



**THE OBLIGATION TO ASSIST
MODEL LITIGANTS IN ADMINISTRATIVE APPEALS TRIBUNAL
PROCEEDINGS SEMINAR**

**The Hon. Justice Garry Downes AM
President of the Administrative Appeals Tribunal
Judge of the Federal Court of Australia**

26 August 2009

It is my great privilege to welcome you all to this interesting seminar.

I particularly want to welcome the Attorney-General, who has made time for the seminar, notwithstanding his significant workload, and also the head of his Department, Roger WILKINS.

During the day we will be hearing from a distinguished group of speakers including a number of heads of Commonwealth departments and agencies. I wish to express my thanks to all these speakers as well.

Before I begin, I particularly want to thank Simon WEBB, a full time member of the Tribunal here in Canberra, who is largely responsible for the idea for this seminar, as well as for its organization. The numbers here are partly due to his organizational ability and enthusiasm.

But I also think the success of the seminar is due to the importance of the topic. It raises issues fundamental to the very nature of merits review. The extent of the obligation on the Commonwealth and its agencies to assist the

Administrative Appeals Tribunal in arriving at its decisions is a topic that I have always thought is very important. I began talking about it in speeches I gave shortly after I was appointed to the Tribunal. This was before the obligation to assist was given statutory force.

Not only is it an important topic, it is, I think, a very interesting topic. It raises issues of public and Constitutional law, which are at the heart of the nature of merits review and the role of the Tribunal. The recent decision of the High Court in *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, analysing the nature of merits review, which until then had been confined to decisions of the Federal Court, provides solid support for the principle.

What is unique about the Tribunal is that it is not a court, but part of the executive or the administration. Yet it goes about its business in the manner of a court and not in the manner of the administration. True, it is informal, and should be as informal as possible, but its manner of informing itself and deliberating has more to do with curial procedures than with the methods of the executive. The *Administrative Appeals Tribunal Act 1975 (Cth)*:

- Identifies the participants in proceedings before the Tribunal as parties (s 30(1));
- Generally requires proceedings before it to be determined through a hearing (s 34J) in public (s 35);
- Gives the parties the right to representation (s 32);
- Requires the Tribunal to act on evidence which it admits (e.g. ss 34E, 40(5) and 43(2B)), although the Tribunal is not bound by the rules of evidence (s 33(1));

- Gives the Tribunal power to take evidence on oath or affirmation (s 40(1E)) and to summons persons to give evidence or produce documents (s 40); and
- Requires the Tribunal to give reasons for its decisions which a party can require to be in writing (s 43(2) and (2A)).

However, this court-like approach should never be allowed to mask the essence of what the Tribunal is doing. Whether it is reviewing an exercise of discretion by a Cabinet Minister, or it is calculating the entitlement of a veteran under the strict controls of Statements of Principles, it is making an administrative decision in exercise of the executive power of the Commonwealth and not making a judicial decision in exercise of the judicial power of the Commonwealth. It is not fundamentally deciding a dispute, but dealing with proper administration, whether that involves regulation (such as the disqualification of a director) or revenue-raising (such as assessing income tax) or revenue distribution (such as authorising a social security payment or payments of employees' compensation).

Admiralty judges might be inclined to describe administrative decisions as decisions *in rem* because they have wider import than the narrow issue of disputes between parties. A migration decision is a decision about the makeup of the Australian people. A taxation decision is a decision about the amount of Commonwealth revenue. Even an employees' compensation decision is a decision about the distribution of the revenues of the Commonwealth. What is important about this is that it places emphasis on the Tribunal's obligation to arrive at the correct or preferable decision in the exercise of the administrative power of the Commonwealth and not merely to resolve the issues in dispute tendered by the parties in litigation. For simplicity I will call this correct or preferable decision, the best decision.

The parties control litigation, even administrative law litigation. If a party wishes to challenge Commonwealth administrative action on one only of three

available grounds, that is a matter for the party. However, if an applicant for merits review raises only one ground of entitlement, where there is another, clearer, ground of entitlement, a tribunal will generally be obliged to consider the further ground.

The Tribunal does not have power to enforce its decisions. But it does not need any enforcement power - because the decision of the Tribunal becomes the decision of the agency that made the original decision and that agency is obliged to carry it into effect.

In virtually every respect the Tribunal's decision is the agency's decision. The agency carries it into effect or enforces it, as if it was its decision. It supervises its implementation. To the agency is given the role of ascertaining whether the decision is no longer applicable and if subsequent events require the decision to be revoked or varied, such as when a social security recipient ceases to qualify for a pension, it is for the agency to cancel the pension.

When an administrative decision is to be made in a department or agency the decision-maker will expect staff to assist the decision-maker in making the decision. This role may involve ascertaining and furnishing information, it may involve correcting wrong information, it may involve discussion and suggestion (always consistently with the decision-maker making the actual decision), it may involve advocating a position; it may even involve putting arguments advocating Commonwealth expenditure merely to test their strength. If the decision-maker seeks further information on a matter from a staff member it will undoubtedly involve staff attempting to satisfy the request. The decision-making process will not simply involve advocating a position which protects the revenue. It will not simply involve seeking to defend a prior decision. In summary it will involve seeking to assist the decision-maker to make the best decision.

It is difficult to see why the situation should be any different when the decision-maker is the Tribunal and the agency has retained lawyers to assist

it in a hearing. The atmosphere will be court-like but the object is for the best decision to be arrived at which will become the agency's decision.

