

FLEXIBILITY, INFORMALITY AND DESPATCH

STRIKING THE BALANCE IN TRIBUNAL DECISION-MAKING

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The rule of law is the bedrock of civilised society. It is the assumption upon which even the *Constitution* is based.¹ It represents the supremacy of law over naked power or unbridled discretion. It is as binding upon judges as administrators.

In 1983 a security training exercise arranged by the Australian Secret Intelligence Service went awry. Four ASIS agents were meant to rescue one of their number who was playing the role of hostage by imagined ‘captors’ in a hotel room. They executed the rescue by breaking down the door of a room at the Sheridan Hotel. Unfortunately the hotel manager had not been warned about the exercise. When he went to investigate, the disguised and armed participants left hurriedly and somewhat sheepishly.

The Chief Commissioner of Police for Victoria began to investigate whether criminal offences had been committed. At his request, the State government asked the Commonwealth to reveal the names of the participants so that the police enquiries could proceed. The participants moved the High Court for an injunction to restrain the Commonwealth from revealing their names, asserting that it was a breach of a term in their contracts of employment to do so. A major constitutional case ensued and you will find it reported under the name *A & Ors v Hayden (No 2)*.²

Given the unusual facts it is hardly surprising that Mason J opened his judgment by suggesting that there was an air of unreality about the case. He described it as having:³

“ the appearance of a law school moot based on an episode taken from the adventures of Maxwell Smart.”

In refusing the injunctions sought by the agents, the High Court provided a ringing endorsement of the rule of law and its application to the Executive government even in matters of national security.

¹ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J. See also *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [2003] HCA 2 at [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)

² (1984) 156 CLR 532.

³ At 550.

The idea that law is superior to arbitrary power has an ancient lineage. But it is much more than a philosophical proposition. In the 17th century much blood was shed, including that of a king, to vindicate the principle. And when Charles I's successors still missed the point, the Stuart line was deposed in the Glorious Revolution. It is therefore unsurprising that courts sometimes hark back to these brutal facts of history when lecturing the executive arm of government. Thus, when Windeyer J referred to the Act of Settlement as expressing the principle that all officers and ministers ought to serve the Crown according to the laws, he added:⁴

"it may be desirable that sometimes people be reminded of this and of the fate of James II..."

Tribunals help ensure the effective and just delivery of government programs. The remarkable growth of tribunals as a permanent arm of Executive government is testament that 'good government' often depends upon informed and fair decision-making. Without elementary fairness, the Executive cannot expect that spirit of compliance that is as essential as an effective police force. Tribunals, like mercy, bless both those that give and those that receive the fruits of government.

The qualities of tribunals have been identified as openness, impartiality, efficiency, expedition and economy.⁵

The growth of tribunals has not occurred without opposition. Sometimes the higher echelons of government resent the public accountability, delay and cost of a tribunal doing that which would formerly have been achieved by a faceless public servant. Tribunals that sit in public and give reasons expose governmental decision-making to the winds of judicial review more effectively than the silent stamp of an unidentified official in a dossier.

Of course, there is really no dichotomy between tribunals and government such as I may have implied. Tribunals are themselves an arm of government. In Kiefel J's words, they are "instrument[s] of government administration."⁶

Courts too have shown surprising hostility to the expansion of tribunals in the past. Surprising, because most tribunals do not involve themselves in adjudicative tasks traditionally performed by courts. In any event, judges should hardly complain if Parliament sees fit to take certain categories of dispute out of the judicial context, so long as the courts' jurisdiction to supervise legality is maintained; all the more so if the transfer came about because of **unnecessary** inefficiencies in the judicial process or the excesses of the adversary process.

The 2003 High Court decision of *Plaintiff S157/2002 v Commonwealth*⁷ involved the scope and validity of privative clauses affecting decisions of the Refugee Review Tribunal. Much of

⁴ *Cam & Sons Pty Ltd v Ramsay* (1960) 104 CLR 247 at 272.

⁵ De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* 5th ed, 1-075.

⁶ *Shi v Migration Agents Registration Authority* (2008) 235 CLR 285, [2008] HCA 31 at [140], referring to the AAT.

⁷ (2003) 211 CLR 476, [2003] HCA 2.

the discussion relates to federal constitutional law. There are however, points of general interest to my topic today. These concern the explanation of the differences between judicial and executive power, including the executive power exercised through tribunals.

