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THE MERITS OF “MERITS” REVIEW: A COMPARATIVE LOOK AT THE AUSTRALIAN ADMINISTRATIVE APPEALS TRIBUNAL

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This article compares several systems of administrative adjudication. In the U.S., adjudication is typically performed by the same agency that makes and enforces the rules. However, in Australia, almost all administrative adjudication is performed by the Administrative Appeals Tribunal [AAT], a non-specialized adjudicating agency, and several other specialized tribunals that are independent of the enforcing agency. These tribunals (which evolved out of concerns about separation of powers) have achieved great legitimacy. In the U.K., recent legislation [the Tribunals, Courts and Enforcement Act] merged numerous specialized tribunals into a single first-tier tribunal with much stronger guarantees of independence than previously existed. An upper tribunal hears appeals from the first tier and largely supplants judicial review. The article concludes by asking whether the U.S. could learn anything from the Australian and U.K. experience and suggests that a single tribunal to adjudicate federal benefits cases might be a significant improvement over the existing model.

Cet article compare un certain nombre de systèmes de règlement judiciaire de différends dans le domaine administratif. Aux Etats-Unis, typiquement, le règlement de différends est effectué par la même agence qui établit les règles et qui les met en application. Toutefois, en Australie, presque tous ces règlements sont effectués par le Administrative Appeals Tribunal [AAT], une agence non-spécialisée de règlement de différends, ainsi qu'un certain nombre d'autres tribunaux spécialisés qui sont indépendants de l'agence qui met les règles en application. Ces tribunaux (qui émanent de préoccupations au sujet de la séparation des pouvoirs) ont atteint un niveau élevé de légitimité. Au Royaume-Uni, une loi récente [la Tribunals, Courts and Enforcement Act] a fusionné plusieurs tribunaux spécialisés en un seul tribunal de première instance ayant des garanties d'indépendance bien plus fortes qu'auparavant. Un tribunal supérieur juge les appels des décisions du tribunal de première instance et supprime largement la révision judiciaire. L'article se termine en posant la question à savoir si les Etats-Unis pourraient apprendre quelque chose de l'expérience australienne et britannique et suggère qu'un seul tribunal pour juger les cas de bénéfices fédéraux pourrait constituer une amélioration importante par rapport au modèle existant.

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I. INTRODUCTION

Modern governments have to decide many disputes arising out of regulation or benefit schemes. There are various models of administrative dispute resolution available. The disputes can be adjudicated by a national court system or within the agency that made the initial decision but subject to judicial review. A third way is adjudication by specialized courts or tribunals. The United States relies heavily, but not exclusively, on adjudication within its agencies, while Australia and the United Kingdom rely on national administrative appeal tribunals. This article discusses these different approaches.

II. U.S., AUSTRALIAN AND U.K. APPROACHES TO ADMINISTRATIVE ADJUDICATION

A. Administrative Adjudication in the U.S.

At the federal level, the U.S. has generally avoided establishing specialized courts, although a few have been created and some continue to exist.¹ Most disputes involving the government are resolved within regulatory and benefit agencies, not by courts. The U.S. Supreme Court upheld administrative adjudication in 1932,² and in 1946 Congress responded by enacting the *Administrative Procedure Act* [APA]. At that time, administrative adjudication was viewed largely as the vehicle for agency implementation of regulatory statutes such as those relating to energy, transportation, communications, securities, or labour law. Such policy-oriented adjudication still continues, although most of it has been supplanted by agency rules that resolve the issues across-the-board rather than through case-by-case decisionmaking. Today, the great majority of federal agency adjudication relates to benefit statutes such as social security.

The APA contains provisions for trial-type procedures for on-the-record agency hearings required by statute. Specially qualified, quasi-independent adjudicators, who are now called administrative law judges [ALJs], preside over these formal adjudications.³ The APA calls for separation of functions between decisionmakers and agency prosecutors or investigators. Although the rules of evidence are relaxed and cross-examination may be limited, these hearings resemble courtroom trials. The ALJ writes the initial decision in the case but there may be internal agency appellate review (by the agency head or a delegate of the agency head). Judicial review (on legal, factual, and discretionary issues) is available in the federal courts, but such review is deferential and is based on the administrative record, not on a new record made in court. In this manner, a fair hearing is provided *inside* the agency.

Federal agencies also conduct a vast range of “informal” adjudication that is not governed by the APA. Some of it (such as immigration disputes) entails relatively formal trial-type hearings that are presided over by an administrative judge [AJ],

¹ See Paul R. Verkuil & Jeffrey S. Lubbers, “Alternative Approaches to Judicial Review of Social Security Disability Cases” (2003) 55 Admin L Rev 731 at 744-48 (discussing past and existing specialized courts).

² *Crowell v. Benson*, 285 U.S. 22 (1932), discussed further at text accompanying notes 54-55.

³ As of September 2008, there were 1469 federal ALJs, 1219 of them employed by the Social Security Administration. Office of Personnel Management chart, “CDPF Status Report as of September 2008,” on file with the authors.

rather than an ALJ. Even in informal adjudication, agencies generally craft "some kind of hearing"⁴ and judicial review proceeds in a similar way.

B. Administrative Adjudication in Australia

1. Internal Review

In Australia, adjudication by Commonwealth ministries and agencies is not governed by an *APA*-like code, but instead by provisions in individual statutes and by the common law principles of "natural justice," roughly similar to U.S. due process. As with U.S. informal adjudication, the variety of first-level decisions is so great that it makes any generalization about the application of natural justice principles difficult.

Commonwealth agencies maintain a variety of different systems of internal review of decisions unfavorable to private parties under regulatory or benefit statutes.⁵ Most (but not all) of the internal review systems are provided for by statute. Generally, agencies provide an opportunity for an internal merits review by an official who was not involved in the initial decision. The review process often furnishes an opportunity for written submission and sometimes involves an opportunity for an oral contact in person or over the phone between the private party and the reviewer, although not a formal hearing. In addition, reviewers usually contact the primary decisionmaker to discuss the facts and reasons for the decision. Reviewers will inform the private party of the outcome of the review decision and of the availability of external review. In many cases, it is necessary for the private party to exhaust the internal review process before seeking external review before a tribunal.

For example, in social security cases, claimants are encouraged (but not required) to request reconsideration from the primary decisionmaker. If that fails, they must seek review of the disputed decision by the Authorized Review Officer [ARO] before proceeding to a tribunal – in this case the specialized Social Security Appeals Tribunal [SSAT]. Review by the ARO generally involves a meeting (or at least a phone conversation) with the applicant, the opportunity to submit additional evidence, and a statement of the reasons why the ARO has refused to change the decision.

2. External Review in Tribunals⁶

Australian administrative tribunals at the federal level are independent of the primary decisionmaker. Their task in conducting "merits review" is to "examin[e] whether a decision is substantively correct, after consideration of all relevant issues of law, fact, policy and discretion."⁷ Merits review means that the tribunal "stands in the

⁴ See *Goss v. Lopez*, 419 U.S. 565, 579 (1975) ("some kind of hearing" required before short-term suspension of student from school). A fair hearing is required by the due process clause of the Fifth Amendment whenever agency action deprives a person of life, liberty or property.

⁵ The material in this paragraph and the following one is drawn from: Administrative Review Council, *Report to the Attorney General: Internal Review of Agency Decision Making* (Report No. 44, Nov. 2000).

⁶ For useful authorities see Peter Cane, *Administrative Tribunals and Adjudication* (Oxford and Portland, Oregon: Hart, 2009); Peter Cane, "Understanding Administrative Adjudication" in Linda Pearson, Carol Harlow & Michael Taggart, eds, *Administrative Law in a Changing State* (Portland: Hart, 2008) 273 [Cane chapter]; Linda Pearson, "Fact-Finding in Administrative Tribunals" in *Administrative Law in a Changing State* 301; Robin Creyke, "Administrative Tribunals" in Matthew Groves & H.P. Lee eds, *Australian Administrative Law: Fundamentals, Principles, and Doctrines* (Cambridge: Cambridge University Press, 2007) 77; and Robin Creyke & John McMillan, *Control of Government Action: Text, Cases and Commentary* (Sydney: LexisNexis Butterworths, 2005) at 114-179. For an early description, see Mark Aronson & Nicola Franklin, *Review of Administrative Action* (Sydney: Law Book, 1987) at 221-240.

⁷ Creyke & McMillan, *ibid* at 114.

shoes”⁸ of the agency and is empowered to substitute the “correct or preferable” decision for that of the agency. Its power extends to substituting decision on issues of fact, law, and discretion. “Correct” in this formula refers to situations in which the tribunal considers that there is only one acceptable decision, and “preferable” refers to situations where it considers that there is more than one acceptable decision.¹⁰ Tribunal review often entails creation of a fresh evidentiary record including evidence of facts arising after the original agency decision and it allows the tribunal to reweigh the relevant factors in exercising discretion.¹¹

At the federal level, the “peak” merits review tribunal is the Administrative Appeals Tribunal [AAT] created in 1976.¹² However, there are more specialized tribunals in the area of benefits and immigration, including the SSAT, the Veterans’ Review Board [VRB], the Migration Review Tribunal [MRT], and the Refugee Review Tribunal [RRT].¹³ In addition, in the economic regulatory area, the Takeovers Panel reviews decisions by the Australian Securities and Investments Commission involving corporate takeovers¹⁴ and the Australian Competition Tribunal [ACT, formerly the Trade Practices Tribunal] reviews decisions of the Australian Competition and Consumer Commission.¹⁵

The AAT “falls within the portfolio of the Attorney General,”¹⁶ while the specialized tribunals are within those of the relevant department ministers. Most of the states have an AAT counterpart and some specialized tribunals as well.¹⁷

⁸ The oft-used “stands in the shoes” metaphor was expressed by Smithers, J. in an important Federal Court decision. *Minister for Immigration & Ethnic Affairs v. Pochi*, (1980) 31 ALR 666, 671.

