FUTURE DIRECTIONS

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Speech to the Australian Institute for Administrative Law's forum, "Administrative Law: Problem areas – Reflections on practice"

4 July 2003

On 6 February this year the Attorney-General announced that the Government would not, for the present, be continuing with the proposal to amalgamate a number of the major Commonwealth Administrative Tribunals into a new Administrative Review Tribunal. Instead, it would embark upon a process of reform calculated to achieve many of the objects of the Administrative Review Tribunal bill within the current tribunal structure.

Future directions, for the Administrative Appeals Tribunal, and for the Social Security Appeals Tribunal, the Migration and Refugee Appeals Tribunals, and, to an extent the Veterans Review Board, are now to be seen in this context.

The Government is committed to ensuring "ready access to independent and high quality review of government decisions". That objective is supported by the Commonwealth tribunals. As part of this objective the Government is committed to providing "a faster and more effective merits review system that strives to deliver administrative justice to individuals and a high standard of government decision-making." There is always room for improvement and the Commonwealth Tribunals stand ready to play their part to assist in the realisation of this objective.

In line with these commendable policies the Attorney-General has announced that the Government proposes first to introduce reforms of the Administrative Appeals Tribunal. It follows that for the AAT it is these proposals which form a primary focus for future directions.

In his February announcement the Attorney-General said: "Areas of amendment could include procedures of the tribunal, constitutional requirements and allowing greater use of ordinary members." He went on to describe the goal of the AAT as delivering "informal, fast and fair merits review, unfettered by costly and legalistic procedures." He continued: "The Government's reforms are aimed at enabling the AAT to flexibly manage its workload and to ensure that reviews are conducted as efficiently as possible."

Some of the Government's aims may be capable of being achieved by executive action, for example through the appointments process. However, as the Attorney-General recognised, other aspects of the aims will require legislation. The form which the legislation will take is not yet known. However, the announcement by the Attorney-General gives some clue as to what the Government is thinking.

The Government's proposals largely reflect the way the Tribunal has itself been heading. Shortly after my appointment I established three committees to cover areas which I considered to be important to the future of the Tribunal. The committees are:

The Constitution Committee
The Practice and Procedure Committee
The Professional Development Committee

The Constitution Committee is charged with looking at the way in which the Tribunal is constituted to hear applications for review. The membership of the Tribunal covers a very wide range of expertise. The core of the Tribunal's members is made up of lawyers. But the Tribunal is also able to call on the expertise of distinguished medical practitioners, both specialist and general,

accountants, actuaries, aviators, servicemen to the ranks of Air Marshal, Rear Admiral and Major-General – we may have a potential Governor-General. We also have distinguished academics from diverse disciplines such as pharmacology, pathology and environmental science as well as the law. Professor Stan Hotop is the current author of Benjafield and Whitmore on Administrative Law where I first learned the subject.

The Administrative Appeals Tribunal has four levels of members: Judicial, Presidential, Senior Member and Member. It has full and part time members. They live in every state and in this territory. The AAT can be comprised of panels of three, two or one member.

The AAT cannot operate on a docket system in which each new application is assigned to a member by rotation. Constituting the AAT to hear different applications is a complex logistical matter. Deciding how it should be constituted for particular matters requires careful planning. However, these practical issues reflect a more fundamental question of principle as to what is the ideal composition of the Tribunal to better ensure that the outcome is "the correct or preferable decision."

Courts sometimes appear to forget that administrative tribunals are administrative decision-makers whose task is to arrive at a decision. They are not dispute resolvers although a dispute will always underlie an application to a tribunal. Administrative decision-making is a different process to judicial dispute resolution although there are obvious similarities.

Because of the different process it has always been thought to enhance administrative decision-making for the process to involve experts in the subject of the decision. At the level of merit review the Tribunal's lawyers have been thought to make a valuable contribution because administrative decision-making at Tribunal level can be complex and often requires consideration of questions of law. However, to my knowledge each of the Committees who have considered the question of what should be the composition of tribunals charged with merits review of administrative decision-

making, going back to the Franks Committee in the United Kingdom and the Kerr Committee in Australia, have considered that experts contribute substantially to the quality of the decisions. An ideal for tribunal composition has been suggested to be an expert panel with a lawyer presiding.

These are the parameters within which the Constitution Committee of the AAT is seeking to arrive at practical conclusions calculated to achieve the best method of constituting panels for the AAT. An important aspect of the work in the AAT is to ensure that there is uniformity throughout Australia. However, all these issues must be considered in the context of unavoidable budgetary restraints. Three person tribunals are more costly than one person tribunals.

In his announcement earlier this year the Attorney-General adverted to constitutional issues when he indicated that areas of amendment of the Administrative Appeals Tribunal Act could include "constitutional requirements and allowing greater use of ordinary members."

