12 The framing of tribunal procedures

A question of balance or a participation-centred approach?

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12.1 Introduction¹

The Australian legislative framework governing tribunals often specifies the ‘just, quick, and cheap resolution’ of the issues in dispute—a phrase that is increasingly finding its way into statutory schemes as an overriding purpose or guiding principle for both courts and tribunals across the spectrum. The quick and cheap aspect of this mantra has been the subject of attention directed to what procedures legal institutions should adopt to make them more accessible and affordable to litigants. Statutory phrases of this kind have been interpreted as necessitating the elimination of unnecessary delays and avoiding unduly technical and costly disputes (Black 2009). But how should we understand the meaning of ‘just’ in the context of tribunal procedures, and can we give effect to it in a way that can be reconciled with the quick and cheap aspects?

A common way of answering this question is to suppose that tribunals should balance the competing considerations of cost, efficiency, and justice (Mason 2017). It has been described as a ‘search for that elusive point of equilibrium’ (Productivity Commission, *Access to justice arrangements*, 2014, p. 14). In a similar vein, Rees (2006) identifies it as a tension to be resolved as a consequence of the fact that ‘fairness and detachment are sometimes in conflict with efficiency and accessibility’ (p. 54). This chapter explores whether the standard approach of seeking to balance these three competing dimensions provides an adequate account of the way in which the procedures of tribunals should be assessed. It argues instead for a relational justice approach that is centred on the notion that participation has an intrinsic value quite separate from questions of cost and efficiency. Giving effect to the just dimension thus requires that an opportunity for participation must be afforded to the parties before cost savings and other claimed efficiencies come into consideration. There may be circumstances where affording that opportunity is considered inefficient or costly. Nevertheless, the opportunity for participation is a fundamental requirement that must be met and cannot simply be ‘balanced’ away in the service of timeliness or efficiency.

In this chapter I use the concept of participation to encompass practices that afford an opportunity to have an input into how a dispute to which an individual is a party is resolved, acknowledging that an individual may not in fact take up

that opportunity (Solum 2004, pp. 272–273). I argue that although participation may take different forms in various contexts in order to bring about efficiencies and timeliness, these factors do not overcome the need for regard in the first place to whether a party was afforded the opportunity for some form of participation appropriate to the nature of the dispute.

There are several arguments supporting this approach. First, is the way in which tribunals are set up to function. Most operate on the premise that parties will represent themselves and be their own advocate in resolving a dispute. To varying degrees, tribunals limit the opportunities for legal representation or make this conditional on the tribunal's assent. Therefore, a party's own involvement is set up as pivotal to the resolution of the dispute. Second, the idea that participation is a core consideration finds support in the fact that tribunals themselves are regularly subject to some form of statutory obligation to take certain measures to help parties understand the proceedings in which they are involved. Third, the importance of participation is consistent with findings in social psychology that highlight the connections between relational concerns and people's perceptions of procedural justice. These findings confirm that the opportunity to present information to a decision-maker prior to a decision being made has a positive effect on the perception of the fairness of the decision-making process (Thibaut & Walker 1975). Tyler and Lind (1992) identified that participation in the form of the opportunity to voice one's concerns and to present evidence on one's own behalf conveys that a person is worthy of being heard (pp. 140–141), thereby supporting a sense of self-respect (Tyler & Blader 2000, p. 171). These positive perceptions can in turn enhance the perceived legitimacy of legal institutions and foster compliance.

My focus in this chapter is on the procedures commonly utilised by Australian tribunals with a broad remit, rather than institutions that are principally involved in administrative reviews or bespoke tribunals limited to one area of specialisation, such as mental health or industrial relations. The jurisdiction of the tribunals I consider in this chapter may include reviewing administrative decision-making, and extend to areas such as consumer, commercial, and tenancy disputes; occupational regulation and professional discipline; and matters pertaining to guardianship, discrimination, or the care of children. Tribunals of this nature largely operate at the state and territory level in Australia, as this extended jurisdiction is not available to federal tribunals. My focus on tribunals is quite deliberate and is informed by several factors. First, it is very common for academic commentary to focus on criminal proceedings when exploring aspects of fair procedures, where the threat of a deprivation of liberty dictates certain types of procedural safeguards. Instead, I use the context of civil proceedings, where the subject matter of disputes is quite different, and therefore factors that do not pertain to the serious nature of criminal convictions may influence the types of procedure that are considered appropriate. Second, tribunals tend to use a greater variety of non-determinative dispute resolution processes, such as conciliation and mediation, than do other more formal legal institutions such as courts. Tribunal proceedings therefore have the potential for a more inclusive dialogue and greater

participation of individuals. Third, it is more likely that individuals will participate in tribunal proceedings without legal representation than in court settings. This has the advantage that an assessment of the opportunity for meaningful participation is less likely to be masked by the involvement of legal representatives. Fourth, unlike courts, tribunals are often subject to a statutory obligation to assist parties to understand the available procedures.

In Section 12.2, I examine the common features of the operational set up of Australian tribunals. In Section 12.3, I explore the aspect of the statutory frameworks governing Australian tribunals that involve the obligation to help parties understand the procedures and examine the role of appropriately resourced tribunals in facilitating such participation. In Section 12.4, I examine the tension within the quick, cheap and just mantra, and the competing values that influence decisions about how to reconcile these factors. Section 12.5 offers some tentative conclusions.

