‘*ex tempore* decisions’³² as a way of reducing backlogs;³³ and the promotion of circuits to regional areas. According to VCAT Member 5: “the President when VCAT was formed was really keen to ensure that we covered all the regions — that we could have hearings in all lists, as close as possible to the clients”.³⁴

Overall, the evidence from both States reinforces the proposition that the NSW Government had not empowered the ADT to develop as an independent organisation under the direction of its President. In other words, the ‘apron strings’ tying the new body to the Government had not yet been cut at the time this research was conducted. It is argued this was a manifestation of the lower level of political commitment to the reforms in NSW than was present in Victoria.

The conclusion drawn is that this unfavourable context constrained the ability of ADT management to implement improvements and develop new initiatives. As the discussion above has highlighted, a newly-amalgamated tribunal will not have the opportunity to capitalise upon the potential benefits of amalgamation unless it is given a clear mandate by government to do so.

SETTING STANDARDS

As argued in Chapter 4, the third ingredient of optimal tribunal reform is ‘organisation’. The proposition put forward is that the processes and procedures adopted within a newly-amalgamated tribunal are an important element in this regard.

³⁰ VCAT Senior Member 3 at paragraph 173.

³¹ VCAT Senior Member 2 at paragraph 137.

³² This term refers to decisions that are made immediately following the conclusion of an oral hearing, in the presence of the parties.

³³ VCAT Member 3 at paragraph 141.

³⁴ VCAT Member 5 at paragraph 17. Anecdotal evidence indicates that the number of tribunal hearings in rural Victoria increased by up to 30% following the creation of VCAT — Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on the jurisdiction and operation of the Administrative Decisions Tribunal*, NSW Parliament, Sydney, 2002, at 36. Note that, while these developments featured more prominently in Victoria in the early years of the ADT’s and VCAT’s operation, there is evidence that the ADT is now

This proposition is reinforced by the research presented in Chapter 8, which indicated that the extent to which the ADT and VCAT developed and implemented new initiatives impacted significantly on the perceived success or otherwise of each amalgamation. It is argued that the ability of tribunal management to take an innovative and directed approach towards setting the standards by which a new tribunal will operate is central in the establishment and consolidation of an effective amalgamation process.

The concept of achieving optimal tribunal reform through the setting of high standards has a number of different aspects. Firstly, it is informative to examine the extent to which the ‘opportunity benefits’ that amalgamation can be *expected* to provide have been delivered. These benefits include the opportunity to make improvements to processes and structures that existed within former specialist tribunals, and to deliver improvements that derive from being part of a larger, generalist organisation.

Secondly, it is relevant to consider the extent to which those responsible for implementing an amalgamation process create new opportunities above and beyond those which should be anticipated. Of interest in this regard is whether an amalgamation process is treated as a chance to implement new developments and explore new initiatives.

Finally, the degree to which management has achieved greater efficiencies and increased flexibility in the use of resources indicates whether a key objective of tribunal reform — namely, the more efficient use of resources — has been realised.

There were significant differences between the ADT and VCAT in relation to all of these elements. In particular, there was a strong sense that there had been a greater commitment in Victoria to evaluating and considering where improvements could be made to the operation of different lists. The perception of subjects was that there had been a comprehensive process in VCAT of reviewing the processes used in specialist tribunals and abandoning inefficient practices in favour of greater consistency and economy in a range of areas. In other words, it seems the creation of VCAT was treated

increasing the number of hearings it conducts in regional areas — Administrative Decisions Tribunal, *Annual*

as an opportunity for ‘spring-cleaning’ and thinking carefully about how things could be done better. This perception was reinforced by the comments of VCAT Senior Member 2 regarding management’s approach to establishing the newly-amalgamated Tribunal:

A. I do think the amalgamation has caused, I mean basically our position has been this — we’ve re-engineered the thing and now we’re turning around and saying, OK well what’s the next project. An operation as big as this you turn around and say all right, well now we’re at stage one — what’s stage two, what’s stage three, and I think involved in that is re-analysing what you’re doing, where you’re going.

Q. So a continuous improvement approach?

A. Yes.³⁵

The comparative lack of similar developments in the ADT emerges as a key factor in the effectiveness of the amalgamation process in NSW. In particular, the limited scope of the amalgamation and the implications this had for the ADT’s caseload and budget, reduced the capacity of management to move resources around and create opportunities for new initiatives to be developed. The importance of such initiatives to the successful development of VCAT strongly suggests that, conversely, their absence is critical.

Opportunity benefits

Realising the potential benefits inherent in an amalgamation process is an important element of optimal tribunal reform. The opportunity benefits that amalgamation brings include the opportunity to challenge the views that dominated in the smaller, specialist tribunals that are amalgamated, as well as a range of benefits that are available in larger organisations, including greater opportunities for professional development.

Improving on past practices

There was a commonly held perception among ADT and VCAT subjects that amalgamation had provided an impetus for former specialist tribunals to reflect on their practices and initiate improvements. This had happened to a much greater extent in Victoria, but the phenomenon was not completely absent in NSW. To a limited extent

report 2002–2003, ADT, Sydney, 2003, at 7.

³⁵ VCAT Senior Member 2 at paragraphs 101 to 105.

there was a perception among some ADT subjects that the amalgamation had provided an opportunity to improve the operation of a number of smaller tribunals which had functioned in quite an insular fashion until the creation of the ADT. For instance, ADT Member 4 commented:

A. ... it could be that the Act, that the provisions of the ADT Act are giving us a sense of either things could be more flexible or this is a good opportunity to change.³⁶

...

I suppose there must be something there, whether it comes from Nancy being there, or having to look outside the Anti-Discrimination Act — and into the ADT Act — yes, maybe something's triggered it, but we're certainly in the last couple of years, last 18 months, and with the Manual, we're certainly looking where we never looked before for ways of operating in a more successful fashion.

Q. A little bit of a shakeup?

A. Yes.³⁷

This benefit was also identified by ADT Senior Member 2:

I think it's drawn quite insular and isolated bodies together and enabled them to be more forward thinking and benefit from different input and ideas, policies and practices. I don't think there'd be many people here who would say "no, we were better off on our own tribunal".³⁸

And:

A. I think generally speaking, all those things [fairness, justice, informality, efficiency] have been enhanced by joining. The reason I say that is people are, get very comfortable and very used to their own environment, and exposure to other ways of doing things can improve things. There's one registry here and we've got standards about time and all the rest of it, and I think that's probably more rigorous than it has been in the past. I think there is some cross-fertilisation of ideas between divisions whereby things are dealt with and perhaps in a more structured way.

...

Q. Why do you think [improvements] didn't happen in those tribunals and it is happening now?

A. Well because I think there was probably less accountability, less pressure. They were all specialist tribunals. Nobody bothered them or — they had to write an annual report, everybody was part-time, they had ... there still is in Equal Opportunity the head has traditionally been a district court judge for three years, so

³⁶ ADT Member 4 at paragraph 153.

³⁷ *Ibid.*, at paragraphs 157 to 161.

³⁸ ADT Senior Member 2 at paragraphs 159 and 243.

they're doing their district court judging most of the time, so the time to do a performance appraisal system — there's no way.³⁹

It may be difficult to avoid challenging the bad habits of former specialist tribunals, given that amalgamation involves the replacement of one organisational framework with another, and opportunities for interaction with members and staff from previously separate bodies. However, while these benefits were identified by ADT subjects, particularly those from the Equal Opportunity Division, there was no indication this had occurred to a significant extent in NSW.

Indeed, in some divisions, there was a perception that things had deteriorated since the amalgamation. For instance, the view was expressed that the former Community Services Tribunal had essentially been 'swallowed up' in the merger and had lost its specialist profile which encouraged users to identify with it.⁴⁰ ADT Member 7 considered this was due, at least in part, to the fact that no one person had taken responsibility for ensuring that smaller divisions like the Community Services Division continued to operate as effectively — or more effectively — after amalgamation.⁴¹

In contrast, a strong theme to emerge in the data collected from VCAT subjects concerned the benefits of opening smaller tribunals up to different ways of doing things:

A. I think that when people are only working in a particular area there is some risk of the members getting too close to some of the repeat players, be they lawyers, be they representatives of an organisation which appears in a particular kind of matter regularly — I would much prefer to work in different parts of the Tribunal on a regular basis because one then sees new faces regularly. I don't suggest anything sinister there or anything improper, I'm simply suggesting that it's a fact of life that if you're working in a particular tribunal, seeing the same lawyers representing respondents for example, there's some risk that you might unconsciously, or perhaps consciously, simply not go through all the processes that you should — you might adopt some shortcuts taking the view — oh well, Mr X for the respondent of course knows all that, I don't need to go through all that. There's a risk that one might forget that the complainant ought to hear the normal spiel that would be given to the respondent at that point, for example.

Q. So that familiarity may have some consequences?

³⁹ *Ibid.*, at paragraphs 157 to 159.

⁴⁰ ADT Member 7 at paragraphs 41 and 49.

⁴¹ *Ibid.*, at paragraphs 275 to 277.

A. I think it can over time potentially anyway lead again to some insularity in the way matters are conducted.⁴²

Similarly, VCAT Member 3 commented on the advantages of exposing smaller, specialist tribunals to new experiences, and enabling them to adopt practices which may prove more effective in their particular jurisdictions.⁴³ VCAT Member 4 referred to the problems that the insularity of specialist tribunals could generate:

A. I think there was too much of a proliferation of these little sort of you know, laws unto themselves, and I don't think that was desirable. Some of them [specialist tribunals] had very whacky procedures which really weren't appropriate.

Q. Appropriate in their own jurisdiction even?

A. Appropriate anywhere. I mean I don't think at the start of a case we should all join hands and say the oath, stuff like that.⁴⁴

Similarly, VCAT Senior Member 2 commented:

I think that there were a variety of cultures out in the small tribunals that weren't necessarily particularly appropriate and I think there were varying standards of work ethic. I think it's better to have some sort of uniformity about those sort of things, but also I think people, particularly in a small organisation can get a particular mind set which ought to be challenged.⁴⁵

In this subject's opinion, it would be relatively easy for the few people managing a smaller tribunal to think that "their little shemozzle's running fine".⁴⁶

There were several concrete examples of improvements in practice and approach that had occurred as a consequence of the shake-up of former specialist bodies. For instance, VCAT Member 6 reported that the complacency and poor work ethic of some members in the planning jurisdiction had been addressed, and they were now working far more efficiently.⁴⁷ In relation to the Guardianship List, VCAT Member 1 perceived improvement in the way that members approached their task:

A. There's no pomposity anymore.

⁴² VCAT Senior Member 3 at paragraph 73.

⁴³ VCAT Member 3 at paragraph 185.

⁴⁴ VCAT Member 4 at paragraphs 289 to 293.

⁴⁵ VCAT Senior Member 2 at paragraph 129.

⁴⁶ *Ibid.*, at paragraph 97.

⁴⁷ VCAT Member 6 at paragraphs 147 to 157.

Q. Did there use to be?

A. Well I don't think it was ever intentional but sometimes people wanted to be sure that this legislation was seen to be important ...⁴⁸

VCAT Senior Member 1 commented favourably on the introduction of case conferencing and mediation in jurisdictions which had previously been dealt with by the Victorian AAT. This subject saw no reason why these techniques had not been used in the AAT, particularly as such developments enabled members to provide a better service to users.⁴⁹ Similarly, VCAT Member 3 referred to the cultural shift in the Anti-Discrimination List away from providing extensive written reasons in every matter. This adjustment in approach was perceived to have resulted in greater efficiencies.⁵⁰ These experiences indicate the way in which an amalgamation can provide opportunities to reassess the way things have been done in the past, and to think creatively about improvements that can be made.

Many of these benefits were facilitated by conditions that were not present in the ADT, such as a high level of communication between members and the sharing of information and ideas throughout the Tribunal. More generally, it is argued that the same benefits were not identified in relation to the ADT because different divisions had retained many of the features — including features of organisational culture — that had characterised the operation of the former specialist tribunals that were amalgamated. The difficulties faced by ADT management in challenging past practices contributed to the less than optimal outcome of the amalgamation in NSW.

Opportunity benefits available within larger, generalist organisations

In addition to the opportunity to address bad habits, opportunities arise by virtue of the fact that an amalgamated tribunal will be larger and more diverse than the specialist bodies it replaces. The resource implications of being a larger organisation with a substantial workload were discussed in some detail in Chapter 7. However, there are a

⁴⁸ VCT Member 1 at paragraphs 143 to 147.

⁴⁹ VCAT Senior Member 1 at paragraphs 95 to 99.

⁵⁰ VCAT Member 3 at paragraphs 135 to 141.

number of other benefits associated with the creation of a larger organisation and the bringing together of several previously separate tribunals.

VCAT Registry Staff Member 1 reported that a number of improvements had flowed as a result of the transition to a larger registry. In particular, the opportunity had been taken to multi-skill staff, many of whom had had limited options for promotion as a result of undertaking extremely specialised work in the registries of former tribunals. This had improved the career development opportunities for staff:

... it'll take you twice as long, but eventually you'll canvass all of it [the registry work of the Tribunal] and you'll become proficient at each and every individual process all the way along. And once you are proficient at that, then the advantages are that you can be moved to work anywhere along the [conveyor] belt rather than be restricted to this little area.⁵¹

Similar improvements could be expected in NSW, but the opportunities for career development would have been fewer given the smaller scale of amalgamation in that State.

A number of VCAT subjects considered that amalgamation had provided similar professional development opportunities for members:⁵²

Not speaking of myself personally because I'm still only on the two lists that I came with to VCAT from, but other members, yes particularly I think for the younger members who would perhaps make a career in adjudication — it's very good for them career-wise to have experience across all lists — because see Residential Tenancies is too much of a legal backwater.⁵³

VCAT Member 3 had certainly experienced these benefits. As well as gaining a broader range of skills from working across different lists,⁵⁴ this subject derived professional satisfaction from having a more varied workload:

A. I think it's also better for members because rather than being stuck in one tribunal they can move around and do different work, and a lot of the other work is interesting and exciting for me as well.

⁵¹ VCAT Registry Staff Member 1 at paragraph 223. See also Kellam, above n 20, at 433.

⁵² VCAT Senior Member 1 at paragraphs 121 and 161; VCAT Member 1 at paragraphs 203 to 207; VCAT Member 5 at paragraphs 143 and 145 to 147. VCAT Senior Member 3 stated at paragraph 56: "There's scope for professional development which I doubt was present in the previous set-up with various separate bodies."

⁵³ VCAT Member 2 at paragraph 123.

⁵⁴ VCAT Member 3 at paragraphs 161 to 169.

Q. So is there a professional development aspect to that for members?

A. Definitely and I think a lot of them, you would get tired of sitting in a couple of lists the whole time ...⁵⁵

As well as improved opportunities to sit on different lists and thereby gain diverse skills and experience, a number of subjects commented favourably on the learning opportunities that flowed from the fact that VCAT, as a larger organisation, exposed members and staff to colleagues with a greater range of experience. As VCAT Senior Member 2 pointed out, members of VCAT are regularly in a position to observe the work of at least three experienced judicial members.⁵⁶

Another opportunity benefit that can be capitalised upon is the greater status and independence that a larger tribunal can provide.⁵⁷ This benefit was more apparent in Victoria than in NSW. A number of examples were given of the way in which VCAT, as a larger organisation with a greater proportion of judicial members, was better equipped to hear matters that were controversial or politically sensitive. For instance, VCAT Senior Member 2 noted that special attention had been paid to the way in which the Tribunal was constituted when hearing matters relating to the Kennett Government's ambulance reforms, private prison contracts, the Crown Casino, the Olympic Games, and discrimination against an HIV positive footballer.⁵⁸ Other benefits included the standardisation of terms of appointment, and the inclusion of members in the judicial remuneration process.⁵⁹

Overall, there is no doubt the amalgamation in Victoria resulted in opportunity benefits that would not have arisen had the former system of smaller, specialist tribunals been retained. This had not occurred to the same extent in NSW, largely because many of the divisions retained the features of the specialist tribunals they replaced. This underlines the proposition that an amalgamation can have vastly different consequences, depending

⁵⁵ *Ibid.*, at paragraphs 189 to 193.

⁵⁶ VCAT Senior Member 2 at paragraphs 63 to 67.

⁵⁷ VCAT Member 2 at paragraphs 133 to 135.

⁵⁸ VCAT Senior Member 2 at paragraph 21. See also VCAT Senior Member 3 at paragraph 157. VCAT Member 6 made similar comments at paragraphs 207 to 213.

⁵⁹ VCAT Senior Member 2 at paragraph 71.

on how it is approached and executed. More particularly, it demonstrates the significant improvements that can be achieved if full advantage is taken of the opportunity benefits that amalgamation provides.