⁹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60; 24 ALR 577 (Bowen C.J. and Deane J.) 149.

¹⁰ Cane, *supra* note 6 at 149.

¹¹ *Shi v Migration Agents Registration Authority*, (2008) 248 ALR 390, 397-403 (Kirby J), is typical of cases that spell out the principles of merits review [*Shi*]. *Shi* was a professional license revocation case. It held that the Administrative Appeals Tribunal [AAT] is permitted to consider new evidence and determine the “correct or preferable” result based on a fresh factual record including facts arising after the Authority’s decision. Moreover, the AAT is empowered to exercise its discretion as to the appropriate sanction (rather than to remand to the Authority for reconsideration of the sanction). In *Shi* the AAT decided to “caution” the licensee rather than revoking his license. It also imposed a scheme of probation; the power to impose the probationary condition on the caution arose from an amendment to the statute enacted after the date the Authority acted but before the AAT acted. *Ibid* at 403-07.

¹² It was created by the *Administrative Appeals Tribunal Act* 1975, current version available online: Comlaw <<http://www.com-law.gov.au/Com-Law/management.nsf/current/by-title/54DB-558856AEE672CA256F-710006F886?OpenDocument>>.

¹³ See Creyke & McMillan, *supra* note 6 at 121. There is also a National Native Title Tribunal, whose function is to determine initial eligibility and then provide a forum for mediation of applications for native title that have been filed in federal court. If no agreement is reached, the application may have to be determined by the court following a trial. See online: National Native Title Tribunal <<http://www.nn-tt.gov.au/What-Is-Native-Title/Pages/Approaches-to-Native-Title.aspx>>.

¹⁴ See online: Australian Government <<http://www.takeovers.gov.au/about.aspx#role>>; *Attorney-General v. Alinta Ltd.* (2008) 233 CLR 542, discussed in *infra* note 76 [*Alinta*].

¹⁵ See online: Australian Government <<http://www.competitiontribunal.gov.au/>>; *Tasmanian Breweries* decision, discussed in *infra* notes 69, 75.

¹⁶ See “About the AAT” online: Australian Government <<http://www.aat.gov.au/About-The-AAT/Introduction-ToTheAAT.htm>>.

¹⁷ Creyke & McMillan, *supra* note 6 at 123-26.

(a) The AAT

As of January 27, 2010, there were 89 "Members" of the AAT, representing a mix of part-time and full-time judges, lawyers and lay persons with "expertise in a range of areas, including accountancy, aviation, engineering, law, medicine, pharmacology, military affairs, public administration and taxation."¹⁸ There were 154 staff persons serving the AAT as of June 30, 2009. The AAT President must be a judge of the Federal Court. There are nineteen other part-time "Presidential Members" – eight Federal Court judges and five judges of the Family Court of Australia, and six full-time Deputy Presidents who must have been enrolled as legal practitioners for at least five years. There were 63 other members, some of who were senior members and most of whom were part time. Not all of the non-judicial members need be lawyers. The AAT achieves some specialization because it is split up into four divisions.¹⁹

Formally, appointments to the AAT are made by the Governor-General (the Queen's representative in Australia), though in practice they are made on the advice of the Attorney General.²⁰ The appointments process is based primarily on informal and largely unregulated consultation within government and between departments and tribunals. Federal tribunal members serve for fixed terms of three, five or seven years with possibility of reappointment. The informal appointments process and the relative shortness of terms obviously have a bearing on the independence of the tribunals. AAT members may be removed by Parliament "for 'proved misbehavior or incapacity' and must be dismissed for bankruptcy" and salaries are set "by an independent remuneration tribunal." This mix of provisions leads Professor Cane to conclude that the independence of the members of the AAT is better protected than that of members of the specialist federal merits review tribunals, but much less well protected than that of court judges.²¹ AAT members are also less well protected than U.S. ALJs, although better protected than most U.S. AJs.

The AAT can review a decision only if a statute so provides but there are over 400 such enactments.²² The AAT received 6226 applications for review in the 2008-09 year.²³ During that period, it provided 1393 hearings. Of these, 390 decisions set aside the decision appealed from, 96 varied the decision, and 907 affirmed the decision.²⁴ The most important of the AAT's jurisdictions are second-tier hearings in

¹⁸ The material in this paragraph is drawn from "About the AAT," *supra* note 16.

¹⁹ The divisions are the General Administrative, Security Appeals, Taxation Appeals, and Veterans' Appeals Divisions. Presidential members can exercise powers in any of the Tribunal's divisions, while other Senior Members and Members may exercise powers only in the division or divisions to which they have been assigned.

²⁰ The material in this paragraph is drawn from Cane, *supra* note 6 at 100, 111-12.

²¹ Cane points out that originally immigration cases were in the bailiwick of the AAT, but "[g]overnment dissatisfaction with the patterns of immigration decision-making by the AAT in the 1980s" led to the creation of the two specialist immigration-related tribunals with no right of appeal to the AAT. Moreover, these tribunals are "more closely integrated into" the department of immigration, "a greater proportion of the members lack legal training than is the case in the AAT," and their work is "actively managed (by the imposition of performance targets, for instance) in a way that the work of the members of the AAT is not." Cane chapter, *supra* note 6 at 298-99.

²² See online: Australian Government <<http://www.a-a-t.gov.au/Legislation-And-Jurisdiction/Jurisdiction-List.htm>>.

²³ AAT, 2008-09 *Annual Report*, ch. 3, online: AAT <<http://www.a-a-t.gov.au/Corporate/Publications/annual/Annual-Report-2009.htm>>. The vast majority of the cases lodged with the AAT are resolved without a hearing through a negotiated settlement or a successful ADR proceeding (usually a pre-hearing conference with the judge) or because the applicant chose to discontinue them or the AAT dismissed the case. See text *infra* notes 109-13.

²⁴ *Ibid.*

Social Security and veterans' benefits cases (after such matters were heard initially in the SSRT and VRB) as well as workers' compensation and tax disputes.²⁵

There are a number of specialized adjudicatory tribunals whose decisions cannot be reviewed by the AAT (including the MRT, RRT, ACT, Takeovers Panel, and National Native Title Tribunal).²⁶

Although not a court, the AAT functions like one with a full array of prehearing, ADR, and, if necessary, hearing processes.²⁷ At the "hearing" stage, while the parties can agree to a decision "on the papers," there is a right to a formal adversarial proceeding, with testimony under oath and a right to be represented by lawyers. While the tribunal may perform some research on legal issues, it relies on the parties to elicit the facts, rather than on its own research.²⁸ However, the ordinary rules of evidence do not apply, neither party bears the burden of proof, and the respondent agency must forward a statement of reasons and all relevant documents to the tribunal. Decisions are supposed to be based on the civil standard "the balance of probability," similar to the preponderance-of-the-evidence standard in the U.S.²⁹ The AAT can set decisions aside for error of law (subject to judicial review). Tribunal decisions on legal issues do not constitute binding precedent in subsequent tribunal cases. However, the managerial staffs of tribunals circulate such decisions and strive for consistency.³⁰ On the other hand, with respect to fact findings, issue estoppel may apply if an earlier court or tribunal made a final ruling on an issue of fact.³¹

Finally, section 44 of the *AAT Act* specifies that "[a] party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding."³² This means, of course, that either party may appeal. After 1999, some of these cases may be transferred first to the lower Federal Magistrates Court.³³ A further appeal is possible to the High Court if special leave is granted.³⁴

(b) The SSAT

The largest specialized Commonwealth tribunal is the SSAT, a statutory body that conducts merits review of administrative decisions made under the social security law,

²⁵ Together these four areas comprise about 85% of the cases heard by the AAT. *Ibid.* Although the AAT provides hearings under about 400 different statutes, most of them give rise to very few actual cases lodged with the AAT.

²⁶ See text accompanying *supra* note 13.

²⁷ See online: AAT <<http://www.aat.gov.au/ApplyingToTheAAT/ApplicationProcess.htm>>.

²⁸ See Creyke & McMillan, *supra* note 6 at 156.

²⁹ See text at notes 107-09.

³⁰ See Creyke & McMillan, *supra* note 6 at 175.

³¹ See *ibid* at 176.

³² *AAT Act* para. 44(1).

³³ However, an amendment to the *Administrative Appeals Tribunal Act*, para. 44AA, provides that the Federal Court may not transfer an appeal from the AAT to the Federal Magistrates Court if the appeal is from a Tribunal decision by a member or a panel containing a member who was a Presidential Member. See Australian Government <<http://www.f-m-c.gov.au/servi-ces/html/administrative.html>>.

³⁴ The scope of judicial review is a complex issue that is far beyond the scope of the present article. Suffice it to say that review is usually limited to questions of law or violations of procedural norms; however, the entire absence of evidence to support the determination is considered to be an error of law as is a completely irrational decision. For an excellent discussion of these complexities, see Pearson, *supra* note 6.

the family assistance law and other related laws.³⁵ The SSAT operates as the first tier of external merits review in the social security appeals system. Further rights of appeal for all parties to a social security appeal include a full merits review by the AAT as well as judicial review.³⁶

On June 30, 2009, the SSAT had 230 members (41 full-time and 189 part-time).³⁷ Most hearing panels consist of two members depending on the nature and complexity of the application. "The SSAT is 'inquisitorial' in its approach. Each SSAT panel takes a fresh look at the matter, including the consideration of events which might have occurred since the decision being appealed was made."³⁸

Applications to the SSAT in 2008-09 totaled 16,319 lodged and 16,668 finalized. About 25-30% of all appeals lead to a reversal or change. Average time for decision was about 10 weeks. Appeals to the SSAT are free and travel and accommodation costs are borne by the Tribunal, with a total average cost per applicant of nearly \$32,700AUS.

