



**THE SECURITY APPEALS DIVISION
OF THE ADMINISTRATIVE APPEALS TRIBUNAL**

**PROCEDURAL FAIRNESS, HEARINGS AND DECISION-MAKING IN THE
SECURITY CONTEXT OF THE ADMINISTRATIVE APPEALS TRIBUNAL**

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**Paper presented to the Australian Government Solicitor Administrative
Law Symposium**

26 March 2010

Introduction

I am very pleased to be able to speak to you today about the Security Appeals Division of the Administrative Appeals Tribunal and the particular challenges posed by procedural fairness for hearings and decision-making in this division.

By way of introduction, I note that the procedures and powers of the Security Appeals Division are unusual. To put them in context I will give you a brief overview of the Tribunal and the way in which it operates. This will provide a basis for analysing the types of decisions that are dealt with in the Security Appeals Division, the procedures that apply to their review and the Tribunal's decision-making powers on review.

Overview of the Tribunal

The Tribunal was established as part of a group of measures which together introduced a new and advanced system of administrative law for Australia. The other parts included:

- the establishment of the office of the Ombudsman to investigate complaints about Australian Government departments and agencies;

- the modernisation of the rules for challenging administrative decisions of the Australian Government in the courts in the form of the *Administrative Decisions (Judicial Review) Act 1977*;
- the introduction of freedom of information legislation to facilitate access to government documents and other records; and
- the establishment of the Federal Court of Australia.

These measures were designed to improve the accountability and transparency of government in a number of distinct, but complementary, ways. The individual citizen would have a range of options for seeking redress in relation to decisions and processes affecting him or her.

The role of the Tribunal is to review administrative decisions on the merits: that is, to consider afresh the facts, law and policy relevant to a decision and decide whether that decision should be affirmed, varied or set aside. If the decision is set aside, a new decision is substituted. The Tribunal is said to stand in the shoes of the original decision-maker in making its substituted decision.¹ In undertaking this task, the Tribunal is required to make the "correct or preferable decision".² The conjunction reflects the difference between a matter susceptible of only one decision, in which the "correct" decision must be made, and a decision which requires the exercise of a discretion or a selection between more than one available decision, in which case the word "preferable" is appropriate.

By providing individuals and others with a mechanism for challenging decisions that affect their interests, the Tribunal offers the opportunity for a more just outcome in cases where the decision under review was not the correct or preferable decision. However, the Tribunal's role goes beyond justice in individual cases. The Tribunal's decisions provide guidance to decision-makers more generally in relation to the interpretation of law and policy for decisions that it reviews. The Tribunal's decision in one matter should be applied to future decision-making in the same area.

¹ See, for example, *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934 at 943.

² *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591 per Bowen CJ and Deane J.

How does the Tribunal operate generally?

The Tribunal is required to provide a review process that is fair, just, economical, informal and quick.³

On receipt of an application, the Tribunal notifies the decision-maker that an application has been lodged. Within 28 days of receiving the notice, the decision-maker must provide to the Tribunal and send to the applicant:

- a statement setting out the findings on material questions of fact, referring to the evidence supporting the findings and giving the reasons for the decision; and
- every document that is in the decision-maker's possession or control that is relevant to the review.⁴

These requirements are a crucial part of the review process. In particular, they assist the Tribunal and the person affected by the decision to understand the basis on which the decision was made.

In most applications, the parties attend one or more conferences conducted by a conference registrar or Tribunal member. Conferences provide an opportunity for the Tribunal and the parties to:

- discuss and define the issues in dispute;
- identify any further supporting material that parties may wish to obtain;
- explore whether the matter can be settled.

Conferences also provide an opportunity for the Tribunal to discuss with the parties the future conduct of the application and, in particular, whether another form of alternative dispute resolution (ADR) may assist in resolving the matter. The Tribunal can refer an application to conciliation, mediation, case appraisal or neutral evaluation.

³ Section 2A of the *Administrative Appeals Tribunal Act 1975*.

⁴ Section 37 of the Act.