12.2 Common features of Australian tribunal procedures

The environment in which Australian tribunals operate is one that seeks to offer what is often referred to as ‘affordable’ justice. Common descriptors of what tribunal processes aspire to achieve are that they are accessible, fair, just, economical, informal, quick, and proportionate to the importance and complexity of the matter. The legislative intent is that they are not designed to operate with perfect procedures. In the context of tribunal proceedings, it has been observed that ‘the content of procedural fairness should take its colour from the structure of the statute and circumstances of the case’ (Smyth 2010, p. 262). Procedural flexibility and the capacity of tribunals to inform themselves in any way they consider appropriate is what often sets tribunals apart from courts (Allars 1991, p. 377). The mantra of ‘just, quick, and cheap’ is often written into the statutory framework of a tribunal as a guiding principle or overall objective with respect to the exercise of the tribunal’s functions and in relation to its approach to practices and procedures. Tribunals also aspire to accessibility, both in a geographic sense, and in the sense of less formal processes (Crekye 2012, p. 19).

Tribunals are commonly given considerable latitude by statute to determine their own procedures, to inquire into and inform themselves on any matter in such manner as they think fit, and to act with as little formality as the circumstances of the case, equity, and good conscience permit.² As a consequence, tribunals have considerable discretion as to how proceedings are conducted in practice. For example, they are able to invoke procedures that impose time limits on the presentation of cases if appropriate, limit the number of witnesses, direct that witness evidence be given in writing or only orally, require that parties provide further information, or determine a claim based on the papers only. In addition, tribunals are not bound by the rules of evidence, but are guided by the relevance of the evidence in question.

The fact that tribunals are empowered to make their own inquiries is regarded as a basis for tribunals not to restrict their deliberations to the material put forward

by the parties, enabling tribunal members to ask questions or raise issues that they regard as insufficiently dealt with by the parties themselves. Such features are generally interpreted as giving tribunals the capacity to operate in a manner more akin to an inquisitorial rather than an adversarial approach. Some commentators contest whether this is in fact inquisitorial in the European sense,³ and prefer to see the reliance on less formal and more user-friendly processes as an evolution in the common practices of courts and tribunals through the greater use of alternative dispute resolution (ADR) and case management, and the adoption of a less passive role (De Villiers 2014, p. 182). The operations of Australian tribunals do not reflect a strict binary divide between inquisitorial and adversarial procedures (Bedford & Creyke 2006, p. 66). While tribunals have the discretion to make their own inquiries, courts have not interpreted this as *requiring* that tribunals take on such a role, nor do they impose this on tribunals as a strict duty, except in limited circumstances.⁴ Moreover, due to the limitations on resources available it is not common for tribunals to undertake extensive enquiries beyond the material presented by the parties themselves (Groves 2011, p. 177; Smyth 2010, p. 238). Hence the material on which a decision is made will, in the majority of disputes, be dependent on what the parties bring to the tribunal's attention through their individual input into the processes.

The statutory framework governing tribunals will often expressly encourage the use of ADR to resolve or at least narrow the issues in dispute,⁵ and the referral of a matter to a form of ADR, such as mediation, can be made with or without the parties' consent.⁶ Wright (2015) described alternative dispute resolution processes in tribunals as 'not merely an alternative to an adjudicative hearing but rather at the heart of what the Tribunal is doing' ([103]). He also characterises tribunals as offering litigants the opportunity to present their own cases 'without disadvantage', particularly where the proceedings involve smaller value claims, where it has been stated that 'resolution is not assisted by an adversarial approach' ([50]–[51]).

The legislative framework governing tribunals may impose a positive obligation on the parties and their representatives to cooperate with or assist the tribunal to give effect to the guiding principle or overall objective. Few statutory schemes governing tribunal procedures provide for a specific obligation in this respect. However, the legislation governing the operations of the Civil and Administrative Tribunal in New South Wales (NCAT) does articulate the duty to cooperate and imposes a requirement on parties to participate in the processes of the tribunal.⁷ Case law and commentary both make clear that the duty to cooperate with NCAT is not considered in a vacuum, but rather in the context of giving effect to the mandate of the tribunal and as inherently tied to facilitating the overall guiding principle of 'just, quick and cheap'.⁸ The duty to cooperate may also be relevant to the determination of orders for costs (*Maiolo v Chiarelli* (No 2) [2016] NSWCATAP 219 [30]).⁹

However, the procedural flexibility and freedom from the rules of evidence vested in tribunals by statute is usually explicitly subject to adherence to the principles of procedural fairness. As outlined in an NCAT decision, the guiding

principle ‘does not gainsay in any way the right to be accorded procedural fairness’ (*Su v Public Guardian* [2014] NSWCATAP 32 [25]). The tribunal expressed a similar sentiment in *Amad El Ahmad v Imelda Reyes* ([2015] NSWCATAP 50 [32]), stating,

The Tribunal is required to comply with natural justice and to ensure that parties have a reasonable opportunity to be heard. The Tribunal has not been established to operate in the same way as a court. However, while it must facilitate quick and inexpensive resolution of the real issues, it must do this in a just manner, which requires adherence to the principles of procedural fairness, which, in the circumstances of this case, meant allowing cross-examination of the applicant.

