ACCESS TO JUSTICE: TECHNICALITIES AND THE TRIBUNAL SYSTEM

THE SIR RICHARD BLACKBURN LECTURE

An Address by Justice DF O'Connor, President of the Australian Industrial Relations Commission

27 May 1997

Introduction

Thank you for the opportunity to speak this evening.

"Access to justice" has become something of a motherhood statement these days, but I believe it is one of the fundamental pillars of our legal system and that it should not be just an empty slogan. Having a legal system for only a select few, which is maintained out of tax payer funds, offends the Australian notion of a fair go. The Federal government report in 1994, Access to Justice, highlighted some of the aspects of the legal system which need improvement. More recently, the Australian Law Reform Commission has put out a discussion paper on re-thinking the adversarial nature of civil litigation.¹

One of the elements that the discussion paper canvasses is the interrelationship, as it currently exists and may exist in the future, between the court system and "alternative dispute resolution", or ADR as its often called. ADR is defined in the discussion paper "to include mediation, conciliation, evaluation, case appraisal and arbitration." As the discussion paper points out, there is a view among some that "ADR processes should be kept quite separate and apart from litigation, as an option to be resorted to only with the agreement of the parties".2

I am not one of those who think there is no place for ADR in litigation, and it is in this context that it seems timely to reconsider the place of tribunals in our legal system.

The tribunal system is one of the most important access points to justice, in my view, because it is designed to be a fast, informal and easy-to-use process. My views on the benefits of tribunals probably come as no surprise, since I have been the President of five Commonwealth tribunals over the last ten years.3 This evening, I want to revisit some of the ideas that underpin our Australian tribunal system and explore some of the implications inherent in the new directions for tribunals. In particular, I will use some of the developments in the industrial arena as illustration.

Background

In the 1960s and 70s, when the Kerr and Bland Committees made their landmark recommendations for the reform of the administrative law

---

2 ALRC, Review of the Adversarial System of Litigation, April 1997, at 82.
3 They are: ABT, AAT, SAT, NNTT, AIRC.
system, there had been a significant post-war expansion of government activity. The number of activities regulated by government was matched only by the volume and range of services provided by government for the benefit of the public. These activities were accompanied by a substantial increase in the powers and discretions of administrators involved in making decisions which affected people's everyday lives. Part of the motivation of the Kerr Committee was to provide access for individual citizens to a forum which had the power to redress the imbalance between the citizen and the State. The fundamental concern of the reformers was to strengthen the accountability of administrators exercising broad discretionary powers. To that end, the Administrative Appeals Tribunal was established in 1975 and many specialist tribunals have followed.

Now, of course, as the people of Canberra are only too aware, the expansion of the public sector is no longer any cause for concern. But, whether or not the public sector itself is larger or smaller, government is continuing to regulate a vast range of activities and it is tribunals which enable individuals to obtain speedy resolution of their administrative or legal problem. What we have seen over the past 25 years are the benefits of a system which can deal with a high volume of matters expeditiously and provide, by and large, greater satisfaction to all parties than the expensive court system. In many ways, the tribunal system has been a model that has pointed the way ahead for dealing with areas of conflict outside government.
The adaptation of the public sector tribunal model of conflict resolution can readily be seen now in the private sector. We now have private sector roles such as the Banking Ombudsman, as well as a growing number of small private sector tribunals, such as the Superannuation Complaints Tribunal and the Residential Tenancies Tribunal. These tribunals operate under legislation, but resolve conflict which arises as between citizens and corporations and between citizen and citizen.

It is the special attributes of tribunals which make them such an attractive option for both public and private sectors.

**The Tribunal System and its Attributes**

One of the salient features of tribunals, compared with courts, is the focus on informality. Informal, of course, does not necessarily imply non-adversarial, although many tribunals do adopt a non-adversarial approach. But in most cases, informality refers to the kinds of pre-hearing procedures tribunals can adopt and their ability to waive the technical rules of evidence. In addition, tribunals are often established to ensure they are a body of experts, rather than a body of lawyers.

**Conciliation**

Conciliation and/or mediation are the means by which many tribunals are able to maintain both high volume workloads and consumer satisfaction. The conciliation process enables both the applicant and the respondent to discuss the issues involved and perhaps come to a compromise.

---

4 For example, the SSAT.
agreement. There have been, of course, understandable concerns over the imbalance of power which is often inherent in these types of informal processes. But after nearly 10 years in the tribunal system, I have found these concerns to be largely misplaced. Most applicants I have dealt with would prefer to avoid the stress, and the financial burden, of a full hearing. In many cases, applicants are able to have a representative present to assist them and, where this is not the case, the conciliator ensures that the process is fair.