3. Contrast to the U.S.

In summary, there is a sharp contrast between the U.S. and Australian systems of administrative adjudication. The U.S. generally provides a hearing *inside* the agency that made the initial determination, often but not always before an ALJ. The final administrative decision is usually reserved to the head of the agency or to an appellate body within the agency. In contrast, Australian adjudication is provided by an internal review procedure, followed by a merits review consisting of a trial-type hearing provided *outside* the adjudicating agency. Most such hearings are provided by the SSAT, VRB, RRT, MRT, or the AAT. The AAT is a centralized administrative tribunal providing review of the decisions of hundreds of agencies (and which provides a second tier review of SSAT and VRB decisions). Both countries provide for judicial review of agency or tribunal adjudicatory decisions, but in Australia judicial review is generally limited to questions of law.

C. Administrative Adjudication in the U.K.

The design of the Australian tribunal system (prior to its redesign in 1976) closely resembled the U.K. tribunal system. Administrative tribunals date from the dawn of the British welfare state in the early years of the Twentieth Century (particularly the *National Insurance Act 1911*).³⁹ Policymakers felt that resolution of the huge number of

³⁵ See the SSAT's home page online: SSAT <<http://www.ssat.gov.au>>.

³⁶ Most SSAT appeals are now heard by the Federal Magistrates Court. See accompanying text *supra* note 33.

³⁷ Material in this paragraph and the following one is drawn from *Social Security Appeals Tribunal, Annual Report 2008-2009*, available online: SSAT <[http://www.s-s-a-t.gov.au/iNet/ssat.nsf/1a2f57-b7c6453c8fca-256cb6001-c5def/cdc071f19d8533b3ca25770a000b9831/\\$FILE/SSAT-%20AR-%202008-09.pdf](http://www.s-s-a-t.gov.au/iNet/ssat.nsf/1a2f57-b7c6453c8fca-256cb6001-c5def/cdc071f19d8533b3ca25770a000b9831/$FILE/SSAT-%20AR-%202008-09.pdf)>. This comprehensive report, along with those from previous years, is on the SSAT website, *supra* note 35.

³⁸ SSAT Annual Report, *ibid* at 19.

³⁹ See R. E. Wraith & P. G. Hutchesson, *Administrative Tribunals* (London, Allen & Unwin, 1973) at 33-42; Paul Craig, *Administrative Law* 6th ed (London, Sweet and Maxwell, 2008) at 64-69. In fact, various forms of ad hoc tribunals have existed for centuries in British law. During the 1800s, some combined-function agencies emerged, but they mostly evolved into tribunals whose only responsibility was to adjudicate disputes arising out of regulatory legislation. Wraith & Hutchesson, at 17-28. Yet some still remain that have administrative tasks along with adjudicatory ones. See Craig at 61 (describing the Gaming Board which has substantial rulemaking and law enforcement functions along with adjudication of licensing disputes), and *ibid.* at 72 (describing the Civil Aviation Authority, which is mostly an administrative body but also adjudicates licensing issues).

disputes arising out of this legislation should not be assigned to the courts, both because of the sheer numbers of cases and because the courts were perceived as being hostile to social legislation.⁴⁰ Instead, the dispute resolution function was assigned to tribunals, meaning administrative units engaged exclusively in adjudication and outside the regular court system. These tribunals were often staffed with a mix of lawyers, specialists, and lay people and their proceedings tended to be quite informal.⁴¹

In general, British tribunals have always provided a form of merits review, meaning that they conduct a *de novo* hearing of a matter under dispute and issue a decision on the merits with little or no deference to the prior departmental decision (or lower level tribunal decision). Unsurprisingly, Australian lawyers, judges, and policymakers, who were steeped in British practice, followed suit when they came to organize their own system of administrative adjudication. It seemed most natural to them to follow the British practice by creating a new tribunal to deal with the adjudication generated by each new regulatory or welfare program.

This adaptation from existing British institutions illustrates the “path dependence” phenomenon in which institutions are built to resemble those already in existence.⁴² It is often more natural and efficient to copy what already exists and seems to be working tolerably well than to redesign and rebuild institutions from scratch. This is true even if the older model evolved more or less serendipitously and the older model is decidedly suboptimal.

In most cases, the disputes adjudicated by British tribunals arose from the decisions of a specific department of government. Prior to the recent amendments discussed below, most tribunals were organizationally part of the department whose decisions they reviewed. The tribunals thus were reliant on that department for services and other resources. Nevertheless, tribunal members typically regarded themselves as independent of the department and they did not engage in functions other than adjudication.

Each new piece of welfare or regulatory legislation created a new tribunal. The result was a hodgepodge of different tribunals with varying jurisdictions, each with its own system of appointment of members and procedures. Especially after World War II, the number of specialized tribunals continued to increase rapidly with little attempt to achieve consistency either in the organization or procedures of the tribunals or in the details relating to judicial review of their decisions.⁴³

In 1955, the Franks Committee took a fresh look at tribunals.⁴⁴ It recommended the establishment of a Council on Tribunals and also promoted a judicialized model of tribunal procedure as well as openness, fairness, and impartiality of tribunal decisionmaking. It recommended that tribunals be required to state reasons for their decisions. And it favored appeal to a superior tribunal and judicial review on points

⁴⁰ The experience with assigning disputes over workers' compensation to the courts in the 1890's was quite unsuccessful. See Wraith & Hutchesson, *ibid* at 28.

⁴¹ *Ibid* at 129-31.

⁴² See generally Oona A. Hathaway, “Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System” (2001) 86 Iowa L. Rev 601 at 606-22. Path dependence is often referred to as the “qwerty” phenomenon. Although the traditional layout of the typewriter and now computer keyboard is undoubtedly suboptimal, the costs of switching to a new one outweigh the benefits of doing so. Moreover, someone who introduces a new and much superior keyboard will fail if customers refuse to adopt the innovation (because the existing keyboard works well enough) and other competitors make the rational decision to stick with the old keyboard on their products. *Ibid* at 611-13.

⁴³ See Wraith & Hutchesson, *supra* note 39 at 43-44.

⁴⁴ See Craig, *supra* note 39 at 259-61.

of law. The *Tribunals and Inquiries Act 1958* implemented many of the recommendations of the Franks Committee; although it applied only to certain tribunals and left many unregulated, it improved tribunal procedure and adopted a requirement that tribunals give reasons for their decisions. The *Tribunals and Inquiries Act* created the Council on Tribunals, which conducted studies of tribunal procedures and issued numerous recommendations. Meanwhile, the courts began to intensify judicial review of tribunal decisions.⁴⁵ This created a generally satisfactory situation which remained stable until the close of the century.

The movement toward centralization and upgrading of the U.K. tribunals took a great leap in 2007 with the enactment of the *Tribunals, Courts and Enforcement Act* [TCEA],⁴⁶ an epochal event in the history of British administrative law. The TCEA must have been significantly influenced by the successful Australian experiment with a single centralized administrative tribunal, although it did not go as far in that direction as the Australian model.

Under the TCEA, the existing tribunals were brought under a single Tribunals Service. The Tribunals Service provides the necessary resources (such as engaging staff and acquiring property), thus breaking the long-standing pattern of dependence of tribunals on the departments whose decisions they reviewed.⁴⁷ The TCEA requires that the Judicial Appointments Commission recommend the appointment of judges and lay members of tribunals; the actual appointments are made by the Lord Chancellor. This appointment system thus supplants the prior practice under which appointments to tribunals were made by departments or ministers. The TCEA also protects the independence of tribunal members and provides for a Senior President of Tribunals, a position to be held by a judge who represents the views of tribunal members to Parliament and the various ministers responsible for specific departments. The Senior President also is empowered to promulgate practice directions.

The TCEA grouped the jurisdictions of many (though not all) of the formerly free-standing specialized tribunals into several "chambers." These chambers are referred to as "first-tier tribunals."⁴⁸ The first-tier tribunals adjudicate disputes between private parties and government under a wide range of regulatory and welfare statutes. First-tier tribunals can reconsider and correct their own decisions on their own initiative or on petition of a party.

The TCEA also provide for an Upper Tribunal (which is treated as a court of record) and is also divided into chambers. The Upper Tribunal provides for appeals on a point of law from first-tier tribunals (with leave from either the first-tier tribunal or the Upper Tribunal).⁴⁹ The Upper Tribunal can reconsider its own decisions and

⁴⁵ See Wraith & Hutchesson, *supra* note 39 at 44-45.

⁴⁶ Most of the important innovations of the TCEA were recommended by the Leggatt Report of 2000. See Craig, *supra* note 39 at 261-63. Craig provides an excellent and complete discussion of the TCEA reforms. *Ibid* at 263-283.

⁴⁷ The Tribunal Service maintains an excellent website, <<http://www.tribunals.gov.uk>>. Along with a wealth of information and updates, it contains the text of the TCEA. In 2010, Asylum and Immigration chambers were established at both the first-tier and Upper Tribunal levels, in place of the former Asylum and Immigration Tribunal. The Tribunal Service also administers the Employment Tribunals which are otherwise not within the first and upper tier structures.

⁴⁸ There are, at present, five chambers (most consisting of several "jurisdictions"). See website, *ibid*. The Upper Tribunal has four chambers.