Implementing new initiatives

In addition to presenting opportunities to deliver a standard range of improvements, an amalgamation process provides a chance to go even and develop improvements and new initiatives beyond those that would ordinarily be expected. The data presented below show the way in which VCAT took advantage of the amalgamation to *create* opportunities to overhaul a range of existing practices and procedures. The initiatives that were introduced contributed significantly to VCAT's success in maximising the potential for optimal tribunal reform in Victoria.

From the very beginning, a conscious effort was made to take advantage of the amalgamation in Victoria to pursue an agenda of positive tribunal reform. Rather than merely managing the transition itself, the chance to think critically about structures, processes, equipment and training was embraced by VCAT management. As articulated by VCAT Registry Staff Member 1, the perception was that there was no reason not to take advantage of this opportunity:

At the end of the day this jurisdiction was never going to change again, we'd just tipped the whole thing upside down, and we were going through a massive learning curve.⁶⁰

This proactive approach translated in practice into a variety of organisation-wide initiatives that contributed substantially to VCAT's success. In many ways, it is the range and number of improvements that were made after amalgamation that signified the difference between *positive* and *optimal* tribunal reform in Victoria.

VCAT subjects gave numerous examples of initiatives that had been implemented or that were being trialled in different lists following amalgamation. A very practical example was the consideration given by different elements of registry to the type of telephone

⁶⁰ VCAT Registry Staff Member 1 at paragraph 111.

system each would adopt upon the transition from specialist to generalist tribunal. Ultimately, different areas adopted systems that best suited their particular needs. For instance, Residential Tenancies staff established a call centre, whereas registry staff servicing the General List chose to adopt a ‘hunt group’ system which spreads the function of answering telephone calls evenly across every member of staff.⁶¹

More recently, at the time of data collection, registry staff were trialling a new electronic filing system in the Residential Tenancies List in light of the high number of applications and repeat users in that List:

... one of the latest initiatives is what’s called VCAT Online, and it’s been initiated in Residential Tenancies first whereby estate agents have an email facility for lodging their applications online and they set up an account with the Registrar, so the \$25 application fee is deducted from their account, so they can lodge their applications online.⁶²

Registry was also considering trialling a computerised Order Entry System in the Residential Tenancies List, which would enable members to generate orders for parties ‘on the spot’.⁶³ Other initiatives included the implementation of a ‘buddy system’ for staff — the objective being to multi-skill VCAT employees to enable them to deal with a wider range of jurisdictional issues than before; a policy of rotating staff between different parts of the VCAT Registry for six week periods;⁶⁴ staff conferences; and induction programs for new staff.⁶⁵

Another important initiative implemented by VCAT management was the practice of rotating Deputy Presidents. According to VCAT Senior Member 2, the objective of rotating Deputy Presidents to a new list every few years was to encourage them to reconsider and challenge the effectiveness of the processes and procedures operating in that list. It was expected that Deputy Presidents would suggest ideas for improvement that were informed by the practices used in other lists.⁶⁶ The implementation of this

⁶¹ *Ibid.*, at paragraph 99.

⁶² VCAT Member 2 at paragraph 155.

⁶³ VCAT Registry Staff Member 1 at paragraphs 253 to 261.

⁶⁴ *Ibid.*, at paragraph 175.

⁶⁵ VCAT Registry Staff Member 1 at paragraphs 157 to 175.

⁶⁶ VCAT Senior Member 2 at paragraphs 133 to 137.

policy further demonstrates how the amalgamation in Victoria was seized on as a chance to implement new initiatives and improvements.

Moreover, this initiative has sparked a number of subsequent developments as a result of greater interaction between lists. There were several examples of different procedures being trialled in circumstances where a new Deputy President had seen the same procedure operating successfully in a different list. According to VCAT Member 5:

... there's definitely a bringing together of different perspectives and different ways of handling things ... particularly on an administrative level about how you handle paperwork and files and all those sorts of things. Yes, or they might decide that, for example that mediation would be worthwhile to try out in this jurisdiction where it hadn't been before and so on and I mean they're bound to have a whole lot of administrative, again a number of administrative functions that they take with them where they can see improved processes and so on.⁶⁷

Another subject noted that the recently introduced requirement in some lists to prepare witness statements prior to hearings had significantly streamlined the hearing process.⁶⁸ Other initiatives included a code of conduct for mediators;⁶⁹ greater consistency in the making of costs orders;⁷⁰ an increased focus on conducting circuits in country Victoria;⁷¹ the appointment of a full-time librarian and part-time research assistant;⁷² and the mediation-related initiatives discussed in some detail in Chapter 8. VCAT Senior Member 2 summarised the overall perception of VCAT subjects by saying:

I think most people would agree that the standards — go and talk to barristers who appear here, and I think they would agree that standards are improving bit by bit.⁷³

To some extent it could be argued that the introduction of new initiatives generated something of an 'upwards spiral' of continuous improvement within VCAT.

In contrast, there was no sense among ADT subjects that the amalgamation had been seized on as an opportunity to explore new developments or implement new initiatives.

⁶⁷ VCAT Member 5 at paragraphs 137 to 139.

⁶⁸ VCAT Member 7 at paragraph 151.

⁶⁹ VCAT Senior Member 2 at paragraph 73.

⁷⁰ VCAT Senior Member 3 at paragraph 45.

⁷¹ VCAT Member 5 at paragraph 17.

⁷² VCAT Member 4 at paragraph 375.

⁷³ VCAT Senior Member 2 at paragraph 59.

This is not to say that no new initiatives were adopted by the ADT following the amalgamation. For instance, a number of ADT subjects commented favourably on the development of a members' manual which encouraged greater consistency within and between divisions.⁷⁴ ADT Member 3 observed a number of other administrative improvements following the amalgamation, such as an improved case management system, and greater emphasis on compliance with procedural requirements in a timely fashion:⁷⁵

I think there was some administrative and operational improvements in terms of the establishment of practice notes, the strong reforms towards consistency and collegiality if that's a word, amongst Tribunal members, the arrangement of training ... training days for members.⁷⁶

A number of subjects commented positively on attempts by registry to streamline Tribunal forms and to provide explanatory material in accessible, consistent language.⁷⁷ ADT Member 9 also referred to a shift in emphasis away from directions hearings as a worthwhile development.⁷⁸ Other initiatives that had either been implemented or were being developed at the time of data collection included time standards for the rate at which matters should progress through the Tribunal's processes;⁷⁹ the appointment of a research associate with responsibility for producing case summaries and bulletins on relevant legal issues;⁸⁰ a mentoring scheme for new members; and a structured training program for new members.⁸¹

⁷⁴ ADT Member 3 at paragraph 109; ADT Member 4 at paragraphs 61 and 205; ADT Member 7 at paragraphs 343 to 353; ADT Member 8 at paragraph 131; ADT Member 9 at paragraphs 151 and 181 to 183.

⁷⁵ ADT Member 3 at paragraph 69.

⁷⁶ ADT Member 3 at paragraph 25. Similar benefits were identified by ADT Member 8 at paragraphs 139 to 159, and paragraphs 287 to 295.

⁷⁷ ADT Member 9 at paragraph 191; ADT Senior Member 1 at paragraph 83.

⁷⁸ ADT Member 9 at paragraph 191.

⁷⁹ ADT Senior Member 1 at paragraphs 129 to 133.

⁸⁰ ADT Registry Staff Member 1 at paragraph 271.

⁸¹ ADT Senior Member 2 at paragraphs 171 to 175. The importance of high quality training for tribunal members is highlighted in Creyke's discussion of the training given to tribunal members in the French administrative review system, and the subsequent high quality and reputation of administrative review in that country. See Creyke, Robin, "Tribunals and access to justice" (2002) 2(1) *Queensland University of Technology Law and Justice Journal* 64-82, at 79.

In general, however, the impression of most ADT subjects was that things had continued in much the same way as before. This perception was particularly strong among subjects associated with the Legal Services Division, who were under the impression that the Division had not altered its practices and procedures, or its culture, as a result of amalgamation. For instance, in ADT Member 10's view:

The procedures haven't changed — things basically carry on as they did before. However, it operated better and more efficiently when it was a specialist tribunal.⁸²

In relation to the procedures and processes applied in the Equal Opportunity Division, ADT Member 5's view was that the ADT had "had no impact".⁸³ ADT Member 2 made similar comments:

A. I mean it's quite frankly had little effect on the way we previously operated — it's a discrete area which is still basically discrete. I don't think there's really been much of a change in the Tribunal.

Q. So it's almost like a change by name only?

A. I would see it in those terms.⁸⁴

The fact that so many ADT subjects felt uninspired and unaffected by the amalgamation at the time data were collected may be a consequence of the Tribunal's disjunctive organisational culture, which inhibited the sharing of ideas among members. This idea is explored further in Chapter 11. The absence of political commitment to the ADT's success may also have contributed to the apparent lack of creativity in implementing initiatives.

Alternatively, it may be that many of the new initiatives described above had not yet permeated the day-to-day operation of different divisions, or were not of a type that would impact significantly on the operation of the Tribunal as a whole. Indeed, a number

⁸² ADT Member 10 at paragraph 64. See also ADT Member 6 at paragraphs 109 to 111. Similar views were expressed by ADT Member 11 at paragraphs 29 to 43. See also ADT Member 1 at paragraph 59.

⁸³ ADT Member 5 at paragraph 189. Similar comments were made by ADT Member 8 at paragraphs 205 to 207.

⁸⁴ ADT Member 2 at paragraphs 21 to 25.

of initiatives related to the induction and training of new members — something which would not impact noticeably on the work of existing members.⁸⁵

Whatever the reasons, in comparison to the level of activity within VCAT, it appears that ADT management was restricted in its ability to set standards that would perceptibly improve the Tribunal's effectiveness. It is argued that the lack of political support for the amalgamation in NSW was a significant factor in this regard. The degree to which each Tribunal was active in pursuing improvements beyond those to be expected had implications for the extent to which optimal tribunal reform was achieved in each State.

Efficient use of resources

The multi-faceted ingredient of 'organisation' obviously has a key role to play in the successful implementation of amalgamation proposals. The final element to emerge upon closer analysis of the qualitative data is the extent to which organisational efficiencies are achieved as a result of amalgamation. It is argued that the achievement of greater efficiencies is an important element of optimal tribunal reform.

There were a number of differences in the extent to which the ADT and VCAT implemented procedures and adopted practices which would ensure the optimal use of resources in each Tribunal. Almost all subjects acknowledged there were cost-benefits to be gained from amalgamating. However, VCAT subjects were far more likely than ADT subjects to point to specific examples where efficiencies had actually been achieved. While there was a perception that the creation of the ADT had resulted in the basic savings that could be expected to flow from any amalgamation, comments by VCAT subjects suggested Tribunal management in Victoria had been more creative in this regard.

The two themes explored below are the extent to which costs were reduced as a consequence of each amalgamation, and the degree of flexibility that each Tribunal had

⁸⁵ As noted in Chapter 5, the research gathered provides a 'snapshot' of the ADT four years on from amalgamation. It is therefore not intended to be indicative of the way in which the Tribunal will develop over time. Indeed, initiatives such as member training and the development of a members' manual may have resulted in 'VCAT-style' improvements since the time these data were collected.

to move resources around as required. Both issues are central to the commonly cited objective of increased efficiency through amalgamation.

Reducing costs

A number of ADT subjects referred to the costs that would have been saved as a result of the process of amalgamation itself. Most cited benefits relating to economies of scale and the reduction of unnecessary duplication.⁸⁶ Indeed, there was a general consensus that administrative efficiencies had been achieved by amalgamating, and that registry services had improved as a result of a pooling of resources. For instance, ADT Member 6 noted that administrative staff in the ADT were available to service members on a full-time basis, whereas some smaller, specialist tribunals had only had part-time staff.⁸⁷

According to this subject:

I think that there would be economies across the board because I think as I recall there were something like 26 or 27 tribunals in all to be [amalgamated] progressively ... into a central registry. Well you don't have to be a genius to work out that that would have been a good thing, financially.⁸⁸

Similar comments were made by ADT Senior Member 1:

There's a degree of dysfunctionality in very small tribunals, and costs are generated in it that would certainly be squeezed out through amalgamation. And some people just say, "It's a simple exercise to save costs." But I think you do get that benefit.⁸⁹

Specific examples of greater efficiencies included the more effective use of hearing rooms;⁹⁰ more effective and flexible utilisation of registry staff;⁹¹ savings in rent;⁹² and

⁸⁶ ADT Member 1 at paragraph 67; ADT Member 3 at paragraph 133; ADT Member 4 at paragraph 125; ADT Senior Member 2 at paragraph 243.

⁸⁷ ADT Member 6 at paragraph 111. See also ADT Member 3 at paragraph 173; ADT Member 4 at paragraphs 39 to 41. ADT Member 7 conceded that these kinds of improvements could occur as a result of amalgamation — paragraph 293.

⁸⁸ ADT Member 6 at paragraph 115.

⁸⁹ ADT Senior Member 1 at paragraph 197.

⁹⁰ In particular, ADT Senior Member 2 noted that a number of smaller, specialist tribunals — such as the Community Services Tribunal — would only sit once or twice a week, leaving a hearing room that was not utilised on a full-time basis. These types of inefficiencies could be reduced where a number of different divisions shared common hearing rooms — at paragraph 231.

⁹¹ ADT Senior Member 2 at paragraph 227; ADT Registry Staff Member 1 at paragraph 103.

⁹² ADT Registry Staff Member 1 at paragraph 291.

the appointment of a research associate who could provide services such as case summaries Tribunal-wide.⁹³

Beyond this, however, there was little indication that the amalgamation in NSW had resulted in dramatic efficiencies. For instance, ADT Member 2 had not observed any particular improvement in the Tribunal's operation. Rather, this subject commented that things weren't "working any more inefficiently".⁹⁴ ADT Member 7 had actually observed a decrease in efficiency in the Community Services Division since the amalgamation:

Q. And you mentioned before that it was slower, it would take longer to get a decision, that it was not as quick. Why do you think that is?

A. I don't know — it's from the administration. I think it's administration because it takes too long to write, it takes too long to communicate, it takes too long to get responses.

Q. Responses between the different members of the panel?

A. And with the applicants — with all the participant parties. My experiences in the last three hearings that I have had is that it's getting slower and slower and more inefficient.⁹⁵

ADT Member 10 made similar comments in relation to the Legal Services Division:

One of my apprehensions was that the Tribunal would lose its 'tightness', and this has eventuated. The Legal Services Tribunal ran very well — it was tight, efficient and well-run.⁹⁶

A number of ADT subjects also referred to delay in getting decisions out.⁹⁷ ADT Member 9 considered that a heavy reliance on part-time members — most of whom have other commitments — was a significant cause of delay.⁹⁸ While there was no suggestion that time standards had deteriorated as a result of the merger, there was certainly no indication that greater efficiencies had been achieved in this regard.

⁹³ *Ibid.*, at paragraphs 267 to 275.

⁹⁴ ADT Member 2 at paragraph 61. Similarly, ADT Member 7 had not observed any improvements in efficiency since the amalgamation — paragraphs 223 to 233. See also ADT Member 3 at paragraph 101, and ADT Member 6 at paragraph 111.

⁹⁵ ADT Member 7 at paragraphs 355 to 361.

⁹⁶ ADT Member 10 at paragraphs 22 to 28.

⁹⁷ ADT Member 9 at paragraph 79; ADT Member 8 at paragraph 355.

⁹⁸ *Ibid.*, at paragraphs 79 to 83.

Whereas no ADT subject was particularly effusive about the cost savings and efficiencies deriving from amalgamation, VCAT subjects were consistently positive in this regard. There was a general consensus that, as with the ADT, the amalgamation itself had resulted in costs savings in Victoria.⁹⁹ According to VCAT Senior Member 2: “We can demonstrate that the average cost of cases across the board is being reduced, that’s an economy of scale I’ve got no doubt”.¹⁰⁰ Similarly, VCAT Registry Staff Member 1 remarked:

Q. Do you find that over time you do get those increased efficiencies just having that flexibility simply by being bigger and able to manage?

A. Yes. No question at all that we’re running the whole of the AAT in a much more flexible leaner way than you could possibly do before. People aren’t as stressed. It hasn’t been at the expense of peoples’ stress levels.¹⁰¹

A number of subjects gave examples of administrative efficiencies that had flowed from the merger¹⁰² including central listing of matters;¹⁰³ a centralised electronic case management system;¹⁰⁴ computerised research resources and a full-time librarian;¹⁰⁵ a greater number and more effective utilisation of hearing rooms;¹⁰⁶ more efficient utilisation of registry staff and facilities;¹⁰⁷ and savings from coming together in one building.¹⁰⁸ Some subjects had also observed a cultural shift towards greater efficiency among members of certain lists since the creation of VCAT.¹⁰⁹

A number of subjects also noted that the increased emphasis on mediation throughout VCAT had reduced costs by facilitating speedier resolution of matters.¹¹⁰ VCAT Senior

⁹⁹ See, for example, VCAT Member 7 at paragraphs 123 and 183.

