RECENT AMENDMENTS TO THE *ADMINISTRATIVE APPEALS TRIBUNAL ACT 1975*

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Address to the Victorian Commercial Bar Association - Public Law Section

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This document provides a brief summary of some of the major changes made to the *Administrative Appeals Tribunal Act 1975* (AAT Act) and related Acts by the *Administrative Appeals Tribunal Amendment Act 2005* (AAT Amendment Act).

The AAT Amendment Act was passed by the Commonwealth Parliament on 17 March 2005. It was assented to on 1 April 2005. Its operative provisions were proclaimed to commence on Monday, 16 May 2005.

The summary has been arranged thematically as follows:

- the new objects clause;
- changes to procedures for dealing with applications for review;
- changes to the powers of members, Conference Registrars and the responsibilities of decision-makers as parties to the review;
- changes to the provisions for constituting tribunals;
- changes to the powers of the Federal Court and Federal Magistrates Court in relation to appeals.

TRIBUNAL'S OBJECTIVE

The Amendment Act has inserted an objects clause into the AAT Act. New section 2A provides that, in carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

CHANGES TO AAT PROCEDURE

Application for Review

Further Statement Of Reasons for Application

Pursuant to s. 29(1)(c) of the AAT Act, an application for review must, among other things, contain a statement of the reasons for the application.

New s. 29(1B) of the AAT Act provides that, if the Tribunal is of the opinion that an applicant's statement of reasons for the application is not sufficient to enable the Tribunal to identify why the applicant believes the decision is not the correct or preferable decision, the Tribunal may request that the applicant amend the statement within the period specified by the Tribunal.

Pre-Hearing Processes

Alternative dispute resolution processes

Prior to the commencement of the amendments, the AAT Act provided for the Tribunal to conduct conferences and mediations. The Amendment Act has introduced a new set of provisions relating to alternative dispute resolution processes. ADR processes are defined in s. 3(1) of the AAT Act to mean procedures and services for the resolution of disputes and include:

- conferencing;
- mediation;
- neutral evaluation;
- case appraisal;
- conciliation; and
- other procedures or services specified in the regulations.

Arbitration and court procedures or services are specifically excluded from the definition of ADR processes.

Pursuant to new ss. 34A and 34B of the AAT Act, the President or another member may direct that a conference be held or that a matter be referred to another ADR process There is no statutory requirement that the parties must consent to the conduct of any ADR process.

Requirement to act in good faith in ADR processes

Each party involved in an ADR process is required to act in good faith in relation to the conduct of the ADR process: new ss. 34A(5) and 34B(4) of the AAT Act.

Agreements as to the terms of a decision made in the course of ADR process

Section 42C of the AAT Act is the provision that has generally been relied upon to finalise an application where the parties reach agreement as to the outcome. The Tribunal may make a decision in accordance with terms of agreement lodged in writing by the parties provided that:

- the Tribunal is satisfied that a decision in those terms or consistent with those terms would be within the powers of the Tribunal; and
- the Tribunal considers it appropriate to make a decision in accordance with those terms.

The Amendment Act has introduced new s. 34D of the AAT Act in relation to agreements reached in the course an ADR process. The provision is in the same terms as s. 42C of the AAT Act except that it makes provision for a cooling-off period. The Tribunal may only give effect to an agreement reached in the course of an ADR process if:

- 7 days pass after lodgment of the terms of agreement; and
- none of the parties has notified the Tribunal in writing that he or she wishes to withdraw from the agreement.

Other issues relating to ADR processes

The Amendment Act has introduced new provisions relating to:

- the admissibility of evidence as to anything said, or things done, at an ADR process; and
- the eligibility of a member who has conducted an ADR process participating in the hearing of a proceeding.

In general, new s. 34E of the AAT Act provides that evidence of anything said, or any act done, at an ADR process is inadmissible in any court or in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory to hear evidence. However, evidence is admissible in an AAT hearing if:

- the parties agree to the evidence being admissible;
- the evidence in question is a case appraisal report or neutral evaluation report and neither party objects to the report being admissible at the hearing.