Ultimately, the restatement of the three dimensions of just, quick and cheap in conducting tribunal proceedings does not resolve how to accommodate these aspects. Despite the latitude tribunals have to determine their own procedures to enable a speedy and cost-effective resolution, the fairness of the procedures adopted still needs to be established.

12.3 The role of tribunals in supporting participation

A range of legislative provisions impose on tribunals a requirement to take certain measures to assist parties to understand the proceedings in which they are involved. Different statutory schemes frame the obligation in different ways. In some jurisdictions it may not be explicit in the governing legislation,¹⁰ but could form part of a tribunal’s practices. The taking of reasonable measures might be directed to ensuring that the parties understand the nature of the proceedings¹¹ or the nature of the matter under consideration.¹² In some legislative schemes it includes helping the parties to understand the nature and legal implications of any assertions made by parties before the tribunal,¹³ or providing an explanation where requested to do so.¹⁴

The threshold question is, what is the scope of the legislative obligation? If the legislation is worded as relating to an understanding of the nature of the proceedings, the scope of the obligation will depend on how ‘proceedings’ is defined. If the legislation defines ‘proceedings’ in a way that restricts it to the conduct of hearings, then the obligation may not arise unless there is an actual hearing, as opposed to some less formal process that disposes of the matter, such as a case conference or mediation. Some provisions have a broader reach, as they extend the obligation not only to proceedings, but also to an understanding of the ‘practices and procedures of the tribunal’ (*Queensland Civil and Administrative Tribunal Act 2009* (Qld) s29). In addition to the question of the contexts in which the duty might arise, there is the secondary question of the nature of the obligation itself. Most of the statutory provisions refer to measures that are reasonably practicable, or to the taking of reasonable steps. Others frame the obligation more broadly by using the terminology of ‘all reasonable steps’ and

the concept of ‘ensuring proper understanding and regard’ (*Queensland Civil and Administrative Tribunal Act 2009* (Qld) s29). Thirdly, the obligation to explain to the parties any aspect of the tribunal’s procedures arises in a number of jurisdictions only where requested to do so.

In reviewing the various statutory frameworks, the Queensland legislative scheme appears the most comprehensive regarding a tribunal’s mandate to support parties to understand its practices and procedures, as well as the nature of the matter to which they are a party. Wilson (2013) described the Queensland Civil and Administrative Tribunal (QCAT) as planning to be ‘actively fair’ from its inception (p. 131). The obligation is expressed in Section 29 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (*QCAT Act*) in mandatory language whereby the tribunal *must* take all reasonable steps to:

- (a) ensure each party to a proceeding understands—
 - (i) the practices and procedures of the tribunal; and
 - (ii) the nature of assertions made in the proceeding and the legal implications of the assertions; and
 - (iii) any decision of the tribunal relating to the proceeding; and
- (b) understands the actions, expressed views and assertions of a party to or witness in the proceeding, having regard to the party’s or witness’s age, any disability, and cultural, religious and socioeconomic background.

Framing the statutory obligation in this manner establishes an explicit responsibility to ensure that parties understand all the procedural aspects as well as the implications of what happens in any proceedings. But, as Matthew Groves (2011) argues, this does not ‘oblige tribunals to assume control of, or responsibility for, the conduct of a party’s application’ (p. 184). The *QCAT Act* further requires the QCAT principal registrar to,

give parties and potential parties reasonable help to ensure their understanding of the tribunal’s practices and procedures, including, for example, reasonable help to complete forms required under this Act or the rules (Section 30).

While the scope of statutory provisions such as Section 29 of the *QCAT Act* can be viewed through the lens of what would assist a self-represented party to understand the legal implications of tribunal proceedings, it is also open to a broader view. For example, in *Lida Build Pty Ltd v Miller* ([2010] QCAT 17 [6]), the tribunal described the obligation inherent in Section 29 as follows:

While this provision largely reflects and embodies what the courts have said in recent years is the nature of the duty owed by the judicial system to, at least, self-represented litigants, *it also suggests that parties to proceedings before this Tribunal will receive, and have an entitlement to expect, assistance with the legal implications of the issues in the case* [my emphasis].¹⁵

The notion that parties are entitled to expect assistance clearly places an obligation on the tribunal to actively assist the parties. Without such assistance the likelihood of a party having an opportunity to participate in a meaningful way may be diminished. But tribunals have not regarded all failures in terms of information provision as automatically leading to a breach of this obligation.¹⁶

The comparable obligations in Section 38(5) of the *Civil and Administrative Tribunal Act 2013* (NSW) ('CAT Act') are framed around taking such measures as are reasonably practicable:

- (a) to ensure that the parties to the proceedings before it understand the nature of the proceedings, and
- (b) if requested to do so—to explain to the parties any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceedings, and
- (c) to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings.

The *CAT Act* also provides in relation to matters dealt with in the consumer or commercial division, that the tribunal will have regard to 'the extent to which the party is familiar with the procedures of the Tribunal' and 'the party's capacity to understand, and act on, a direction of the Tribunal' in determining whether the conduct of a party 'unreasonably disadvantages another party in the proceedings' (Schedule 4, Part 5, Section 10(3)(a)–(b)).