¹⁰⁰ VCAT Senior Member 2 at paragraph 59.

¹⁰¹ VCAT Registry Staff Member 1 at paragraphs 125 to 127.

¹⁰² VCAT Member 3 at paragraphs 227 to 229 and 241; VCAT Member 4 at paragraph 73.

¹⁰³ VCAT Member 3 at paragraph 241.

¹⁰⁴ *Ibid.*, at paragraph 241.

¹⁰⁵ VCAT Member 4 at paragraph 375.

¹⁰⁶ VCAT Member 5 at paragraph 43; VCAT Member 6 at paragraphs 243 to 249.

¹⁰⁷ VCAT Member 6 at paragraphs 217 to 229; VCAT Senior Member 2 at paragraph 51; VCAT Registry Staff Member 1 at paragraphs 123 and 223.

¹⁰⁸ VCAT Member 6 at paragraph 377.

¹⁰⁹ *Ibid.*, at paragraph 337.

¹¹⁰ VCAT Member 5 at paragraph 63.

Member 3 was particularly impressed by the cost savings achieved in the Anti-Discrimination List due to the introduction of mediation.¹¹¹

In contrast to the divergent experiences at the ADT, there was relatively uniform feedback from VCAT subjects to the effect that tribunal decision-making in Victoria had become more efficient as a result of amalgamation. For instance, VCAT Member 6 commented:

Q. So would you say it's generally more efficient than it was?

A. Far more efficient. I don't know whether in terms of cost, but I think overall it probably would be. It's certainly, things are moving far better than they used to, I reckon anyway.¹¹²

This had resulted in the reduction of substantial backlogs which had been carried over from some specialist tribunals.¹¹³ Indeed, the turnaround time for matters in some lists was as low as six weeks:

A. You put in your claim form and it costs you a minimal fee, in Guardianship it's nothing and in Residential Tenancies and Civil Claims it's \$30 and you'll get a hearing in six to nine weeks. You don't have to have any legal representation. You walk out with a result in that time, and I think that's sensational.

Q. It's a good turn around time.

A. It's fantastic and you get a result.¹¹⁴

While the evidence suggests that efficiencies were achieved as a result of both amalgamation processes, it appears this occurred to a greater extent in Victoria than in NSW.

¹¹¹ VCAT Senior Member 3 at paragraphs 121 to 125.

¹¹² VCAT Member 6 at paragraphs 163 to 165.

¹¹³ VCAT Member 3 at paragraphs 257 to 265; VCAT Member 6 at paragraph 169.

¹¹⁴ VCAT Member 3 at paragraphs 273 to 277.

Increased flexibility

A further measure of efficiency is the extent to which resources can be mobilised and moved around when and where the need arises. A number of VCAT subjects commented on the flexibility of being able to move members around to make more effective use of resources. For instance, VCAT Registry Staff Member 1 commented:

A. But yes, there's enough hearing rooms and enough sessional members around to be able to pump those resources as they're needed ...

Q. In a flexible way?

A. Yes, to meet those needs. So that governments aren't in a position necessarily when something like that happens they suddenly have to create a new building and create a new, you know whole other [review mechanism].¹¹⁵

Greater flexibility was also reported in the way that VCAT's human resources can be utilised post-amalgamation:

Over time it became obvious that people down here were much better skilled and people up here were much better skilled in the work that they knew nothing about before and we now have the flexibility of saying to people this — at the moment for example one of these people as of Monday has got a job in Civil, got a promotion and so she's going over to there. I'm not replacing her. I'm actually pulling a lady out of this area because she needs a lot of experience in Planning so I'm pulling her up to here to sit here and be trained in Planning.¹¹⁶

The experience of VCAT Member 3, who was cross-appointed to five different lists, was that the primary lists in which sessional members worked would shift as a result of changing workloads and priorities:

Q. There is that flexibility, then, to move you as a sessional member, to move you around between the lists that have more work and the lists that have less work?

A. Oh yes. I mean everything's fluctuating and they're expecting things may change and it may change and I could be moved to those lists. In fact the General List is my home list [but] it's probably the List I've worked least in.¹¹⁷

This flexibility was said to significantly assist in the reduction of backlogs when particular areas experienced a “surge” of applications.¹¹⁸

¹¹⁵ VCAT Registry Staff Member 1 at paragraphs 287 to 291.

¹¹⁶ *Ibid.*, at paragraph 123.

¹¹⁷ VCAT Member 3 at paragraphs 19 to 21.

¹¹⁸ *Ibid.*, at paragraph 265. Similar comments were made by VCAT Senior Member 2 at paragraphs 139 to 141; and VCAT Registry Staff Member 1 at paragraphs 287 to 291.

There was similar flexibility in the way in which sessional members were utilised in the day-to-day operations of the Tribunal. For instance, a number of subjects cited examples where they had been called into the Tribunal at short notice to conduct hearings, or where matters for which they had been listed had been withdrawn and replaced by others at short notice:

A. You might find yourself with half a day free and they'll give you some of that work to do. Sometimes I get called down to do Guardianship or do some, help out somewhere else.

Q. Does that happen often — that something just pops up that they're able to program you in for?

A. Yes, probably at least once a week or more. It depends. If I've got a full list where I am they'll leave me there but quite often they'll change it, and they'll change even in advance. They'll say look we don't need you in Residential Tenancy now, we need you in Guardianship. So I say that's fine.¹¹⁹

Similarly, VCAT Member 5 observed that “they will often call me in if they get into overload and there are emergency cases to do and stuff like that.”¹²⁰ VCAT Registry Staff Member 1 commented favourably on the flexibility this gave VCAT management in listing matters for hearing:

We can over-list, we can work on the basis here where we will have all of these resources of all of these members and staff to move around on an ‘as needs’ basis. So instead of listing one matter in Anti-Discrimination you might actually list two, on the basis that you'd also, if you've got two members available out of this whole pool of members, you can mix and match.¹²¹

This subject cited the following example of the flexibility which a larger registry gives in enabling managers to move resources and staff around to satisfy demand:

... one of the guys over in Residential Tenancies said, gee, we're struggling to get our orders out. So we scooped those up and had the bench clerks down here doing them, and they were quite happy to do it. So that kept them up to date. Little examples like that that occur regularly which means that the whole place can operate better. And everyone — those guys get together with these guys, ‘thanks very much for your help’, and they get to know each other.¹²²

¹¹⁹ VCAT Member 3 at paragraphs 41 to 49.

¹²⁰ VCAT Member 5 at paragraph 87.

¹²¹ VCAT Registry Staff Member 1 at paragraph 3. See also VCAT Member 3 at paragraph 9; VCAT Member 5 at paragraph 23; VCAT Senior Member 2 at paragraph 117.

¹²² VCAT Registry Staff Member 1 at paragraph 91.

One or two subjects identified inefficiencies which had emerged as a result of amalgamation. For instance, VCAT Member 1 commented on the recently introduced practice in the Guardianship List of reviewing administration orders on a regular basis, rather than maintaining the more informal approach that had existed previously.¹²³ More generally, VCAT Member 7 considered that inefficiencies may start to emerge if VCAT became any bigger.¹²⁴

In general, however, the overwhelming impression was that the amalgamation had improved the efficiency of tribunal review in Victoria. One of the key advantages was greater flexibility in mobilising resources, members and staff as required. This was seen to have significant implications for the efficiency and effectiveness of VCAT as a whole.

There were far fewer comments from ADT subjects about greater flexibility in the utilisation of Tribunal resources following amalgamation. ADT Registry Staff Member 1 did note there were increased opportunities for multi-skilling registry staff and using the Tribunal's human resources in a more flexible manner.¹²⁵ However, the comparative lack of examples given by other subjects suggests the impact of amalgamation in NSW had been less significant in this regard.

CONCLUSIONS

The summary at the beginning of this Chapter set out subjects' overall perceptions about the success of the amalgamation process in each State. This reinforced the theme that emerges repeatedly from the qualitative data — that VCAT is more successful than the ADT. The remainder of the Chapter further explored two of the key ingredients responsible for this outcome: context and organisation. The data support the proposition that both factors are influential in determining the extent to which optimal tribunal reform is delivered.

¹²³ VCAT Member 1 at paragraphs 87 to 91.

¹²⁴ VCAT Member 7 at paragraphs 183 to 187 — these comments are quoted in full in Chapter 7.

¹²⁵ ADT Registry Staff Member 1 at paragraphs 105 to 115.

More specifically, the discussion highlighted that the extent to which management has authority to set the direction of a new tribunal is a crucial aspect of the political commitment that must be given to an amalgamation process. In particular, the ADT experience highlights the importance of a commitment by government to ensuring that a newly-amalgamated tribunal has sufficient organisational independence to be self-directed and innovative. The evidence suggests that placing constraints on tribunal management will undermine their ability to implement the improvements that are vital to achieving optimal tribunal reform.

In terms of organisation, a key element is the extent to which amalgamation is seized as an opportunity to set standards, implement efficiencies, and improve processes and procedures. The VCAT experience indicates what can be accomplished when management has the capacity to take full advantage of the opportunity benefits that amalgamation provides. As well as the introduction of a range of anticipated and unanticipated improvements, VCAT management capitalised upon the efficiencies that the merger was able to deliver. These factors contributed significantly to the overall success of the reforms in Victoria.

Chapter 11 further analyses the contributions that a balanced organisational structure and managed cultural change can make to optimal tribunal reform.

CHAPTER 11: HOW TO ACHIEVE AN OPTIMAL AMALGAMATION — MANAGING SPECIALISATION AND DISJUNCTION

This Chapter follows on from the refinement in Chapter 10 of several key ingredients of an optimal amalgamation process. The first issue examined is a further element of ‘organisation’ — namely, the balance struck within an amalgamated tribunal between retention of necessary specialisation and greater consistency. It is argued that the extent to which a tribunal’s organisational structure enables relevant specialisation to be retained and unnecessary specialisation to be discarded is a telling feature of a successful amalgamation. The degree to which specialisation has been retained in Victoria is particularly relevant in light of the range of new initiatives that have been implemented throughout VCAT.

The final ingredient explored is ‘people’. It is argued that an important element of this ingredient is the degree of disjunction that exists within the culture of a newly-amalgamated tribunal. The extent to which the ADT and VCAT are characterised by cultures of disjunction or cohesion is therefore analysed with a view to pinpointing those elements that are determinative of each Tribunal’s success in this regard. Active management of the way in which an amalgamated tribunal’s culture develops emerges as a central factor here.

The conclusion to be drawn from this analysis is that careful attention must be paid to the legislation, context, organisation and people of a newly-amalgamated tribunal. In particular, care should be taken in addressing the six constituent elements outlined in Chapter 4 in order to secure optimal tribunal reform.

STRIKING A BALANCE BETWEEN SPECIALISATION AND CONSISTENCY

One of the biggest challenges of an amalgamation process is to create an organisation whose structures and processes are cohesive, flexible and appropriate. A fundamental difficulty in this regard is retaining necessary specialisation within divisions or lists while at the same time taking advantage of the benefits that amalgamation can bring — namely,

greater efficiency, consistency and an opportunity to raise standards across the board.¹ The analysis of the ART and CTP Bills in Chapter 6 demonstrated the importance of legislation in striking an appropriate balance between the retention of necessary specialisation and the introduction of consistent standards. The following analysis of qualitative data reinforces the significance of this as a key element of ‘organisation’.

On a conceptual level there was general recognition among interview subjects that a degree of specialisation was important in divisions or lists dealing with matters in different jurisdictions.² For instance, ADT Member 4 opined that administrative efficiencies should not be sought at the expense of necessary specialisation in the different divisions of an amalgamated tribunal:

... the manager can't ignore the very real claims that all the jurisdictions have to the particular needs [of their constituents]. What I think the jurisdictions are really doing is defending the interests of the constituency of the jurisdictions they're meant to serve. I mean if, for example, anyone ever suggested that the Guardianship Board — which was the Guardianship Tribunal as they set [it] up in Victoria — the Guardianship Tribunal would be perfectly entitled to say we are just so different, we are so out there, but then again I suppose so could Community Services have said that — they're a really odd type of tribunal. So as long as the fundamental differences in service delivery are appreciated then I don't see a problem with providing a common administrative base.³

VCAT Senior Member 2 also recognised the importance of striking a balance between specialisation and consistency:

I think it's important to keep differences in processes between lists because if you're going to amalgamate the thing and just make it an homogenous mess you won't achieve the benefits of amalgamation. The benefits of amalgamation in my view are to keep specialised expertise still available in its stream but at the same

¹ The importance of striking an appropriate balance between the retention of necessary specialisation and the introduction of new standards is widely acknowledged — see, for example, Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on the jurisdiction and operation of the Administrative Decisions Tribunal*, NSW Parliament, Sydney, 2002, at 30 to 31.

² For instance, ADT Member 1 noted that a degree of specialisation was appropriate in light of the significant differences between the power and resources of those appearing before the Legal Services Division, and users of the Equal Opportunity or Community Services Divisions who were more likely to lack education and resources — ADT Member 1 at paragraph 83.

³ ADT Member 4 at paragraph 189. Similar sentiments were expressed by ADT Member 1 at paragraph 59; ADT Registry Staff Member 1 at paragraph 155; Separate NSW Tribunal Senior Member 1 at paragraph 111; VCAT Member 2 at paragraph 119; VCAT Senior Member 1 at paragraphs 159 to 161; VCAT Registry Staff Member 1 at paragraph 269.

time to provide the overall umbrella benefits of a large organisation with its own culture, its own discipline, its own processes.⁴

Interestingly, in practice, the data reveal fewer differences between VCAT and the ADT in this regard than in relation to most other issues. In particular, apart from the experience of the former Community Services Tribunal in NSW, there were relatively few complaints from subjects regarding a loss of specialisation.

These results may be indicative of the degree of disjunction or lack of cohesion within each organisation. That is, specialisation may have been retained by virtue of the fact that consistent standards had not been set Tribunal-wide. Alternatively, it may be that both Tribunals succeeded in striking an appropriate balance between encouraging consistency and the retention of specialisation following amalgamation. In light of the discussion below about managing disjunction, it is argued that specialisation was retained in the ADT more by accident than by design, while the reverse was true in relation to VCAT.

More generally, it is argued that an appropriate balance between specialisation and consistency can be struck if the natural tendency towards retention of specialisation is actively managed. This needs to be complemented by a range of strategies designed to establish consistent standards that apply across an amalgamated tribunal as a whole.

The experience in Victoria indicates that this process will be assisted if Tribunal management takes measures to encourage recognition and respect for the importance of specialist jurisdictions throughout an organisation. As well as reassuring members from smaller divisions or lists, this approach better ensures that new initiatives implemented by management will be effective across the organisation as a whole, but not at the expense of specialist practices. These concepts are explored in more detail after the following overview of the degree to which specialisation was retained in each Tribunal.

⁴ VCAT Senior Member 2 at paragraph 45.

Loss of specialisation within the ADT

There was an interesting split in the views of ADT subjects about whether specialisation had been lost or appropriately retained following the amalgamation in NSW. Some subjects felt that important specialisation had been lost, and that a number of features had been reduced to the level of ‘lowest common denominator’. Others were happy with the level of specialisation. This suggests that specialisation had been lost in some areas, and retained or even strengthened in others.

Generally speaking, subjects who were cross-appointed, or whose work involved having some overview of the Tribunal’s operations, considered that an appropriate degree of specialisation had been retained within the ADT:

I think we’ve got there by allowing everyone to keep going in their own little groove, but yes, as a merger goes, I think on balance it’s ... been very good.⁵

And:

... amalgamation leads to a situation where you over time become more uniform among divisions in what you do, especially if you’ve got people sitting across divisions. But there are still very inherent, quite strong cultural values that people have from the old tribunals and they continue.⁶

ADT Registry Staff Member 1 noted that, at the time research was undertaken, different practice directions and practice notes had been retained on the basis that various divisions had different requirements. There had also been an attempt to design adjustable hearing rooms which could be rearranged to suit the level of formality required in different types of matters.⁷

Similarly, the experience of a number of subjects associated with the Equal Opportunity Division was that an appropriate degree of specialisation had been retained (even strengthened) following amalgamation. The fact that ADT Member 2 considered nothing much had changed since the amalgamation⁸ implies the specialist features which this subject saw as important had been retained. ADT Member 3 considered the specialist

⁵ ADT Member 4 at paragraphs 199 to 201. See also ADT Member 1 at paragraphs 85 to 87.

⁶ ADT Senior Member 2 at paragraph 105.

⁷ ADT Registry Staff Member 1 at paragraphs 155 and 159.

practices and procedures within the Equal Opportunity Tribunal had been strengthened by the amalgamation:

I don't think [specialist procedures] have been lost. I think they've actually been improved. These specialist procedures we're considering judicially if you like have been better retained I think because they've been written up more and sort of logged more and paid more attention to, so I would think that there have been improvements there and probably greater consistency.⁹

Some subjects considered that the retention of specialisation had occurred at the expense of cohesion within the ADT:

A. ... there hasn't been any kind of homogenisation.

Q. So that's been of benefit ... ?

A. Well it does mean the divisions can continue ... they've got the advantage of continuing as they were but with no particular advantage of having learnt from each, although there are some members who are in different divisions.¹⁰

This view is consistent with the perception that there is a relatively high degree of disjunction between separate divisions of the ADT.