Gleeson CJ quoted Denning LJ with approval when he said:⁸

“If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.”

This might seem a little heavy-handed, but it is within the legal tradition I have already spoken about.

Obviously a tribunal must obey its jurisdictional signposts, doing everything it is set up to do but not a jot more. My topic today concerns matters procedural, although rule of law principles intrude here as well. They explain why flexibility has its bounds. Obviously some of these bounds may be found in mandatory procedural stipulations in legislation. Others derive from fundamental principles of the common law touching administrative law, most notably the rules of natural justice.

But it must not be forgotten that statutes command as well as prohibit. Tribunal legislation is replete with injunctions to avoid technicality, delay etc. For example, s 33 (1) (b) of the *AAT Act* stipulates that the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirement of the legislation and a proper consideration of the matters before the Tribunal permit.⁹ These duties must be taken seriously if tribunal members are themselves to strive to conform to the rule of law.

Since this is a COAT National and COAT (NSW) joint conference I shall endeavour to span both the Administrative Appeals Tribunal and the New South Wales Civil and Administrative Tribunal, citing the key provisions of the *Administrative Appeals Tribunal Act 1975* (Cth) (the “AAT Act”) and the *Civil and Administrative Tribunal Act 2013* (NSW) (the “NCAT Act”). In doing so, I will bypass specific provisions which have more traditional (and in some cases radically less traditional) regimes for dealing with enforcement and penalty proceedings, security assessments and the like.

Flexibility, informality and despatch

Each Tribunal is **required** to exercise its review functions in a way that encourages informality, informality and despatch. The *AAT Act* speaks of mechanisms that are:¹⁰

“accessible, fair, just, economical, informal and quick; and proportionate to the importance and complexity of the matter.”

The *NCAT Act* speaks of:¹¹

⁸ *R v Medical Appeal Tribunal; Ex parte Gilmore* [1975] 1 QB 574 at 586, quoted by Gleeson CJ at [8].

⁹ See also *NCAT Act*, s 36 (2).

¹⁰ *AAT Act*, s 2A.

¹¹ *NCAT Act*, s 3 (d). See also ss 36 (2), 38 (4).

“[a duty] to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible.”

In my experience, objects clauses in statutes usually speak with forked tongues. So do not be surprised to learn that the New South Wales statute also includes a duty to strive for decisions that are “timely, fair, consistent and of a high quality”.¹²

As indicated, these provisions do not merely authorise flexibility, informality and despatch. They mandate these qualities, although in terms that sometimes suggest their outer limits. These and more detailed provisions in the statutes should encourage innovation and discourage heavy-handed judicial review. Tribunals are not courts. What is more, they are not intended to act as if they were courts. If tribunals slide into the legalistic, adversarial, judicial model they will be thanked by neither courts nor government.

In aid of the broad goals for tribunals I have already set out from the statutes and the text books, the legislature has conferred broad procedural powers that are not necessarily part of the judicial armoury or, if they are, may not be spelt out so explicitly.

There are also express powers to:

- hold directions hearings and preliminary conferences¹³
- set time limits for the presentation of the respective cases of the parties if limits are determined reasonably necessary for the fair and adequate presentation of the cases¹⁴
- limit witness numbers or require witnesses to give evidence at the same time¹⁵
- require parties to provide further information in relation to the proceedings¹⁶
- dismiss at any stage proceedings considered frivolous or vexatious or otherwise misconceived or lacking in substance.¹⁷

Each Tribunal’s statutory discretion to determine its own procedure¹⁸ is a further indication that flexibility and innovation are encouraged. This is not just innovation vis a vis courts, but innovation within the Tribunal’s own docket of work. What is right for one type of matter may be quite unsuitable for another. The parties have a duty to assist or cooperate,¹⁹ and this may be called in aid by the Tribunal if there is resistance.

Concurrent evidence by experts is now widely accepted on my understanding. For the AAT, there is a *Use of Concurrent Evidence...Guideline* reproduced on the AAT website. The Full AAT has indicated that the experts should be directed to confer together, without legal

¹² *NCAT Act*, s 3 (e).

¹³ *AAT Act*, s 33 (1A).