The Tribunal has a high rate of success in assisting parties to resolve their matters by agreement. In the most recent financial year, 81 per cent of applications were finalised other than by way of a decision of the Tribunal on the merits of the application. In the financial year to date, the rate is 83 per cent. For those matters that do not resolve during the pre-hearing process, the Tribunal must hold a hearing. It can be dispensed with only if all parties agree and the Tribunal is satisfied that the issues can be adequately determined on the papers.⁵

In general, Tribunal hearings are open to the public: s 35.⁶ While the Tribunal can order that all or part of a hearing be conducted in private, this occurs rarely. Hearings must proceed without unnecessary formality or technicality. The Tribunal is not bound by the rules of evidence and may inform itself on any matter as it thinks appropriate.⁷

While there is procedural flexibility and informality, the rules of natural justice apply. Section 39 of the *Administrative Appeals Tribunal Act 1975* provides specifically that the Tribunal must ensure that every party is given a reasonable opportunity to present his or her case and, in particular, to:

- inspect any documents to which the Tribunal proposes to have regard in reaching a decision; and
- make submissions in relation to those documents.

The Tribunal requires parties to disclose as early as possible in the review process relevant material which they believe supports their case. While the immediate purpose is to facilitate the settlement of an application or narrow the issues in dispute, it also ensures parties have the opportunity to prepare for the hearing knowing what material the other party will seek to rely on.

⁵ Section 34J of the Act.

⁶ Section 35 of the Act.

⁷ Section 33 of the Act.

In terms of the structure of the Tribunal, the Act requires the Tribunal to exercise its powers in Divisions.⁸ In addition to the Security Appeals Division, there is:

- the General Administrative Division;
- the Taxation Appeals Division including the Small Taxation Claims Tribunal; and
- the Veterans' Appeals Division.⁹

Presidential members of the Tribunal - that is, judicial members and Deputy Presidents - may exercise powers in any Division of the Tribunal. Non-presidential members - Senior Members and Members - may only exercise powers in the Divisions to which they have been assigned.¹⁰ Senior Members and Members are assigned to different Divisions on the basis of their particular knowledge and expertise.

The Security Appeals Division

With this background as to the procedures generally in the Tribunal I now pass to the procedures in the Security Appeals Division.

Three types of applications must be dealt with in the Security Appeals Division:

- applications for review of adverse or qualified security assessments undertaken by the Australian Security Intelligence Organisation (ASIO)¹¹;
- applications for review of decisions of the Australian Archives under the *Archives Act 1983* in respect of access to a record of ASIO¹²; and
- applications for review of preventative detention orders issued or extended under the *Criminal Code*¹³.

⁸ See section 19 of the Act.

⁹ The Veterans' Appeals Division is not listed in s 19(2) of the Act. It is prescribed in reg 4A of the *Administrative Appeals Tribunal Regulations 1976*.

¹⁰ Section 19(3) and 19(4) of the Act.

¹¹ Section 19(6)(a) of the Act.

¹² Section 19(6)(b) of the Act.

The focus of my presentation today will be the Tribunal's jurisdiction in relation to security assessments undertaken by ASIO, but I will make some brief comments on the other areas of jurisdiction.

It is relevant to note that the Security Appeals Division was established only in 1995. Prior to that, reviews of ASIO assessments were undertaken by the Security Appeals Tribunal (SAT) – an independent body established under the *Australian Security Intelligence Organisation Act 1979*. The SAT commenced operations in 1980 and was abolished in 1995 when jurisdiction was transferred to the AAT. Jurisdiction in relation to preventative detention orders was conferred by the *Anti-Terrorism Act (No. 2) 2005* which commenced in December 2005.

Review of adverse or qualified security assessments made by ASIO

Making an adverse or qualified security assessment

ASIO undertakes security assessments for a variety of purposes. One of its primary functions is to gather and analyse intelligence for the purpose of identifying activity that may be prejudicial to the security of Australia or other countries. The *ASIO Report to Parliament 2008-2009* provides general information on the nature of the agency's activities in this area.¹⁴ As part of its role, ASIO may issue security assessments that are provided to other Commonwealth agencies including the Department of Foreign Affairs and Trade. On the basis of an adverse assessment, the Minister for Foreign Affairs may decide not to grant, or to cancel, an Australian passport. In the period from November 2001 to June 2005, this was done in relation to 33 Australians.¹⁵ The Tribunal has jurisdiction to review both the security assessment issued by ASIO and the decision relating to the passport.