Loss of specialisation

In contrast to these views, there was a perception among some subjects that the former Community Services Tribunal had lost much of its specialisation in the transition to a generalist tribunal. For instance, ADT Member 7 considered that specialist procedures — in particular, the grass roots or community liaison activities of the former Community Services Tribunal — had been lost as a consequence of the amalgamation:

Q. And how important is it in the Community Services area to have that grass roots input?

A. Oh I think that it is essential. It's essential [because] the users of this tribunal are really very disadvantaged people. If there is not that grass roots approach it's very difficult, and I don't ... because I feel very sad that to see what is happening in the Community Services Division of the Administrative Decisions Tribunal. I think it's lost.¹¹

⁸ ADT Member 2 at paragraphs 21 to 29.

⁹ ADT Member 3 at paragraphs 103 to 109.

¹⁰ ADT Member 1 at paragraphs 149 to 155.

¹¹ ADT Member 7 at paragraphs 75 to 77.

ADT Member 7 reported that initiatives developed by the former Tribunal — such as attending public meetings, distributing information, having a newsletter, making contacts with relevant non-government organisations, and running training sessions for people from non-English speaking backgrounds and workers in migrant resource centres — had lapsed since amalgamation.¹² There was also a perception that important features such as accessibility in approach and informal hearing room layout had been lost.¹³

There was some suggestion that the Community Services Tribunal, as a comparatively small tribunal with a low workload,¹⁴ had been overshadowed by larger or more influential divisions. For example, it appears that the greater formality of other divisions had affected the operation of the Community Services Division:

A. I really felt that probably we were going to lose some of that [informality] and I think we have. Partly because the furniture and the architecture is not the same.

Q. Because you're all using the same hearing rooms?

A. We're using the same hearing rooms. I mean we are all on one level, we don't sit up high, and we have got, you can have a look at the hearing rooms, you've probably seen ... they're in bit of a state of disrepair at the moment, we're all on one level, so that's something, but I suppose — we used to do our own recordings so we never had a monitor, whereas now [we do], so even that adds a little bit more. We didn't always make somebody sit in a special spot when they were giving evidence whereas now we would have them and swear them in, whereas we used not to even swear them in.

Q. Did some of that stuff come from the ADT Act?

A. Not really because — I think it just comes from a slightly more legal, formal style.¹⁵

Moreover, ADT Member 7 considered that the reputation of the Community Services Division had diminished owing to the inaccessibility and delay characterising the ADT:

The public profile is actually getting worse because I think that the ADT is not having a group community profile in the sense that it is not very well known, it's

¹² *Ibid.*, at paragraph 97.

¹³ *Ibid.*, at paragraph 237. Similar comments were made by Elizabeth Ellis, specifically, that the 'court-like' layout of ADT hearing rooms as they were in 2000 increased the formality and legal technicality of hearings — Ellis, Elizabeth, "Promise and practice: the impact of administrative law reform in New South Wales" (2002) 9(3) *Australian Journal of Administrative Law* 105-124, at 122. Note, however, that these issues may have been addressed since the research for this thesis was undertaken.

¹⁴ In the financial year 2001–2002, 70 matters were filed in the Community Services Division compared to a total of 756 matters that were filed across the ADT as a whole (including with the Appeal Panel) — Administrative Decisions Tribunal, *Annual report 2001–2002*, ADT, Sydney, 2002, at Appendix E.

¹⁵ ADT Senior Member 2 at paragraphs 97 to 105.

very slow, it takes a long time for a case to be heard, it's not giving the impression of being quick and easy and accessible to people.¹⁶

Overall, this subject's perception was that amalgamation had resulted in a loss of momentum and creativity in this jurisdiction. For example:

Q. And so did you have any concerns when the amalgamation was, or when the ADT was announced? Did you have concerns about it?

A. Yes I did. And it has proved I think correct those concerns. One of the concerns was that there was for a while the possibility of building up a group of people who were really interested not only in the issues related to the Tribunal but how to project the Tribunal and how to form the community relations and how to explain to people where it is going, how to appeal and when to appeal — to have more contact with the Department of Community Services and this I personally feel has been lost.¹⁷

The experience of the Community Services Tribunal demonstrates that one of the dangers inherent in an amalgamation process is the homogenisation of specialist tribunals that had developed unique characteristics in order to better serve the needs of users. In other words, there is a danger that individual divisions will be dragged down to the level of 'lowest common denominator'. The fear that the amalgamation in NSW would have a homogenising impact on the specialist features of former tribunals appears to have been realised to some extent in the loss of profile and reputation experienced by the Community Services Division.

There were indications that this had occurred as a result of the low profile of the Community Services Division within the ADT.¹⁸ There were suggestions that the Community Services Division was seen as relatively unimportant in the ADT context, due to its small workload and small number of members:

Q. And what about in Community Services Division?

A. Well that's very small. There are only three judicial members. We do talk. ... So, but there is a bit of that but not in a formal way, but obviously once you've got so few people it's not so important, but then that's not a big area about the Tribunal's jurisdiction.¹⁹

¹⁶ ADT Member 7 at paragraph 41.

¹⁷ *Ibid.*, at paragraphs 31 to 33.

¹⁸ *Ibid.*, at paragraphs 181 to 189.

¹⁹ ADT Member 9 at paragraphs 109 to 111.

This phenomenon had been observed by others, including ADT subjects not directly associated with the Community Services Division:

I'm also aware of the Community Services Tribunal which had its own fairly sophisticated, well it was getting there, a much more considered and trained group of members and they really had put a lot of effort into thinking about themselves and creating their image and creating their ... sort of externalising their style for the world to see. So they've sort of just been integrated in there now, and they're just there but they don't have any influence ... apart from their President who is now a Deputy President of the ADT.²⁰

This suggests that the potential dangers of amalgamation for the Community Services Tribunal had not been carefully managed within the ADT — possibly because of a lack of leadership within the Division, or an absence of effective mechanisms for communicating the Division's experiences to management.

The impact of amalgamation in this jurisdiction highlights what can go wrong if firm action is not taken to counteract the natural tendencies towards 'lowest common denominator' and 'dominance of the fittest' that can occur following amalgamation. The research suggests the Community Services Division was vulnerable because of its relative lack of importance within the ADT, and was particularly susceptible to assimilation within a generalist tribunal. The fact that steps were reportedly not taken to ensure the Community Services Division retained important specialist features reinforces the proposition that the amalgamation in NSW was unregulated and uncontrolled.

Some subjects associated with the Legal Services Division also considered that a degree of specialisation had been lost in the amalgamation. For instance, ADT Member 10 considered the Legal Services Tribunal had operated in a more formal manner appropriate to legal discipline matters.²¹ Similarly, ADT Member 11 considered that the importance of legal services matters had been undermined by combining them with a range of 'less serious' matters:

The matters dealt with in the Legal Services Tribunal were much more serious and complex than those that would be likely to be dealt with in the other divisions and that they really ought to keep them separate, because apart from anything else, the Legal Services Tribunal, or Division as it now is, has a concurrent jurisdiction

²⁰ ADT Member 1 at paragraph 83.

²¹ ADT Member 10 at paragraphs 30 and 88.

with the Court of Appeal to strike practitioners off the roll of practitioners so it's a pretty serious sort of organisation ...²²

There was a perception that the standards achieved by the Legal Services Tribunal were being lowered to the level of the 'lowest common denominator':

I think they ignore, because they think there's too much formality in the Legal Division, they want the Legal Division to have the sort of less structured set-up that some of the other places, other Divisions use. But it's not appropriate.²³

However, there was no legitimate suggestion that Legal Services had suffered the same fate as the Community Services Division. The Legal Services Division did not have the same vulnerability — a fact that is demonstrated by the maintenance of its own institutional culture after amalgamation. Nonetheless, these data reinforce the proposition that the 'lowest common denominator' phenomenon was operating within the ADT. It is therefore unclear whether important aspects of the Legal Services Division's culture will be maintained over time as the ADT develops its own institutional culture.

All of this suggests there have been centripetal or unifying forces operating within the ADT post-amalgamation which are pushing the practices and cultures of specific divisions in the direction of those that are more 'mainstream'. For instance, a number of ADT subjects noted that the culture and procedures of the former Equal Opportunity Tribunal were more 'middle of the road' and, as such, more likely to be reflected in the practices and procedures being adopted Tribunal-wide:

Yes, Legal Services Division — they'd all be perfectly comfortable and they'd probably really like to sit in a court, up high, looking down and rules of evidence apply, and I respect the fact that rules of evidence apply, because of what's at stake, that's fine, so they can have their room there. At the other end of the scale, Community Services should be sitting around a table like this ... like the SSAT, and that's how they should be set up, and somewhere in the middle is Equal Opportunity ...²⁴

The suggestion that divisions with less mainstream cultures and practices were becoming more like the Equal Opportunity Division is reinforced by the fact that, in constructing ADT hearings rooms which could be used by all divisions, community services hearings

²² ADT Member 11 at paragraph 35.

²³ *Ibid.*, at paragraph 195.

²⁴ ADT Member 4 at paragraph 197.

became more formal and legal services hearings less formal.²⁵ This may have implications for the retention of necessary specialisation within the ADT over time. As ADT Member 1 pointed out “the risk is that you get a homogenised [tribunal], which is often the lowest common denominator of all of them”.²⁶

Decreased visibility

Another potential danger of amalgamation is that former specialist tribunals will lose their visibility upon becoming part of a larger organisation with no established reputation or profile. This, in turn, could lead to decreased accessibility by one-off users — particularly in jurisdictions designed to cater to the needs of users from lower socio-economic backgrounds.

A subtle decrease in the profile of former specialist tribunals can be observed following the amalgamation in NSW. Even in relation to the Equal Opportunity Division, which was not considered as vulnerable as other divisions, there was a sense that something had been lost. ADT Member 4 thought there had been a loss of profile which made the Tribunal’s task of raising awareness within the community more difficult:

I think the most important issue that was never addressed and which I think is problematic is one of appearances and public perception. For NSW to lose an obvious Equal Opportunity jurisdiction is a great pity. To not be able to say to people, the public, “NSW has an Equal Opportunity Tribunal, go to the Equal Opportunity Tribunal”, is not merely confusing but a real loss in public awareness and education. To say to people, “oh you can go to the Administrative Decisions Tribunal, and in there they do discrimination law” isn’t nearly as powerful a message²⁷

Similarly, ADT Member 2 commented:

I don’t think there’s any perception in the public of the ADT. I think if you were to walk out into the street and say to people, “Have you heard of the NSW ADT”, people would look at you blankly and say, “I haven’t the faintest idea what you’re talking about, mate”.

...

²⁵ ADT Registry Staff Member 1 at paragraph 151.

²⁶ ADT Member 1 at paragraph 59.

²⁷ ADT Member 4 at paragraph 25.

But I think if you walk down the street and say to people, “Are you aware of equal opportunity and sexual harassment and racial vilification”, 70% of the public would say yes.²⁸

ADT Member 8 considered that the change to the ADT had been a bit confusing for applicants, as no-one would associate the name ‘Administrative Decisions Tribunal’ with equal opportunity matters. As a result, this subject tended to refer to the Equal Opportunity Division rather than the ADT.²⁹

ADT Senior Member 2 had a different view — namely, that the larger size of an amalgamated Tribunal would eventually result in it having a greater profile than any former specialist tribunal could have attained:

I think it means hopefully that people don’t associate the Tribunal with the government department that’s got a similar name. For example Community Services, Equal Opportunity etc — that this is a different Tribunal, that it’s bigger, that it’s a generic tribunal for NSW ... I think it does certainly give the impression of greater independence and no doubt a higher profile because rather than being four organisations it’s only one; so people hear the name more often ...³⁰

While this process had been hampered by the fact that significant NSW tribunals had been left out of the amalgamation, ADT Senior Member 2 believed the profile of the ADT would become established over time.

At the time data were collected, however, the overwhelming impression was that the ADT was not ready or able to have a profile of its own, as it had not yet developed into a cohesive, integrated organisation. As ADT Member 1 pointed out, the ADT gave the impression of being something of a half-way house — an amalgamated tribunal that was no greater than the sum of its parts. It was therefore not in a position to command anything like the same degree of public recognition as VCAT:

VCAT’s good for that — it’s got good visibility, people know that you go there for a whole lot of things and that’s really big plus. The problem is where you’ve got a tribunal that’s got some things but not all things and then you’re kind of neither one nor the other.³¹

²⁸ ADT Member 2 at paragraphs 69 to 73.

²⁹ ADT Member 8 at paragraphs 305 to 315.

³⁰ ADT Senior Member 2 at paragraph 235.

³¹ ADT Member 1 at paragraph 131.

The perception that amalgamation in NSW had resulted in a loss of profile and public recognition was reinforced by comments of Separate NSW Tribunal Senior Member 1, who considered that the profile of that subject's Tribunal would be diminished if it were amalgamated to form part of the ADT:

I think there is real benefit and I get continually reminded that this is the case by people from the peak bodies and all of that, that the specialist tribunal carries with it, what's the word, they believe that therefore the tribunal is a tribunal that they have confidence in, it carries their confidence because it is designed to deal with the problems they know, have not been dealt with well in the past ...³²

The lack of public profile surrounding the ADT, and the perception that users as well as members identify more with particular divisions than with the Tribunal as a whole, seems to be a consequence of the fact that those responsible for implementing the amalgamation in NSW were slow in creating a cohesive, integrated organisation that was greater than the sum of its parts.

Despite these difficulties, it is probably fair to say that a majority of ADT subjects considered an appropriate balance had been achieved between retention of specialisation and consistency. For these subjects, there was a sense that individual divisions had retained many of their specialist characteristics, including many aspects of the cultures that had existed within former specialist tribunals.

However, it is argued that significant loss of specialisation did not occur largely because of the degree of disjunction that continues to characterise the ADT. Indeed, it seems the extent to which positive specialisation has been retained in individual divisions has depended on the strength or clout of the individual tribunals that were amalgamated. This indicates that the ways in which divisions interacted and influenced one another occurred by accident rather than through a considered process of ensuring that necessary specialist features were retained. While some former tribunals have survived and thrived in the brave new world of the ADT, the effectiveness of others has been diminished.

³² Separate NSW Tribunal Senior Member 1 at paragraph 107.

The retention of specialisation within VCAT

The experience of VCAT subjects was that an appropriate balance had been struck between retaining specialisation and encouraging consistency or improvements throughout the Tribunal.³³ For instance, VCAT Member 5 commented:

... [VCAT] does very well in recognising that you need particular types of knowledge, expertise and knowledge but we share the skill base more I think, so you come with your expertise and some with experience from a particular area but in terms of the way you conduct hearings, the way you conduct mediations, the sorts of skills that you are using, the techniques that you use, are far more shared, and so you get the benefit of both things.³⁴

There was certainly a perception held by subjects associated with larger lists that an appropriate level of specialisation had been retained following the amalgamation.³⁵ Examples of the differential treatment afforded to the Residential Tenancies List, with its 70,000 matters a year, included the fact that mediation, which was encouraged elsewhere in VCAT, was not used in residential tenancy matters. This was in recognition of the fact that these matters tend to run for two hours or less and are therefore not suited to mediation.³⁶ In addition, this List retained its own specialised electronic case management system following the amalgamation,³⁷ and was expected to be one of the lists to benefit most from the introduction of a new electronic order entry system that was being developed at the time data were collected.³⁸

Unlike the experience in NSW, there was not the same perception among VCAT subjects that some former tribunals had been disadvantaged by the amalgamation while others had benefited. Rather, there was a sense that lists across the board had retained specialist features where necessary. For instance, a number of subjects noted that differences had been retained across lists in the initiating documentation that users would complete when

³³ VCAT Member 2 at paragraphs 221 to 223. VCAT Member 4 noted the different practices of lists in listing matters for hearing — at paragraph 97. The same subject considered an appropriate balance had been struck between the retention of specialisation and consistency — at paragraphs 305 to 307. Similar comments were made by VCAT Member 5 at paragraphs 153 to 155.

³⁴ VCAT Member 5 at paragraph 155.

³⁵ VCAT Member 2 at paragraphs 57 to 63.

³⁶ *Ibid.*, at paragraph 95.

³⁷ VCAT Registry Staff Member 1 at paragraphs 27 to 31.

³⁸ *Ibid.*, at paragraph 265.

lodging an application, as well as in the ways different lists conducted hearings.³⁹ VCAT Senior Member 3 noted that the cultures and approach of different lists could vary considerably — for instance, the Anti-Discrimination List generally operated in a far more formal manner than the Guardianship List.⁴⁰ In particular, there was a perception that the practices and cultures of smaller lists — such as Guardianship — and more specialised lists — such as Planning — had not been subsumed by those of the larger or more mainstream lists.