The obligation to take reasonable measures to ensure that the parties have an opportunity to be heard, or otherwise have their submissions considered in the proceedings, encapsulates what is generally considered to be covered by the fair hearing rule. However, that is only one of the dimensions specified in the *CAT Act*. It imposes additional requirements, by extending the mandatory obligation to include taking all reasonable steps to ensure that parties understand the nature of the proceedings and to provide an explanation of the procedures where requested to do so. A good example that illustrates how these additional aspects operate is the decision of *ZDU v ZDV* ([2017] NSWCATAP 197). The appellant (ZDU) successfully appealed a decision of the NCAT Guardianship Division on the basis that the tribunal in the first instance failed to comply with its obligations as set out above. The Panel's reasons for allowing the appeal are extracted at length below:

As directed by s 38(5)(a) of the CAT Act, the Tribunal must take such measures that are reasonably practicable to ensure that parties understand 'the nature of the proceedings'. Self-evidently, without such understanding, a party will be unable to make submissions about the key issues that arise for determination in the proceedings. It follows, that *unless the Tribunal has complied with its obligations under s 38(5)(a) of the CAT Act, there is a risk it might also fail to comply with its obligation under s 38(5)(c) of the CAT Act to ensure that the parties have a reasonable opportunity to be heard ... However,*

we believe the primary cause for concern was the limited nature of the measures taken by the Tribunal to ensure that ZDU and ZEF, both unrepresented parties, understood the nature of the proceedings in which they were involved ... The particular circumstances of this matter were that: ZDU and ZEF were unrepresented; they were in a spousal relationship; and both were opposed to the making of a financial management order. Given these circumstances, the Tribunal was obliged to take reasonably practical measures to ensure that ZDU and ZEF understood the nature of the proceedings. They were obliged to take steps to ensure that ZDU and ZEF were aware that the issue of who could be appointed as ZDU's financial manager if an order was to be made was a live issue in the proceedings so that each had an opportunity to be heard on this critical matter.

([44], [47], [49], [51], [53]–[54], emphasis added)

An interesting aspect of the *ZDU v ZDV* decision is the reference to the inter-relationship between ensuring the parties have an understanding of the proceedings and ensuring a reasonable opportunity to be heard. The decision indicates that a failure to provide for the former also potentially puts at risk the latter requirement. At the same time, it acknowledges that both are distinct statutory obligations. Hence, the duty to ensure a level of understanding can be seen as a stand-alone obligation, and not simply as part of the fair hearing rule. It is something more than a requirement that a decision-maker must 'hear' a person before making a decision affecting their interests (*Kioa v West* (1985) 159 CLR 550, 585). It is also an obligation to ensure a level of understanding that will facilitate their opportunity to be heard.

It is possible to view this decision as confined to the situation where persons are self-represented, as a result of which their circumstances warrant special attention to their understanding of what the proceedings involve and what orders are at risk of being made. However, the legislative framing of the obligations is not confined to the circumstances of self-represented persons. Moreover, even though the situation of self-represented individuals may necessitate a higher duty, this does not detract from the imposition of the obligation more generally with respect to all parties. Unless the statutory framing of the duty restricts its operation in some way, the requirement that a tribunal help parties understand the proceedings is an obligation that applies to *all* parties.

What this analysis confirms is that the obligation on tribunals to support the participation of parties is not a passive one, especially where the enabling statutes of tribunals are relatively comprehensive in terms of the nature and extent of the obligation to help parties understand the proceedings. Parties need to be actively supported not only in comprehending the steps involved in reaching a resolution, but also in developing an understanding of what is actually involved in pursuing or defending a claim, how to go about identifying the real issues in the dispute, and how to determine the most appropriate dispute resolution pathway for their situation. It necessitates a type and level of interaction between a party and the tribunal that facilitates a party's understanding of the conduct of the proceedings and the legal implications that arise.

While the statutory provisions and case law referred to above acknowledge the importance of facilitating this participation, in practice few tribunals are set up or resourced to service these needs. Some institutions attempt to fill the gap through the provision of guidance materials in on-line and other forms. While this might be cost-effective, it is doubtful that such materials would assist individuals with little prior exposure to tribunals to develop a full understanding of the nature of the proceedings or an understanding of how to frame their claim in such a manner that a legal authority is likely to be receptive. The Law Council of Australia's Report on the Justice Project (2018) stated,

the capacity of courts and tribunals to resolve matters both swiftly and fairly is hampered by insufficient resources in the face of increasing demand for services ... [and that] ... sufficient resources and sustainable funding, coupled with active case management and triage, are necessary for courts and tribunals to efficiently process disputes and provide a fair outcome to participants. (p. 4)

The Report makes mention of the critical under-resourcing of courts and tribunals as a 'false economy' and as contributing to 'expensive societal problems over the long term' (p. 10). The Report also recorded the Council's observation that 'involvement of legal practitioners in certain tribunal proceedings can significantly enhance the efficiency and fairness of proceedings and improve the participant's experience' (p. 4). Hence, the continual emphasis on the ability of individuals to self-navigate the system and on limiting legal representation in tribunal proceedings may in fact be counterproductive in some circumstances. While one State Attorney-General has proudly described the tribunal operating in that state as a 'lean, mean, justice machine' (Queensland, Parliamentary Debates 2013, p. 1314) such 'leanness' runs the risk of impacting adversely on the opportunity parties have for input into how their dispute is resolved.