The second committee I have constituted is the Practice and Procedure Committee. This committee is charged with guiding the AAT's constant struggle to finalise matters before it as quickly and efficiently as possible consistently with fairness and justice. An aspect of this process is seeking to increase the informality of tribunal procedures, to avoid unnecessary legalism, and to reduce costs. The realisation of these positive objectives is partly associated with the different nature of administrative decision-making to which I have earlier referred.

It is important to remember, however, that a good deal of the work of the Tribunal is not what is considered to be conventional administration. For example, one of the bulk jurisdictions of the Tribunal is Commonwealth Employees Compensation. There is little to distinguish hearings of these types of claims from claims in state workers compensation courts. Problems of scheduling hearings to fit in with the commitments of medical witnesses create constant delays. And the parties are often the last ones who want to

push matters on to a speedy conclusion if there is anything standing in the way.

Nevertheless an innovative trial of adducing evidence from medical witnesses in concurrent sessions when the medical witnesses can discuss their differences in front of the Tribunal and base their conclusions on the evidence that has actually been given by the applicant rather than on possibly inaccurate histories taken long before has been introduced in the Tribunal. This process is proving to be less formal, quicker and more likely to yield the correct decision. The adducing of concurrent evidence or the use of so called hot-tubs is not new. The method has been used a number of times in the Federal Court. However, the Federal Court cases where it has been used have tended to be cases where there are differences of opinion amongst experts in highly specialised areas. The AAT experiment involves the use of concurrent evidence in ordinary cases. So far the trial appears to be showing that concurrent evidence is really useful in all situations where there is expert evidence.

The Tribunal is also firmly requiring parties before it, both private applicants and government agencies, to comply with the time provisions applicable to proceedings in the Tribunal. Often this is a difficult task. There was a time when some parties tended to regard time limits in the Tribunal as almost voluntary. Government agencies were prominent amongst these parties. However, I am glad to say that this perception is substantially changing as a result of the Tribunal's action.

The broad work of the Practice and Procedure Committee is to look with new eyes at the way matters progress through the Tribunal with a view to considering improvements. It is looking at these matters separately in each state. This will assist in achieving greater uniformity. But it will also allow the Tribunal to choose the best of the procedures from each state and territory.

The emphasis in the Tribunal on executive or administrative decision-making gives the Tribunal a greater opportunity than courts to act less formally. The

introduction of concurrent evidence is just one of the possible ways of improving the quality of decision making while reducing necessary time and cost.

As part of the announcement earlier this year the Attorney-General stated that the Government's reforms were "aimed at enabling the AAT to flexibly manage its workload and to ensure that reviews are conducted as efficiently as possible". This proposal will assist the work of the Practice and Procedure Committee particularly to the extent to which it allows the Tribunal greater flexibility in moulding its procedures to suit different types of cases. The variety of cases before the Tribunal is of such width that flexibility of procedures is necessary in assuring the achievement of the Government's and the Tribunal's joint goals. To this end, one of the matters which the Practice and Procedure Committee is already considering is whether the Tribunal should continue with its General Practice Direction, at any event, in its current form. A practice direction calculated to apply to all cases is hardly consistent with flexibility. This goal will be assisted if registrars and conference registrars in the AAT are permitted to give procedural directions.

The final committee which I have established is the Professional Development Committee. Nearly 400 pieces of Commonwealth legislation confer power to review on the Administrative Appeals Tribunal. Keeping up with the array of rights and obligations which flow from legislation is not an easy task. Changing practices and procedures in the Tribunal also require a continuing process of keeping up to date.

To this must be added the need for Tribunal members and staff to keep abreast of legal pronouncements relating to the matters which the Tribunal has jurisdiction to review and the law generally. The Federal Court publishes many decisions each year relating to areas of law impacting directly and indirectly on the Tribunal.

Accordingly, continuing legal direction is essential to a properly working Tribunal. So is wider professional development such as improving the ability

of members to preside over well ordered processes, to determine matters efficiently and to deliver and write decisions which satisfy the needs of both lay reader and appellate court alike and all in the shortest possible time.
All these matters require a formal process of professional development associated with its necessary concomitant of performance appraisal. The legal education must be dealt with through seminars and other aids to keeping up to date and also through private study and work. The same methods are also appropriate to wider professional development. But here I think that a process of mentoring can also be very helpful. Performance appraisal is relatively new to Tribunals but it can be a very useful guide to tribunal members when properly handled and very helpful to reinforce the overall achievements of professional development.

These are the matters which the Performance Development Committee is grappling with. Although the Attorney-General's announcement did not address professional development in terms I have no doubt that the Tribunal's proposals will have his and the Government's support.

The amending legislation foreshadowed by the Attorney-General is likely to be introduced into the Parliament in the Spring sittings. It will no doubt be received with interest, and, I am sure will further assist the Tribunal in seeking to achieve the goals upon which it is already working as part of the implementation of the Government's and the Tribunal's common purpose of improving the ability of the Tribunal to provide the prompt, efficient and fair administrative review which the Australian people are entitled to.