¹⁴ *AAT Act*, s 33 (2A); *NCAT Act*, s 38 (6) (c).

¹⁵ *AAT Act*, s 33 (2A) (d), (e).

¹⁶ *AAT Act*, s 33 (2A) (b).

¹⁷ *AAT Act*, s 42B; *NCAT Act*, s 55 (1) (b).

¹⁸ *AAT Act*, s 33 (1) (a); *NCAT Act*, s 38 (1).

¹⁹ *AAT Act*, s 33 (1AB); *NCAT Act*, s 36 (3).

representatives present, so as to identify the issues as to which they agree and those where their opinions differ. They then give their evidence together and the hearing process is more of a discussion between experts, with the legal representatives and tribunal drawing attention to certain issues, or asking for clarification, rather than examining and cross-examining the experts.²⁰

For the NCAT, the matter of hot-tubbing is addressed in *NCAT Procedural Direction 3 (February 2014)* which suggests that the preferred procedure in this State's Tribunal is for the experts to respond to questions asked by the Tribunal and the parties or their representatives. I would, however, be surprised if there were great differences between the federal and state Tribunals in this regard. The over-riding mantra of flexibility should encourage those presiding at tribunals to allow the more relaxed conversation between experts to the extent that that is seen appropriate.

Sometimes, but only sometimes, it may be better to work through a matter issue by issue, at least with respect to hearing evidence and submissions. But except where findings on one issue will dispose of the whole case, you should beware of producing interim or piecemeal findings. There is the risk that the position you adopt (say on credibility) at one stage may need to be revised later. That will be embarrassing or worse.

Limited application of the rules of evidence

Each Act provides that (with limited exceptions) the Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit or appropriate.²¹ The New South Wales provision stipulates that this is "*subject to the rules of natural justice*" but that is implicit in the Commonwealth version as well.

The law of evidence started off as judicial commonsense and fairness practised in context. But by the mid-twentieth century it had hardened and atrophied. In civil matters at least, its rules had become traps for the unwary rather than guideposts to facilitate the orderly gathering and testing of relevant information.

The *Evidence Act 1995* is a much more flexible tool than the corpus of black and white technical rules found in early editions of *Phillips' Law of Evidence*. That is not to say that the Act is free from its own complexity and arcana. Nevertheless, it arrived on the scene too late to stem a major shift from courts to tribunals. There are many understandable reasons why this shift occurred. One of them, however, was that the courts were too slow in adapting the rules formulated for criminal trial by jury to the quite different context of civil disputes tried by judge alone where documentary evidence is increasingly dominant.

I would commend Professor Enid Campbell's article on "Principles of Evidence and Administrative Tribunals"²² for a general exposition.

²⁰ See *Re King* (2005) 83 ALD 322, [2005] AATA 89 at [22] (Senior Member Dwyer and member Shanahan).

²¹ *AAT Act*, s 33 (1) (c); *NCAT Act*, s 38 (2).

²² Campbell and Waller eds, *Well and Truly Tried: Essays on Evidence in Honour of Sir Richard Eggleston* (1982) p 36.

With limited exceptions, the Tribunals are entitled to have regard to sworn and unsworn evidence as well as information as to fact or opinion to be found in reports or published works. I repeat that all this is subject to the principles of procedural fairness. But within those limits, in the words of Hill J, the provision:²³

“means what it says. The fact that material may be inadmissible in accordance with the law of evidence does not mean that it cannot be admitted into evidence by the Tribunal or taken into account by it. The criterion for admissibility of material in the Tribunal is not to be found within the interstices of the rules of evidence but within the limits of relevance.”

The NCAT Act provides an express power to require evidence or argument to be presented in writing (s 38 (6) (b)). Since what is required is necessarily permitted, a tribunal should in my view be slow to reject or deter evidence presented in this way. I say this because I have been informed of a recent instance where a member of NCAT effectively refused to accept evidence proffered in this manner, despite absence of objection, on the basis of a threat to give it little weight.

