17TH AUSTRALIAN ARMY LEGAL CORPS CONFERENCE 2005

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President of the Administrative Appeals Tribunal

Future Directions for the Administrative Appeals Tribunal

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Introduction

It gives me great pleasure to speak to you today about the Administrative Appeals Tribunal and its work. I will take the opportunity to outline the role of the Tribunal in the broader context of our system of administrative law. I will briefly describe how the Tribunal goes about its core work of conducting administrative review. I will identify the areas of the Tribunal's jurisdiction that are most relevant to current and former members of the Defence Force and discuss the Tribunal's expertise in relation to military matters. Finally, I would like to mention some of the other areas of work that the Tribunal and its members undertake.

The establishment of the AAT

In 2006, the Tribunal will celebrate its 30th anniversary - a significant milestone for any organisation. As you will be aware, the Tribunal was established in the 1970s as part of a package of measures known as the "New Administrative Law". Other parts of the package were:

- the establishment of the office of the Ombudsman to investigate complaints about Government departments and agencies;
- the modernisation of the rules for challenging administrative decisions of the Commonwealth 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.

As Justice Michael Kirby, then Chairman of the Australian Law Reform Commission, remarked in 1980:

> *"The development of the new administrative law in Australia represents a belated attempt of a legal system inherited from England to come to terms with the tremendous expansion of the importance of government decision-making in the lives of all individuals in society."*[1]

The 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 the decisions and processes affecting him or her.

The role of the Tribunal in the system of administrative law is to review administrative decisions on the merits: that is, to consider afresh the facts, law and policy relevant to a decision under review and decide whether that decision should be affirmed, varied or set aside. It has many times been said that the Tribunal stands in the shoes of the original decision-maker in making its substituted decision: see, for example, *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934 at 943.

[1] The Hon. Justice MD Kirby, 'Towards the New Federal Administrative Law', *Australian Journal of Public Administration*, vol 40, no. 2, 1981, p. 116.

In undertaking this task, the Tribunal is frequently required to review the exercise of discretionary powers. This is reflected in the phrase which is usually used to describe the decision-making function of the Tribunal, namely that the Tribunal must make the "correct or preferable decision": *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591 per Bowen CJ and Deane J. The conjunction is used to accommodate 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 can be applied to future decision-making in the same area. While the Tribunal's interpretations of legislation are not binding on decision-makers in the same way that court decisions must be followed, the Tribunal's decisions are persuasive.

From a constitutional perspective, it is important to understand that merits review under the *Administrative Appeals Tribunal Act 1975* (Cth) is an exercise of the administrative power of the Commonwealth and not of the judicial power of the Commonwealth. This is so even though the President of the Tribunal is a judge of the Federal Court of Australia and other federal judges may be appointed as members of the Tribunal. The making of administrative decisions and the reviewing of them on the merits are functions regulated by Chapter II of the Constitution relating to the Executive Government and not Chapter III relating to the Judicature. Understanding this is fundamental to an understanding of administrative review.

By way of contrast, judicial review of administrative decisions involves an assertion by an applicant against a government respondent, which resists the claim, that an administrative decision is unlawful. There is only one answer. Either the decision is unlawful or it is not. In general, the court hearing the application has no power to consider the merits of the decision. If the decision is unlawful, it cannot be made lawful by a court engaged in judicial review: see, for example, *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

It is perhaps worth noting that the creation of the AAT as a generalist tribunal to review a wide range of government decisions on the merits was a unique development in the 1970s. While similar generalist tribunals have now been established in states and territories of Australia, review of administrative decision-making elsewhere in the world is generally either confined to judicial review or limited to specific subjects. Review on the European continent is generally confined to judicial review even though it is carried out by a separate court structure. In the United Kingdom there is currently limited merits review before specialist tribunals. However, this is about to change as the United Kingdom adopts a system of general tribunal review substantially influenced by the Australian system.

How does the AAT operate?

The Tribunal is required to provide a review process that is fair, just, economical, informal and quick: section 2A of the Administrative Appeals Tribunal Act. The Tribunal's case management process pursues the dual goals of attempting to resolve matters by agreement between the parties where possible while ensuring that appropriate steps are taken to promptly prepare for hearing those matters that do not settle.