Most security assessments undertaken by ASIO relate to personnel security and counter-terrorism checking. In relation to personnel security, ASIO

¹³ Section 105.51(6) of the *Criminal Code*.

¹⁴ Australian Security and Intelligence Organisation, *ASIO Report to Parliament 2008-2009*.

¹⁵ Australian Security and Intelligence Organisation, *ASIO Report to Parliament 2004-2005*, 21.

conducts security assessments at the request of Australian Government agencies in relation to individuals whose work involves access to national security classified information or to areas to which access is controlled or limited on security grounds. The assessment forms part of the process of the agency deciding whether or not to grant a person a security clearance.

As is noted in the *ASIO Report to Parliament*, ASIO will advise the agency whether anything in the person's background or activities is a cause for security concern. The advice is usually based on an assessment of material that has been provided by the relevant agency and by the applicant.¹⁶

After undertaking the assessment, ASIO will either:

- advise the agency that it does not recommend against a security clearance; or
- issue an adverse or qualified assessment.

An adverse security assessment is a recommendation that the person should not be granted the access proposed. A qualified assessment does not recommend against access but provides information that ASIO considers may need to be considered in decision-making. Qualified assessments also provide the requesting agency with information to help minimise the potential for the compromise of sensitive information. It is important to note that the ultimate decision to grant or deny a security clearance rests with the agency.

In the area of counter-terrorism, ASIO undertakes security assessments in relation to people undertaking a variety of activities. They include:

- people required to hold Aviation and Maritime Security Identification Cards to access secure areas at airports and ports;
- pilots and trainee pilots generally;
- people who require access to ammonium nitrate;
- Staff and visitors to the Australian Nuclear Science and Technology Organisation facility at Lucas Heights, Sydney.

¹⁶ Australian Security and Intelligence Organisation, *ASIO Report to Parliament 2008-2009*, 26.

Assessments in this area are limited to examining whether the relevant person has any known links to terrorism.¹⁷ In 2008-09 ASIO completed more than 65,000 of these checks.¹⁸

The Tribunal has jurisdiction to review adverse or qualified security assessments issued by ASIO in relation to both personnel security and counter-terrorism checking.¹⁹

I note that ASIO also undertakes security assessments in relation to whether persons applying for visas to enter and remain in Australia may be a threat to national security. In 2008-09, nearly 60,000 assessments were undertaken.²⁰ In general, however, these assessments are not subject to review by the Tribunal.

There are two kinds of cases which generally come before the Tribunal as a result of an adverse or qualified ASIO security assessment. First, there are public servants who are appealing against their security assessment because it diminishes their capacity to fulfill their roles or to be eligible for promotion. Secondly, there are cases involving appeals against a cancellation of or refusal to issue an Australian passport. All three reported judgments from the Tribunal and the Federal Court concerning the Security Appeals Division were passport cancellation matters. These cases are *Traljesic v Attorney-General (Cth)* (2006) 150 FCR 199, *Hussain v Minister for Foreign Affairs & Anor* (2008) 169 FCR 241 and *Habib v Director-General of Security & Anor* (2009) 175 FCR 411.

Notification of an adverse or qualified security assessment or of a passport cancellation

Where ASIO provides an adverse or qualified security assessment to an Australian Government agency or to a State authority, the agency or authority is generally required to notify the affected person that an assessment has

¹⁷ *Ibid.*, 27.

¹⁸ *ibid.*

¹⁹ Section 54 of the *Australian Security and Intelligence Organisation Act 1979*.

²⁰ Australian Security and Intelligence Organisation, *ASIO Report to Parliament 2008-2009*, 20

been made. The notice must be given within 14 days after the agency or authority receives the assessment and it must include information on the person's right to apply to the Tribunal for review. A copy of the assessment must be attached to the notice.²¹

The Minister for Foreign Affairs may make a decision to cancel or refuse to issue an Australian passport under ss 14 and 18 of the *Australian Passports Act 2005*. Such decisions, amongst others, are subject to review by the Administrative Appeals Tribunal, according to ss 48 and 50 of the Passports Act. However, applications for review of a passport cancellation or refusal to issue a passport are not heard in the Security Appeals Division of the Tribunal.