These principles mean that the rule in *Browne v Dunn*²⁴ has no application having regard to the essentially non-adversarial nature of most tribunal proceedings. The suggestion that the testimony of witnesses must be contradicted by having the opposing case put in terms to them was firmly rejected by Gleeson CJ, Gummow and Heydon JJ in *Re Ruddock; Ex parte Applicant S154/2002*.²⁵ Occasionally, however, the duty of procedural fairness may mean that a Tribunal should permit or itself initiate an inquiry of an applicant to allow explanation why his or her account should be accepted in light of specific contradicting material.²⁶

There are however, some fundamental principles of law which masquerade as rules of judicial evidence but which cannot be overreached by a tribunal in the absence of the clearest statutory authority. These include client-legal privilege, public interest immunity and the privilege against self-incrimination.²⁷ Indeed, s 46 (3) of the NCAT Act goes further, stipulating that NCAT’s powers in relation to witnesses do not enable it to compel a witness to answer a question if the witness has a “reasonable excuse for refusing”. A reasonable excuse is broader than a lawful excuse.²⁸

These provisions do not exempt the respective Tribunals from the obligation to ensure that their findings and ultimate conclusions rest upon material having “rational probative force”.

²³ *Casey v Repatriation Commission* (1995) 60 FCR 510 at 514. See also *Barbaro v Minister for Immigration and Ethnic Affairs* (1982) 44 ALR 690 at 694 (Fox, Blackburn, Lockhart JJ); *Shulver v Sherry* (1992) 28 ALD 570.

²⁴ (1893) 6 R 67.

²⁵ [2003] HCA 60, (2003) 75 ALD 1 at [57]. See also *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555, [2014] FCAFC 93 at [149] (Flick and Perry JJ).

²⁶ See *SZBEL v Minister for Immigration, and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, [[2006] HCA 63 at [47] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

²⁷ See, eg NCAT Act, ss 38 (3) (b) and 67 preserving the privilege against self-incrimination.

²⁸ *Ganin v New South Wales Crime Commission* (1993) 32 NSWLR 423.

This qualification is explained with magisterial clarity by Brennan J in *Pochi v Minister for Immigration and Ethnic Affairs*.²⁹

I would, however, remind you that these provisions do not stipulate that the Tribunal must *ignore* the rules of evidence. Within those rules there may be principles reflecting the wisdom of the ages which, though not necessarily forming part of the concept of natural justice, are designed to aid the Tribunal in its endeavour to administer “*substantial justice*”.³⁰ One such principle, now written into the *Evidence Act* worthy of being borne in mind, is found within s 135 of that Act:

“The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or*
- (b) be misleading or confusing; or*
- (c) cause or result in undue waste of time.”*

The power of a tribunal to decline to receive material of little or no probative value was affirmed by French J in *Mt Gibson Manager Pty Ltd v Deputy Commissioner of Taxation*.³¹

In essence, a tribunal has a choice when faced with material that it is convinced is really marginal. It may decline to admit it, so long as it is not thereby refusing a fair opportunity to present a case. Or it may make it plain from the outset that its weight is slight because better evidence is available. The NCAT Appeal Panel has approved the following remarks of Davies J when he was the President of the Administrative Appeals Tribunal:³²

“In informing itself on any matter in such manner as it thinks appropriate, the Tribunal endeavours to be fair to the parties. It endeavours not to put the parties to unnecessary expense and may admit into evidence evidentiary material of a logically probative nature notwithstanding that the material is not the best evidence of the matter which it tends to prove. But the Tribunal does not lightly received into evidence challenged evidentiary material concerning a matter of importance of which there is or should be better evidence. And the requirement of a hearing and the provision of a right to appear and be represented carries with it an implication that, so far as possible and consistent with the function of the Tribunal, a party should be given the opportunity of testing prejudicial evidentiary material tendered against him. It is generally appropriate that a party should have an opportunity to do more than give evidence to the contrary of the evidence adduced on behalf of the other party. He should be given an opportunity to test the evidence tendered against him provided that the testing of the evidences seems appropriate in the circumstances and does not conflict with the obligation laid upon the Tribunal to

²⁹ (1979) 36 FLR 482 at 492-3.

³⁰ See the discussion in *Kevin v Minister for the Australian Capital Territory* (1979) 37 FLR 1.

³¹ (1997) 81 FCR 335 at 343.

³² *United Bonded Fabrics Pty Ltd v Roseman* [2000] NSWADTAP 13 at [27], applying *Re Barbaro and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 1 at 5.

proceed with as little formality and technicality and with as much expedition as the matter before the Tribunal permits.”