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 for 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.

The requirement for a decision-maker to provide all of the relevant documents to the Tribunal and the applicant is a crucial part of the review process.

In most applications before the Tribunal, 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; and
- 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. Conciliation and mediation have been used by the Tribunal for many years. In May of this year, the Act was amended to provide specifically that the Tribunal can undertake case appraisal and neutral evaluation. The Tribunal is currently reviewing the use of ADR and, in particular, has developed guidelines to assist in determining when a particular form of ADR may be appropriate to use.

The Tribunal has a high rate of success in assisting parties to resolve their matters without proceeding to a formal hearing. In the 2004-05 financial year, 78 per cent of the approximately 7,500 applications finalised by the Tribunal were finalised without the Tribunal making a decision on the merits following a hearing. Consensual resolution of an application has significant benefits for the parties, as well as for the Tribunal. It reduces the costs that the parties and the Tribunal incur in relation to the proceeding and brings the dispute to a conclusion earlier.

Where an application is not resolved, the Tribunal is required to conduct a hearing: s 35 of the Act. The hearing can only be dispensed with when all parties agree and even then the Tribunal has a discretion: s 34B. The hearing must generally be in public: s 35. Although the Tribunal is not bound by the rules of evidence (s 33), the rules of natural justice apply. The Tribunal can be said to be based on the judicial model.

In the very earliest days of the Tribunal the first president, Brennan J, in *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158 at 161, said this:

> *"The legislature clearly intends that the Tribunal, though exercising administrative power, should be constituted upon the judicial model, separate from, and independent of, the Executive (see Pt II of the Act). Its function is to decide appeals, not to advise the Executive."*

It has been recognised many times that the judicial aspects of the Tribunal's approach to decision-making enhances the quality of its work. Sir Anthony Mason has identified four such qualities (although he suggested there were five):

> *"Experience indicates that administrative decision-making falls short of the judicial model – on which the AAT is based – in five significant respects. First, it lacks the independence of the judicial process. The administrative decision-maker is, and is thought to be, more susceptible to political, ministerial and bureaucratic influence than is a judge. Secondly, some administrative decisions are made out in the open; most are not. Thirdly, apart from statute, the administrator does not always observe the standards*

of natural justice or procedural fairness. That is not surprising; he is not trained to do so. Finally, he is inclined to subordinate the claims of justice of the individual to the more general demands of public policy and sometimes to adventitious political and bureaucratic pressures.

The five features of administrative decision-making which I have mentioned reveal why it is that administrative decision-making has never achieved the level of acceptance of the judicial process in the mind of the public."[2]

To summarise, the four qualities are:

1. independence of the Tribunal;
2. decision-making in public;
3. natural justice applies; and
4. individual justice will not be subordinated to public policy.

At a practical level one might add that the judicial model leads to a more thorough and detailed examination of the facts and a more rigorous consideration of the possible outcomes. These qualities enhance a merits review process which already exemplifies the best aspects of the original process of decision-making. The judicial model is important to decision-making in the Tribunal but it does not deny the proposition that merits review is an exercise of administrative power and continues to possess attributes appropriate to that process.

The Tribunal's role in relation to military and veterans' matters

The Tribunal does not have a general power to review decisions made under Commonwealth legislation. It can only review a decision if an Act or other legislative instrument provides that a person may apply to the Tribunal for review of that decision. It is important to note, however, that it is now accepted within Government that, in general, decisions that will, or are likely to, affect a person's interests should be subject to merits review.

[2] Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years', (1989) 18 Fed L Rev 122 at 130.

The Tribunal currently has jurisdiction to review decisions made under more than 400 Acts or legislative instruments. These include a range of decisions relevant to serving and former members of the Defence Force. For example, the Tribunal can review:

- decisions relating to defence home loans;
- decisions of the Defence Force Retirement and Death Benefits Authority;
- decisions on claims for employer support payments in relation to service in the Defence Reserves; and
- decisions concerning benefits and entitlements for injuries suffered and diseases contracted by members of the Defence Force as a result of service.

It is perhaps this last area of jurisdiction that is of greatest significance, not only in relation to numbers of applications to the Tribunal but also in terms of impact on the lives of current and former service men and women and their dependants.