In fact, it is my belief that the model adopted in the Australian Industrial Relations Commission, where there is a statutory obligation to focus primarily on conciliation, is one of the more successful approaches to dispute resolution that I have encountered. While the AIRC model was designed mainly for collective disputes, as between union parties and employer organisations, it has translated very effectively to individual disputes - which I will discuss shortly in more detail.

Body of experts
Like the AAT, the Industrial Relations Commission was established with a view to ensuring that its members are familiar with the type of disputes they are going to encounter. Unlike the AAT, though, there is no requirement that its presidential members be lawyers. This arrangement has had no detrimental effect on the qualifications or standards of the Commission and has provided an opportunity for consumers to benefit from the expert knowledge of industrial relations found among those who have worked at the coal face of the union movement and business. This conceptualisation of the tribunal as a body of experts, including
legal experts, gives access to a broad range of abilities and helps to keep the processes down-to-earth and relevant to the issues.

*Waiver of the rules of evidence*

Another way in which informality is maintained by tribunals is by their having the ability to waive the application of the technical rules of evidence. In practice, many of the rules of evidence are followed, since there is still the legal obligation to provide natural justice. The more technical requirements, however, are often dispensed with and this both speeds the process and enables unrepresented applicants an opportunity to participate more easily.

*Efficiency with flexibility*

Finally, what the tribunal system adds up to, in a simple phrase, is efficiency with flexibility, for high volume matters in the system. This permits access and remains a cheaper option, particularly for low income earners.

You may, by now, be wondering at my reason for going over what is, for many of you, familiar ground. The reason is that I believe it is timely to raise questions about the ways in which tribunals are in danger of losing some of their most positive attributes. An illustration of some of my concerns is provided by what is happening at the Australian Industrial Relations Commission.
The Australian Industrial Relations Commission

For most of its the life, the Conciliation and Arbitration Commission, now the Australian Industrial Relations Commission, stood apart from the majority of tribunals in the sense that it was not designed to dispense justice to individuals. The Industrial Relations Commission has traditionally been a forum for collective organisations - both employer and employee - using a conciliation approach to resolving disputes.

In recent years, though, the predominantly collective nature of the jurisdiction has begun to change. The introduction of an extensive legislative basis for unfair dismissal claims has opened the jurisdiction to individual applicants - whether or not they are represented by a union. This marks a welcome advancement in terms of the policy of providing access to justice.

As I mentioned earlier, there has been a shift in terms of coverage offered by the tribunal system. It is no longer just a forum for the citizen to challenge decisions by government. In the case of the Commission, which is a Commonwealth tribunal, the unfair dismissal jurisdiction regulates private sector employment practices as well as the public sector.

Like any legal forum established to provide redress for wrongs, the Commission has its share of applications under the unfair dismissal laws which have little, if any, merit. On the other hand, there is no doubt that the majority of claims in the unfair dismissal jurisdiction are made in
good faith, with many having substantial merit. The process for resolving disputes over dismissal is still primarily focussed on conciliation, with arbitration a last resort.

The issues I want to focus on this evening, however, concern the ways in which the policy of providing an accessible forum for individual justice is being hemmed in and undermined by imposed technical requirements in a way that seems to be bringing it closer to the court system and which is making it much less accessible. I should say at the outset that I do not think that this outcome is in any way intended, especially since the government is currently funding a review of many of these restrictive practices in the court system itself.

It is in the jurisdiction of unfair dismissals and unlawful terminations that some of these technical requirements are having the greatest impact.

**Unfair Dismissal and Unlawful Termination**

The *Workplace Relations Act* incorporates two main schemes which enable applicants to claim compensation for unfair dismissal or unlawful termination. Unfair dismissal occurs when the dismissal is made for reasons that are judged to be "harsh, unjust or unreasonable". Unlawful termination, on the other hand, takes place when an employer breaches one of the statutorily prohibited reasons for dismissal, such as dismissing an employee for being temporarily absent from work because of illness or injury, or for reasons of family responsibilities. These two schemes work relatively independently of each other.
Unfair Dismissal

The unfair dismissal provisions of the Act have strict eligibility criteria and apply only to employees employed under Federal industrial instruments (that is, awards, Certified Agreements or Australian Workplace Agreements) and who work for a Constitutional corporation. They also apply to Commonwealth public sector employees, and to all Victorian and Territory employees. In addition, maritime workers, flight crew officers and waterside workers employed under a Federal award are covered. Non-award employees, or employees covered by a Federal award but who do not work for a Constitutional corporation, no longer have redress for unfair dismissal in the Federal system.