A number of subjects indicated that the Planning List was treated quite differently to other lists. While there had been a conscious effort at registry level to ensure that all staff in the Administrative Section had the ability to answer queries relating to planning, there was acknowledgment that the issues arising in these matters were unique.⁴¹ Not only did the ability to service the Planning List require detailed knowledge of the jurisdiction and its procedures, but there was also a recognition that procedures adopted in other areas — such as hearing clerks — would simply not be appropriate in the planning jurisdiction.⁴² More generally, comments by subjects gave the impression that the Planning List is a world unto itself within VCAT,⁴³ and that the degree of specialisation retained within the List is entirely appropriate.

In relation to Guardianship (which bears some similarities to the Community Services jurisdiction in NSW in terms of its relative size and informality) there were concerns prior to amalgamation that its specialist features would become subsumed in the merger. For instance, there were concerns that the Guardianship List would lose its identity as a specialist jurisdiction:

A. Of course there was a lot of personal concern about how it would work, and a lot of personal concern about losing the individuality of being a member of the Guardianship and Administration Board rather than a member of VCAT. So I'm a member of VCAT, but I hear Guardianship List applications.

³⁹ See, for instance, VCAT Senior Member 1 at paragraphs 67 and 105.

⁴⁰ VCAT Senior Member 3 at paragraph 41.

⁴¹ VCAT Registry Staff Member 1 at paragraph 63.

⁴² *Ibid.*, at paragraph 95.

⁴³ VCAT Member 6 noted that members on the Planning List tended to associate mainly with other members on that List — at paragraphs 125 and 327 to 333.

Q. So why was there that concern?

A. People thought that, people who were against it — and I was one of them — I mean I wasn't against it in that I stood up and said I'm not doing it, but I was sceptical about the potential for success because we were a specialist tribunal, everybody knew we were a specialist tribunal, and the only people who came to our premises were people with disabilities and generally speaking it was very obvious. And I was quite sceptical about how it would work. And also about sitting across tribunals — other people coming in — thinking, rather foolishly I suppose now, but thinking that guardianship would lose its importance in terms of the disability section of the community that it works for ...⁴⁴

However, these concerns did not eventuate; on the contrary, this subject was particularly enthusiastic about the consequences of amalgamation for the Guardianship List. In this regard VCAT Member 1 noted the care with which appointments were made to the List,⁴⁵ as well as the recognition by VCAT management that guardianship matters were special and that specialist practices need to be retained.⁴⁶ According to this subject:

We are seen to be not only important but performing a really important function within the community and ... [that] you can't put us in with everybody else.⁴⁷

There was a perception that, as a result, the Guardianship List's focus on people with disabilities had been retained. VCAT Senior Member 3 commented:

I don't sense that anything's been lost, and I don't sense that any of the repeat players who I meet from time to time in those lists — Anti-Discrimination and Guardianship — I don't sense that anyone is regretting the loss of anything.⁴⁸

There were comments from one or two VCAT subjects that a degree of specialisation had been lost in some areas as a result of mergers. For instance, VCAT Member 7 noted that a degree of specialist expertise in relation to drainage matters had been lost when the former Drainage Tribunal was amalgamated:

A. Now the Drainage Tribunal was, had one registrar and one permanent qualified lawyer, probably about half a dozen part-time people — occasionally simply being a farmer who'd been in the district for a long time type of stuff, but people with survey or engineering qualifications, and that Tribunal at least in my opinion, gained very high respect because it was just simply dealing with drainage matters, water matters, and it had, and the member who had the legal qualifications was rather astute about the whole thing and was very careful about how he pronounced

⁴⁴ VCAT Member 1 at paragraphs 29 to 33.

⁴⁵ *Ibid.*, at paragraphs 47 to 51.

⁴⁶ *Ibid.*, at paragraphs 103 and 175 to 179.

⁴⁷ *Ibid.*, at paragraphs 75 and 139.

⁴⁸ VCAT Senior Member 3 at paragraph 93.

his decisions. It got quite a good reputation. It then got absorbed by — I've got to get this right — by the Planning Appeals Tribunal and the jurisdiction widened if you like. The members who were only doing water cases before were now, had to do other things.

Q. So it got mixed in with other jurisdictions and other Acts?

A. Went in to the predecessor to the VCAT which is the Administrative Appeals Tribunal and it widened again and then it got caught into VCAT and the end result is that while it's probably doing the government a whole lot of excellent things in relation to saving money and all that, it in my book at least has lost the ability in a large degree to have the expertise that was the original concept.⁴⁹

VCAT member 7 considered that loss of specialist expertise was a particular risk in jurisdictions where the workload was not high:

In the areas where there's not a lot of cases and VCAT covers a multitude of, as you are probably aware by now, a multitude of disciplines, there's not the expertise carried through any longer, and I just find that somewhat regrettable.⁵⁰

Overall, however, almost all VCAT subjects interviewed gave the impression that VCAT had largely retained specialist procedures where appropriate. At the same time, as the discussion in Chapter 10 about standard-setting highlighted, VCAT management took advantage of the opportunities which amalgamation provided to initiate new developments and achieve greater consistencies across lists. Thus, there is little doubt that a careful balance was struck within VCAT between these potentially competing objectives.

The conditions required to strike a balance between specialisation and consistency

The above analysis provides useful lessons in how to strike an appropriate balance between the retention of necessary specialisation and the promotion of consistency within an amalgamated tribunal. In particular, the degree to which specialisation was both retained and lost within the ADT following amalgamation, and the consequences of this for specific divisions, demonstrates that the natural tendencies towards assimilation and retention of inappropriate specialisation must be managed so that necessary or useful features are retained, and irrelevant ones discarded. At the same time, there must be a concerted effort to set standards across the organisation as a whole.

⁴⁹ VCAT Member 7 at paragraphs 119 to 123.

⁵⁰ *Ibid.*, at paragraph 131.

The most important lesson to emerge from the data is that tribunal management must be actively involved in monitoring and regulating the experience of different divisions as they are incorporated into an amalgamated tribunal. This means ensuring that every division or list, no matter how influential or vulnerable within the context of the broader organisation, is given sufficient opportunity to be involved in decisions about the specialist features to be kept and the extent to which it is appropriate to adopt consistent standards. If this process is not managed, a newly-amalgamated tribunal risks losing specialist features from smaller jurisdictions that would improve the quality of its decision-making overall.

The apparent assimilation of the Community Services Tribunal in NSW highlights that not enough thought was given to the way in which various divisions would be integrated within the ADT. Indeed, while divisions such as Community Services were disadvantaged, divisions with a higher workload and more members — such as the Equal Opportunity Division — seem to have done quite well. This reinforces the proposition that the dominance of the fittest phenomenon was operating within the ADT. This is further reinforced by the fact that the approach of the Equal Opportunity Division is apparently becoming dominant throughout the Tribunal as a whole. A number of EOD subjects made comments along these lines:

I thought we would have been something like the poor relations of the ADT, but it turns out that we're big brothers.⁵¹

And similarly:

I think the EOD is fairly coherent but perhaps that's because I've been a member of that for quite a long time and I have a sense that we sort of dominate those premises.⁵²

There is no suggestion that this development occurred because the Equal Opportunity Division was perceived to be a role model for other divisions to follow because of the quality of its processes and outcomes. Indeed, a number of subjects associated with the former Tribunal indicated there was significant room for improvement in the way that it

⁵¹ ADT Member 5 at paragraph 149.

⁵² ADT Member 8 at paragraph 103.

operated.⁵³ Rather, it seems the culture of the Equal Opportunity Division has become dominant within the ADT because, second to the General Division, it has the highest workload in the Tribunal⁵⁴ — in other words, because its members make most use of the ADT’s facilities and are more highly represented at its premises. This suggests that specialisation within the ADT has not been retained on the basis that it contributes to effective decision-making in particular jurisdictions.

Rather than allowing smaller jurisdictions to be disregarded, the role of those managing the transition should have been to ensure that all aspects of the ADT’s work were regarded as equally valid. The experience of the Guardianship List within VCAT highlights that this can be achieved in a number of ways. For instance, VCAT subjects noted how cross-appointments to the Guardianship List improved the understanding and status of this jurisdiction throughout the Tribunal. In turn, this better enabled members to identify guardianship issues which arose in the context of other matters. This would appear to be one of the primary advantages of amalgamating.

The experience of the Guardianship List also demonstrates the way in which fostering recognition and respect for the specialist work of a particular list can enhance its performance and the confidence of its members. For example, one member of the Guardianship List commented:

Our List has gained in not credibility, but stature, sense of importance. Our List is seen now to be important. “It’s really important work isn’t it?” people say.⁵⁵

It is argued that the importance of guardianship matters was elevated by becoming part of a larger, more influential organisation *because* its integration within VCAT had been

⁵³ ADT Member 3 at paragraphs 29 and 73. As noted above, ADT Member 4 referred to the former Equal Opportunity Tribunal as a “political backwater” — at paragraph 165.

⁵⁴ In the period 2000–2001 the Equal Opportunity Division disposed of 118 matters. In the same period the General Division disposed of 358 matters, while the Legal Services and Community Services Divisions disposed of 34 and 37 matters respectively — Administrative Decisions Tribunal, *Annual report 2000–2001*, ADT, Sydney, 2001, at 33 to 36.

⁵⁵ VCAT Member 1 at paragraphs 75 and 139.

carefully managed.⁵⁶ The deliberate strategies of VCAT management in cross-appointing members and rotating Deputy Presidents are pertinent examples of how this was done.

Another important lesson to emerge from the VCAT experience is how the deliberate fostering of respect for appropriate specialisation better enables management to set standards throughout a newly-amalgamated tribunal. More specifically, the evidence suggests that specialist pockets who feel secure about their position within an organisation will be less resistant to new initiatives.

This proposition is further reinforced by the converse experience in relation to the Legal Services Division within the ADT. Data from its members indicated that a degree of angst had been caused by the perceived lack of respect afforded to the Division. For instance, there were suggestions that this Division had, at worst, been deliberately run down and, at best, sidelined in preference to the development of the administrative review jurisdiction of the ADT. ADT Member 11 considered that the ADT President was: “not interested in the Legal Services Division. He’s interested in the other divisions.”⁵⁷ The same subject had a perception that ADT management regarded the Legal Services Division as “an elitist group that should be cut down to size”.⁵⁸

While there are dangers in making too much of comments such as these, the fact that they were made indicates that insufficient consideration was given to managing the transition from specialist to generalist tribunal. These and other comments suggest that ADT management did not generate a perception that the work of the Legal Services Division was important, or that it would be worthwhile retaining some elements of its specialist procedures and culture. As a result, there seemed to be a degree of competitive feeling between members in the Legal Services Division and members in other divisions, and a subsequently increased resistance to change. There are indications that this situation contributed to the ADT’s lack of success in setting consistent standards and taking advantage of the opportunities that amalgamation provides.

⁵⁶ *Ibid.*, at paragraphs 143 to 147.

⁵⁷ ADT Member 11 at paragraph 167.

⁵⁸ *Ibid.*, at paragraph 63.

In short, the above discussion shows there can be resistance among specialist tribunals to abandoning their practices post-amalgamation and adopting the procedures and culture of a new organisation. If left unchecked, this can defeat several key objectives of an amalgamation process. A more successful amalgamation is one which results in the development of a cohesive organisation with its own culture and practices, rather than a loose confederation of disparate groups of members and staff. While the latter situation may be an appropriate outcome in the context of a co-location proposal, the concept of amalgamation envisages the creation of a new organisation. To capitalise on the potential benefits that amalgamation offers, there must be some degree of consistency and commonality tribunal-wide.

At the same time, it is important that the constituent elements of an amalgamated tribunal retain those features developed by specialist tribunals which were necessary to their effective operation in particular jurisdictions. However, a distinction can be drawn between the appropriate retention of specialisation, and the preservation of unnecessary specialist features or cultures. As the ADT experience demonstrates, the preservation of unique practices and procedures for no reason other than ‘this is how we’ve always done things’ can undermine the cohesion of an organisation and frustrate the objectives of amalgamating.

In practice, achieving an appropriate balance between specialisation and consistency is likely to be a challenging task. Judgements need to be made about which features to retain, which to discard, and which to impose across the tribunal as a whole. Moreover, even if good judgement is shown, there may still be legitimate differences of view among stakeholders which need to be managed. Nonetheless, the amalgamation process in Victoria demonstrates the benefits of successfully negotiating these issues.

MANAGING THE DEGREE OF DISJUNCTION

A related challenge is to manage the structural, procedural and cultural disjunction that can persist when a number of separate bodies are brought together to form one single organisation.

This section builds on the discussion in Chapter 9 about the degree of disjunction and cohesion that characterised the ADT and VCAT respectively. There is no doubt that the culture of an organisation will be influenced by a wide range of variables, not all of which can be controlled. However, it is argued that, unless managed carefully, the inevitable tendency towards continuing disjunction following amalgamation can result in the maintenance of distinct organisational cultures within a larger amalgamated tribunal.

The experience within VCAT suggests that at least some variables can be positively engineered or managed with beneficial effect. Thus, the experience of the ADT and VCAT in managing disjunction is explored with a view to pinpointing those initiatives that have been used effectively in counteracting this tendency. The following discussion demonstrates how this element of ‘people’ can contribute to an amalgamation process that delivers optimal tribunal reform.

After recapping briefly on the organisational cultures of each Tribunal, the impact of the ADT’s continuing disjunction upon its development as an amalgamated Tribunal is explored in more detail. This analysis reveals a distinct difference between the ADT and VCAT in the extent to which management has been able to implement initiatives which encourage the development of a shared organisational culture. In particular, there is far less evidence of interaction and cross-fertilisation between different ADT divisions than could be expected. This emerges as both a cause and effect of management’s apparent powerlessness to sufficiently control or direct the development of the ADT’s organisational culture.

In contrast, the extent to which new practices were explored and adopted by lists throughout VCAT is indicative of the level of cross-fertilisation between different parts of that organisation. The degree to which this occurred was assisted by the greater level of interaction between individual members and staff and the supportive atmosphere engendered within that Tribunal. VCAT’s experience highlights the importance of people in constructing an amalgamated tribunal which operates successfully as a single organisation.

A key lesson to draw from these amalgamation experiences is that an organisation which facilitates and encourages interaction among its people gains additional benefits which would not otherwise be achieved. Moreover, an analysis of the Victorian experience shows the importance of positively engineering the way in which the culture of a newly-amalgamated tribunal develops, with a view to deliberately counteracting the destructive effects of continuing disjunction.

Revisiting the degree of disjunction and cohesion characterising each Tribunal

The material presented in Chapter 9 explored the extent to which the ADT and VCAT were able to draw their different divisions and lists together into a cohesive organisation with a shared vision and culture. This was done by looking at the degree of interconnectedness between divisions and lists, as well as the extent of interaction between individual members and staff from different parts of each Tribunal.

The data showed that ADT subjects tended to identify more readily with individual divisions than with the ADT as a whole. Whereas members of the Tribunal were able to describe the culture of divisions they were associated with, phrases such as ‘disparate’, ‘fragmented’ and ‘a sum of its parts’ were used to describe the institutional culture of the ADT. There were indications that members who were appointed to particular divisions had little understanding of the role or function of other divisions within the ADT. The Legal Services Division, in particular, seemed to be an unknown entity to a number of ADT members:

I don't think there'd be many people here who would say, "no we were better off on our own tribunal". I'd say, I don't know about Legal Services in that respect — you'd have to talk to them — because they're the ones I suppose I have least to do with.⁵⁹

⁵⁹ ADT Senior Member 2 at paragraph 243.

And vice versa, as comments from this subject associated with the Legal Services Division suggest:

Often [ADT newsletters] are not of huge interest to me because they're about other divisions and people that I don't know really anything about, but I do always look at them and they come regularly.⁶⁰

Similarly, ADT Member 3 commented at one stage: "I'm only talking about the Division I'm in — I'm can't really talk about the others."⁶¹

In contrast, VCAT subjects were able to identify and describe the organisational culture of their Tribunal as a whole. Moreover, subjects were overwhelmingly positive when describing the impact of VCAT's culture on their work, the operation of their lists and their overall sense of well-being in the workplace.

Similar differences were experienced in relation to the degree of interaction between the members and staff of each Tribunal. ADT subjects were concerned about the implications of a large part-time membership and lack of shared spaces within which members from different divisions could interact. There is no doubt both of these factors contributed to the degree of disjunction experienced within the ADT. VCAT subjects, on the other hand, related numerous examples of the benefits that had been gained from increased interaction between members and staff following amalgamation. In particular, this was a significant factor in the success with which VCAT management had inculcated a unifying culture throughout the Tribunal as a whole.

