FORUM OF COMMONWEALTH AGENCIES NETWORK LUNCH

The Hon. Justice Garry Downes AM
President of the Administrative Appeals Tribunal

Address to the Forum of Commonwealth Agencies Network

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Modern tribunals play an important part in society. In 1975 the Australian Government established the Administrative Appeals Tribunal as a general administrative tribunal to review a broad range of government decisions. These include social security, veterans' entitlements, Commonwealth employees' compensation, taxation, migration, freedom of information, corporations, insurance, fisheries and many other areas. Other administrative tribunals established by the Commonwealth include the Social Security Appeals Tribunal, the Veterans' Review Board and the Migration and Refugee Review Tribunals. The Commonwealth has also established other tribunals such as the National Native Title Tribunal and the Superannuation Complaints Tribunal.

MERITS REVIEW

The Commonwealth administrative tribunals and many state tribunals are merits review tribunals. They reconsider the decision under review and determine whether it is the correct or preferable decision. Correct, when there is only one decision; preferable, when a range of decisions is available. Administrative review tribunals are accordingly concerned with more than determining legal rights. They may determine, for example, whether a development should proceed or what conditions should be imposed on a broadcasting licence. Merits review has been said to involve the administrative review tribunal "standing in the shoes" of the original decision-maker.

Merits review in the Administrative Appeals Tribunal is to be contrasted with judicial review in a court. Courts reviewing administrative decisions are concerned with the lawfulness of the decision rather than its correctness. The Tribunal must make lawful decisions first, and then correct ones. A court may set aside a decision because, for example, the decision-maker has wrongly understood the legal basis for it, or acted on wrong material, or not permitted the parties a proper opportunity to be heard. It may not set aside a decision because it does not agree with it unless the decision is so unreasonable that no reasonable person could have made it. Such a decision is contrary to law.

THE AAT

Before a hearing the Tribunal conducts conferences with the parties to explore settlement. If the matter cannot be settled, conferences help to prepare the matter for hearing. An important aspect of the role of the Tribunal is that Government decision-makers and agencies must assist the Tribunal in making its decision. They are not there merely to oppose the applicant's claim.

However, the similarities between the Tribunal and courts are not irrelevant. The Tribunal carries out its role in the manner that courts carry out their roles.

It has wider decision-making powers but it determines how it should exercise them in a similar way to a court.

Accordingly, where the parties do not reach agreement as to the outcome, the Tribunal is required to hold a hearing and to listen to arguments presented by representatives of both sides before it makes its decision. Its decision must be supported by reasons which are generally made public. The level of procedural fairness accorded to each applicant depends on the circumstances of the case. In some administrative tribunals where only one party is present there may be no legal representation and no witnesses giving oral evidence. However in other hearings before administrative tribunals, both these factors may be present.

THE TRIBUNAL'S INDEPENDENCE

What is particularly important about the Tribunal is that it is independent from Government even though it reviews decisions of the Government. Its members are not public servants. They are appointed by the Governor-General, usually for five years. They can only be removed by both Houses of Parliament acting together.

The perception and reality of the independence of the Tribunal is crucial in an age where citizens are demanding greater accountability from governments, when there is mass communication and greater public awareness. The rationale for the very existence of administrative review is undermined, unless the public are confident that administrative decision-makers responsible for the review of decisions made by government officials and the institutions to which they belong are competent and independent.[1]

[1] See Justice Deirdre O'Connor, "Administrative Decision-Makers in Australia: the Search for Best Practice" 17-20 June 2001

A recent "User Satisfaction Survey" conducted by the Tribunal showed that while applicant participants in the survey were generally satisfied with all aspects of the Tribunal's service, the perceived independence of the Tribunal received the lowest rating in this section at 3.5 (on a scale where 5 = satisfied and 1 = not at all satisfied). When representatives of government departments and agencies, and legal practitioners for applicants and respondents were asked the same question about their perception of the Tribunal's independence from government, government agencies rated the Tribunal's independence at 4.8; legal practitioners for applicants at 4.4 and legal practitioners for respondents at 4.8. Individual applicants see the Tribunal as a continuum in the decision-making process and not necessarily as an independent body.

Applicants only apply to the Tribunal when they are dissatisfied with the decision of a Government department or agency. Consequently, they usually have a negative predisposition towards that department in particular and government 'bureaucracy' in general and this will inevitably affect their perception of the Tribunal and its services. It was clear from some of the comments that many applicant participants did not distinguish the Tribunal from the original decision-making agency. As far as they were concerned, the Tribunal process was another step in their long journey towards 'justice'.