As you will no doubt be aware, three compensation schemes now operate in relation to injuries and illnesses suffered by members of the Defence Force. Depending on the type of service rendered and the dates of that service, entitlements and other benefits may be claimed under:

- the *Safety, Rehabilitation and Compensation Act 1988* (Cth) which also applies to Commonwealth employees more generally*;*
- the *Veterans' Entitlements Act 1986* (Cth); and
- the *Military Rehabilitation and Compensation Act 2004* (Cth).

The new Military Rehabilitation and Compensation Act covers all injuries, diseases and deaths that are related to service on or after 1 July 2004. Injuries and diseases relating to service before this date are generally dealt with under the Safety, Rehabilitation and Compensation Act or the Veterans' Entitlements Act depending on the type of service. In contrast, the new Act covers military personnel whether they are injured in Australia undertaking peacetime duties or undertaking more dangerous duties in places such as Afghanistan or Iraq. The Tribunal has power to review decisions made in relation to each of the schemes.

The Tribunal has substantial experience in relation to the review of decisions under the Safety, Rehabilitation and Compensation Act and the Veterans' Entitlements Act. In each of the last five financial years, the Tribunal has received in excess of 350 applications for review relating to decisions under the Safety, Rehabilitation and Compensation Act concerning Defence Force service. Over the same period, the number of applications for review of decisions of the Veterans' Review Board (VRB) relating to disability pensions and pensions for widows and other dependants under the Veterans' Entitlements Act has gradually declined from approximately 1400 in 2000-01 to approximately 900 in 2004-05.

The Tribunal is yet to receive an application for review of a decision under the Military Rehabilitation and Compensation Act. However, it has identified some practical issues that will arise in relation to the management of applications under the new Act. Before referring to these, it may be helpful to identify some features of the review of decisions under the Safety, Rehabilitation and Compensation Act and the Veterans' Entitlements Act.

Given that entitlements arise under two different statutes, it is not surprising that applications under the Safety, Rehabilitation and Compensation Act, whether relating to claims concerning the Defence Force or other Commonwealth employment, and applications under the Veterans' Entitlements Act have been

treated somewhat differently. They each have their particular characteristics and particular practices have arisen in relation to them. While there are clear differences in relation to the substantive decisions to be made and the decision-making processes under the two Acts, I will focus on some of the procedural differences that exist at the Tribunal level.

In relation to the Tribunal's processes, applications for review under the Safety, Rehabilitation and Compensation Act were traditionally dealt with in the Tribunal's General Administrative Division. Applications for review of decisions under the Veterans' Entitlements Act are dealt with in the Veterans' Appeals Division. While this difference does not impact significantly on case management practices, it does affect which of the Tribunal's members are eligible to hear and determine the applications. While the President and Deputy Presidents can hear applications in any division, Senior Members and Members must be assigned to one or more of the Tribunal's divisions. Not all Senior Members and Members have been assigned to the Veterans' Appeals Division.

There is also a difference in terms of the use of conciliation in relation to applications under the two Acts. Since July 1998, a compulsory conciliation is held in relation to any compensation application, where the applicant is represented, if it has not settled at the end of the conference process. Both parties and their representatives must attend in person. There is currently no compulsory conciliation in applications under the Veterans' Entitlements Act.

The Military Rehabilitation and Compensation Act adopts aspects of both the Safety, Rehabilitation and Compensation Act and the Veterans' Entitlements Act in establishing a single military compensation scheme for injuries, diseases and deaths related to service on or after 1 July 2004. For example, in relation to the process for reviewing decisions, claimants who are unhappy with a primary decision may seek review by either of the discrete methods that are available under the Safety, Rehabilitation and Compensation Act and the Veterans'

Entitlements Act. The claimant may apply to the Military Rehabilitation and Compensation Commission to reconsider the decision internally or apply to the VRB for external review. If the person is unhappy with a decision of the Commission or the VRB, he or she may apply to the Tribunal for review.

Given the coverage of the new Act, decisions will continue to be made for some time under the Safety, Rehabilitation and Compensation Act and the Veterans' Entitlements Act in relation to injuries and diseases related to service before 1 July 2004. This raises issues for the Tribunal and its users in relation to the management of applications under the different Acts.