12.4 Competing values and approaches

The standard approach to reconciling the three dimensions of quick, cheap and just is the adoption of a balancing approach. Courts and tribunals have recognised that the objectives of speed, efficiency and fairness may give rise to tension, because a mechanism that is 'economical, informal and quick' may well not be fair or just.¹⁷ A common response to seeking to resolve this tension is the balancing approach. The Hon Michael Black AC QC, former Chief Justice of the Federal Court of Australia, articulates this approach using a mixture of references to perfection, fairness and justice in the following terms:

We should maintain the search for that *elusive point of equilibrium* at which the competing pulls of cost, speed, perfection and fairness are balanced in a way that produces substantial and accessible justice—not perfection, but

nevertheless processes and outcomes readily recognisable as substantial justice according to law.

(Michael Black quoted in Productivity Commission Inquiry Report No.72 2014 p. 14, my emphasis)

This attempt at balancing competing considerations is regularly adopted in the decision-making of tribunals and by appellate courts evaluating the procedural practices of other legal institutions. For example, a decision by QCAT stated that there needs to be a balance between ‘the obligation to provide procedural fairness with the tribunal’s obligation to deal with matters economically and quickly’ (*Jennifer D Keen Pty Ltd t/as Brides of Brisbane v Barkhuizen* [2013] QCATA 224, [7]). The tribunal justified the approach on the basis that

resources for the resolution of disputes are in high demand and serve, as the High Court has recently observed in relation to court resources ... the public as a whole, not merely the parties to the proceedings.

(at [7])

Similarly, in considering whether a refusal to adjourn a hearing could constitute a failure to give a party an opportunity to present their case, NCAT has acknowledged that

essential to a just resolution to proceedings it is also necessary to minimize delay and expense [and that] the achievement of a just but timely and cost-effective resolution of a dispute has effects not only upon the parties to the dispute but upon the court and other litigants.

(*El-Saeidy v NSW Land and Housing Corporation*
[2016] NSWCATAP 155[40])

In other proceedings, NCAT concluded that its duty to ensure that a party has a reasonable opportunity to present its case did not extend to acceding to every application for evidence to be admitted out of time, where the effect of granting the request would necessitate setting aside a further hearing date. It stated:

The Tribunal’s broad inquisitorial powers do not impose upon it an obligation to inquire into every matter a party asserts might be relevant to the facts in issue. The duty of the Tribunal is to ensure that a party is given a reasonable opportunity to present its case. That duty does not extend to acceding to every application for evidence to be admitted out of time, which a party believes might assist the Tribunal’s knowledge of its case. One of the directives in s 73 is that the Tribunal act as quickly as possible. The practical effect of granting this application would have been to require a further hearing day to be set aside.

(*Battenberg v The Union Club* [2004] NSW ADT
285 [23]–[24])

A landmark case in this area is the High Court of Australia's decision in *AON Risk Services Australia Limited v Australian National University* ([2009] HCA 27) ('*Aon*') where the court took a strong stand with respect to a late application to amend pleadings in a litigated matter. It adopted an approach that had regard to the public interest and the interests of litigants in other cases waiting for their matters to be heard that might be affected by a further adjournment of the matter, and to the community interest in the efficient use of court resources. The court followed its earlier approach in *Sali v SPC Ltd* ((1993) 116 ALR 625) where Brennan, Deane and McHugh JJ stated:

What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources.

(p. 629)

In declining to allow the late application to amend the pleadings, the High Court observed:

Where a party has had a sufficient opportunity to plead his or her case, it may be necessary for the court to make a decision which may produce a sense of injustice in that party, for the sake of doing justice to the opponent and to other litigants.

([94])

The inaugural President of QCAT attributes this broader notion of whose interests are relevant as being propelled by

the growth in individual rights, and increasing pressure from the Executive and Parliament upon courts and tribunals to be 'productive' in the sense that more services are to be provided to more citizens, but at lesser cost to society.

(Wilson 2013, p. 132)

In framing this approach, the President referenced the work of Les Arthur (2011), who states:

While justice on the merits fits well with formal access to justice, which regards justice as a commodity to enforce an essentially individualistic philosophy of rights, it is unable to give practical effect to the widespread vindication of legal rights ... Recognition of the limited resources available for the delivery of civil justice means that in order to achieve overriding objectives, community interests in the administration of justice must transcend partisan interests.

(p. 241)

Arthur does acknowledge that the contemporary formulation of the statutory mandate of courts and tribunals ‘requires balancing justice *with* efficiency, not the wholesale replacement of justice *by* efficiency’ (p. 246). Along similar lines, the case of *Amad El Ahmad t/as Cars for Everyone v Imelda Reyes* ([2015] NSWCATAP 50), an NCAT decision on whether a refusal to allow an applicant the opportunity to cross-examine the respondent amounted to a denial of procedural fairness, included the following observation by an Appeal Panel that

speed must be tempered by the requirements of fairness. Focussing on timeliness or the potential problems posed by unpreparedness to the exclusion of fairness is not mandated by section 36.

([27])

The prevailing approach to balancing appears to be that the broader interest in the administration of the civil justice system should be taken into account, in a way that extends the balancing approach beyond the interests of the parties themselves. Balance of this kind could be determined by factors that pertain to broader economic considerations and bear little relation to the circumstances of the parties themselves or their substantive claim.¹⁸ A party may feel a justifiable sense of injustice when it is not the balance between the parties that is determinative, but instead involves considering other factors extraneous to their dispute, for example, the efficient use of court resources and the cost to the community as a whole of certain procedural safeguards.