Thus, the overwhelming impression from the qualitative data is that the amalgamation in Victoria resulted in the establishment of a cohesive, interconnected organisation, whereas the ADT more or less remained a sum of its separate parts.

⁶⁰ ADT Member 6 at paragraph 67.

⁶¹ ADT Member 3 at paragraph 29.

The impact of disjunction within the ADT

The degree of disjunction that characterised the ADT had a significant impact upon its development. In particular, it has affected the extent to which its divisions benefited from practices and experiences that have proved useful in other divisions.

Cross-fertilisation between divisions

Few would disagree that the bringing together of a range of different tribunals provides the opportunity for a creative interplay between the practices, procedures and approaches that had previously only been used in different jurisdictions. As VCAT Member 5 commented, amalgamation provides an opportunity to reflect on how things are done and to experiment with new ideas:

So I suppose that too, that once you get, once all of it had to come together under the one piece of legislation and together as an institution, then there was the possibility ... I suppose things had to be clarified just to start with, so everyone knew what everyone was talking about. But it also meant that you could start to look at the ways of doing things, and different areas can pick up some new ideas or some variations from other areas, so, and I think too that because you've got the President and Vice Presidents who are overseeing the whole thing, they too, and the leaders group which comprises the Deputy Presidents, they too have an opportunity to be looking at what's happening in different lists — whether there are gains to be made by making some changes and what might be used, what might be applicable in an area where it hasn't been tried before and so on.⁶²

However, there were significant differences between the ADT and VCAT in the level of experimentation and cross-fertilisation — both in terms of personnel and practices — between divisions and lists. The data from ADT subjects paint a picture of the ADT as a collection of disparate divisions operating under one banner. A number of comments suggested there were not many instances of different divisions sharing experiences and techniques. For instance, ADT Member 4 commented:

I'm pretty clear that the [Equal Opportunity] jurisdiction continues to operate in its own little channel separate from the others and I've said that there isn't a whole lot of mixing or cross-fertilisation ...⁶³

⁶² VCAT Member 5 at paragraph 59.

⁶³ ADT Member 4 at paragraph 157.

Similarly, ADT Member 2 observed:

I don't think we've had a members meeting for the whole tribunal, you know, casts of hundreds maybe. There's not much cross-fertilisation at all.⁶⁴

This is not to say there had been no attempts by ADT management to improve the level of cross-fertilisation between divisions. For instance, ADT Registry Staff Member 1 referred to the policy of attempting to cross-appoint members in a conscious effort to break down cultural barriers.⁶⁵ In addition, ADT Senior Member 2 thought there was “some cross-fertilisation of ideas between divisions whereby things are dealt with ... perhaps in a more structured way.”⁶⁶ One of the few examples given of this interchange of ideas was the introduction of case conferencing in some divisions:

Well the only change I've noticed recently that's significant is the case conferencing. Now I don't know if that was a result of the ADT Act or if somebody just had an idea that this might be a good idea. I know that other tribunals use it, and we had a member of another tribunal come and talk to us in a meeting about the benefits of case conferencing ...⁶⁷

In general, however, there was no sense from ADT subjects that the NSW Tribunal had taken full advantage of the opportunities for improved interaction and the sharing of ideas that amalgamation offers.

Some ADT subjects considered that a degree of separateness among divisions was necessary in light of the different nature of the tasks they undertook. For instance, ADT Member 2 noted the task of the Equal Opportunity Division was to determine disputes between citizens, whereas the role of the General Division was to conduct administrative review. In this subject's view, this went some way to explaining the degree of disjunction that existed between different ADT divisions, although this does not account for the fact that similar challenges have been overcome in VCAT.⁶⁸

⁶⁴ ADT Member 2 at paragraph 37.

⁶⁵ ADT Registry Staff Member 1 at paragraphs 143 to 147.

⁶⁶ ADT Senior Member 2 at paragraph 159.

⁶⁷ ADT Member 8 at paragraph 267. See also ADT Member 9 at paragraphs 213 to 215. This example was also referred to by ADT Senior Member 2 at paragraphs 135 to 151.

⁶⁸ ADT Member 2 at paragraphs 137 to 147. See also ADT Member 4 who commented: “We are actually running at least three very, very different kinds of jurisdictions if you like” — at paragraphs 29, 41 and 45.

Overall, whether by accident or necessity, almost all subjects agreed there was a large degree of disjunction among the ADT's divisions which prevented a greater cross-fertilisation of ideas throughout the Tribunal. ADT subjects could not have been expected to describe the opportunities that had been lost as a result of the limited communication between divisions. However, the absence of comments in this regard indicates that members had not been encouraged to think broadly about the types of possibilities that are available within a newly-amalgamated tribunal.

Dominance of the fittest

The disjunctive nature of the ADT had a number of causes and effects. The effect just described is the lack of cross-fertilisation of ideas that occurred within the ADT after amalgamation. Another consequence was the powerlessness of ADT management to control and implement various developments throughout the Tribunal. The assumption is that it will be more difficult for those in charge of a newly-amalgamated Tribunal to direct the way in which its organisational culture develops — or even to introduce Tribunal-wide practices and standards — if there is resistance among its divisions to sharing information and a lack of mechanisms in place to counteract this. This lack of control can, in turn, serve to reinforce the very disjunction that produces it.

In the case of the ADT, it appears that management's lack of control over the development of the Tribunal manifested in a disorderly transition from specialist to generalist Tribunal, with the consequence that some divisions became dominant while others were subsumed. This suggests that the way in which the ADT developed post-amalgamation was a result of 'natural forces' rather than considered engineering. This had a number of undesirable consequences, perhaps the most detrimental being the loss of necessary specialisation in some divisions.

Unlike the experience in Victoria, there was a perception that no-one had taken responsibility for ensuring the ADT emerged from amalgamation as a cohesive, effective organisation. As discussed above, the perception of ADT Member 1 was that the ADT

had been put together in a haphazard, ill-considered manner.⁶⁹ Moreover, when commenting on the informality and accessibility that the Community Services Tribunal had lost in the transition to the ADT, ADT Member 7 remarked: “It could be changed if someone takes responsibility”.⁷⁰

The perception that no-one had been given a mandate to manage the transition from specialist to generalist tribunal in NSW was reinforced by a range of related factors. In particular, it was reinforced by the view that the ADT President had not been given sufficient authority to influence the development of the ADT following amalgamation. As noted in Chapter 10, the ability of Tribunal management to self-manage was very restricted, especially in relation to the appointment of members and staff.⁷¹ ADT Member 1 commented on the difficulty of managing a Tribunal when the President had little say in the appointment of members:

I mean I think that the head of a tribunal has to be responsible properly for the tribunal and the quality of the tribunal and it's not possible to do that if the person who is the head of the tribunal, even if they're a judge, has absolutely no say in who's appointed and the types of skills and the types of attributes you need in members at a particular time, so you might have people appointed who have excellent skills in a particular area, but you might not have any cases in that area for two years. So what do you do with them. Do you sit them out of their skills area or do you just ignore them?⁷²

ADT management's lack of authority is further evidenced by its powerlessness to implement any kind of performance management system for members:

The difficulty we have is we, people aren't, when I say people aren't selected on merit, there's no interview process. No ... people are appointed after making an expression of interest. Apart from me, I think I actually was interviewed for the Community Services job but I think virtually everybody else here has been appointed after expressing interest without an interview, so it makes it very hard then for us to say, “well our expectations of you are x, y and z”, and they say, “I only want to come when I say it's OK with me to come and where does it say I was supposed to get this done within this time and that I have to come to this training”, and so it makes it much more difficult to manage people where you don't call the shots from the start ...⁷³

⁶⁹ ADT Member 1 at paragraph 63.

⁷⁰ ADT Member 7 at paragraph 289.

⁷¹ ADT Registry Staff Member 1 at paragraphs 25 to 33.

⁷² ADT Member 1 at paragraph 21.

⁷³ ADT Senior Member 2 at paragraph 167.

Another factor in the powerlessness of ADT management to provide a strong sense of vision for the Tribunal was the decision to initially appoint its President on a part-time basis. ADT Member 3 noted that it was hard for the President to focus on developing the ADT given that he was also the President of another tribunal. In this subject's view: "I think if he played a more involved role there would have been more a feeling of being part of a bigger organisation."⁷⁴ Other subjects blamed the President's lack of involvement in certain divisions. In commenting on the ability of the President to influence the Tribunal's organisational culture, ADT Member 9 noted: "he will set the tone to a great extent except in those divisions where he really doesn't have any involvement at all, like Legal Services and Equal Opportunity".⁷⁵

Thus, it is argued that the lack of care that went into the organisational planning and delineation of roles within the ADT undermined management's ability to redress the degree of disjunction within that Tribunal. In many ways this was a product of the unfavourable context within which the ADT was created. It is assumed that, had there been greater political support for the amalgamation in NSW, the ADT would have been given more autonomy and an increased ability to manage its own affairs.

More relevantly, the failure to ensure that each division of the ADT was incorporated appropriately into the larger structure undermined the development of a cohesive organisational culture within the Tribunal. The autonomy with which different divisions operated made it difficult for ADT management to gain early control over its development by, for example, implementing Tribunal-wide initiatives.⁷⁶ The consequences of failing to engineer the cultures of particular divisions in positive ways highlights the importance of people and culture in effecting positive tribunal reform. This is further demonstrated by the amalgamation experience in Victoria.

⁷⁴ ADT Member 3 at paragraph 41.

⁷⁵ ADT Member 9 at paragraph 191. ADT Member 11, in contrast, considered that the ADT President was fairly influential in determining how the ADT was run. However, some of this subject's views appeared to derive from disapproval of the fact that the Legal Services Tribunal had been amalgamated at all — ADT Member 11 at paragraph 203.

⁷⁶ ADT Member 1 at paragraph 59.

How disjunction can be managed: the VCAT experience

The ADT experience demonstrates what can happen if key elements of an amalgamation process — such as the active management of disjunction — are missing. The VCAT experience, on the other hand, highlights the positive steps that Tribunal management can take following an amalgamation to ‘bed down’ the reforms and counteract the tendency for individual lists to retain separate cultures. The following discussion contains numerous examples of the benefits of an interventionist approach in this regard.

Cross-fertilisation between lists

Comments made by a number of VCAT subjects demonstrate that VCAT faced the same challenges as the ADT when it was first created. In particular, there were strong cultural divides between different lists within the newly-amalgamated Tribunal:

... people who are in the General List perceive that they are in the best list so they probably don’t want to swap, so they see themselves as being in the premier list and they wouldn’t see that coming down to civil claims or residential tenancies would be an ideal for them at all.

...

... a lot of their people are represented so they see themselves as being in a superior style of list.⁷⁷

VCAT Senior Member 2 described the challenges as follows:

A. The first one was combining so many cultures and I think that was always going to be the biggest challenge and probably still is. It’s less so. We’ve overcome it. I think we’re developing our own internal culture but there are still divisions. It’s not homogenous like a court. There are pockets of people who do particular work in particular places.

Q. Do you think that’s helpful to have those pockets, or the slight cultural differences between . . . ?

A. Well I think it’s sort of, I’m not sure it’s helpful but at the same time I think it’s the price you pay. I mean I don’t think it does much harm if you manage it.⁷⁸

Thus, those responsible for managing the transition from specialist to generalist Tribunal in Victoria did not allow the unhelpful aspects of specialisation and cultural difference to continue. Rather, there were indications throughout the data that management

⁷⁷ VCAT Member 3 at paragraphs 193 to 201.

⁷⁸ VCAT Senior Member 2 at paragraphs 41 to 45.

consciously set out to engineer the culture that developed across the organisation and the way in which different parts of VCAT were integrated into the whole. The number and variety of initiatives and techniques that were put into place to further these objectives demonstrates what can be achieved if Tribunal management are given the opportunity to be self-directed in this regard.

The range of strategies adopted are explored in detail below. These strategies significantly reduced the degree of disjunction within VCAT, largely by increasing the level of cross-fertilisation throughout the Tribunal. VCAT subjects gave numerous examples of instances where procedures used in particular lists were successfully adopted in other jurisdictions. A pertinent example relates to the use of mediation and case conferencing.

A number of subjects referred to the adoption of mediation in several lists as part of the standard process of dispute resolution following amalgamation. This had led to the resolution of significantly higher numbers of cases prior to hearing. In relation to the Anti-Discrimination List, for example, the former specialist tribunal had not had the statutory power, resources or experience to utilise mediation.⁷⁹ The facilitation of mediation throughout VCAT was of particular benefit in that jurisdiction, where mediations now have a 70% success rate.⁸⁰ VCAT Member 8 made similar comments in relation to the Planning List, where mediation had not previously been used, but where it was now having a success rate of between 60% and 80%.⁸¹ In relation to the former AAT, VCAT Senior Member 1 commented:

You see we didn't ever do mediations at the AAT. We didn't even do particularly compulsory conferences in the time I was there. You didn't do compulsory conferences where you take an active role in trying to resolve the matter. Just in the history of my experience we didn't ever really do that. We just concentrated on hearings.⁸²

⁷⁹ VCAT Member 5 at paragraph 39; VCAT Senior Member 1 at paragraph 113.

⁸⁰ VCAT Senior Member 3 at paragraph 109.

⁸¹ VCAT Member 8 at paragraphs 155 to 177.

⁸² VCAT Senior Member 1 at paragraphs 95 to 99.

The adoption of mediation across VCAT resulted in part from a push by the President for different lists to explore its potential. It is argued that the greater experience and more rapid adoption of mediation in particular lists also encouraged its adoption in others. In other words, it seems the many opportunities for members of different lists to share experiences and ideas facilitated the spread of mediation throughout the Tribunal as a whole. As noted above, VCAT Senior Member 3 emphasised the importance of interaction between the former specialist tribunals in encouraging the use of mediation in lists that had not previously been exposed to its benefits.⁸³

Further examples of cross-fertilisation included the adoption within the Guardianship List of the Residential Tenancies practice of allocating ‘interlocutory hearings’⁸⁴ to a wider group of members.⁸⁵ VCAT Member 4 noted that the new Deputy President in Anti-Discrimination had usefully discouraged the tendency of members in that List to “build up expectations for a case that was ... clearly hopeless”.⁸⁶ VCAT Senior Member 1 referred to the newly adopted practice in the same List of immediately listing matters for mediation rather than holding time-wasting interlocutory hearings, noting that this idea had come from one of the other lists.⁸⁷ VCAT Senior Member 3 noted that compulsory conferences had recently been introduced in the Land Valuation jurisdiction, following discussions with members in other lists who were experienced in ADR techniques.⁸⁸

Thus, the benefits of increased member interaction and a cohesive organisational culture were felt throughout VCAT as a whole. Unlike subjects in NSW, VCAT members and staff were able to point to numerous examples where practices had improved as a direct result of cross-fertilisation between lists. As the following discussion shows, the extent to which ideas and experiences were shared throughout VCAT was no accident.

⁸³ VCAT Senior Member 3 at paragraphs 105 to 109.

⁸⁴ Interlocutory hearings are shorter, preliminary hearings about matters such as adjournments, special requests for documents and waivers of fees, that take place prior to the substantive hearing in a matter.

⁸⁵ VCAT Member 3 at paragraph 177.

⁸⁶ VCAT Member 4 at paragraph 217.

⁸⁷ VCAT Senior Member 1 at paragraphs 181 to 183.

⁸⁸ VCAT Senior Member 3 at paragraph 137.

Achieving cultural change

An analysis of the amalgamation in NSW showed the interplay between the degree of disjunction within an organisation and the ability of management to take measures to counteract it.

The data collected about VCAT reinforce this proposition by showing the converse. There is a great deal of evidence to suggest that the benefits of cross-fertilisation described above were engineered by a range of strategies implemented with the deliberate objectives of encouraging consistency, facilitating the sharing of experience and information, and developing a cohesive institutional culture.

When the Tribunal first came together a concerted effort was made to facilitate informal networks and break down the cultural barriers that persisted, for instance, because members and staff of the former specialist tribunals did not know each other. VCAT Member 5 commented favourably on the open atmosphere that post-amalgamation meetings had helped to foster within VCAT:

A. I actually think they did very well in terms of getting to know all of us because that wasn't easy either.

Q. On a personal kind of level?

A. Yes. And they arranged times for groups of us to come in and meet with the President and Vice Presidents and stuff like that over drinks and things like that so we all got to know each other and I think that was really good, that was terrific because then it's a name to a face and, I mean certainly I still feel like yes I can go down and say, look I really need to speak to the President — that's not a problem or anything like that. I think they've done really well like that.⁸⁹

...

Q. So there's that effort, almost a conscious effort, at creating a more collegiate atmosphere?

A. Yes and certainly at the beginning when it was really really needed because people were, nobody was quite sure how this was going to happen. Like were we just going to run into each other at different places — I mean how did this all happen, and I think that was handled really well and the way it was handled too was to ensure that it wasn't like the President and the Vice Presidents are today going to meet with the former Anti-Discrimination members, it was making sure it was bringing together groups ...⁹⁰

⁸⁹ VCAT Member 5 at paragraphs 111 to 115.