⁴⁹ The Upper Tribunal has first-instance jurisdiction in complex cases and cases raising issues of general significance. In British practice, the term "point of law" covers unreasonable applications of law to fact as well as procedural violations and also may well cover unfair and unreasonable factual and

grant judicial review of tribunal decisions in the form of a prerogative writ. It can also award monetary damages.⁵⁰ The *TCEA* provides for a further appeal on an important point of principle from the Upper Tribunal to the Court of Appeal (but only if the Upper Tribunal or the Court of Appeal gives leave to appeal).⁵¹

The *TCEA* thus brings tribunals and courts into a single integrated adjudicatory system for the dispensation of procedural justice in administrative law. It severed the connection between tribunals and the departments whose decisions they review. For all practical purposes, the *TCEA* seems to abolish any distinction between tribunals and courts. In this respect, the *TCEA* goes much further than Australia in integrating its tribunals into the judicial system; as we are about to see, Australians would raise serious constitutional objections to such a move. On the other hand, the Australian AAT centralizes adjudicatory power into a single adjudicating entity (as opposed to the multiple chambers that remain under the *TCEA*).

III. SEPARATION OF POWERS UNDER THE AUSTRALIAN CONSTITUTION

Australia chose a tribunal model of adjudication, rather than a combined-function model, largely because it was heavily influenced by British practice. However, another reason for the development of the Australian tribunal system was the approach taken by the Australian High Court to constitutional separation of powers. The Australian constitution drew heavily on the separation-of-powers provisions of the U.S. constitution (while preserving British-style parliamentary supremacy). For that reason, Australia might have chosen to follow the American “combined functions” model for administrative adjudication. However, Australia did not and could not adopt the combined-function model because it maintains a much stronger version of separation of powers than does the U.S. Under the Australian approach to separation of powers, the judicial branch cannot exercise executive functions (sometimes referred to as “administrative functions”) and the executive branch cannot exercise judicial functions.⁵² Of course, the terms “executive,” “administrative,” and “judicial” are hardly self-defining and the application of these vague criteria has caused much difficulty.

A. The American Approach toward Delegation of Adjudicatory Power to Non-Article III Judges

American constitutional law takes a more pragmatic approach to separation of powers than does Australian law. American doctrine tolerates statutory arrangements by which the powers of the three branches are shared with the others, but guards against statutes that enable Congress to broaden its own powers at the expense of other branches or that unduly impair the ability of other branches to carry out their assigned functions.

discretionary decisions as well. Craig, *supra* note 39 at 269-71; see also Sir William Wade Christopher Forsyth, *Administrative Law* 10th ed. (Oxford: Oxford University Press, 2009) at 793-800. Further explication of the scope of review by the upper Tribunal and by the courts is beyond the scope of this article.

⁵⁰ See Craig, *supra* note 39 at 271-73; Wade & Forsyth, *ibid.* at 780.

⁵¹ See Timothy Endicott, *Administrative Law* (Oxford: Oxford University Press, 2009) at 435-38, 451-52. In addition, there is the possibility of judicial review through prerogative writ in the High Court if appeal to the Court of Appeal is denied.

⁵² *R v. Kirby; Ex Parte Boilermakers' Society of Australia*, (1956) 94 CLR 254, 271 [Boilermakers'], *aff'd* by Privy Council, *Attorney General (Commonwealth) v The Queen* (1957) 95 CLR 529.

Thus it has long been clear that Congress can delegate judicial power to an administrative agency, at least with respect to so-called "public rights." Broadly speaking, "public rights" involve disputes between private parties and the United States.⁵³ Typical public rights disputes involve claims to government benefits or enforcement of the tax laws, as well as federal law enforcement against private parties and enforcement of the immigration laws.

In the leading case of *Crowell v. Benson*,⁵⁴ the Supreme Court upheld the delegation to a federal agency to adjudicate a case of "private rights," meaning a private-versus-private dispute. *Crowell* involved an employee's claim against the employer for workers' compensation in a maritime dispute.⁵⁵ This was a statutory right of action as opposed to a traditional common law claim. It remained unclear whether Congress could assign the adjudication of such traditional tort or contract claims to a non-Article III adjudicator. In *Northern Pipeline*, the Court held that the adjudication of a traditional private-versus-private contract dispute could not be delegated to a non-Article III adjudicator.⁵⁶ Clearly, the Court was concerned that Congress might strip the federal courts of large portions of their traditional jurisdiction by assigning broad swatches of it to agencies or other non-Article III bodies and might even preclude judicial review of their determinations.

Northern Pipeline was swiftly undermined by later decisions. In *Thomas*, the Court upheld a system of agency-operated binding arbitration of claims by a prior pesticide registrant for compensation arising out of the use by a later registrant of the prior registrant's data.⁵⁷ The key was that the private right was newly created and closely integrated into a public regulatory scheme. Finally, in *Schor*, the Court approved a delegation to an agency of the power to decide a contract counterclaim that was ancillary to a statutory system of reparations in favour of customers who claimed that their brokers had violated the rules.⁵⁸ If the agency could not adjudicate the contract counterclaim asserted by the broker, the entire system of reparations would have collapsed. The language of the *Schor* decision stresses pragmatism and the balancing

⁵³ However, it may be that "public rights" include "a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989).

⁵⁴ *Supra* note 2.

⁵⁵ *Crowell* also held that "jurisdictional" facts determined by the agency in a private-rights case were subject to *de novo* redetermination in federal court. Within short order, however, this portion of the *Crowell* decision was quietly abandoned, although it has never been formally overruled. See Reuel E. Schiller, "The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law" (2007) 106 Mich L Rev 399 at 410-12, 438-39.

⁵⁶ *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). The statute assigned the trial of all issues in a bankruptcy case, including breach of contract issues, to bankruptcy judges who lack life tenure. Subsequently, the Court applied the *Northern Pipeline* ruling to a case challenging the constitutionality of bankruptcy court jurisdiction to adjudicate preferential transfer claims. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

⁵⁷ *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985).

⁵⁸ *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). In *Schor*, the statute empowered an agency to award reparations to customers from commodity brokers for violations of the statute or regulations. The agency adopted regulations providing that brokers could submit counterclaims against their customers when the customer sought reparations. An alternative ground for the decision in *Schor* is that the customer waived the right to have the counterclaim tried in federal court. *Ibid* at 849-50.

of all factors in determining whether the assignment of a particular type of private right claim is improper.⁵⁹

B. Australian Agencies Cannot Exercise Judicial Powers

In the remarkable *Wheat* case of 1915,⁶⁰ the High Court of Australia firmly committed the country to strict separation of judicial and executive powers. The *Australian Constitution* of 1900 provided for an Inter-State Commission [ISC] to regulate trade between the states and it explicitly provided that the ISC would have “such powers of adjudication and administration as the Parliament deems necessary.”⁶¹ The American Interstate Commerce Commission (created in 1887) was clearly one of the models for the ISC along with some British regulatory agencies. However, the High Court held that the ISC could not exercise judicial power. If an agency could not be given judicial powers by an *explicit constitutional provision*, Parliament certainly lacked authority to delegate such powers by a statute. The *Wheat* case sounded the death knell in Australia for the combined function approach to administrative adjudication.⁶²

In the leading *Boilermakers’* case,⁶³ the Court made clear that judicial and non-judicial powers could not be combined in the same body. The case concerned the Court of Conciliation and Arbitration, a labor arbitration body created by Parliament under a specific constitutional authority.⁶⁴ The High Court held that the Court of Conciliation and Arbitration could render arbitral awards, as arbitration is not a judicial function.⁶⁵ However, that Court could not be given the power to *enforce* its own awards through an injunction or a contempt order, since enforcement of an arbitral award against a union is a judicial function.⁶⁶ Apparently the court that is called upon to enforce an arbitral award is not expected to retry the merits; the arbitral decision established the “factum” on which judicial enforcement depends.⁶⁷

Wheat seemed to rule out adjudication by a combined-function agency and *Boilermakers* indicated that an agency could not be given power to enforce its own decisions. As a result, Australian legislators designed specialized adjudicatory *tribunals* that are independent of the department that made the underlying disputed decision

⁵⁹ The Court stated “we have also been faithful to our Article III precedents, which counsel that bright-line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries. . . . Rather, due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III.” *Ibid* at 857. For discussion of the incoherence of the U.S. law relating to delegation of adjudicatory powers, see Richard E. Levy & Sidney A. Shapiro, “Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Judicial Review” (2006) 58 Admin L Rev 499 at 507-24; Richard Fallon, “Of Legislative Courts, Administrative Agencies, and Article III” (1988) 101 Harv L Rev 916 at 918-33.

⁶⁰ *New South Wales v Commonwealth*, (1915)20 C.L.R. 54.

⁶¹ Australian Constitution. paras.101, 102.

⁶² Cane remarks that the Australian version of separation of powers effectively prevented the creation of combined function agencies. As a result, adjudication by agencies engaged in regulatory functions is unknown in Australia. Cane, *supra* note 6 at 58.

⁶³ *Supra* note 52.

⁶⁴ See *Australian Constitution*. para. 51(xxxv) (empowering Parliament to make laws with respect to “Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State”).

⁶⁵ See *Waterside Workers’ Federation of Australia v JW Alexander Ltd.* (1918)25 CLR 434, 464-65.

⁶⁶ Similarly, see *R v Davison*, 90 CLR 353 (1954), holding that the decision that a person is bankrupt is a judicial function that cannot be delegated to the registrar of the bankruptcy court.