The balancing approach is also open to criticism on the basis that the weighing of the various considerations and their reconciling can be highly subjective. Academic commentary has pointed to the fact that speed and efficiency on the one hand, and fairness and justice on the other, have been given different weight by judges in superior courts’ reviews of tribunal processes (Creyke 2006, pp. 17–18). Creyke gives the example of the High Court’s approach in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* ((2005) 215 ALR 162), where the decision at a hearing to give oral rather than written notice of material adverse to the claim, was criticised by the majority as undermining a just approach. However, the dissenting judges found that written notice would have been pointless in the circumstances, and that the objective of the hearing was ‘to hear evidence and receive arguments in the most useful and efficient manner’ (Creyke 2006, p. 21). In addition, Courts have accepted that in some contexts the fairness dimension can be diminished to ‘nothingness’ by the circumstances in which a statutory power is exercised.¹⁹ However, a reduction of this type will not occur unless there is a clear statutory direction to this effect. Finally, some of the case law lends itself to an interpretation that there is a blurring of the distinction between procedural and substantive fairness in some cases, evidenced by judicial observations to the effect that adopting a particular process would not have made any difference to the actual outcome.

If one looks at the way in which the High Court in *Aon* referred to doing justice in the broader sense of what serves the public interest in the administration of

justice, it was qualified by the notion that '*a party has had a sufficient opportunity to plead his or her case*'. It is important to give this qualification due weight. This could be construed as suggesting that where a party has had a genuine opportunity to have an input into the process, then it is possible to take into account other factors, such as the effect on the tribunal operations and on other litigants waiting to have their disputes dealt with in deciding whether to allow a late application to amend the pleadings. Using this approach, the opportunity that the parties were afforded to engage in a meaningful way in the processes is a precursor to considering those broader factors. It would then follow that without the initial provision of the opportunity for the parties to have input into the process, factors such as speed or efficiency do not have a role to play. This is because affording the opportunity for participation is a fundamental requirement that cannot simply be 'balanced' away to meet the need for speed and efficiency.

A participation-centred approach is justified by relational approaches to justice according to which an individual's self-identity and sense of self-respect are shaped by the nature of the interpersonal interactions they have with institutions such as legal authorities (Meyerson & Mackenzie 2018, p. 8). Studies in psychology have established that relational factors such as voice, neutrality, dignified treatment, and trustworthiness play an important role in conveying messages of social inclusion and that individuals value interpersonal treatment from legal authorities that sends a message of equal status or value within a social group (Tyler & Lind 1992, pp. 140–141; Tyler & Blader 2000, p. 171). Being afforded the opportunity to have an input into how one's dispute is resolved has the potential to convey that a person is worthy of being heard. It is not simply a matter of how an individual subjectively feels about a tribunal's processes. Processes that convey to individuals that they are valued as full participants in society are more likely to be regarded as legitimate, which in turn promotes compliance with legal outcomes. The argument of this chapter is that it is not possible for messages of equal status and value to be conveyed to an individual unless they are afforded the opportunity to have an input into the processes used by tribunals to resolve matters.²⁰

This approach is compatible with the established legal rules used to determine whether procedural fairness has been denied in the context of a hearing. The classic judicial pronouncements on procedural fairness²¹ are formulated in terms of the key concepts of the hearing rule and the rule against bias. An individual does not have the opportunity to participate if there is no opportunity to be heard or if the decision-maker is not open to hearing what the person has to say, due, for example, to some form of bias or partiality. An approach based on participation is also capable of dealing with the variety of ways in which tribunals actually resolve matters. As outlined earlier, much of the work of tribunals is directed to deploying alternative mechanisms for dispute resolution to assist the parties to reach a settlement, without the need for a formal hearing of the matter. A participation-focused approach can accommodate the different forms of ADR that are part of the broad dispute resolution framework of Australian tribunals, and allow the fairness of processes to be judged beyond simply the application of rules that are constructed around the typical adjudicative process of a formal hearing (MacDermott & Meyerson 2018).

If we accept that participation has a central role to play in assessing tribunal procedures, there is then the question of what type or extent of participation may be appropriate in a particular factual scenario. Is there some ‘irreducible minimum’ that determines the fairness or otherwise of that opportunity? The notion of proportionality serves a useful function in this context. Some legislative schemes governing tribunals specifically dictate a proportionality approach. By way of example, section 36 (4) of the *CAT Act* states that

the practice and procedure of the Tribunal should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is proportionate *to the importance and complexity of the subject-matter of the proceedings*.

Hence processes could be seen as being on a spectrum that ranges from elaborate procedural safeguards to a form of participation that may, for example, be time-limited, judged solely ‘on the papers’, or take place in a truncated form. However, utilising the concept of proportionality does not involve balancing away the opportunity for participation. It acknowledges participation as a foundational requirement but allows measures to be adopted that take account of, and are appropriate for, the nature of the dispute.

Compare a claim for a refund on goods purchased to a guardianship dispute where a person’s autonomy to manage their own affairs is in question. In these situations, there is scope for crafting different procedural responses and safeguards to reflect what is at stake for the parties and what investment of time and resources is therefore warranted. However, in both cases initial regard should still be paid to the opportunity to participate that is made available to the parties, albeit proportionate to the circumstances. The fact that a claim might be regarded as involving a small monetary claim, or an item of low value, does not mean it will be simple to resolve (Genn 1993, pp. 393–400). There is a risk of over-extending the category of disputes that are regarded as largely transactional in nature, simply on the basis of a monetary figure. Moreover, for the individuals who are parties to the dispute, the issues at stake for them personally are not necessarily defined only in terms of the amount of money claimed. From the perspective of the parties, the value of the processes used to resolve a dispute includes being afforded the opportunity to have their say and to have their concerns taken seriously by a legal institution.