If a member conducts an ADR process in a matter, new s. 34F of the AAT Act provides that he or she is not entitled to participate in the hearing of the same matter if any party notifies the Tribunal prior to the hearing that they do not want the member to participate.

Tribunal may determine Scope of Decision under Review

New s. 25(4A) of the AAT Act provides specifically that the Tribunal has power to determine the scope of the review of a decision by limiting the questions of fact, the evidence and the issues that it considers.

CHANGES TO POWERS OF MEMBERS AND CONFERENCE REGISTRARS AND OBLIGATIONS OF DECISION-MAKERS

Powers exercisable by Members

Prior to the commencement of the Amendment Act, a range of powers under the AAT Act could be exercised prior to the formal constitution of the Tribunal only by members who were Judges, Deputy Presidents and Senior Members. The Amendment Act allows the President to authorise Members to exercise those powers that previously only presidential members or Senior Members could exercise. The relevant powers include the following:

- to extend the time for lodging an application: s. 29(7);
- to decide that a person whose interests are affected by a decision to an application be made a party to the proceeding: s. 30(1A);
- to make a decision in accordance with terms of agreement lodged by the parties: ss. 34D and 42C;
- to make confidentiality orders relating to documents lodged with the Tribunal: s.35(2)(b);
- to make an order staying the operation or implementation of a reviewable decision or varying or revoking that stay order: ss. 41(2) and (3);
- to dismiss or reinstate an application on a range of procedural grounds: s. 42A.

The Amendment Act also allows the President to authorise Members to exercise the following powers in relation to summonses:

- to authorise the refusal of a request to issue a summons: s. 40(1C);
- to give parties leave to inspect documents produced under a summons: s. 40(1D).

Authorised Conference Registrars

New s. 33(4) allows the President to authorise Conference Registrars to give, vary or revoke a direction as to the procedure to be followed in relation to a proceeding. Conference Registrars are officers of the Tribunal who conduct the majority of conferences held by the Tribunal. Prior to the commencement of the amendments, only members of the Tribunal could give binding directions to the parties.

Obligations on Decision-Makers

New s. 33(1AA) of the AAT Act provides that the person who made the decision under review must use his or her best endeavours to assist the Tribunal to make its decision.

Section 37 of the AAT Act sets out the requirement that the person who made the decision under review must provide relevant documents to the Tribunal. The Amendment Act has amended s. 37(1)(b) to change the test as to a document's relevance from a subjective test to an objective test.

Rather than being required to lodge with the Tribunal every document or part of a document that is considered by the person to be relevant to the review of the decision by the Tribunal, the person must lodge with the Tribunal every document that is in the person's possession and relevant to the review of the decision.

NEW CONSTITUTION PROVISIONS

Two or more Members may constitute the Tribunal

The AAT Act provides that, in general, the Tribunal may be constituted for the purposes of a particular proceeding by one, two or three members: s. 21(1). Prior to the commencement of the amendments, if two or more non-presidential members were sitting together, at least one of them had to be a senior member. The Amendment Act has repealed that requirement.

Multi-member panels comprised solely of Members are now permitted.

Constitution and reconstitution of the Tribunal

The provisions relating to the constitution of Tribunals for the purposes of proceedings have been revised. In particular, new provisions have been introduced to authorise the reconstitution of the Tribunal where a hearing has commenced or been completed but the Tribunal has not yet given a decision under s. 43(1) of the AAT Act: new ss. 23 and 23A.

Reconstitution if member ceases to be available

New s. 23 of the AAT Act deals with the situation where a member ceases to be available for the purposes of a proceeding. For the purposes of s. 23, a member *ceases to be available* if the member:

- stops being a member (s. 23(2)(b)(i)); or
- for any reason, is not available for the proceeding (s. 23(2)(b)(ii)); or
- is directed by the President not to continue to take part in the proceeding (s23(2)(b)(iii)).

The President must not direct that a member not continue to take part unless he or she is satisfied that it is in the interests of justice and the President has consulted the member: s. 23(9).