The Attorney-General has power under the ASIO Act to limit the information that is provided to a person in relation to a security assessment that has been conducted. The Attorney-General may certify that the withholding of notice of the making of a security assessment is essential to the security of the nation. In this case, the agency or authority is exempt from providing a notice to the person of the making of the assessment.²²

The Attorney-General may also certify that disclosure of one or more of the grounds for making the security assessment would be prejudicial to the interests of security. The copy of the assessment provided to the person must not contain any of the material covered by the certificate.²³

Certificates of these types have been the subject of an unsuccessful constitutional challenge in the situation where a Chapter III Judge is presiding in the Tribunal over a Security Appeals matter. In *Hussain v Minister for Foreign Affairs & Anor* (2008) 169 FCR 241, the full Federal Court held that such a certificate does not constitute control by the Attorney-General to a level

²¹ Section 38(1) of the ASIO Act.

²² See ss 38(2)(a) and 38(4) of the ASIO Act. If a person is not notified of the making of an assessment, the person cannot apply to the Tribunal for review of the assessment. Section 65 of the ASIO Act provides that the responsible Minister may, if satisfied that it is desirable to do so by reason of special circumstances, require the Tribunal to inquire and report on any question concerning action taken by ASIO in these circumstances or to review such assessment and the information on which it was based.

²³ Sections 38(2)(b) and 38(5) of the ASIO Act.

which would render the proceedings incompatible for a Chapter III Judge to hear. Furthermore, the court observed (at 280) that “there is much to be said for having a judge exercise the vital task of reviewing ASIO assessments and decisions by the relevant Minister to refuse or cancel passports.”

The review process

- Applying for review

An application to the Tribunal for review of an adverse or qualified security assessment can be lodged only by the person in respect of whom the assessment was made.²⁴ The application must be in writing and must be accompanied by:

- a copy of the security assessment; and
- a statement indicating the parts of the assessment with which the applicant does not agree and setting out the grounds on which the application is made.²⁵

The application must be lodged within 28 days after the person is notified of the making of the assessment.²⁶ The Tribunal can grant an extension of time to make the application if the Tribunal considers it is reasonable in all the circumstances.²⁷ An application fee of \$682 must be paid unless the applicant falls within one of the categories of people exempt from paying the fee. The Tribunal may waive the fee on the basis of financial hardship.²⁸

Applications for review of adverse or qualified assessments form only a small part of the total number of applications received by the Tribunal.²⁹

²⁴ Section 54 of the ASIO Act and s 27AA(1) of the Act.

²⁵ Section 29(1)(ca) of the Act.

²⁶ Section 29(2) of the Act.

²⁷ Section 29(7) of the Act.

²⁸ Section 29A of the Act. A person is not required to pay a fee if he or she has been granted legal aid, is in prison or otherwise detained in a public institution, is aged under 18 years of age, holds a card that certifies entitlement to Commonwealth health concessions or is in receipt of Austudy payment, youth allowance or ABSTUDY recipient.

²⁹ The Tribunal has received the following number of applications over time: 0 in 1995-96; 0 in 1996-97; 1 in 1997-98; 2 in 1998-99; 0 in 1999-2000; 4 in 2000-01; 8 in 2001-02; 3 in 2002-03; 3 in 2003-04; 7 in 2004-05; 9 in 2005-06; 2 in 2006-07; 0 in 2007-08; and 0 in 2007-08.

On receipt of a valid application for review, the Tribunal sends a copy of the application and the statement that has been lodged with the application to the Director-General of Security and to the agency to which the assessment was given.³⁰

The parties to the review are the Director-General of Security and the applicant.

- Pre-hearing process

It is from this point that the review process for applications of this kind begins to diverge from the usual case management processes in the Tribunal. Neither the Director-General nor the agency or authority who received the security assessment is required to comply with s 37 of the Act. That is, there is no requirement to provide the Tribunal and the applicant with a full statement of reasons or the relevant documents within 28 days.