⁶⁷ See *Boilermakers’*, *supra* note 52.

and that lack enforcement power. After *Boilermakers*, Australian courts had to decide precisely what executive agencies could not do. As *Boilermakers* suggests, an agency cannot have the power to enforce its own judgment through the normal process of judicial execution. The clearest authority to this effect is the *Brandy* case involving anti-discrimination law.⁶⁸ Under the law prior to 1992, the Human Rights and Equal Opportunity Commission [HREOC] could adjudicate discrimination cases but its decisions were not legally enforceable. A victim of discrimination had to make a fresh application to the Federal Court which, after a rehearing, could make such orders as it thought fit. In 1992, Parliament amended the *Act* so that HREOC's determination could be "registered" with the Federal Court. If the losing party sought review, the court "may review all issues of fact and law" but no new evidence could be introduced. If the losing party did not seek judicial review (or if the Federal Court affirmed HREOC's decision), the HREOC decision (which might call for monetary damages or specific relief) became enforceable like any other judgment.

In *Brandy*, the High Court invalidated these amendments, holding that a proceeding is inevitably judicial if the tribunal that renders it has the power to enforce it by execution or otherwise.⁶⁹ Consequently, the case would have to be retried in federal court before the decision could be enforced. The *Brandy* decision immobilized Australian anti-discrimination law and, if it were read broadly, could have cast doubt on the constitutional validity of other administrative adjudicatory tribunals whose decisions are more or less self-enforcing.

To an American reader, the *Brandy* decision seems hopelessly formalistic. Given that *Boilermakers* accepted the idea that an executive arbitral decision could be the factum on which judicial enforcement rested, the rejection of HREOC's registration mechanism seems unfounded. The *Brandy* decision appears to reflect a judicial distaste for anti-discrimination law (or perhaps doubts about the impartiality of HREOC) and it may reflect judicial disinclination to part with jurisdiction over a type of case that resembles traditional tort litigation.

Both before and after *Brandy*, the High Court has repeatedly been forced to answer the question of whether a particular package of adjudicatory and enforcement powers delegated to a particular agency adds up to an exercise of judicial power.⁷⁰ This unfortunate result is inevitable, since the decisions are defending a distinction that does not exist. The realities of modern administration have forced the High Court to retreat steadily from the absolutist separation of powers rhetoric of cases like *Wheat*, *Boilermakers* and *Brandy*. In the contemporary world, government agencies are empowered to adjudicate a huge range of regulatory and welfare disputes between private parties or between private parties and government. Administrative adjudication of such disputes is clearly necessary to the functioning of modern society.⁷¹ Courts could not remotely handle this enormous body of adjudicatory

⁶⁸ *Brandy v Human Rights and Equal Opportunity Commission*, (1995)183 CLR 245.

⁶⁹ 183 CLR at 267-71 (rejecting the argument that the registration provision should be interpreted so that the decision subject to enforcement was made by the Federal Court rather than HREOC).

⁷⁰ As the Court remarked in the *Tasmanian Breweries* decision: "The uncertainties that are met with arise, generally if not always, from the fact that there is a 'borderland in which judicial and administrative functions overlap' . . . so that for reasons depending upon general reasoning, analogy, or history, some powers which may be appropriately be treated as administrative when conferred on an administrative functionary may just as appropriately be seen in a judicial aspect and be validly conferred upon a federal court." *R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Proprietary Ltd.*, (1970) 123 CLR 361, 373 (op. of Kitto, J).

⁷¹ As the High Court recognized in 1926, "[I]f a legislative provision of the present nature [for a taxation tribunal] be forbidden, then a very vast and at present growing page of necessary

work. Administrative decisions are largely self-enforcing but the enforcement process sometimes requires judicial assistance. Given this array of administrative dispute settlement and enforcement mechanisms, it is impossible to say which adjudicatory decisions are “administrative” and which are “judicial.”

Notwithstanding cases like *Boilermakers* and *Brandy*, the High Court has in fact approved various administrative adjudication schemes that are largely self-enforcing. Some of these cases involve schemes in which the primary agency decision is in question; others involve merit review schemes. But all of them are enforceable (either against private parties or against government) without the need for de novo judicial consideration. Thus agencies can remove a trademark from the registry of trademarks.⁷² They can adjudicate tax disputes.⁷³ They can adjudicate pension disputes.⁷⁴ They can establish child support obligations.⁷⁵ Most importantly, administrative tribunals can invalidate contracts or order relief against unfair business practices such as monopolization. Under the *Trade Practices Act*, the ACT can declare a contract unenforceable or restrain a practice if the contract or practice is “contrary to the public interest” and such decisions have the force of law.⁷⁶ The Takeovers Panel can invalidate a corporate acquisition. Courts are prohibited from affording judicial remedies but have jurisdiction to enforce the Panel’s decisions.⁷⁷ At this point, an outside reader is baffled; how, if at all, are such responsibilities and enforcement powers different from those involved in *Brandy* or *Boilermakers*?

constitutional means by which Parliament may in its discretion meet . . . the requirements of a progressive people, must, in my opinion, be considered as substantially obliterated. . . .” *Federal Commissioner of Taxation v Munro*, (1926) 38 CLR 153, 178 [Munro] (opinion of Isaacs, J. upholding the validity of the taxation Board of Review), affirmed by Privy Council *sub. nom. Shell Co. of Australia Ltd. v Federal Commissioner of Taxation* (1930) 44 CLR 530.

⁷² *R v Quinn; Ex Parte Consolidated Foods Corp.* (1977) 138 CLR 1, 12.

⁷³ *Munro*, *supra* note 71. Only a year earlier the High Court had invalidated a very similar tax tribunal. Parliament immediately acted to create a new tribunal. The primary difference between them was that no “appeal on law points” to the High Court was provided for. Thus, Parliament managed to transfer tax adjudication from the judicial to the administrative branch by reducing the ability of taxpayers to obtain judicial review of the tribunal’s decision.

⁷⁴ *Attorney-General v Breckler*, (1999) 197 CLR 83, 110-12. The decision turned on several factors. The pension plan provided that the trustees would be bound by a decision of the Superannuation Complaints Tribunal, so it was not necessary to rely on judicial enforcement. Moreover, it was possible to collaterally attack the tribunal’s decisions in court.

⁷⁵ *Luton v Lessels*, (2002) 210 CLR 333, 360 (the administrative determination of liability creates a “factum” by reference to which the statute creates rights for the future which then are enforced by resort to courts).

⁷⁶ *Tasmanian Breweries*, *supra* note 69, at 372-78 (Kitto, J. – the “public interest” standard is too subjective to be characterized as judicial); 401-03 (Windeyer, J. – the public interest standard is remote from standards courts apply, relying on American authorities upholding judicial delegations to agencies) 408-09; (Owen, J. – Tribunal lacks enforcement powers).

⁷⁷ *Alinta*, *supra* note 14. Although the High Court was unanimous in this case, there are six separate opinions that rely on an uneasy combination of different reasons for finding the Panel’s power to be non-judicial. These include the fact that the Panel takes account of policy considerations that are different from the kind of policy determinations made by common law courts; that the Panel’s order creates “new rights and obligations;” that historical analysis shows that it would be inappropriate for a court to undertake review of takeovers; that the displacement of contract rights from a takeover agreement is different from what happens in a contract case in court; that the Panel’s order provides the “factum” which courts would then be required to enforce; and numerous other factors that strike an outside reader as wholly lacking in analytical substance.

C. Australian Courts Cannot Exercise Executive Power

As discussed above, Australian executive departments cannot exercise judicial power. Just as importantly, a federal court cannot exercise executive power. Providing merits review of the factual or the discretionary aspects of a government decision is considered an executive power. Consequently, a court is precluded from providing such review. Australians believe that it would be deeply improper for a court to interfere in the substance of executive decisionmaking by substituting its judgments about factual or discretionary matters for the judgment of an agency. Yet it is plain that some form of merits review of the factual and discretionary basis of the adjudicatory decisions of government agencies must be provided. Since courts cannot supply merits review of factual or discretionary determinations because of separation of powers constraints, such review must occur within the executive branch.

The epochal Kerr Committee report of 1971 explicitly determined courts could not provide merits review of administrative decisions. Consequently, it recommended adoption of a peak merits review tribunal and the creation of the AAT implemented that recommendation.⁷⁸

IV. THE AAT IN PRACTICE

The Australian AAT is an attractive model. It has attained a high degree of legitimacy in Australia, as shown by the spread of tribunals in both the Commonwealth and in the Australian states. Before considering whether the Australian model might be transplanted to the U.S., a more detailed examination of the pros and cons of the AAT is in order.

A. The AAT's Procedures

The AAT's organic statute states that "[i]n carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick."⁷⁹ Of course, as Professor Creyke has pointed out, "[c]omplying with this litany of adjectives has created difficulties...not least because they are internally inconsistent."⁸⁰ The procedures are supposed to be "conducted 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"; moreover, "the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate."⁸¹ But as the famous *Mathews v. Eldridge* balancing test for measuring due process in the U.S. implicitly acknowledges, accuracy, fairness and efficiency values are often at odds.⁸²

⁷⁸ See Cane, *supra* note 6 at 60-67, 145-49. He argues that the Kerr Commission missed the mark, because the vast majority of administrative decisions do not involve determinations of policy or applications of discretion. Instead, they involve application of specific detailed and formal principles to the facts. In that respect, they are just the same as the kinds of decisions courts make and review all the time. So judicial review of the vast majority of administrative decisions would not have offended separation of powers. When the AAT does confront important issues of policy, it generally defers to the executive, which further undercuts the reasoning of the Kerr Committee. See discussion in the text, *infra*, at notes 118-24.

⁷⁹ AAT Act para. 2A.

⁸⁰ Creyke, *supra* note 6 at 94.

⁸¹ AAT Act paras. 33(1)(b)&(c).

⁸² See 424 U.S. 319, 335 (1976).