12.5 Conclusion

Civil tribunals exercising jurisdiction over a broad range of subject areas offer a context in which to focus on procedural justice that is not subject to the same considerations that arise with criminal proceedings. These tribunals are also vested with considerable procedural flexibility and the discretion to inform themselves in any way they consider appropriate. How they meet the requirement that their procedures operate fairly, while subject to the pressures of efficiency and affordability, poses an interesting dilemma. A standard response in the tribunal

context is to see it as a matter of balancing competing considerations, including broader considerations beyond the interests of the parties themselves, such as those pertaining to the administration of the civil justice system and the needs of other litigants. This chapter has argued for an approach that is less concerned with seeking to balance competing factors and instead looks first to the opportunity a party was afforded to participate in the process, before factors of cost and timeliness come into play.

Thus, this chapter has argued that from the perspective of relational justice, participation is the pivotal factor in understanding how legal institutions that are designed to offer affordable and timely justice can operate fairly. The informality with which tribunals are meant to operate is premised on the notion that parties are able to navigate the processes without requiring legal representation and that individuals can successfully advocate on their own behalf. This makes the participation of parties of primary importance. This is reinforced by the fact that many tribunals are required by statute to be actively engaged in helping parties to understand the nature of the proceedings, and thereby to facilitate that participation. However, to fulfil this important function, tribunals need to be appropriately resourced. Finally, enabling individuals to have an input into how legal institutions such as tribunals resolve disputes, can have a positive influence on how individuals view the interactions they have with such authorities. This in turn can build legitimacy in the operation of such institutions and the trust and confidence vested in them.

Notes

- 1 Research for this chapter was funded by the Australian Research Council's Discovery Project funding scheme (DP1701009600: 'A Relational Theory of Procedural Justice').
- 2 See *Civil and Administrative Tribunal Act 2013* (NSW) Section 38, *Queensland Civil and Administrative Tribunal Act 2009* (Qld) Section 28; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) Section 98; *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) Section 53; *South Australian Civil and Administrative Tribunal Act 2013* (SA) Sections 39 and 43; *ACT Civil and Administrative Tribunal Act 2008* (ACT) Section 23; *State Administrative Tribunal Act 2004* (WA) Sections 9 and 32.
- 3 Robin Creyke describes the inquisitorial process of European based civil proceedings as 'where the adjudicator takes an active role in identifying witnesses and seeking out the evidence before reaching a conclusion' (Creyke 2006, p. 17).
- 4 See *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *KO v Commissioner of Police* [2004] NSWADT 3; *Chand v Rail Corporation of New South Wales* (EOD) [2007] NSWADTAP 54. See also Smyth (2010) p. 241.
- 5 See for example *Civil and Administrative Tribunal Act 3* Section 37.
- 6 See *Queensland Civil and Administrative Tribunal Act* Section 75. *Victorian Civil and Administrative Tribunal Act* Section 88; *Northern Territory Civil and Administrative Tribunal Act* Section 118; *South Australian Civil and Administrative Tribunal Act* Section 51; *ACT Civil and Administrative Tribunal Act* Sections 31 and 35; *State Administrative Tribunal Act* Section 54.
- 7 See *New South Wales Civil and Administrative Tribunal Act* Section 36(3). This is also present in the legislation applicable to civil proceedings more generally. See for example, *Civil Procedure Act 2005* (NSW) Section 56(3)–(4).

- 8 See *Edmondson Rural Holdings Pty Ltd v Gordon* [2017] NSWCATAP 155 [3]; *Shirley Ford v Conrad Meder t/as Brian's Autoscreens & Glass* [2014] NSWCATCD 156 [18]; *Woodhouse v Thalys* [2017] NSWCATAD 260 [43].
- 9 See also *John Maiolo t/as M & N Peninsular Kitchens & Joinery v Chiarelli* [2017] NSWSC 982 [51].
- 10 See for example, the operations of the Victorian Civil and Administrative Tribunal and the Federal Administrative Appeals Tribunal.
- 11 See *Civil and Administrative Tribunal Act* Section 38(5)(a)–(b); *South Australian Civil and Administrative Tribunals Act* Section 43(1)(c); *State Administrative Tribunal Act* Section 32(6)(b); *Northern Territory Civil and Administrative Tribunal Act* Section 54(c); *Queensland Civil and Administrative Tribunal Act* Sections 29–30.
- 12 See *South Australian Civil and Administrative Tribunals Act* Section 43(1)(a); *Northern Territory Civil and Administrative Tribunal Act* Section 54(a).
- 13 See *South Australian Civil and Administrative Tribunals Act* Section 43(1)(b); *State Administrative Tribunal Act* Section 32(6)(a); *Northern Territory Civil and Administrative Tribunal Act* Section 54(b); *Queensland Civil and Administrative Tribunal Act* Section 29(1)(a)(ii).
- 14 *Civil and Administrative Tribunal Act* Section 38(5)(b). *Northern Territory Civil and Administrative Tribunal Act* Section 54; *State Administrative Tribunal Act* Section 32; *South Australian Civil and Administrative Tribunal Act* Section 43.
- 15 See also *Thorne v Toowoomba Regional Council & Tytherleigh* [2017] QCATA 128 [15]–[22].
- 16 See for example, *Cox Industries (Australia) Pty Ltd v Burns* [2015] QCATA 9 where the QCAT Appeal Panel noted that where a party failed to appear in a matter on the basis of advice allegedly provided by the QCAT 1300 telephone information service, that issue did not constitute a failure of the tribunal's Section 29 obligations.
- 17 See for example, *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 643.
- 18 The problem of a balancing approach not giving due weight to a party's substantive rights is considered by Denise Meyerson (Chapter 7) in this volume.
- 19 See also Johnson (1985), p. 71.
- 20 The claim that there is a normative requirement on institutions to establish processes that express respect for citizens is explored in more detail in the contributions to this volume by Ceva (Chapter 8), Mackenzie (Chapter 9), and Stoljar (Chapter 10).
- 21 See *Kioa v West* (1985) 159 CLR 550; *Annetts v McCann* (1990) 170 CLR 596; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273.