Where an application for review has been made and the Attorney-General has issued a certificate that disclosure of the complete statement of grounds contained in a security assessment would be prejudicial to the interests of security, the Director-General is required to send a copy of the certificate to the Tribunal and the complete assessment within 30 days of receiving notice of the application.³¹ The Tribunal must not tell the applicant of the existence of, or permit the applicant to have access to any copies of particulars of, the certificate or any matter to which the certificate relates.³²

This is the first of a range of situations in which the Tribunal will receive information which it is not permitted to disclose to the applicant.

No conferences are held in relation to applications for review of security assessments. In fact, the Act provides specifically that the Division of the Act relating to ADR processes does not apply to reviews of this kind.³³

³⁰ Section 29B of the Act.

³¹ Section 38A(1) of the Act.

³² Section 38A(2) of the Act.

³³ Section 34 of the Act.

The usual course is for the member who will preside at the hearing to conduct one or more directions hearings with both parties and/or their representatives.³⁴ The directions hearings provide an opportunity for the Tribunal and the parties to discuss the issues involved in the case including the reasons why ASIO made the decision, the reasons why the applicant thinks ASIO's decision is wrong and the sort of information that the applicant may seek to rely on in support of his or her case. They also provide an opportunity for the Tribunal to set a timetable for the parties to lodge information that they will seek to rely on at the hearing and otherwise discuss matters relevant to the conduct of the hearing.

To an extent, the directions hearings cover matters that would otherwise be dealt with in a conference. There is, however, a greater focus on procedural issues than on the exploration of settlement possibilities. Given the nature of the applications, there is more limited scope for reaching an agreed outcome.

- Information provided by ASIO to the Tribunal

While section 37 of the Act does not apply in proceedings of this kind, the Director-General is under a duty to present to the Tribunal all relevant information that is available to ASIO, whether it is favourable or unfavourable to the applicant.³⁵ This provision ensures that the Tribunal is in the same position as ASIO in relation to the making of the decision.

Contrary to the usual practice in other matters before the Tribunal, copies of material lodged by the Director-General with the Tribunal will not necessarily be provided to the applicant. The Attorney-General may issue a certificate stating that the disclosure of particular information or the contents of certain documents would be contrary to the public interest.³⁶ The Tribunal must ensure that the information or documents specified in the certificate are not

³⁴ Section 39A(4) of the Act.

³⁵ Section 39A(3) of the Act.

³⁶ Section 39B(2) of the Act.

disclosed to any person other than the members constituted to hear the matter.³⁷ This includes the applicant and his or her representatives.

In limited circumstances, the Tribunal has a discretion to determine that material covered by a certificate should be released to the applicant.³⁸ The discretion is not available, however, if the certificate has been issued on the basis that disclosure of the information or documents would prejudice security or the defence or international relations of Australia or because it would involve the disclosure of deliberations or decisions of the Cabinet, a Committee of the Cabinet or the Executive Council.

- Constitution of the Tribunal for hearing

If the matter is not resolved during the pre-hearing process, it will proceed to a hearing. The Act specifies how the Security Appeals Division must be constituted for the purposes of reviewing a security assessment.³⁹ This is one of the few remaining areas where constitution requirements are specified in statute. In most other areas, it is for the President or his or her delegate to determine constitution taking into account the nature of the matter.

The Act provides that the Tribunal must consist of three members:

- a presidential member - that is, a judge or a Deputy President; and
- two other members of the Tribunal.

At least one of these two members must have knowledge of, or experience in relation to, matters of the kind to which the assessment is related.⁴⁰ For example, if the assessment concerns employment in the Australian Public Service, one member must be a former public servant. If it concerns the *Australian Citizenship Act 1948*, the *Migration Act 1958* or the *Australian Passports Act 2005*, the member must have knowledge or experience regarding the needs and concerns of people who are or have been migrants.

³⁷ Section 39B(3) of the Act.

³⁸ Section 39B(5) of the Act.

³⁹ Section 21AA of the Act.

⁴⁰ Section 21AA(5) of the Act.

The Tribunal members who are eligible to exercise powers in the Security Appeals Division have a wide range of relevant knowledge and experience. Members have experience in the Australian Public Service, service in the Defence Force and experience in migrant and ethnic affairs.