1. AAT's Mix of Adversarial and Inquisitorial Procedures

As mentioned before, the AAT provides a blend of adversarial and inquisitorial process,⁸³ while the specialized tribunals tend to be closer to the inquisitorial end of the spectrum.⁸⁴

(a) Pro-activity in Obtaining Evidence

One issue is whether the AAT sufficiently uses its inquisitorial powers to require submission of material documents from the parties or even to gather other information, especially where the applicant is unrepresented.⁸⁵

Professor Cane concludes that the AAT could do more: "on the whole...it seems that Australian merits tribunals rarely obtain information other than from or through the applicant and the decision-maker." In part, as he acknowledges, this is a resource issue, and without the availability of staff to find witnesses or information not produced by the parties, "the most that tribunals are likely to do is to invite, encourage, or perhaps, require, parties to provide additional evidence."⁸⁶ At any rate the law does not require more at this point: although Creyke and McMillan point to several tribunal decisions that have been held invalid for failing to consider whether additional evidence was needed, or seeking clarity on matters deemed unclear or obscure,⁸⁷ they conclude that "the settled principle is...that there is no general legal duty on a tribunal to conduct inquiries."⁸⁸ A discussion paper for the Australian Law Reform Commission proposed an amendment to the *AAT Act* to require the tribunal to be take a more proactive investigative role in cases involving unrepresented parties, but the proposal was never formally recommended.⁸⁹

⁸³ See the High Court's description in of the AAT's procedures in *Bushell v Repatriation Commission* (1992) 175 CLR 408, 424-5:

Proceedings before the A.A.T. may sometimes appear to be adversarial when the Commission chooses to appear to defend its decision or to test a claimant's case but in substance the review is inquisitorial. Each of the Commission, the Board and the A.A.T. is an administrative decision-maker, under a duty to arrive at the correct or preferable decision in the case before it according to the material before it. If the material is inadequate, the Commission, the Board or the A.A.T. may request or itself compel the production of further material. The notion of onus of proof, which plays so important a part in fact-finding in adversarial proceedings before judicial tribunals, has no part to play in these administrative proceedings.

⁸⁴ Examples of inquisitorial practices in the specialized tribunals include the RRT's research unit, which compiles "country information" reports, briefings prepared by the MRT's "case officers," and the appointment to the SSAT of medical specialists and former departmental officials. Creyke & McMillan, *supra* note 6 at 156. For a concise discussion of the differences between adversarial and inquisitorial processes, see Margaret Allars, "Neutrality, the Judicial Paradigm and Tribunal Procedure" (1991) 13 Sydney L Rev 377 at 381-85. For a comparison of adversarial and inquisitorial approaches in environmental assessment of land development, see Andrew Edgar, "Participation and Responsiveness in Merits Review of Polycentric Decisions: A Comparison of Development Assessment Appeals" (2010) 27 Environmental & Planning Law Journal 36.

⁸⁵ See the *AAT Act*, paras. 37, 38 (describing the Tribunal's powers to require the submission of documents and other materials).

⁸⁶ Cane, *supra* note 6 at 241.

⁸⁷ Creyke & McMillan, *supra* note 6 at 163, citing *Azzi v Minister of Immigration and Multicultural Affairs* (2002) 125 FCR 48, and *Budworth v Repatriation Commission* (2001) 33 AAR 48.

⁸⁸ Creyke & McMillan, *supra* note 6 at 163, citing *Minister for Immigration and Ethnic Affairs v Singh* (1997) 44 ALD 487. See also Creyke, *supra* note 6 at 93 ("Courts, too have been slow to impose an obligation on a tribunal to undertake independent inquiries, even given tribunals' ostensible inquisitorial role.").

⁸⁹ *Ibid.*, citing "Managing Justice", Report No 89, 2000, paras. 9.53-9.55.

(b) Handling of Expert Evidence

Since it is not a court, the AAT can be more flexible in its receipt of expert evidence. Some tribunal members obviously have expertise of their own, and "it is generally accepted that tribunal members should be freer than judges to draw on their own personal knowledge and to 'take notice' of information not presented by the parties."⁹⁰ However, parties need to be given a chance to object to the taking of official notice or information obtained from third parties.⁹¹ This is no different from the *APA*'s rules on ALJ hearings in the U.S.⁹² However, tribunals sometimes have been creative in arranging for concurrent presentation of expert evidence in so-called hot tubs; instead of experts presenting evidence individually, a number of experts are brought together in one session at which areas of agreement and difference can be explored and developed by discussion and questioning between the experts themselves.⁹³

(c) Other Rules of Evidence

The AAT Act states that "the Tribunal is not bound by the rules of evidence, but may inform itself in such manner as it thinks appropriate"⁹⁴ – a standard that is even more unrestrictive than that of the U.S. *APA*.⁹⁵

(d) New Evidence

It is commonplace for new evidence to arise during the period between the agency decision and the tribunal hearing. Merits review tribunals review the facts as they exist at the time of the review, not at the time of the agency decision.⁹⁶ This "contemporaneous review" presents its own set of problems. By the time of the review, the agency may have changed its "administrative outlook," but, in contrast to the U.S., the agency cannot revise its decision, because it has already become the responsibility of the tribunal.⁹⁷ Or the facts may have changed, and in many cases the applicant can produce new evidence that was not before the decisionmaker below. This "open record" concept also exists in U.S. social security and veterans' benefit cases, and it has been criticized for creating incentives to hold back evidence. The

⁹⁰ Cane, *supra* note 6 at 240, n.114, citing J.A. Smillie, "The Problem of 'Official Notice': Reliance by Administrative Tribunals on the Personal Knowledge of Their Members," (1975) Public Law 64.

⁹¹ See Pearson, *supra* note 6 at 311 ("Procedural fairness requires the disclosure of information coming from [a tribunal member's expertise] where the tribunal proposes to reach a conclusion based on the knowledge of a member of a particular fact, or relying on a particular expertise."). She cites *Tisdall v Health Insurance Commission* [2002] FCA 97, for this proposition, but adds that "It is troubling to note that this does not always occur." *Ibid* at n. 47.

⁹² See 5 U.S.C. para. 556(e).

⁹³ Cane, *supra* note 6 at 243-244 (citing a survey of AAT members that indicated satisfaction with the procedure, *An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal* (Nov. 2005), available online: AAT <<http://www.a-a-t.gov.au/Speeches-Papers-And-Research/Research/AAT-Concurrent-Evidence-ReportNovember2005.pdf>>)

⁹⁴ *AAT Act*, para. 33(1)(c).

⁹⁵ The *APA*'s provision states: "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or repetitious evidence." 5 U.S.C. para. 556(d).

⁹⁶ See Creyke & McMillan, *supra* note 6 at 144; *Shi*, *supra* note 11.

⁹⁷ *Ibid*.

same concerns have been raised about the tribunals' open record policy.⁹⁸ It should be noted that intervening changes in the *law* may or may not be applied by the tribunal, depending on whether the law itself states whether the change applies to pending proceedings.⁹⁹

2. Role of the Agency Decisionmaker as a Party before the AAT

The responding agency must provide a statement of findings and reasons for its decision and disclose any other document that it has (or controls) that is relevant to the review.¹⁰⁰ Somewhat surprisingly, its overall responsibility is to "assist the Tribunal to make its decision," not to act in an adversary fashion.¹⁰¹ This is consistent with the AAT's merits review responsibility to make the "correct or preferable" decision, but it must be difficult for the agency representative to undergo this "attitudinal adjustment."

On the other hand, in *Hayes* the Federal Court overturned an AAT ruling in a workers' compensation case that a *subsequently discovered* agency video of the applicant should have been disclosed to the applicant prior to its introduction in the hearing so as to allow sufficient time to prepare for cross-examination.¹⁰² Subsequent decisions of the AAT, however, have distinguished this Federal Court decision, one of which commented that "the principal of trial by ambush ... has never held sway in this Tribunal and I hope it never will."¹⁰³

3. Burden-of-Proof Considerations

Given the roles of the parties, how do burden-of-proof considerations factor into the AAT's decision? Even though, "as a practical matter...it is in the interest of a party to [present] evidence to persuade the tribunal,"¹⁰⁴ it seems to be the case that with respect to the tribunals, "it is not appropriate to talk in terms of a formal onus or burden of proof," unless an underlying statute contains one.¹⁰⁵ This is because "the AAT is required...to make its own decision in place of the administrator."¹⁰⁶

But this rationale tends to beg the question, and Professor Pearson explains that the question of how tribunals "proceed when left in a state of uncertainty" is that they generally "turn to the applicable legislation, which will usually be worded in terms requiring the decision-maker to reach a state of satisfaction on a particular issue..."¹⁰⁷ Evaluating whether this requirement has been met obviously requires the

⁹⁸ *Ibid* at 145 (suggesting that "an agency is likely to be disgruntled where a decision is set aside, or a hearing is held unnecessarily, as a result of fresh evidence that might as easily have been presented to the decision-maker").

⁹⁹ *Ibid* at 146. See also *Sbi*, *supra* note 11 (holding that the AAT is permitted to consider new evidence).

¹⁰⁰ *AAT Act* para. 37 (1AAA).

¹⁰¹ *Ibid* at para. 33(1AA). See also Cane, *supra* note 6 at 244. In the SSAT and MRT, the government does not appear as a party (similar to many U.S. benefits adjudications). Creyke, *supra* note 6 at 92.

¹⁰² *Australian Postal Commission v Hayes* (1989) 23 FCR 320; excerpted in Creyke & McMillan, *supra* note 6 at 164-65. The court determined that the *AAT Act* para. 37 requirement that all relevant material be disclosed before the hearing did not require the disclosure of subsequently discovered evidence that was not before the decisionmaker.