There is no question that the independence of tribunal members in decision-making has a substantial influence on the quality of the review system and its value in the framework of government accountability. Equally significant for the legitimacy of the tribunal system is the community's acceptance that the system has value to them as citizens. As the ARC noted in its review of Commonwealth merits review tribunals:

> "It is crucial that members of the community feel confident that tribunal members are of the highest standard of competence and integrity, and that they perform their duties free from undue government or other influence."[2]

[2] Administrative Review Council, Better Decisions: Review of Commonwealth Merits Review Tribunals p 70.

If applicants do not perceive the Tribunal as independent, they will see a decision of the Tribunal as associated with the respondent. The way the respondent conducts itself in the review process and assists the Tribunal in helping it reach the correct or preferable decision is crucial to both the respondent and the Tribunal's perceived and actual independence.

ROLE OF THE RESPONDENT

The role of a respondent in the Tribunal is quite different to the role of a defendant in ordinary litigation, even when the defendant is a government department or agency.

Once the Tribunal becomes the decision-maker it follows that the decision-maker and the respondent's interest is for the correct or preferable decision to be made. This is so even if that decision is different to the decision subject to review. Just as the staff of departments or agencies will have turned their attention to assisting decision-makers in making the original decisions, so too it is natural that they should adopt the same role so far as the Tribunal is concerned. The role of the support teams in the department or agency when the original decision was made was not a partisan role and it should not become a partisan role when the Tribunal is seeking to undertake precisely the same task as was undertaken by the original decision-maker.

Without the need to resort to the detail of the legislation or to government policy it is clear that the role of a respondent before the Tribunal is:

(a) to assist the Tribunal to reach the correct or preferable decision; and

(b) not simply to seek to uphold the existing decision.

This role of the respondent has at least three aspects:

(i) Reconsidering the original decision at the time of the Tribunal review for the purpose of determining whether it continues to represent the correct or preferable decision. This practice may

involve informally referring the decision back to the decision-maker although that should not be allowed to delay review in the Tribunal;

(ii) Furnishing evidence and submissions to the Tribunal to ensure that the Tribunal is in the best position to make the correct or preferable decision. This may involve special assistance being given when an applicant is unrepresented but will continue to apply even though the applicant is represented; and

(iii) Responding to requests for assistance on particular issues from the Tribunal. In undertaking this task the respondent will simply be acting in the way that it would have acted if a similar request had been made by the original decision-maker.

In the early days of the Tribunal much of what I have said already had judicial approval. In *McDonald v Director-General of Security* (1983) 6 ALD 6 at 18, 19 Northrop J, forming part of a unanimous Full Federal Court, said:

> *"… The Tribunal is not bound by the rules of evidence. It has before it all the material that was before the person who made the decision under the Act and which is the subject of the review before the AAT. Additional material may be placed before the AAT. As a matter of convenience, the Director normally appears to assist the Tribunal, but the Director-General is not to be treated in the same way as a party to proceedings before a Court. In* Sordini v Wilcox *(1982) 42 ALR 245, a review under the Administrative Decisions (Judicial Review) Act 1977, the administrative body whose decision was being reviewed appeared before the court. At 255 Northrop J said: "Counsel for the respondents stated that each of the first three-named respondents, being the members of the Review Committee, would abide by the order of the court. Counsel for the respondents, very properly, made substantive submissions on behalf of the Commission. Where there are no adversary parties appearing before an administrative body, as in this case, it is important that the court receive assistance of counsel appearing for the administrative body making the decision which is being challenged under the Judicial Review Act."*
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> *It is equally important that in reviews by the AAT of decisions by administrative bodies such as the Director-General, or his delegate, in which there were no adversary parties, the AAT receive the assistance of persons acting on behalf of the administrative body. Likewise, in appeals of this court from the AAT on questions of law, it is important that the court receive the assistance of counsel appearing for the*

administrative body. This practice, however, which gives the outward appearance of an adversary system, should not be allowed to obscure the true position, and in particular to justify the introduction of concepts of onus of proof into the determination of claims under the legislation where no onus of proof in the legal sense arises. This view, quite correctly, has been acted upon by the AAT in the past. The AAT has not departed from that practice in the present case."