- The hearing

A number of the general provisions of the Act relating to hearings apply to hearings in the Security Appeals Division. For example, the Tribunal is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks appropriate. At any stage of the proceedings, the Tribunal can invite or summons a person to give evidence.⁴¹ A Tribunal member may ask questions of a witness and require a witness to answer such questions.

However, there are also a number of key differences. The order in which the parties present evidence and submissions is unusual. The Tribunal is required to first hear evidence and submissions presented by ASIO and the agency concerned.⁴² The Tribunal must do all things necessary to ensure that the identity of a person giving evidence on behalf of the Director-General is not revealed when asked to do so.⁴³ The applicant is then given an opportunity to present evidence and submissions.⁴⁴

Unlike most other Tribunal hearings, hearings in the Security Appeals Division must take place in private.⁴⁵ That is, members of the public are not permitted to be present at a hearing.

In general, the applicant and his or her representative are entitled to be present when the Tribunal is hearing evidence or submissions presented by the Director-General.⁴⁶ However, the Minister administering the ASIO Act may certify that particular evidence or submissions are of such a nature that their disclosure would be contrary to the public interest on the basis that it

⁴¹ Section 39A(14) of the Act.

⁴² Section 39A(12) of the Act.

⁴³ Section 39A(11) of the Act.

⁴⁴ Sections 39A(12) and 39A(13) of the Act.

⁴⁵ Section 39A(5) of the Act.

⁴⁶ Section 39A(6) of the Act.

would prejudice security or the defence of Australia.⁴⁷ Where such a certificate exists, the applicant is not allowed to be present and the applicant's representative may be present only if the Minister consents.⁴⁸

Certificates of this kind are often issued. Consent is frequently withheld to applicants or legal representatives being present. Such a certificate has recently been the subject of an unsuccessful attempt at judicial review in the Federal Court: *Traljesic v Attorney-General (Cth)* (2006) 150 FCR 199. This case involved a passport cancellation.

As you will have noted, the legislation significantly modifies the rules of natural justice which ordinarily apply in the Tribunal. An applicant will not necessarily know all of the details of the case against him or her. He or she cannot test all of the evidence presented by the Director-General nor present evidence that would controvert adverse material that is not disclosed. He or she cannot make submissions in relation to all of the material before the Tribunal. From the applicant's perspective, the procedures which apply to the review of security assessments are clearly disadvantageous. In *Hussain v Minister for Foreign Affairs & Anor* (2008) 169 FCR 241 at 281, the full Federal Court noted that although the Director – General of Security must give the Tribunal all relevant information, “it would be naïve to think that this is a complete answer to what is otherwise a system that is inherently unfair to an applicant.” On the other hand, in *Habib v Director-General of Security & Anor* (2009) 175 FCR 411, the claim for breach of natural justice turned not on the unique nature of the procedures in the Security Appeals Division, but the weight given to and inferences drawn from untruthful evidence given by the applicant, Mr Habib, and his wife, during their evidence in the proceeding.

The procedures also present challenges for the Tribunal, not only in managing the hearing and the material before it, but also in relation to the Tribunal's role during the hearing and in making its decision. In every kind of application for review, the Tribunal takes an active role in the questioning of witnesses,

⁴⁷ Section 39A(8) of the Act.

⁴⁸ Section 39A(9) of the Act.

requesting further evidence on issues where this appears necessary and asking probing questions in relation to submissions that are made. In the context of proceedings where evidence and submissions may be given in the absence of the applicant, this aspect of the Tribunal's role becomes even more significant. A useful general discussion of issues relating to the exclusion of an applicant from a hearing and its impact on the decision-making process is found in the decision of Brennan J, sitting as President of the Tribunal in *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33 at 53-57.

- The Tribunal's findings

Following the hearing, the Tribunal must make and record its findings in relation to the assessment.⁴⁹ Section 61 of the ASIO Act provides that, to the extent that any of the Tribunal's findings do not confirm the assessment, they are to be treated as superseding it. However, a finding only has the effect of superseding information forming part of an assessment if the Tribunal states that the information is incorrect, is incorrectly represented or could not reasonably be relevant to the requirements of security.⁵⁰

The Tribunal's role in these applications is therefore somewhat more limited than in other applications where it must make the correct or preferable decision and has the power to set aside and substitute its own decision. Here it can only state its opinion as to the correctness of, or justification for, any opinion, advice or information contained in the assessment.⁵¹ Section 61 of the ASIO Act ensures, however, that the Tribunal's decision has effect. Agencies must proceed on the basis of the Tribunal's findings.