¹⁰³ *Re Taxation Appeals NT94-281-NT94-291* (1995) 21 AAR 275, excerpted in Creyke & McMillan, *supra* note 6 at 166.

¹⁰⁴ *Ibid* at 171.

¹⁰⁵ See Pearson, *supra* note 6 at 309.

¹⁰⁶ *McDonald v Director-General of Social Security* (1984) 1 FCR 354 excerpted in Creyke & McMillan, *supra* note 6 at 172).

¹⁰⁷ See Pearson, *supra* note 6 at 309-10.

tribunal to give careful attention to the findings and reasons provided by the decisionmaker, but it can be especially difficult for the tribunal to "balance assessment of credibility based on oral evidence with what might at first appear to be more 'reliable' documentary material such as...information prepared by government agencies."¹⁰⁸ In the end, the "balance of probability" standard is "ordinarily the appropriate standard to be applied by an administrative tribunal."¹⁰⁹

4. Alternative Dispute Resolution [ADR] Techniques

The AAT and other tribunals rely heavily on techniques to avoid formal hearings. To begin with, occasionally the tribunal may determine that the papers filed by the respondent agency allow for a favorable decision for the applicant "on the papers."¹¹⁰ The AAT may also decide to proceed on the papers with both parties' consent.¹¹¹

Many cases also settle, through party conferences with an AAT member, or through other ADR processes such as mediation.¹¹² In 2008-09, the AAT resolved 5838 cases without a hearing and provided only 1393 hearings.¹¹³ Thus only 19% of the cases lodged in the AAT actually resulted in a hearing. But the AAT must agree to the disposition because "[o]nce an application for review has been made, the AAT alone can bring the proceedings to an end."¹¹⁴ This also prevents an agency from trying to "pull back" an appeal.

5. Decisionmaking and Opinion-Writing

The AAT's decisions from 1976 to the present are available on line on the Australasian Legal Information Institute website.¹¹⁵ According to Professor Creyke, decisions of the AAT, because it is not a court, are not precedential.¹¹⁶ However, issues of consistency and following precedent can occur with respect to prior tribunal rulings on both legal and factual questions. Although AAT decisions on legal interpretation questions are subject to judicial review, sometimes a case will involve a legal issue that has been decided in an earlier unappealed AAT case. The AAT's Deputy President has opined that in that situation the AAT should follow the decision in the earlier case, especially if the decision was made by a presidential member, although the member deciding the later case could note his or her disagreement with the result.¹¹⁷

6. Generalized vs. Specialized Expertise

Given that over 400 statutes provide for AAT jurisdiction, and that its members are a mix of lawyers and non-lawyers and full-timers and part-timers, one might legitimately wonder whether the Tribunal can handle cases from agencies that present difficult and technical issues. This objection has also been leveled at federal judges in

¹⁰⁸ *Ibid* at 311.

¹⁰⁹ Creyke & McMillan, *supra* note 6 at 171.

¹¹⁰ *Ibid* at 157.

¹¹¹ *AAT Act*, para. 34J.

¹¹² *Ibid* at para. 34A. See also Cane, *supra* note 6 at 246-49.

¹¹³ AAT Annual Report 2008-09, App. 3, *supra* note 22.

¹¹⁴ Cane, *supra* note 6 at 246-47.

¹¹⁵ See online: Australasian Legal Information Institute <<http://www.aust-ll.edu.au/au/cases/cth/A-A-T-A>>.

¹¹⁶ See Creyke, *supra* note 6 at 98.

¹¹⁷ See *Re Ganchov and Comcare* (1990) 19 ALD 541 (Decision of Deputy President Todd), excerpted in Creyke & McMillan, *supra* note 6 at 176.

the United States who hear appeals from a multitude of agencies. But the difference is that U.S. judicial review of disputes about fact findings and exercises of discretion is limited to a “reasonableness” form of review (the substantial evidence test for formal adjudication and the arbitrary and capricious test for informal adjudication). Similarly, in the U.S., judicial review of questions of law is also usually quite deferential to the agency’s interpretation of statutes and of its own regulations.

The literature on Australia’s tribunals does not appear to view this as a serious concern even though AAT members are not provided with legal or technical assistants. Perhaps the AAT’s ability to call on the decisionmaking agency for additional documents and to call upon the agency’s counsel to assist the tribunal in making the “correct or preferable” decision is regarded as giving the AAT members the tools they need. In addition, the AAT does not review tribunal decisions relating to takeovers and trade practices that might present issues beyond the ken of many AAT members¹¹⁸ nor does it review most decisions relating to immigration and refugee policy, which may reflect political considerations. Finally, note that several high volume specialized tribunals (the SSAT and VRB) siphon many cases away from the AAT (although the AAT provides merits review of challenged SSAT and VRB decisions that are unfavorable to the applicant).

7. Following Governmental Policy

Whether tribunals must follow agency policy presents an important and recurring issue. This is also a question that confronts U.S. ALJs. In Australia, an influential AAT decision, *Drake No. 2*¹¹⁹ held that the AAT should apply a presumption in favour of relevant government policies (assuming that the “policy” does not conflict with “hard law” such as a statute or regulation). The AAT should depart from policy only for “cogent reasons,” such as injustice in an individual case, but not because it disagrees with the policy in general. One reason for deference to policy is to achieve consistency between unappealed decisions and AAT decisions.¹²⁰ Another is to keep the AAT out of politics and avoid clashes with government departments; its job is to adjudicate, not set government policy.¹²¹

These generalities leave open questions about whether the tribunal’s duty to depart from government policy only for cogent reasons is affected by the level of the policymaker (ministerial, departmental, or lower) or the procedure used to issue the policy (after public consultation or not). Andrew Edgar has focused on the distinction, often suggested by academic commentators and found in case law, between “high” and “low” policy. High policy comes from the minister, is subject to “ministerial responsibility” and is scrutinized by Parliament; *Drake 2* requires the AAT to follow high policy. Low policy, on the other hand, comes from soft law issued by the department. The AAT either ignores or considers but feels free to redetermine low policy. Edgar criticizes this distinction and suggests that the AAT should defer to both high and low policy, because the failure to defer to soft law results in inconsistent decisionmaking by different AAT panels and the substitution

¹¹⁸ See accompanying text in *supra* note 33.

¹¹⁹ *Drake and Minister for Immigration & Ethnic Affairs* (No. 2) (1979) 2 ALD 634. *Drake No. 2* was written by High Court Justice Brennan sitting as AAT president.

¹²⁰ See Andrew Edgar, Tribunals and administrative policies: Does the high or low policy distinction help? (2009) 16 *Australian Journal of Administrative Law* 143

¹²¹ See Cane, *supra* note 6 at 169 (suggesting that reweighing factors in reviewing a discretionary decision is something the AAT does cautiously as it could be seen as making policy and creating conflict with government departments).

of a less informed for a more informed determination of appropriate policy.¹²² He argues that the AAT lacks the relevant information to make proper judgments about policy because often the rationale for the policy is not articulated in the department's decision, which is specific to the facts of the case. Moreover, he contends that lack of deference produces an accountability problem because the AAT's decision on policy is not reviewable either in court or as a political matter (other than through parliamentary legislation).

Nor is Edgar any more enamored of a distinction based on whether or not the policy was developed after public consultation. He observes that where consultation has taken place, agencies can "cherry-pick" from among the comments that are "consistent with their pre-determined view and ignore other submissions," and that tribunals would not know when this sort of "charade" had taken place.¹²³ He also opines that some agency policies promulgated without consultations (including interpretive rules) are quite legitimate and should be followed by tribunals.

Professor Cane takes a more positive view of tribunal review of policy that is only reflected in soft law. He believes that these policies are certainly relevant considerations for the tribunal, but they are not binding. More broadly, in his view, the AAT is entitled to refuse to apply a lawful policy not only because the policy leads to injustice in the particular case but also because the AAT believes the policy is not sound or wise. Moreover he goes on to say the AAT would also be "entitled to enunciate a new policy, inconsistent with an existing policy, as the basis for varying a decision or making a substitute decision."¹²⁴ He bases this conclusion on the fact that the power to undertake merits review includes the power to substitute a correct or preferable decision, and that must encompass the power to act inconsistently with government policy. But he tempers his point by suggesting that the differences between high and low policy or policies developed with and without consultation are appropriate factors for the Tribunal to consider.¹²⁵

V. WOULD THE AUSTRALIAN TRIBUNAL MODEL WORK IN THE U.S.?

Could the U.S. borrow from the Australian experience? We believe that something like the Australian tribunal model might work in the area of federal benefits adjudication. These are mass justice systems in which decisionmakers must deal with a heavy caseload of individual cases that largely turn on medical and vocational issues and are not used as vehicles for the announcement of policy.

For purposes of this article, we limit our proposal to an independent U.S. Social Security Tribunal [SST], which would be similar to the Australian SSAT. However, we also believe that policymakers should consider whether the SST might be expanded to cover adjudication arising under some or all of the other federal benefit programs, including schemes administered by the Department of Veterans Affairs and the Department of Labor. If that were to occur, the result would be a federal benefits tribunal of generalized jurisdiction, much like the AAT. Our discussion does

¹²² See Edgar, *supra* note 120 at 149, 150-51. Interestingly, on this point, he invoked K.C. Davis's criticism of merits review, *ibid* at 150, citing K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969) at 142.

¹²³ *Ibid* at 146.

¹²⁴ Cane, *supra* note 6 at 159.