Viewed this way it seems obvious that the role of an agency in an appeal to the Administrative Appeals Tribunal is ultimately one of assistance; one very similar to the role of staff when the original decision was made. To my mind this duty was so clear that I spoke about it before the amendments to s33 of the Act in 2005 made it a statutory obligation.

So what is the role in practice? I think it imposes an obligation which has parallels to the obligation of counsel assisting an enquiry. The ultimate object must never be the defence, for the sake of it, of the decision under review. It must always be seeking to procure the best decision on the evidence available at the time of the decision. I think it imposes an obligation on agencies to constantly address the question of whether the decision under review is the best decision. Further, the evidence adduced should be evidence which will assist, in whatever direction it points, and not simply evidence to support the decision under review.

I am pleased to say that I think this approach is consistent with current government policy and particularly with the Attorney-General's special interest in ensuring that the best decision is arrived at as early as possible in the process (and as often as possible before applications for review are made) and with his interest in seeking to resolve disputes, when they continue, at the earliest possible time, including by using alternative dispute resolution.

I do not seek to ignore the different circumstances which accompany tribunal review. It is particularly to be noted that for possibly the first time an applicant before the tribunal will be entitled to put a positive case and respond to the agency's position. The applicant may have legal assistance, even legal assistance of a high order. It is not unusual for applicants to be represented by senior counsel in the Tribunal. Although this may affect the way the obligation to assist is performed in particular cases, however, it is wrong to think that it qualifies it in some way.

Where applicants are represented the obligation to identify the case contrary to the decision under review may be lessened. It will generally positively assist the Tribunal for the applicant's case to be tested, both by furnishing evidence and by challenging the applicant's evidence, including by cross-examination. But that in no way exempts an agency or its lawyers from constantly re-examining its own case. The agency remains obliged to see that all evidence favourable to the applicant is before the Tribunal, especially where the applicant may not know of the evidence.

Where applicants are unrepresented the importance of the principle is clearer. The obligation to ensure that all relevant material and arguments are before the Tribunal, so that the best decision is arrived at, becomes even more important.

Generally, agencies do act in accordance with these principles. Some regard them, as they should, as paramount. However, I am not sure that full implementation of the obligation to assist is universal. The human characteristic of wanting to defend and protect, particularly the revenue, is very strong. The court-like procedures of the Tribunal do tend to foster a "them and us" attitude within some agencies. There may sometimes be an understandable, though wrong, perception, particularly on the part of agencies making decisions in areas of expertise, that their decisions must be right and that they are best qualified to make them. Sometimes agencies appear to be very defensive about their decisions. There are, however, a few answers to these claims. First and foremost, the Parliament has spoken to the contrary. Secondly, the Tribunal itself has a very important expertise, namely the expertise of decision-making. Thirdly, review before the Tribunal will generally be much more thorough, and usually based on more complete evidence, than a busy administrative decision-maker was able to devote to the original decision. Finally, the Tribunal has its own experts in most areas of expertise.

I hope that the discussions today will explore the issues which these considerations throw up. My own views must by now be clear. The object is the highest quality of administrative decision-making in exercise of the administrative power of the Commonwealth. There is no room for defence for the sake of it. There is no occasion to give in to the thrill of the contest. The sole focus of the Commonwealth and its agencies must be on achieving the right outcome and at every level to be looking to assist the decision-maker to achieve that result. The object will generally best be achieved by agencies adopting the right attitude as much as it will be achieved by treating the obligation as a rule.

I should say a word about the model litigant rules. The Commonwealth has adopted model litigant rules to guide its approach to litigation. These rules now apply to proceedings before tribunals. They provide a guide which addresses some of the detail of the conduct of Commonwealth instrumentalities to litigation. They provide assistance to agencies as to some aspects of tribunal proceedings. However, their purpose is not the same as the obligation to assist and their provisions are different. The model litigant rules were promulgated to ensure that Commonwealth instrumentalities adopted the highest level of fairness in the conduct of court contests. Accordingly, for example, the Commonwealth will not put in issue a fact it knows to be true. Such rules are fine for tribunal proceedings as far as they go. But tribunal proceedings are not court litigation. The obligation to assist has a different basis. It reflects the closeness of the role of the Tribunal to the original decision-maker. It goes much further than the model litigant rules. The obligation to assist must at least accommodate all the model litigant rules. But assisting a tribunal to come to the best decision requires more. The model litigant rules may provide some assistance to agencies in how they should conduct review in the Tribunal, but it would be wrong to think that where an agency has complied with the model litigant rules it has no other or higher obligation.

It is now my great pleasure to introduce the Attorney-General. The Attorney has many roles in addition to his traditional role as first law officer. However,

it is in that role that his activities are of most significance to us. In the relatively short time he has been in office, the Attorney has shown himself to be a reforming Attorney-General with a distinct focus on access to justice. He has made changes which render processes of judicial appointment more transparent. He is presently guiding a bill through the Parliament which extends court powers to ensure maximum efficiency is achieved in resolving litigious disputes. He is proposing reform of the structure of federal courts to improve the quality and efficiency of their work. He is looking at measures generally to enhance access to justice. He has shown particular interest in ensuring the earliest resolution of disputes, especially through alternative dispute resolution. All these are welcome reforms to improve the quality of justice. With respect to a number of the matters he is considering he has sought the advice of the Administrative Review Council. As part of his address this morning he will be launching one of its publications.

We are fortunate to have the Attorney here this morning to hear his views. I am particularly looking forward to hearing what he says because his views are substantively important to today's topic. He ultimately is the source of the model litigant rules and the ideas which they embody. Please join me in welcoming the Attorney-General of the Commonwealth of Australia.