The Tribunal must provide copies of its findings to the applicant, the Director-General, the relevant government agency and the Attorney-General.⁵² Any part of the findings relating to a matter not disclosed to the applicant will be given only to the Director-General.⁵³ The applicant is entitled to publish the

⁴⁹ Section 43AAA(2) of the Act.

⁵⁰ Section 43AAA(3) of the Act.

⁵¹ Section 43AAA(2) of the Act.

⁵² Section 43AAA(4) and (5) of the Act.

⁵³ Section 43AAA(4) of the Act.

Tribunal's findings subject to any direction that the Tribunal may have made prohibiting or restricting publication of evidence given before the Tribunal, the names and addresses of witnesses or the content of any documents.⁵⁴ Consistent with the Tribunal's general role to provide guidance to decision-makers, the Tribunal may also provide to the Director-General and to the responsible Minister any comments on matters relating to ASIO practice and procedure that have come to the Tribunal's attention as part of the review.⁵⁵

- Other matters

There are a final few matters that I would like to note in connection with these types of applications. The first is the question of costs. The general rule in the Tribunal is that parties must bear their own costs. This is not the case in proceedings in the Security Appeals Division. Where an applicant is successful or substantially successful on the review and the Tribunal is satisfied that it is appropriate to do so in all the circumstances of the case, the Tribunal may order that the Commonwealth pay the reasonable costs of the applicant in connection with the application.⁵⁶

In relation to avenues of appeal from the Tribunal's decision on the review, applications of this kind are no different from other matters before the Tribunal. Either party may appeal to the Federal Court, on a question of law, from any decision of the Tribunal in the proceeding.⁵⁷

- Applications where new evidence becomes available

In general, an administrative decision-maker has one opportunity to exercise its decision-making power. Once a decision is made, it cannot be revisited unless set aside by a court on judicial review. This rule is subject to a number of exceptions. For example, legislation may confer a specific power to revisit a decision. This is so in relation to the review of a security assessment.

⁵⁴ Sections 35AA and 43AAA(6) of the Act.

⁵⁵ Section 43AAA(7) of the Act.

⁵⁶ Section 69B of the Act.

⁵⁷ Section 44 of the Act.

At any time after the completion of a review, the applicant may apply to the Tribunal for a review of its findings on the ground that the applicant has fresh evidence of material significance that was not available at the time of the previous review.⁵⁸ The Tribunal has the power to review its previous findings if satisfied that the application is justified.⁵⁹ The same procedures apply to this review as applied in relation to the initial review.

Access to ASIO records

Decisions made under the *Archives Act 1983* (Cth) to refuse access to ASIO records are also dealt with in the Security Appeals Division. A person may apply to the National Archives of Australia for access to ASIO records that are at least 30 years old. Consideration is given to whether the records covered by the request should be exempt from public release. Exemption may be claimed where disclosure of the information could damage national security or expose the existence or identity of a confidential source.

A person may apply to the Tribunal for review of a decision on internal review to refuse access to the documents that have been requested.⁶⁰ The Tribunal may affirm the original decision or grant access to all or part of a previously exempted record.

Review of preventative detention orders

The area of jurisdiction most recently conferred on the Security Appeals Division is the review of preventative detention orders made under the *Criminal Code*. The object of preventative detention orders is to allow a person to be taken into custody and detained for a short period of time in

⁵⁸ Section 54(2) of the ASIO Act. Application cannot be made in relation to review of a security assessment made for the purposes of s 202(1) of *the Migration Act 1958* which relates to deportation of non-citizens upon security grounds.

⁵⁹ Section 27AA(3) of the Act.