⁹⁰ *Ibid.*, at paragraphs 117 to 119.

Another initiative that was implemented with the aim of developing a VCAT-wide culture was the policy of cross-appointing members to a range of lists. As noted in Chapter 8, in addition to multi-skilling people and providing increased job satisfaction, the primary objective of this policy was to encourage the development of a shared culture.⁹¹ The interaction between different lists in VCAT was certainly enhanced by this policy:

Q. Would it be like as an individual member ... if you have kind of a toolbox of skills — and if you sit on more lists that you can keep adding different skills to the ones that you can draw on?

A. Oh definitely. But you also see how other people deal with them because you're getting other files and you see what other people do and what orders they make and you might be looking at those sorts of things, so you are getting different ideas and different skills — I think you are.⁹²

This subject went on to explain how they had practiced the skill of delivering oral reasons in one list and then applied this skill in other lists.⁹³ Other subjects commented favourably on the success of this approach in broadening people's views and encouraging members to question the way things had been done in the past:

I thought there was a certain amount of, shall we say, inbreeding in views within a certain list in particular. In other words there were some pretty firmly held views about how things should be done, there was really no particular re-examination of those views, but I think because now people work across lists there is that re-examination and there are different perspectives, and I think that's very healthy.⁹⁴

⁹¹ VCAT Senior Member 2 at paragraph 125.

⁹² VCAT Member 3 at paragraphs 163 to 165.

⁹³ *Ibid.*, at paragraphs 167 to 169. VCAT Senior Member 1 reported a similar experience — at paragraph 129.

⁹⁴ VCAT Senior Member 3 at paragraph 49.

The same rationale lay behind the policy of rotating Deputy Presidents between lists. As VCAT Senior Member 2 pointed out: “It might be a good culture, it might be a bad culture, I don’t know, but somebody’s whose been elsewhere can come in and apply new thought to the place”.⁹⁵ VCAT subjects had experienced a number of benefits as a result of this initiative. In particular, there was a strong perception that different lists had benefited from the range of perspectives and experience that each new Deputy President brought:

A. ... see the Deputy Presidents are very much involved in the management of their respective lists, and in a few rotations they get to see what’s happening in other lists.

Q. So you see that as an advantage, for other members on that list as well as the individual Deputy Presidents?

A. Oh yes. Because if they saw some procedure that worked well in another list it’s their call to institute it.⁹⁶

Numerous examples have been given of the rotation of Deputy Presidents resulting in practices being taken from one list and adopted successfully in others. In addition, VCAT Member 1 observed that Deputy Presidents themselves gained a greater understanding of the role and function of different lists. This knowledge would then be inculcated throughout the Tribunal when Deputy Presidents were again rotated.⁹⁷ In this subject’s view, an amalgamated tribunal with that kind of communication between lists is better able to serve the needs of its users by taking a more holistic approach to the performance of its functions.⁹⁸

Another advantage referred to was the impetus which rotation gave to encouraging continuous improvement and reflection about the way things are done:

I also thought it was very good for people to go in and say, “well these are the systems and processes I had there, what works here and what doesn’t work”, and I think that’s been really good.⁹⁹

⁹⁵ VCAT Senior Member 2 at paragraph 133.

⁹⁶ VCAT Member 1 at paragraphs 111 to 115.

⁹⁷ *Ibid.*, at paragraphs 119 to 123.

⁹⁸ *Ibid.*, at paragraphs 125 to 127.

⁹⁹ VCAT Senior Member 2 at paragraph 137.

VCAT Member 5 considered that administrative gains were made as a result of this policy:

I mean there's definitely a bringing together of different perspectives and different ways of handling things and they might re-construct, particularly on an administrative level, about how you handle paperwork and files and all those sorts of things. Yes, or they might decide that, for example that mediation would be worthwhile to try out in this jurisdiction where it hadn't been before and so on. And I mean they're bound to have a whole lot of administrative, again a number of administrative functions that they take with them where they can see improved processes and so on.¹⁰⁰

In addition to cross-appointment and rotation of Deputy Presidents, VCAT management implemented a range of other strategies with the objective of counteracting disjunction and fostering a cohesive organisational culture. When VCAT was first established, the President made a conscious effort to sit on matters in each jurisdiction in an attempt to set consistent standards across lists.¹⁰¹ Positive comments were also made about the policy of intermixing the physical office locations of members belonging to the former specialist tribunals.¹⁰²

Other initiatives included the establishment of a Tribunal newsletter — the *VCAT Vignette*;¹⁰³ the establishment of a Professional Development and Training Committee;¹⁰⁴ the development of a New Members Handbook, New Members Committee and a mentoring program to support newly appointed members;¹⁰⁵ improving the consistency and quality of Practice Notes;¹⁰⁶ the establishment of a VCAT social club;¹⁰⁷ Christmas lunches;¹⁰⁸ an annual dinner for members;¹⁰⁹ and the policy of offering job swaps to

¹⁰⁰ VCAT Member 5 at paragraph 139.

¹⁰¹ VCAT Senior Member 2 at paragraphs 5 to 9.

¹⁰² *Ibid.*, at paragraph 153.

¹⁰³ VCAT member 4 expressed an interest in reading the “gossipy parts” of this publication — VCAT Member 4 at paragraph 29.

¹⁰⁴ Kellam, Justice Murray, “Developments in administrative tribunals in the last two years” (2001) 29(3) *Federal Law Review* 427-436, at 432.

¹⁰⁵ *Id.*

¹⁰⁶ *Ibid.*, at 434.

¹⁰⁷ VCAT Registry Staff Member 1 at paragraph 143.

¹⁰⁸ VCAT Member 4 at paragraph 125.

¹⁰⁹ ADT Member 4 at paragraph 149.

registry staff in different Divisions.¹¹⁰ While these kinds of initiatives may appear trivial in isolation, when taken as a whole there is no doubt they have contributed to the sense of “family” within VCAT that VCAT Registry Staff Member 1 described.¹¹¹

Overall, it is probably true to say that both Tribunals benefited to some extent from a sharing of ideas and experiences following the amalgamation. In particular, subjects gave concrete examples of the ways in which practices commonly used in other divisions or lists were now being utilised successfully in other areas. However, there was nothing like the same degree of interaction and sharing of practices and procedures within the ADT as had occurred within VCAT.

The key lesson is that many of the positive experiences reported by VCAT subjects were a direct result of policies put in place by management for the purposes of achieving more effective promotion of initiatives, and greater exchange of ideas and information throughout the Tribunal as a whole. The amalgamation experience in Victoria, and its converse in NSW, highlight that the adoption of a pro-active approach to controlling the culture and practices that develop within an amalgamated tribunal can counteract the tendencies towards disjunction that will otherwise undermine optimal tribunal reform.

CONCLUSIONS

Closer analysis of the data in relation to the degree of disjunction and retention of specialisation within each Tribunal reinforces the picture that emerged in previous Chapters. There is evidence that the amalgamation experience in Victoria is almost unanimously regarded as a success, while the amalgamation in NSW received a relatively lukewarm response from interview subjects. More specifically, the discussion in this Chapter reinforces the importance of paying careful attention to the various elements of ‘organisation’ and ‘people’ when implementing amalgamation proposals.

The positive perception of the VCAT experience was enhanced by the active approach management took to counteracting the tendency towards disjunction that inevitably arises

¹¹⁰ VCAT Registry Staff Member 1 at paragraph 143.

¹¹¹ *Ibid.*, at paragraph 143.

on amalgamation. Moreover, the fostering of respect for the specialist features of more vulnerable lists better enabled VCAT to strike a successful balance between the retention of necessary specialisation and the promotion of consistent standards Tribunal-wide. This again demonstrates the importance of taking a ‘hands-on’ approach to the establishment and consolidation of an amalgamated tribunal following the initial transition from specialist to generalist body.

Conversely, the ADT experience highlights what can be lost if sufficient vigilance is not exercised over the way different divisions within an amalgamated tribunal come together and interact. The assimilation of the Community Services Division into the ADT, and the unchecked retention of specialisation within other divisions, hampered management’s ability to cultivate the ADT as a cohesive, functional organisation. The evidence suggests that the way in which the amalgamation was handled has not affected the quality of decision-making in most jurisdictions. However, there is little doubt that the potential benefits amalgamation can provide had not yet been fully realised in NSW at the time research was conducted.

In further analysing the lessons that can be learned from the NSW and Victorian experiences, Chapters 10 and 11 demonstrate that, in terms of ‘context’, there must be political commitment to enabling tribunal management to set the direction of a newly-amalgamated tribunal.

Similarly, the structures, processes and procedures that are adopted within a new organisation must take full advantage of the opportunities that amalgamation offers.

Finally, the people of a newly-amalgamated tribunal must work to ensure that its organisational culture resists the temptation to remain disjunctive, and that only unnecessary specialisation is discarded in favour of consistency.

Thus, the closer analysis of the data in Chapters 10 and 11 has enabled the ingredients of optimal tribunal reform — law, context, organisation and people — to be further refined. Elucidating the relative importance of the constituent elements of each ingredient should

better enable policy-makers to consider and predict the likely consequences of the choices they make when implementing future amalgamation proposals.

CONCLUSIONS

The research and analysis presented in this thesis goes some way towards addressing the lack of academic engagement with tribunals and proposals for their reform. It capitalises upon the unique research opportunity that arose when two State Governments made contemporaneous decisions to amalgamate a number of smaller, specialist tribunals within the context of similar legislative frameworks. These amalgamation processes currently represent the high water mark of the recent trend to amalgamate tribunals. As such, the lessons drawn from the ADT and VCAT experiences will be valuable to policy-makers working on similar proposals in other common law jurisdictions.

The particular value of the qualitative data that were collected lies in the opportunities it provided to compare and analyse the differences between two amalgamation processes that were conceptually similar. It is in exploring these differences that the greatest insights into how to achieve optimal tribunal reform can be found.

Understanding the impact of tribunal reform

As argued in Chapter 4, the research undertaken for this thesis is presented against a sparse backdrop of literature and theory on the topic of tribunals. In particular, there is little theoretical guidance about how to measure the effectiveness of different tribunal models, let alone the impact of different amalgamation processes on tribunal performance. There is a clear need for further research in these areas.

In spite of this, the trend to amalgamate tribunals continues to spread to jurisdictions throughout the common law world. In addition to the amalgamations that have taken place in NSW and Victoria, proposals to amalgamate are currently being implemented in Western Australia and the United Kingdom, and considered in Tasmania and Canada. Moreover, while the federal ART proposal remains on hold, both major political parties have expressed continuing support for the concept of amalgamation at Commonwealth level in Australia.

This exponential growth in amalgamation proposals raises a pressing need for research and theoretical engagement with this issue. As one interview subject commented:

The discussion [about amalgamation of tribunals] is occurring at the level of ‘it is a good thing to have amalgamated tribunals’ rather than even thinking about why you’ve got them, how they can work well.¹

While considered debate about the merits of pursuing amalgamation is certainly warranted, the practical reality is that many governments have already committed to this model. Thus, the purpose of this thesis has been to construct a methodology that can be used to evaluate amalgamation processes that have already taken place, with a view to developing a better understanding of how to achieve optimal tribunal reform via future processes. In the absence of existing theoretical frameworks relating specifically to tribunals, this methodology was constructed using concepts derived from the work of organisational theorists.

On the basis of this analysis it is argued that the key ingredients of a successful amalgamation are law, context, organisation and people. More specifically, further analysis in Chapters 10 and 11 reinforced the hypothesis advanced in Chapter 4 — that the key elements of optimal tribunal reform are:

- *Legislation* — the legislation establishing an amalgamated tribunal needs to ensure the amalgamated tribunal will have appropriate independence, powers, processes, membership and structure.
- *Political commitment* — those responsible for proposing and planning an amalgamation need to provide appropriate funding and support for this process and for the establishment of an autonomous, self-directed tribunal.
- *Organisational structure* — the structures put in place need to be appropriate, integrated and flexible, and should promote cohesion and interaction.
- *Process and procedure* — the processes and procedures adopted in an amalgamated tribunal need to capitalise upon the opportunities provided by

¹ ADT Member 1 at paragraph 95. See also ADT Member 1 at paragraphs 39 and 119 to 125.

amalgamation, as well as being appropriate, efficient and able to balance the needs of a range of stakeholders.

- *Organisational culture* — an organisational culture which counters natural tendencies towards disjunction will assist members and staff to identify with a newly amalgamated tribunal and implement initiatives that will improve its performance.
- *Leadership* — effective leadership plays an important role in ensuring a smooth transition from specialist to amalgamated tribunal, and engendering commitment from members and staff.

The data presented in Chapters 6 to 11 represent the application of this framework to the Commonwealth ART proposal, and the amalgamation processes in NSW and Victoria. As well as confirming the hypothesis put forward in Chapter 4, an analysis of these data demonstrates the way in which an amalgamation process should be managed in order to maximise the benefits that organisational change can provide.

How to achieve optimal tribunal reform

The drafting of the ART Bill provided a valuable opportunity to compare the enabling statutes of three amalgamated tribunals — the ART, the ADT and VCAT. The fact that the ART proposal did not ‘get past first base’ demonstrates that an amalgamation proposal cannot proceed unless it is founded on sound legislation that engenders a degree of stakeholder support.

This analysis complements the qualitative data collected from subjects in NSW and Victoria, which highlighted a number of differences between the ADT and VCAT. Overall, there was a perception that the ADT had not yet developed into an integrated organisation capable of striking a balance between retention of necessary specialisation and consistency. In contrast, there was an almost unanimous perception that VCAT had been a success and had improved the efficiency and effectiveness of tribunal decision-making in that State. The failure of the ART Bill, and the fact that the amalgamations in NSW and Victoria produced such distinct outcomes, provided a unique

opportunity to explore the factors that contribute to the success or otherwise of an amalgamation process.

The compelling conclusion is that four broad factors determine the success of an amalgamation process: law, context, organisation and people. If all four ingredients are present, an amalgamation has the potential to result in the creation of a super-tribunal that encourages new initiatives and improves upon the tribunal system that was in place previously. Alternatively, if necessary elements of these ingredients are absent, the result is an amalgamated tribunal which is not much more effective than the sum of its parts — namely, the specialist tribunals that were amalgamated to create it.

Legislation

The analysis of enabling statutes in Chapter 6 reinforces the proposition that a solid legislative foundation is an essential pre-requisite to a successful amalgamation process. The identification of a number of fundamental flaws in the federal Government's ART and CTP Bills suggests that, far from epitomising optimal tribunal reform, the Commonwealth proposal was regressive. An examination of the existing system of Commonwealth merits review tribunals highlighted what would have been lost by moving to an ART that, among other things, lacked independence and standing within the administrative law community. Rather than improving the federal system of administrative tribunals, the nature of the ART proposals suggests the Government was motivated by a number of conflicting aspirations. It is argued that the way in which this manifested in the ART legislation ultimately led to its demise.

In contrast, the statutes establishing the ADT and VCAT both avoided the pitfalls identified in the ART and CTP Bills. The conclusion expressed in Chapter 6 is that the legislative foundation of both Tribunals provided a solid basis upon which to construct effective amalgamated Tribunals. In particular, the enabling statutes gave both Tribunals appropriate independence and standing, and did not retain unnecessary specialist procedures.

These results are consistent with the proposition that a sound legislative basis is a necessary element of optimal tribunal reform, the absence of which will be fatal.

Context

The extent of the differences between the amalgamations in NSW and Victoria highlighted that there are factors other than law that impact upon the outcome of an amalgamation process. It is arguable that the key distinction between the ADT experience and the success of VCAT is the level of political commitment by each Government to creating a self-directed organisation with sufficient resources and authority to be effective in, among other things, reviewing government decisions. There is no doubt the narrow scope of the amalgamation proposal in NSW inhibited the ADT's ability to develop into a cohesive organisation which was well-positioned to improve tribunal practices in that State. The contrast with the Victorian experience highlights that, without sufficient critical mass in terms of workload and resources, the development of a newly-amalgamated tribunal will be stunted from the very beginning.

Ultimately, those within government who are responsible for implementing a decision to amalgamate must ensure that all requisite elements of the process are provided for, and that an amalgamation proposal has sufficient critical mass and support to succeed. In addition, someone must be given authority and responsibility for overseeing the transition from specialist to generalist tribunal — in other words, for ensuring that the task of assembling and consolidating the requisite elements of an amalgamated tribunal is properly carried out.

The way in which VCAT's leadership approached the transition from specialist to generalist Tribunal highlights the importance of active management in 'bedding down' the outcomes of an amalgamation process. VCAT's success is in large measure attributable to the capacity of its management to engineer the development of a collegiate, integrated organisational culture. In contrast, the failure to provide all the elements that are essential to an effective amalgamation process undermined the capacity of the ADT to manage the degree of disjunction that characterised this Tribunal.