In a hearing relating to a radio or television licence the respondent or authority might provide demographic evidence not available to the applicant which is not part of the respondent's case but is part of the applicant's case. In an aviation matter the respondent authority might provide specialist evidence relating to matters not available to the applicant even though they assist the applicant. In a security appeal, particularly where the applicant is not permitted to be present, the respondent should virtually adopt the role of counsel assisting and actively present evidence on all issues, particularly where this is requested by the Tribunal. Where the Tribunal requests information on issues not considered to have arisen by the decision-maker but which the Tribunal considers to be relevant the respondent should present that material. In a Veterans claim the respondent will present material both favourable and unfavourable to the applicant to which the applicant does not have access. In a Comcare case where the respondent has material not favourable to the respondent but not available to the applicant the material will be presented. In every case the object of the respondent should be to assist the Tribunal in coming to the correct or preferable decision and not to "win" or uphold a doubtful decision.

THE NEW STATUTORY OBLIGATION

This analysis has so far drawn only upon the nature of administrative review to draw its conclusions. However, the recent amendment to the *Administrative Appeals Tribunal Act 1975* (Cth) recognises them and gives them statutory effect. The Model Litigant Policy of the Commonwealth is also relevant.

The *Administrative Appeals Tribunal Amendment Act 2005* was assented to on 1 April 2005 and its operative provisions took effect on 16 May 2005. It

introduced, among other things, a range of changes to the way in which the Tribunal may deal with applications for review.

One of the amendments is particularly relevant to the issue of what the Tribunal expects of parties that come before it. A new subsection has been introduced into s 33 of the Act which provides:

> *"Decision-maker must assist Tribunal*
> *(1AA) In a proceeding before the Tribunal for a review of a decision, the person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding."*

This provision probably has its origins in Recommendation 21 of the Australian Law Reform Commission's *Managing Justice* report:

> *"Recommendation 121.*
> *The federal Attorney-General should specify in the model litigant obligations, set down in legal services directions under the Judiciary Act 1903 (Cth), that agencies and agency representatives in the conduct of federal review tribunal proceedings have duties to assist the tribunal to reach its decision."*

The Office of Legal Services Coordination (OLSC) has issued Guidance Note No. 1 of 2005 in relation to this amendment. The OLSC states that the new provision is consistent with and builds on this ALRC recommendation which was made in response to concerns that Australian Government departments and agencies, and their legal representatives, were overly adversarial in their approach to Tribunal proceedings. Behaviours that were said to be indicative of an overly adversarial approach included deliberate late disclosure of material and focussing solely on defeating the application during the hearing. The above analysis shows, however, that the obligation to assist is much more extensive than merely avoiding such negative practices.

To my mind, the provision serves the dual purpose of reminding parties, and particularly respondents, of the matters I have discussed and imposing a positive statutory obligation to that end. As the OLSC notes in its Guidance

Note, the new provision will enable the Tribunal to reach its decision more efficiently by eliminating overly adversarial approaches such as late disclosure of relevant material.

It is important, for the future, for respondents to understand the Tribunal's role, particularly in the light of the recent survey findings relating to independence.

USER SURVEY

Other results of the Tribunal's recently conducted survey show positive improvements in the Tribunal's level of service in a number of areas. Results include:

- The majority of applicant participants (84%) expected their review to take less than six months.
- The time actually taken for most reviews (83%) varied from less than three months to about one year. This compares with 74% of reviews completed in less than one year in the 1996 survey.
- Applicant participants generally (65%) believe the AAT deals fairly with their review (1996 – 67%). So too did representatives of government departments and legal practitioners (98%; 83%).
- In terms of general attributes of service, all aspects of service have improved, other than the return of phone calls which fell from 80% to 78%. The greatest improvement was in the provision of adequate facilities (from 68% in 1996 to 80%).
- The perception of hearings has improved in all areas, other than the convenience of the location, which fell from 76% to 74%. The greatest improvement is for the level of formality of the hearing (from 68% to 76%) and sufficient information given before the hearing (from 63% to 70%).

Applicant participants were generally satisfied with all aspects of the Tribunal's service, with the courtesy of staff receiving the highest rating. In terms of hearings, the results showed that applicant participants appreciated

the level of informality of the hearing and the opportunity they have to explain their case. The explanation of procedures at the hearing and the timing of both the hearing and the decision also rated relatively highly.

It is clear there is a need to raise further awareness that the Tribunal is independent of the original decision-making department. We need to continue to mention at conferences and hearings that the Tribunal is independent and that applicants are assured of a fair and impartial review. However the results have shown that there has been significant improvement in the majority of areas since the survey was last conducted in 1996.