⁶⁰ Section 43(1) of the *Archives Act 1983*.

order to prevent an imminent terrorist act occurring or preserve evidence of, or relating to, a recent terrorist act.⁶¹

In relation to an imminent terrorist act, a senior member of the Australian Federal Police (AFP) may issue an initial order if satisfied that:

- there are reasonable grounds to suspect that the subject will engage in a terrorist act which is expected to occur at some time in the next 14 days, possesses a thing that is connected with the preparation for, or the engagement of a person in, such a terrorist act or has done an act in preparation for, or planning, such a terrorist act; and
- making the order would substantially assist in preventing such a terrorist act occurring; and
- detaining the subject for the proposed period is reasonably necessary for this purpose.⁶²

An initial order may be issued following a terrorist act if a senior member of the AFP is satisfied that a terrorist act has occurred within the last 28 days, it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act and such detention is reasonably necessary.⁶³

A request may be made to extend this initial order. However, the period may be no longer than 24 hours after the person is first taken into custody.⁶⁴ An AFP member may apply to an external issuing authority for a continued preventative detention order. The issuing authority may issue the continued order only if satisfied of the same matters that must be considered in relation to the issue of the initial order.⁶⁵ An extension of a continued order may be granted by an issuing authority which authorises detention for a maximum period of 48 hours after the person is first taken into custody.⁶⁶

⁶¹ Section 105.1 of the *Criminal Code*.

⁶² Sections 105.4(4) and 105.8(1) of the *Criminal Code*.

⁶³ Section 105.4(6) and 105.8(1) of the *Criminal Code*.

⁶⁴ Section 105.10(5) of the *Criminal Code*.

⁶⁵ Section 105.12(1) and 105.12(2) of the *Criminal Code*.

⁶⁶ Section 105.14 of the *Criminal Code*.

A person may apply to the Tribunal for review of a decision to make an initial or continued preventative detention order and any decision to extend such an order.⁶⁷ An application can only be made once an order is no longer in force.

In relation to the procedures that will apply to the review of such decisions, the *Criminal Code* states that the Act will apply subject to the modifications specified in the regulations. No such regulations have yet been made. I would anticipate that the modifications are likely to be similar to those which apply to the review of security assessments.

The Tribunal's role will be to review decisions relating to preventative detention orders on the merits. However, the Tribunal's decision-making powers differs somewhat from those which it exercises on the review of other decisions. The Tribunal may declare a decision in relation to an order to be void:

*if the Tribunal would have set the decision aside if an application for review of the decision had been able to be made to the Tribunal while the order was in force.*⁶⁸

If the Tribunal declares a decision to be void, the Tribunal may determine that the Commonwealth should compensate the person in relation to the person's detention in the amount determined by the Tribunal.⁶⁹

The determination of compensation payable to a person in these circumstances would be a new facet of decision-making in the Tribunal. As with the review of these decisions more generally, the Tribunal will consider its approach when it is called upon to exercise the powers.

Conclusion

This analysis has shown that there can be no doubt that the degree of procedural fairness accorded in the Security Appeals Division of the Administrative Appeals Tribunal is significantly less than ordinary common law

⁶⁷ Section 105.51(5) of the *Criminal Code*.

⁶⁸ Section 105.51(7)(a) of the *Criminal Code*.

⁶⁹ Section 105.51(7)(b) of the *Criminal Code*.

rights demand. The importance of those rights in securing fairness in adjudication has been amply demonstrated by Sir Gerard Brennan in the *Pochi Case* (supra). Does it follow that review in the Security Appeals Division of the Tribunal involves unjustifiable denials of common law rights?

It is obvious that some commentators do think that the limitations on ordinary procedural fairness are not justifiable. This was the basis of the unsuccessful arguments in *Traljesic* (supra) and *Hussain* (supra). However, both cases were unsuccessful. Rares J, in *Traljesic* (supra), did not think that the risk of accidental disclosure of security information was an irrelevant consideration, nor that the decision to issue the certificate was manifestly unreasonable. The Full Court in *Hussain* (at 280) in effect said that, if precluding an applicant from having access to some information was the price for permitting independent merits review there was still “much to be said for having a judge” carrying out the task.

Review in the Security Appeals Division of the Administrative Appeals Tribunal is statutory review. No review is available unless the right is conferred by statute. The alternative to review with full procedural fairness might be no review at all. Extensive merits review is a unique feature of Australian government. There is much to be said for the view that review in the Security Appeals Division of the Tribunal, while not achieving full procedural fairness, is still much better than is available in most other countries.