These eligibility criteria result from the Federal government’s constitutional restrictions in respect of industrial relations. The phrase “harsh, unjust or unreasonable” originated with the State industrial tribunals and has been found by the High Court to have no basis in the relevant ILO Convention.5 As a result, the external affairs power can no longer be used to support the unfair dismissal regime at the Federal level.

In some States, such as New South Wales, employees who are no longer able to gain access to the Federal system may have access to the State industrial system, but this is not the case in all.

Section 359 of the Act, supported by the Regulations, specifies classes of persons who can also be excluded from the operation of the unfair dismissal provisions. They include:

---

5 Victoria v The Commonwealth (unreported, 1996).
employees engaged under a contract of employment for a specified period or a specified task (unless the employer's main purpose for such engagement is to avoid the obligations under the Act);

• employees serving a period of employment or qualifying period;

• employees engaged on a casual basis for a short period (that is, less than 12 months);

• employees in relation to whom the operation of the provisions would cause substantial problems because of their particular conditions of employment or the size and nature of the undertaking in which they are employed;

• employees who are trainees; and

• non-award, high income earners earning over $64,000 pa.

An applicant who arrives at the Commission seeking redress for alleged unfair dismissal, providing they have not fallen foul of these exclusions, is faced with other threshold tests. If the employer challenges any claim on the basis of the following questions, then these preliminary issues must be determined.

• Is the applicant covered by a Federal award? If there is doubt, a Commission member must hear argument prior to conciliation.

• Is the employer a constitutional corporation? Again, if there is doubt, the matter goes to a preliminary hearing.

• Is the application within time? If not, then once again a preliminary hearing occurs.
There is also now the further question of whether the applicant has the compulsory $50 filing fee? If not then the application will not be accepted unless "hardship" is proved. Fortunately, a recently introduced regulation enables the filing fee to be refunded where the application is discontinued at least two days before the listing date for conciliation.

Once these threshold questions have been resolved, the claim can go to conciliation. As can be seen from this brief outline of the jurisdictional exclusions, however, there are many complex factors to be taken into account. While these jurisdictional issues are quite familiar to lawyers, they are a potential minefield for unrepresented applicants. Given that the initial conciliation process is designed to be easily accessible and fast, it is dismaying to realise that many applicants will need to seek legal advice before getting to first base.

*Unlawful Termination*

Unlawful termination, which is separately defined, offers a different set of options. The main grounds for unlawful termination, as distinct from unfair dismissal, are set out in section 170CK(2) of the Act. It is prohibited to dismiss an employee for any of the following reasons:

- a temporary absence from work because of illness or injury;
- trade union membership;
- non-membership of a trade union;
- acting as a representative of employees;
- filing a complaint, or participating in proceedings against the employer involving alleged breaches of the law;
• on grounds of race, colour, sex, sexual preference, age, physical or mental disability; marital status, family responsibilities, pregnancy, religious, political opinion, national extraction or social origin;
• refusing to negotiate, make, sign, vary, etc an Australian Workplace Agreement;
• absence from work during maternity or other leave.

These prohibited reasons for dismissal are grounded in a number of international conventions and enacted on the basis of the external affairs power. No eligibility restrictions therefore apply in respect of the employee needing to be covered by a Federal award, or an employer being a constitutional corporation. The exclusions under the Regulations continue to apply, with the exception of those employees on contracts of 12 months or more. These employees are eligible to claim under all the statutorily proscribed grounds, apart from the notice provisions. All applicants claiming under the statutory grounds I’ve just mentioned, can take immediate advantage of the Commission’s conciliation process.

But, if conciliation is unsuccessful, the complexities of the system become more starkly apparent.

What Happens when Conciliation Fails

First, there is now a requirement on Commission members to state their view of the merits of the case prior to it proceeding to arbitration or the Court. The conciliator’s view may sound in costs, in the event of the applicant persisting with a case against the conciliator’s
recommendation. Sometimes it may be clear to a conciliator that a case has no merit, and in these instances the requirement will be unproblematic. However, the conciliation process is not a forum for presenting evidence and the merits of any given matter will not always be obvious.

Secondly, and more importantly, applicants must make an election as to what type of proceedings they wish to pursue.