Thus, the ADT experience demonstrates the consequences of restricting management's capacity to set the direction of a new tribunal. In NSW this limited the Tribunal's ability to develop to its full potential. While the possibility remains that the ADT will yet develop over time into a cohesive organisation with a shared vision and culture, the lack of political commitment to the amalgamation in that State has already led some to question whether the initiative was worthwhile, and whether it should be built upon in the future.

Organisation

Thus, a solid legislative foundation and strong political commitment are essential pre-requisites to achieving optimal tribunal reform. There is no doubt the ADT has not had the same advantages as VCAT that flow from robust government commitment to an amalgamation process. The consequences of this become clear when examining the organisational structure and processes that were put in place within each amalgamated Tribunal. Specifically, the data highlight distinct differences between the ADT and VCAT in the extent to which each Tribunal succeeded in establishing itself as an integrated organisation following amalgamation.

The evidence demonstrates that those responsible for the operation of the ADT lacked control over important administrative arrangements such as the appointment and cross-appointment of members, the proportion of membership that was part-time versus full-time, and the physical layout of the Tribunal building. In contrast, in addition to exercising control over these things, VCAT management was able to introduce a wide range of initiatives that improved the Tribunal's performance in unforeseen ways. These included the promotion of mediation throughout the Tribunal, multi-skilling of members and staff, the creation of new electronic filing and order entry systems, increased use of country circuits, better research facilities, and greater consistency in the application of process and procedure. Similarly, the discipline of finding new ways to conduct business in a restructured registry provided an incentive to implement a series of administrative improvements.

It is clear that the lack of interaction among ADT members, and the increased interaction at both formal and informal levels within VCAT, contributed to the extent to which each Tribunal was able to take advantage of the opportunities that amalgamation presented. In particular, deliberate initiatives such as cross-appointment of members and rotation of Deputy Presidents facilitated the development of new initiatives and improvements within VCAT. Conversely, the absence within the ADT of a ‘core’ of full-time members and shared physical spaces significantly undermined management’s ability to counteract the disjunction within that Tribunal and create an environment in which new ideas could flourish.

These differences highlight the importance of management playing an active role in developing the structures and procedures that are adopted within a newly-amalgamated tribunal. Unless attention is paid to these kinds of details, the ability of an amalgamated tribunal to improve upon the tribunal system it replaces will be limited.

People and culture

Active management is also essential in influencing the direction in which a new tribunal’s institutional culture develops following amalgamation. The ADT and VCAT experiences highlight that control must be exercised to counteract tendencies towards disjunction. This is particularly important in an amalgamated tribunal seeking to integrate a number of former bodies which all bring their own cultures and identities in the transition from specialist to generalist tribunal.

The amalgamation experience in NSW demonstrates what happens when no serious attempt is able to be made to engineer or direct the organisational culture that develops within an amalgamated tribunal. The perception of subjects was that the ADT had more or less remained a sum of its parts, with particular divisions (such as Legal Services) retaining strong cultural practices that were not necessarily consistent with the ideals that ADT management wished to promote. There was also far less interaction — either formal or informal — among ADT members than among members of VCAT. While there was some indication that a more cohesive ADT culture would develop over time,

the cultural barriers that inevitably arise upon amalgamation had so far undermined the ADT's ability to become a cohesive organisation.

In contrast, the VCAT experience demonstrates the potential of a strong institutional culture to further the corporate objectives of an organisation, and hasten the promotion of common ideals and practices among members and staff. Most importantly, the way in which VCAT management deliberately fostered a collegiate atmosphere indicates that organisational culture is something that can be actively managed. This is demonstrated by the positive impact of policies such as rotating Deputy Presidents, cross-appointing members wherever possible, and facilitating job swaps among Registry staff — strategies which were introduced with the explicit aim of engineering an integrated tribunal. VCAT's overall success highlights the benefits of creating a supportive culture which facilitates the creation of informal networks and the sharing of experience and knowledge.

Finally, the data show that strong leadership and the appointment of highly skilled members and staff can contribute to the effectiveness of an amalgamation process. While the data from NSW indicate this factor will not determine the success or otherwise of an amalgamation, the experience of VCAT subjects demonstrates the important role that people can play in shaping and driving an effective process.

The conclusion to be drawn from this analysis is that optimal tribunal reform is an amalgam of fidelity to 'legal' values (such as independence and coherent statutory objectives) and fidelity to 'administrative' values (such as sound organisational structure, cohesive institutional culture, and strong leadership). When the ingredient of an appropriate legislative foundation is present, an optimal amalgamated tribunal will be one which is also an optimal *organisation*. On top of this, the VCAT experience highlights the benefits of actively managing the wide range of elements that contribute to a successful amalgamation.

Heeding the lessons of previous experience

Perhaps the most important lesson for policy-makers to draw from this study of amalgamation experiences is that, by itself, a decision to pursue amalgamation will be no guarantee of successful tribunal reform. The ADT experience demonstrates that an ill-considered amalgamation will have, at best, a nil effect on the quality of tribunal decision-making. On the other hand, VCAT shows that the prize to be won by deftly balancing all of the elements that are thrown into the air upon amalgamating is an organisation that is more efficient and effective than the sum of its parts.

More generally, if the valuable lessons are heeded, the experience of implementing amalgamation proposals should lead to improvements in knowledge, understanding and — eventually — outcomes in the way that tribunal systems are structured and utilised. Thus, it is possible that the collective experience to be gained from the current trend to amalgamate will ultimately enhance our understanding and appreciation of tribunals, and their function in modern society.

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APPENDIX A

VCAT/ADT INTERVIEWS — MEMBERS

Interview subject's background and experience:

How would you describe your role within the ADT/VCAT? For instance, do you sit exclusively on one division/list? Do you have a legal background? Are you full-time or part-time?

Did you work on a tribunal which was amalgamated to form the ADT/VCAT? If so, what was your role?

Did you have any reservations about the amalgamation? Were these justified?

How was the transition handled? What was your experience? Was it a planned process?

If the interview subject worked in or with an amalgamated tribunal:

Are there significant differences between the way in which the former specialised tribunal operated and the way the ADT/VCAT operates? For instance:

- are there differences in procedure or the manner in which reviews are conducted?
- have any specialist procedures been lost?
- are there differences in the way the registry operates?

How would you compare the effectiveness of the tribunal in which you worked previously to the ADT/VCAT? For instance, is the ADT/VCAT more:

- fair and just
- informal
- economical and quick?

How does the ADT/VCAT operate?

Do members in the ADT/VCAT work predominantly in one division/list?

To what extent do different divisions/lists share procedures and experiences? How separate are they?

What impact does the ADT/VCAT Act have, for instance, the fact that it prescribes certain procedures and processes? Does the Act achieve an appropriate balance between consistency and specialisation?

Interview subject's perceptions of the ADT/VCAT:

What are your observations about the institutional culture which has developed in the ADT/VCAT? Does this help you to perform your role?

Is it your experience that the ADT is evolving into a single organisation with a shared vision and culture? *or* The VCAT Annual Report talks about VCAT evolving into a single organisation with a shared vision and culture — does this accurately reflect your experience?

What impact does a large part-time membership have?

Interview subject's views on the amalgamation:

Why do you think the ADT/VCAT was created? For instance:

- was there a pressure to streamline?
- was it an attempt to save money?
- are there factors specific to the political or historical context in NSW/Victoria which influenced the decision to amalgamate?

Do you think the amalgamation was a good idea?

- Have efficiencies been achieved?
- Is there a better normative impact?
- Is the Tribunal more or less formal?

Is the amalgamated Tribunal better for applicants? For members' professional development?

Is a generalist tribunal more effective than a series of specialist tribunals? What are its advantages and disadvantages?

Is there an appropriate balance between consistency and specialisation?

APPENDIX B

The following tables set out the characteristics of each subject interviewed for this thesis.

ADT Subjects

	Cross-appointments?	Employment Status	Gender	Legal Member?	Member of specialist tribunal?	Primary Division/List	Tribunal	Work Role
ADT Member 1	True	Part-time	Female	False	False	Legal Services	ADT	Member
ADT Member 2	False	Part-time	Male	True	True	Equal Opportunity	ADT	Member
ADT Member 3	False	Part-time	Male	True	True	Equal Opportunity	ADT	Member
ADT Member 4	True	Part-time	Male	True	True	General	ADT	Member
ADT Member 5	False	Part-time	Male	False	True	Equal Opportunity	ADT	Member
ADT Member 6	False	Part-time	Female	True	False	Legal Services	ADT	Member
ADT Member 7	False	Part-time	Female	False	True	Community Services	ADT	Member
ADT Member 8	False	Part-time	Female	False	True	Equal Opportunity	ADT	Member
ADT Member 9	True	Part-time	Female	True	False	Equal Opportunity	ADT	Member
ADT Member 10	True	Part-time	Male	True	True	Legal Services	ADT	Member
ADT Member 11	False	Part-time	Male	True	True	Legal Services	ADT	Member
ADT Senior member 1	True	Full-time	Male	True	False	General	ADT	Presidential Member
ADT Senior Member 2	True	Full-time	Female	True	True	General	ADT	Presidential Member
ADT Registry Staff 1	False	Full-time	Female	True	False	Registry	ADT	Registry

Separate NSW Tribunal subject

	Cross-appointments?	Employment Status	Gender	Legal Member?	Member of specialist tribunal?	Primary Division/List	Tribunal	Work Role
Separate NSW Tribunal Senior Member	N/A	Full-time	Male	True	True	N/A	NSW Guardianship Tribunal	Presidential Member

VCAT subjects

	Cross-appointments?	Employment Status	Gender	Legal Member?	Member of specialist tribunal?	Primary Division/List	Tribunal	Work Role
VCAT Member 1	True	Full-time	Female	False	True	Guardianship	VCAT	Member
VCAT Member 2	False	Full-time	Female	True	True	Residential Tenancies	VCAT	Member
VCAT Member 3	True	Part-time	Female	True	False	Residential Tenancies	VCAT	Member
VCAT Member 4	True	Part-time	Female	False	True	Residential Tenancies	VCAT	Member
VCAT Member 5	True	Part-time	Female	False	True	Anti-Discrimination	VCAT	Member
VCAT Member 6	True	Part-time	Male	False	True	Planning	VCAT	Member
VCAT Member 7	True	Part-time	Male	True	True	Planning	VCAT	Member
VCAT Member 8	True	Part-time	Male	False	True	Planning	VCAT	Member
VCAT Senior Member 1	True	Full-time	Female	True	True	Anti-Discrimination	VCAT	Presidential Member
VCAT Senior Member 2	True	Full-time	Male	True	False	General	VCAT	Presidential Member
VCAT Senior Member 3	True	Full-time	Male	True	False	Anti-Discrimination	VCAT	Presidential Member
VCAT Registry Staff 1	False	Full-time	Male	False	True	Registry	VCAT	Registry

APPENDIX C

CODES USED TO ORGANISE DATA

The following list represents the codes that were used to organise and interrogate the qualitative data collected and presented in this thesis. A total of 92 codes were used to organise data from 27 interview transcripts.

- 1 Alternatives to amalgamation
- 2 Combining review and decision function
- 3 Courts v Tribunals
- 4 Federal v State Tribunal systems
- 5 Lay v Judicial
- 6 Political commitment
- 7 Rationale for amalgamating
- 8 Relationship with Departments
- 9 Significance of co-location
- 10 Visibility and Profile
- 11 Advantages and disadvantages
- 12 Advantages and disadvantages/Advantages of amalgamation
- 13 Advantages and disadvantages/Advantages of amalgamation/Economic benefits
- 14 Advantages and disadvantages/Advantages of amalgamation/Economic benefits/Efficient use of resources
- 15 Advantages and disadvantages/Advantages of amalgamation/Economic benefits/Proliferation of tribunals
- 16 Advantages and disadvantages/Advantages of amalgamation/Economic benefits/Greater flexibility for managers
- 17 Advantages and disadvantages/Advantages of amalgamation/Inherent benefits

- 18 Advantages and disadvantages/Advantages of amalgamation/Inherent benefits/Improved interaction amongst members
- 19 Advantages and disadvantages/Advantages of amalgamation/Inherent benefits/Exposure to new methods
- 20 Advantages and disadvantages/Advantages of amalgamation/Inherent benefits/Professional development
- 21 Advantages and disadvantages/Advantages of amalgamation/Opportunity benefits
- 22 Advantages and disadvantages/Advantages of amalgamation/Opportunity benefits/Setting standards
- 23 Advantages and disadvantages/Advantages of amalgamation/Opportunity benefits/Funding
- 24 Advantages and disadvantages/Advantages of amalgamation/Opportunity benefits/Increased visibility
- 25 Advantages and disadvantages/Advantages of amalgamation/Opportunity benefits/Opportunity for new developments
- 26 Advantages and disadvantages/Disadvantages of amalgamation
- 27 Advantages and disadvantages/Disadvantages of amalgamation/Loss of specialisation
- 28 Advantages and disadvantages/Disadvantages of amalgamation/Lowest common denominator
- 29 Advantages and disadvantages/Disadvantages of amalgamation/Cost of amalgamation
- 30 Advantages and disadvantages/Disadvantages of amalgamation/Decreased interaction amongst member
- 31 Advantages and disadvantages/Disadvantages of amalgamation/Loss of momentum
- 32 Advantages and disadvantages/Disadvantages of amalgamation/Decreased visibility

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- 33 Search Results
 - 34 Search Results/ADT — comments on efficiency
 - 35 ADT Data
 - 36 ADT Data/New Developments
 - 37 ADT Data/New Developments/Training of members and staff
 - 38 ADT Data/New Developments/Appointment of members
 - 39 ADT Data/New Developments/Performance Management
 - 40 ADT Data/Characteristics of the ADT
 - 41 ADT Data/Characteristics of the ADT/Tribunal culture
 - 42 ADT Data/Characteristics of the ADT/Degree of fragmentation~homogeneity
 - 43 ADT Data/Characteristics of the ADT/Degree of fragmentation~homogeneity/Part-time membership
 - 44 ADT Data/Characteristics of the ADT/Degree of fragmentation~homogeneity/Cross-appointment of members
 - 45 ADT Data/Characteristics of the ADT/Formality v Informality
 - 46 ADT Data/Characteristics of the ADT/Independence
 - 47 ADT Data/Snapshot of the ADT
 - 48 ADT Data/Snapshot of the ADT/ADT Structure
 - 49 ADT Data/Snapshot of the ADT/Member profiles
 - 50 ADT Data/Snapshot of the ADT/Alternative Dispute Resolution
 - 51 ADT Data/Snapshot of the ADT/Multi-member panels
 - 52 ADT Data/Snapshot of the ADT/Registry performance
 - 53 ADT Data/Snapshot of the ADT/Registry structure
 - 54 ADT Data/Snapshot of the ADT/Workload of the tribunal
 - 55 ADT Data/The Amalgamation itself
 - 56 ADT Data/The Amalgamation itself/Role of President

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- 57 ADT Data/The Amalgamation itself/Planning of amalgamation
 - 58 ADT Data/The Amalgamation itself/Managing the transition
 - 59 ADT Data/The Amalgamation itself/Impact of new Act
 - 60 ADT Data/The Amalgamation itself/Anticipated consequences
 - 61 VCAT Data
 - 62 VCAT Data/Characteristics of VCAT
 - 63 VCAT Data/Characteristics of VCAT/Independence
 - 64 VCAT Data/Characteristics of VCAT/Formality v Informality
 - 65 VCAT Data/Characteristics of VCAT/Degree of fragmentation~homogeneity
 - 66 VCAT Data/Characteristics of VCAT/Degree of fragmentation~homogeneity/Cross-appointment of members
 - 67 VCAT Data/Characteristics of VCAT/Degree of fragmentation~homogeneity/Part-time membership
 - 68 VCAT Data/Characteristics of VCAT/Tribunal culture
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 - 70 VCAT Data/New Developments/Appointment of members
 - 71 VCAT Data/New Developments/Training of members and staff
 - 72 VCAT Data/New Developments/Performance management
 - 73 VCAT Data/Snapshot of VCAT
 - 74 VCAT Data/Snapshot of VCAT/VCAT Structure
 - 75 VCAT Data/Snapshot of VCAT/Multi-member panels
 - 76 VCAT Data/Snapshot of VCAT/Alternative Dispute Resolution
 - 77 VCAT Data/Snapshot of VCAT/Member profiles
 - 78 VCAT Data/Snapshot of VCAT/Registry performance
 - 79 VCAT Data/Snapshot of VCAT/Registry Structure
 - 80 VCAT Data/Snapshot of VCAT/Workload of the tribunal

- 81 VCAT Data/The Amalgamation Itself
- 82 VCAT Data/The Amalgamation Itself/Anticipated consequences
- 83 VCAT Data/The Amalgamation Itself/Impact of new Act
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