References

- Allars, M 1991, 'Neutrality, the judicial paradigm and tribunal procedure', *Sydney Law Review*, vol. 13, no. 3, pp. 377–413.
- Arthur, L 2011, 'Does case management undermine the rule of law in the pursuit of access to justice?', *Journal of Judicial Administration*, vol. 20, no. 4, pp. 240–247.
- Australian Government Productivity Commission 2014, *Access to justice arrangements*, vol. 1, Report No. 72, <https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume1.pdf>.
- Bedford, N & Creyke, R 2006, *Inquisitorial processes in Australian tribunals*, Australian Institute of Judicial Administration Incorporated, Melbourne.

- Black, M 2009, 'The role of the judge in attacking endemic delays—some lessons from Fast Track', *Journal of Judicial Administration*, vol. 19, no. 2, pp. 88–99.
- Crekye, R 2006, "Inquisitorial" practice in Australian tribunals', *Administrative Review*, vol. 57, pp. 17–32.
- Creyke, R 2012, 'Tribunals—carving out the philosophy of their existence: the challenge for the 21st century', *AIAL Forum*, vol. 71, pp. 19–33.
- De Villiers, B 2014, 'The State Administrative Tribunal of Western Australia—time to end the inquisitorial/accusatorial conundrum', *University of Western Australia Law Review*, vol. 37, no. 2, pp. 182–214.
- Genn, H 1993, 'Tribunals and informal justice', *Modern Law Review*, vol. 56, no. 3, pp. 393–400.
- Groves, M 2011, 'The duty to inquire in tribunal proceedings', *Sydney Law Review*, vol. 33, no. 177.
- Johnson, G 1985, 'Natural justice and legitimate expectation in Australia', *Federal Law Review*, vol. 15, no. 1, 39–75.
- Law Council of Australia 2018, *The justice project final report, part 2 Courts and Tribunals*, viewed 10 October 2019. Available at <https://www.lawcouncil.asn.au/justice-project/final-report>
- MacDermott, T & Meyerson, D 2018, 'Australian tribunals and alternative dispute resolution: a procedural justice perspective', *Civil Justice Quarterly*, vol. 37, no. 4, pp. 443–462.
- Mason, K 2017, 'Flexibility, informality and despatch; striking the balance in tribunal decision-making', *Council of Australasian Tribunal Conference*, 8–9 June 2017, Sydney, viewed 11 October 2019. Available at <https://coat.asn.au/resources-library/>
- Meyerson, D & MacKenzie, C 2018, 'Procedural justice and the law', *Philos Compass*, vol. 13, no. 12, pp. 1–11. Available at <https://doi.org/10.1111/phc3.12548>
- Queensland, *Parliamentary Debates, Legislative Assembly*, 30 April 2013, 1314 (Jarrod Bleijie, Attorney-general and Minister for Justice)
- Rees, N. 2006, 'Procedure and evidence in "court substitute tribunals"', *Australian Bar Review*, vol. 28, pp. 41–87.
- Smyth, M 2010, 'Inquisitorial adjudication: the duty to inquire in merits review tribunals', *Melbourne University Law Review*, vol. 34, pp. 230–267.
- Solum, LB 2004, 'Procedural justice', *Southern California Law Review*, vol. 78, no. 1, pp. 181–321.
- Thibaut, J & Walker L, 1975, *Procedural justice: a psychological analysis*, Lawrence Erlbaum Associates, Hillsdale.
- Tyler, TR & Blader, SL 2000, *Cooperation in groups: procedural justice, social identity, and behavioral engagement*, Psychology Press, Philadelphia.
- Tyler, TR & Lind, EA 1992, 'A relational model of authority in groups', *Advances in Experimental Social Psychology*, vol. 25, pp. 115–191.
- Wilson, A 2013, 'Procedural fairness v modern tribunals: can the twain meet?', *Queensland Lawyer*, vol. 33, no. 2, pp. 131–136.
- Wright, R, 2015, 'An overview of the NSW Civil and Administrative Tribunal', *The College of Law Litigation Breakfast Series*, Sydney, March 2015, viewed 9 October 2019. https://www.ncat.nsw.gov.au/Pages/about_us/news_events/speeches_and_presentations.aspx