Other principles of evidence apt to be borne in mind are the rules in relation to opinion evidence. They reflect good sense and sound principle in excluding information that carries no probative weight. Holding this line may also save time and expense.

The doctrine of “official notice” means that a tribunal may draw upon the expertise and experience of its specialist members, as well as upon its accumulated institutional wisdom. The controlling factor remains that of procedural fairness. I agree with the following comment of Professor Smillie:³³

*“It is necessary to ensure that the parties to an administrative proceeding are given a fair opportunity to address submissions to all the crucial issues, and to produce all relevant material within their possession. The obvious solution is to permit administrative tribunals to rely for any purpose upon relevant material of any kind within the personal knowledge of their members **provided any such material which will play an important part in the final decision is disclosed to the parties in advance and they are given a fair opportunity for discussion and rebuttal.**”*

A tribunal is not restricted to acting only on expert opinion given on oath by a live witness. It may have regard to reports published by research bodies, subject always to procedural fairness. This includes findings of other courts and tribunals or findings of itself in other proceedings.³⁴

Rules of natural justice

The need to ensure procedural fairness is fundamental. It qualifies everything I have already said about flexibility, informality and despatch.

As you know, the rules of natural justice of procedural fairness cluster around two broad principles expressed as maxims: *nemo debet esse iudex in propria sua causa* and *audi alteram partem*.

The former maxim translates as *no one can be judge in his or her own cause*. The rules of bias and ostensible bias cover so many issues that it is impossible to expound them on this occasion. Day to day problems are more likely to arise with the second maxim, which translate literally as *hear the other party*.

³³ J A Smillie, “The problem of Official Notice” [1975] PL 64 at 67 (emphasis added). See also T J H Jackson, “Administrative Tribunals and the Doctrine of Official Notice: ‘Wrestling with the Angel’” in Harris and Wayne eds *Administrative Law* (1991) p 120. See also *R v Milk Board; ex parte Tomkins* [1944] VLR 187 at 197 (Lowe J); *R v Deputy Industrial Injuries Commissioner; ex parte Moore* [1965] 1 QB 456; *Boral Besser Masonry Ltd v Jabarkhill* (1999) 19 NSWCCR 227, [1999] NSWCA 476.

³⁴ See *Re Thorp and the Commissioner of Taxation* (2011) 123 ALD 355 at 366.

Section 38 (5) (c) of the *NCAT Act* reflects the common law when it speaks of a duty “to ensure that the parties have a **reasonable opportunity** to be heard or otherwise have their submissions considered in the proceedings.” (emphasis added)

The judicial officer or tribunal does not have an obligation to ensure that such opportunity is availed of to the nth degree. Never one to hold back on the robust defence of the principles of natural justice, Michael Kirby J has said:³⁵

“sometimes, through stubbornness, confusion, mis-understanding, fear or other emotions, a party may not take advantage of the opportunity to be heard, although such opportunity is provided. Affording the opportunity is all that the law and principle require.”

Earlier, in *Sullivan v Department of Transport*, Deane J said that:³⁶

*“...it is important to remember that the relevant duty of the Tribunal is to ensure that a party is given a reasonable **opportunity** to present his case. Neither the Act nor the common law imposes upon the Tribunal the impossible task of ensuring that a party takes the best advantage of the opportunity to which he is entitled.”*

Tribunals are frequently presented with unrepresented litigants, often lined up against a well-represented governmental party. This almost invariably increases the difficulty involved in ensuring the right balance of fairness and passivity that is essential to natural justice.

In *Gamester Pty Ltd v Lockhart*³⁷ the High Court was entertaining an application for judicial review in relation to the conduct of Lockhart J in the Federal Court. His Honour had dismissed proceedings before him because he was satisfied that they were vexatious and an abuse of process. The proceedings were being conducted by a litigant in person who had filed a great deal of material and was engaged in very lengthy cross-examination. Lockhart J stopped further cross-examination and sought to elucidate the subject matters about which the litigant wished to ask questions. It was very difficult to obtain any rational account of those matters. The forthcoming information did not show any matter that the judge regarded as relevant to the proceeding. He concluded that the case had reached a point where he would not allow it to go on any longer, because to do so would be a serious erosion of the resources of the Court and the Commonwealth and a waste of everybody’s time and money.