If the member who *ceases to be available* for a proceeding constituted the Tribunal alone, the President must direct another member or members to constitute the Tribunal: s. 23(3) The President must not make such a direction unless he or she has consulted the parties to the proceeding: s. 23(10).

If a member who *ceases to be available* for a proceeding was part of a multi-member Tribunal:

- the President must direct the remaining member or members to constitute the Tribunal: s. 23(4)(a); or

- the President must direct another member or members to constitute the Tribunal: s. 23(4)(b).

The President must not give a direction under s. 23(4)(b) that results in the removal of one or more remaining members unless he or she is satisfied that it is in the interests of justice and the member or members have been consulted: s. 23(11). The President must not make any direction under s. 23(4) unless he or she has consulted the parties to the proceeding: s. 23(10).

Reconstitution to achieve expeditious and efficient conduct of proceedings

New s. 23A of the AAT Act allows the President to reconstitute the Tribunal if he or she is of the opinion that the reconstitution is in the interests of achieving the expeditious and efficient conduct of the proceeding. The President may reconstitute the Tribunal by:

- adding one or more members; or
- removing one or more members; or
- substituting one or more other members; or
- any combination of these: s. 23A(2).

The President must not give a direction to reconstitute the Tribunal unless the President has consulted the parties: s 23A(5).

Factors the President must consider when constituting or reconstituting the Tribunal

The Amendment Act has expanded the range of matters that the President must have regard to when giving a direction under s. 20B, 23 or 23A as to the persons who are to constitute the Tribunal for the purposes of particular proceeding. New s. 23B of the AAT Act provides that the President must have regard to:

- the degree of public importance or complexity of the mattes to which the proceeding relates;
- the status of the position or office held by the decision-maker;
- the degree to which the matters to which that proceeding relates concern the security, defence or international relations of Australia;
- the degree of financial importance of the matters to which that proceeding relates;
- the purpose or object underlying the enactment under which the reviewable decision was made;
- the degree to which it is desirable for any or all of the persons who are to constitute the Tribunal to have knowledge, expertise or experience in relation to the matters to which the proceeding relates;
- any notice given by the parties under s. 21(2) that the matter should be dealt with by a presidential member alone; or
- such other matters that the President considers relevant.

Special Constitution Provisions

Prior to the commencement of the amendments, a number of Acts provided that the Tribunal had to be constituted in a particular way for the exercise of certain review powers. For example, the review of certain decisions under the *Migration Act 1958* had to be undertaken by a presidential member alone. The Amendment Act repeals the majority of these special constitution provisions.

Special constitution provisions continue to exist for hearings dealt with in the Security Appeals Division of the Tribunal, for the review of certain decisions under the *Archives Act 1983* and the *Freedom of Information Act 1982* concerning conclusive certificates and for the review of certain decisions under the *Commonwealth Electoral Act 1918* relating to political parties.

ROLE OF THE FEDERAL COURT

The Amendment Act has amended ss. 44 of the AAT Act to allow the Federal Court to make limited findings of fact in certain circumstances where a decision of the Tribunal has been appealed under s. 44(1).

The Federal Court pursuant to s. 44(7) of the AAT Act may make findings of fact if:

- the findings of fact are not inconsistent with findings of fact made by the Tribunal (unless the Tribunal's findings are the result of an error of law); and
- it appears to the Court considers that it is convenient to make findings of fact, having regard to:
    - the extent (if any) to which it is necessary for the facts to be found;
    - the means by which those facts might be established;
    - the expeditious and efficient resolution of the whole matter to which the proceeding before the Tribunal relates;
    - the relative expense to the parties of the Court, rather than the Tribunal, making the findings of fact;
    - the relative delay to the parties of the Court, rather than the Tribunal, making the findings of fact;
    - whether any of the parties considers that it is appropriate for the Court, rather than the Tribunal, to make the findings of fact; and
    - such other matters (if any) as the Court considers relevant.

The Court may have regard to evidence in the proceeding before the Tribunal and may receive further evidence for the purpose of making findings of fact: ss. 44(8).