¹²⁵ *Ibid* at 160.

not include the judicial review stage, but we also believe that policymakers should consider establishing a Social Security Court to review SST decisions.¹²⁶

The hearing stage of the social security adjudication system has encountered deep problems. Most importantly, it struggles with an overwhelming caseload. A combative atmosphere between the Social Security Administration [SSA] and its ALJs has lingered for years. SSA must manage its ALJs to improve the efficiency, accuracy, and consistency of the decisionmaking process. In the past, however, some of these management decisions were explicitly (and wrongly) designed to reduce the number of beneficiaries on the disability rolls and to reduce the percentage of ALJ decisions in favor of claimants.¹²⁷ This has given ALJs and lawyers that represent claimants a basis for condemning SSA management initiatives as subversive of ALJ independence.¹²⁸

On the other hand, it must be recognized that many of the problems of SSA adjudication arise out of problems with the ALJ program itself. The general process by which ALJs are hired and managed has often been criticized.¹²⁹ Under the *APA*, ALJs are hired without a probationary period and receive indefinite tenure. Application of the veterans' preference laws effectively excludes many non-veterans and creates gender and racial disparities. The Office of Personnel Management [OPM] runs the hiring process which is cumbersome and bureaucratic; OPM has often neglected or mismanaged this task. The system requires a hiring agency to choose from among the top three on the list offered to it by the OPM, thus foreclosing any exercise of judgment by the agency. This rigid ALJ selection system is circumvented by many agencies which cherry-pick from the judges already working for the SSA. Alone among all federal civil servants, ALJs are exempt from performance evaluations and it is extremely difficult to discipline or discharge them, especially for low productivity.

The ALJ selection and disciplinary protections arise from explicit provisions of the *APA*. The *APA* struck many political compromises, one of which was to leave the judges housed within agencies for which they decide cases while constructing a set of protections for their independence within that agency. However, if the ALJs functioned within a tribunal separate from the agency that made the decision under review, many of those protections would become unnecessary.¹³⁰

¹²⁶ Lubbers has written in favour of a specialized Social Security court to remove the vast number of Social Security appeals from federal district courts. Lubbers & Verkuil, *supra* note 1. The newly created English Upper Tribunal, which is treated as a court of record and provides for an appeal of the decisions of first-tier tribunals, is a move in the direction of a specialized court that the U.S. would do well to study. See accompanying text at notes 48-50.

¹²⁷ See *Ass'n of Admin. Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132 (D.D.C.1984), *amended* 1985 WL 71829 (July 2, 1985) (finding SSA program of reviewing decisions of administrative law judges with high rates of allowing disability benefit claims to be of dubious legality).

¹²⁸ See generally Richard E. Levy, Social Security Disability Determinations: Recommendations for Reform, (1990) BYUL Rev 461 at 497-502.

¹²⁹ See e.g. Paul R. Verkuil, Daniel Gifford, Charles Koch, Richard Pierce, & Jeffrey Lubbers, "The Federal Administrative Judiciary" 1992 *Reports and Recommendations of the Administrative Conference of the U.S.* 773; Paul R. Verkuil, "Reflections Upon the Federal Administrative Judiciary" (1992) 39 UCLA L Rev 1341; Jeffrey S. Lubbers, "The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs" (1994) 7 Admin L J Am U 589.

¹³⁰ Many have urged procedural reforms of Social Security adjudication and judicial review. Levy, for example, proposes legislation that would remove Social Security ALJs from the SSA and make them an independent corps; he also proposes replacing federal district court review of ALJ decisions with an Article I court of disability appeals that is similar to the Court of Veterans' Appeals. See Levy, *supra* note 128 at 528-37. Similarly, Lubbers & Verkuil propose an Article I Social Security Court, *supra* note 1 at 778-82. This article takes no position on whether the existing system of judicial review

An SST would be independent of the SSA.¹³¹ Its judges could continue to provide informal, inquisitorial methods when that is appropriate. At present, the SSA is unrepresented in disability cases, so the ALJ wears multiple hats (making sure that both the SSA and applicant's position is properly presented, then deciding the case). Of course, the SST judges would be required to follow SSA regulations as well as properly issued soft law policy statements or interpretations propounded by the Commissioner. Decisions by the SST would be final administrative decisions.¹³² The next step would be judicial review, possibly limited to questions of law. Of course, both the applicant for benefits and SSA could seek judicial review of SST decisions.

Creation of the SST would enable a reconsideration of the various management issues currently plaguing the system of social security adjudication. Judges would work for the SST, not for the SSA. As a result, there would be no need for the *APA's* rigid controls on the hiring, supervision, compensation, evaluation, and discharge of ALJs. The SST could hire its own judges using a rational, judgment-based scheme to get the very best people available, as opposed to the wooden system now used by the OPM.¹³³ There could be probationary employment, to weed out unsuitable judges early in their career. Judges' terms would be lengthy but not indefinite and they could be removed only for good cause. There could be a series of grades, so judges could work toward promotion and higher compensation. More difficult cases could be assigned to more experienced judges. Some form of peer review might be instituted to evaluate the work product of the judges. The chief judge of the SST would manage the evaluation process. And if that evaluation established that judges fell below reasonable standards of productivity, misbehaved on the bench, or systematically ignored agency policies, appropriate remedial measures could be put into place from mentoring or performance agreements, all the way to dismissal after an appropriate hearing.

of benefits decisions should be altered, but the creation of a Social Security court should be seriously considered.

¹³¹ About half of the states and a number of large cities have adopted the central panel model. See Chris Guthrie, Jeffrey J. Rachlinski, & Andrew Wistrich, "The 'Hidden Judiciary': An Empirical Examination of Executive Branch Justice" (2009) 58 Duke L.J. 1477 at 1484 n. 29. Under that approach, the judge hearing a case is independent of the agency that brings it. The judges are hired, assigned, managed, and evaluated by an independent central panel agency. Our impression is that central panels have worked well and are considered by the public and by lawyers to be more legitimate than administrative judges embedded in the agency that is a party to the dispute. The central panel has often been proposed and just as often rejected at the federal level, largely because of doubts that central panel judges could effectively handle technical and difficult regulatory problems from numerous agencies. See e.g. Jeffrey Lubbers, "A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level" (1981) 65 *Judicature* 266. However, we are proposing a centralization of adjudication only for Social Security, so that the judges would need to master the law and practice only from a single benefit program. Were the SST to be expanded to other federal benefit agencies, such as those run by the VA and DOL, there would be an additional learning curve, but all of these cases come down to medical and vocational issues, so any competent judge should be able to decide cases accurately under any of the benefit schemes with only modest additional training.

¹³² In considering this proposal, Congress should decide whether to provide for an administrative appeal of SST decisions, such as the AAT provides for SSAT decisions, the Upper Chamber provides in the U.K., or the Appeals Council presently provides for a relatively small fraction of ALJ decisions in Social Security cases. Our preliminary assessment of this issue is that a single administrative decision by an independent ALJ is sufficient and a second level of administrative hearings absorbs resources and causes delay without sufficient countervailing advantage. See Charles H. Koch & David A. Koplow, "The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council" (1990) 17 *Fla St U L Rev* 199 at 296-98.

¹³³ For obvious practical reasons, the existing ALJs working for the SSA would be grandfathered into the new system. However, the existing ALJs would be subject to the new scheme of performance evaluation.

This proposal presents important issues of scale. Obviously the U.S. SST would require a vastly larger corps of judges than the Australian AAT (with its 89 members) or SSAT (with its 230 members). Yet the judges who would staff the SST are already in place – the approximately 1200¹³⁴ skilled, experienced and conscientious Social Security ALJs. They would be the nucleus of the SST.

The issue of consistency of decisions is always problematic in mass justice situations. As Mashaw pointed out long ago, the only way to achieve reasonable consistency of decisions among vast numbers of judges in a mass justice situation is through management initiatives, not through an appeals council or through judicial review of the procedure or the substance of such decisions.¹³⁵ Those management initiatives would be far more practicable and acceptable to the judges if they came from an independent SST rather than from the SSA. For example, the SSA would have to issue more regulations and high-level policy statements than it does today to furnish guidance to SST judges. In addition, the SST might designate important decisions by SST judges as precedent decisions that judges in later cases would be required to follow.

The political feasibility of this proposal can be questioned. It is certainly possible that ALJ organizations would dig in their heels against it, opposing anything that might diminish their *APA* protections, or reduce the number of ALJs in their ranks. Yet many ALJs have favored the creation of a federal, central panel that would remove them from control of the agency that is party to the dispute. The SST would produce exactly that form of independence, but it could be achieved only if the ALJs were willing to accept a change to a new status as SST judges with whatever tailored protections seemed most salient to that position.

Needless to say, many practical issues would arise in so radically changing the structure of federal benefits adjudication, and there will be many compromises along the way. Of course, the hearing process is just one step in a complex state/federal process of disability claim adjudication and cannot be viewed in isolation from all the other stages. This briefly sketched proposal does not address the details or the entire process from state examiner scrutiny of a disability claim through federal court of appeals review. We seek only to point out the advantages of an independent tribunal structure in addressing some of the pathologies of the existing system of social security adjudication.

VI. CONCLUSION

The Australian model shows that a generalized or specialized merits-review tribunal can work efficiently and achieve legitimacy. It can command the respect of all parties. It presents a successful alternative approach to the U.S. system of embedded adjudicators. The fact that the U.K. has adopted a close variant of it is evidence of its success. Whether the tribunal system could be adapted to the U.S. is obviously debatable. However, in the area of mass adjudication of social benefits programs, where policy matters rarely arise in individual cases, a centralized and independent tribunal provides an intriguing and possibly adaptable model. This experience should be carefully considered by American policymakers as they address the seemingly intractable problem of federal benefits adjudication.

¹³⁴ See Office of Personnel Management chart, *supra* note 3.

¹³⁵ Jerry Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven: Yale University Press, 1985) at 104-06, 148-49, 185-90.