The new Act has a provision, section 170CFA, which has been described by the Metal Trades Industry Association, an employer organisation, as "an exceptionally complex section". This section comes into operation in the event that conciliation is unsuccessful and the applicant wishes to persevere with the claim.

The section requires an applicant to make an election to proceed either to arbitration in the Commission, or to begin proceedings in the Federal Court. In some limited cases, an applicant may need to proceed in both jurisdictions. There are many competing considerations to take into account in making such an election. These are perhaps best illustrated using a case study example.

Case Study
In a recent dismissal case in Perth, the conciliation covered the "harsh, unjust or unreasonable" ground, an alleged breach of the statutory notice provisions and an alleged breach of the statutory discrimination ground

---

proscribing dismissal on the basis of a person's union membership. The conciliation was unsuccessful, although the applicant's case had *prima facie* merit according to the conciliator's certificate.

Consequently, the applicant had to elect whether to pursue the "harsh, unjust or unreasonable" ground or the discrimination ground. If he chose the former, then he would elect to have arbitration in the Commission. This would mean that he could not elect to pursue the discrimination aspect in the Federal Court, as the Act prevents him from bringing both actions.

But what of the breach of the notice provisions? A breach of statutory notice cannot be raised in arbitration in the Commission and must therefore be pursued in the Court. In this case, the applicant had been given two weeks' notice, instead of the mandatory four weeks. To recover the balance, he would need to initiate Court proceedings concurrently with his arbitration proceedings in the Commission.

Under this particular scenario, it would be possible to start proceedings in respect of the breach of notice using the small claims procedure in the Magistrates Court, thus avoiding the now considerable court fees associated with Federal Court proceedings. However, if the applicant chose to pursue the discrimination ground, then the Federal Court jurisdiction applies, along with the costs that that jurisdiction involves. Federal Court costs are now such that, according to a former Commissioner from the Australian Law Reform Commission, "it is
rarely worthwhile to take a genuine dispute of less than $10,000 to court.\footnote{Ryland, M., "Legal system out of control", The Australian Financial Review, 6 May 1997, p17.}

This case study is based on a real application which came before the Commission and it is not the only matter to involve complicated decision-making of this kind. The problem is that the complexity of the factors to be weighed means that applicants need to have either the support of a union or a lawyer.

Under the circumstances, it is perhaps not surprising to see that figures relating to applications to the Commission for unfair and unlawful dismissals have changed dramatically since the beginning of this year.

Between January and May this year, the total number of applications for unfair or unlawful dismissal lodged with the Commission was 2,260. This compares with 5,097 for the same period last year. Overall, the figures are substantially less than half.

In the ACT, 61 applications have been received during the period, compared with 157 last year. In NSW, there have been 338 applications, compared with 1,658 last year. Many of those ineligible to apply Federally have been picked up by the State Industrial Relations Commission in NSW. However, in some other States, there is no equivalent State jurisdiction for the applicants who miss out on Federal coverage.
The unfair dismissal and unlawful termination jurisdiction is only a part of the Commission's work, but it represents the aspect of our work that has been the most individually accessible in delivering industrial justice. The technical requirements are now such that most applicants will again need union support or legal advice in bringing a claim, and that in itself reduces the accessibility aspect of the forum.

Conclusion

Let me say in conclusion, that I believe that we in Australia have one of the most accessible administrative and industrial tribunal systems in the common law world and it would be unfortunate to see the systems destroyed by overburdening jurisdictional technicalities.

At a time when costs are an important consideration within the legal system generally, tribunals represent a cheap and efficient option for dispute resolution, while maintaining an ability to process large numbers of applications.

As Justice Michael Kirby stated in a lecture he gave in Melbourne in 1996, the Australian tribunal system has been exported very successfully. South Africa has recently adopted an industrial tribunal system based on the Australian model. As Justice Kirby said:

> It would be an irony if, at the very moment that an efficient and responsive industrial relations body was being created in South Africa, modelled on the Australian experience, we denuded our

---

1 Kirby, M., "Sir Richard Kirby, Mediation and Industrial Relations Today" Industrial Relations Society of Victoria, 20 November 1996.
national body of its relevance, prestige and capacity to act speedily and to safeguard the rights of the vulnerable.

I do not think that that fate has befallen the Commission, or the rest of the tribunal system. But the concern Justice Kirby expresses is timely. If we are to continue to offer an accessible alternative to the court system, we must be very concerned to prevent the two impediments to access - cost and technicality - from barring access to those who benefit most.