Gaudron J had dismissed the application for prerogative relief directed to Lockhart J. A further appeal to the Full High Court was dismissed. In the course of the Court’s reasons her Honour approved the remarks of Gaudron J when she said:

³⁵ *Allesch v Maunz* (2000) 74 ALJR 1206 at 1213. See also *NCAT Act*, s 38 (5) (c) (“a reasonable opportunity to be heard or otherwise have their submissions considered”). As to what this means with a functionally illiterate person, see *Kline v NSW Land and Housing Corp* (2014) NSWCATAP 41 (notice of hearing).

³⁶ (1978) 20 ALR 323 at 342 (emphasis added). See also *Adams v Wendt* (1993) 30 ALD 877; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 187 ALR 117, [2002] HCA 11 at [40] (Gleeson CJ).

³⁷ (1993) 67 ALJR 547.

“It seems to me that there is no denial of natural justice involved in terminating an opportunity to be heard when the evidence appears not to support the relief claimed and requests to state the matters which are said to support the grant of relief fail to produce a statement of those matters.”

Their Honours also said this about a submission which asserted in effect that Gaudron J was obliged to pore through a huge mass of undifferentiated written material. The submission was described as suggesting:

“...that a judge who has given a party a reasonable opportunity to state that party’s claim for relief is under an obligation, without having the benefit of relevant and intelligible submissions to extract from a mass of apparently non-supportive evidence any pieces of the evidence which could be regarded as supportive. The submission is misconceived. In court proceedings, a judge is bound to give a party a reasonable opportunity to state the party’s claim for relief and to point to the evidence which supports it. But if the opportunity is not taken, the judge is not bound to set out in a search for supportive evidence to support a claim which the party has failed to articulate intelligibly.”

This topic has recently been addressed in s 38 (5) of the NCAT Act 38 (5) (b) and (c) which speak of duties to take “such measures as are reasonably practical:

- (a) to ensure that the parties to the proceedings before it understand the nature of the proceedings; and*
- (b) if requested to do so – to explain to the parties any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceedings.”*

The section does not mean that the duty to explain matters is only enlivened by a request. Sometimes an explanation will be necessary because the unrepresented person does not even know for what help to ask. For example, a Tribunal may need to offer a genuinely disadvantaged applicant the opportunity of an adjournment in order fairly to respond to reports filed against him or her: see the discussion in *Su v Public Guardian*.³⁸

In *Monogue v HREOC*, the Full Federal Court endorsed the following observation of Mahoney JA in an unreported decision:³⁹

Where a party appears in person, he will ordinarily be at a disadvantage. That does not mean that the court will give to the other party less than he is entitled to. Nor will it confer on the party in person advantages which, if he were represented, he would not have. But the court will, I think, be careful to examine what is put to it by a party in person to ensure that he has not, because of the lack of legal skill, failed to claim rights or to put forward arguments which otherwise he might have done.”

³⁸ [2014] NSWCATAP 32. Robinson 1-4154.

³⁹ (1999) 84 FCR 438 at 445-6, citing *Rajski v Scitec Corp Pty Ltd* (NSWCA, 16 June 1986, unreported) at 27.

Conclusion

The principles I have discussed are held in uneasy tension. Your tolerant flexibility as tribunal members may be viewed as unbridled licence by your colleagues or, worse still, appellate panels or courts. Mistakes will be made in the process. None of us are immune. In our system, the only people who are incontrovertibly right in a particular dispute are the justices who form the majority in the High Court in the ultimate appeal.

To err is human. Sometimes we look back on what we have done or written and we say (as Baron Bramwell once did):⁴⁰

“The matter does not appear to me now as it appears to have appeared to me then.”

Lord Westbury once rebuffed a barrister’s reliance upon an earlier opinion of his Lordship in the following terms:⁴¹

“I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.”

Sometimes too, we will be troubled by having to go the extra procedural mile for an undeserving litigant. If, despite all injunctions about flexibility, despatch and the like, we are required to do so, we should remember Felix Frankfurter’s remarks that:⁴²

“...the safeguards of liberty have frequently been forged in controversies involving not very nice people.”

⁴⁰ *Andrews v Styrap* 26 LTNS 704, 706.

⁴¹

⁴² *United States v Rabinowitz* 339 US 56 at 59 (1950).