The Tribunal is currently reviewing the way in which it manages applications for review and, in particular, how the Tribunal communicates to parties its expectations and requirements in relation to the review process. The Tribunal proposes to issue guides in relation to each of its major jurisdictions which set out how the Tribunal will manage applications in that jurisdiction.

The first stage of the review has involved an examination of practice and procedure in the compensation jurisdiction. The Tribunal released a draft guide for comment and will introduce the finalised guide in early 2006. The guide will also apply to defence-related claims under the Safety, Rehabilitation and Compensation Act and provides for a compulsory conciliation in those applications where the applicant is represented.

It is anticipated that the Tribunal will have dealt with a number of applications under the new Military Rehabilitation and Compensation Act by the time the Tribunal is ready to commence its review of practice and procedure in the veterans' jurisdiction. The Tribunal will then be able to consider how applications under the three different pieces of legislation should best be managed. Pending that review, it will be for the Tribunal in consultation with the parties to determine the most appropriate way of managing applications.

The Tribunal is aware that there may well be circumstances where an applicant will have applications before the Tribunal relating to claims under more than one of the Acts. The Tribunal's usual practice is to deal with multiple applications relating to a single person together. To ensure that applications under the three different Acts are dealt with by the same members, I have issued a direction to the effect that all defence-related claims under the Safety, Rehabilitation and Compensation Act lodged on or after 11 August 2004 and all applications under the Military Rehabilitation and Compensation Act should also be dealt with in the Veterans' Appeals Division.

The Tribunal's expertise in relation to military and veterans' matters

One of the Tribunal's great strengths since it was established has been the appointment of members who have expertise in areas that are relevant to the classes of decisions that the Tribunal reviews. Members appointed to the Tribunal have expertise in areas such as accountancy, aviation, engineering, medicine and, importantly, military affairs.

The Tribunal may consist of one, two or three members to conduct a hearing and determine an application. When deciding how the Tribunal should be constituted, one of the matters that must be taken into account is the degree to which it is desirable for any or all of the members to have knowledge, expertise or experience in relation to the matters to which the proceeding relates: s 23B(f) of the Act. The inclusion of a specialist member on the Tribunal enhances the Tribunal's ability to understand the issues and the evidence and to reach the correct or preferable decision.

Service experience is an area of expertise that is commonly of assistance in the determination of applications before the Tribunal. I note with pleasure that the Tribunal has among its members a number of distinguished ex-service personnel

who held senior positions in the army, navy and air force. Many of the Tribunal's part-time Members who have medical expertise also have military experience. There are also a number of members who are current serving officers in the Reserves.

The Tribunal values the knowledge and expertise that these members bring to the Tribunal. It serves to enhance the Tribunal's understanding of issues relating to military service that arise in particular applications and in relation to military issues generally. While appointments to the Tribunal are a matter for the Government, the Tribunal anticipates that members with service experience will continue to be among the members appointed to the Tribunal.

Other roles for the Tribunal and Tribunal members

While the Tribunal's primary role is to conduct merits review of administrative decisions, I note that a range of other functions have been conferred on members of the Tribunal that are quite separate from their work under the Act. Further, there have been proposals for the Tribunal to undertake tasks of a somewhat different nature to its core work.

A number of legally-qualified members of the Tribunal are authorised to issue telecommunications interception warrants and surveillance device warrants in connection with the investigation of serious criminal offences. Tribunal members issue the majority of warrants under the *Telecommunications (Interception) Act 1979* (Cth).[3] Members also review certificates that authorise controlled operations under the *Crimes Act 1914* (Cth).

[3] Australian Government Attorney-General's Department, *Telecommunications (Interception) Act 1979: Report for the year ending 30 June 2004*, pg 44.

A number of legally-qualified members of the Tribunal are approved examiners for the purposes of the *Proceeds of Crime Act 2002* (Cth). At the request of the Commonwealth Director of Public Prosecutions, an authorised member may issue a notice to a person requiring his or her attendance at a compulsory examination before the member to answer questions in relation to the affairs of any person subject to orders under the Act.

In 2003, the President and Deputy Presidents of the Tribunal were included in the class of persons who may be appointed as prescribed authorities under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth). Prescribed authorities have powers in relation to overseeing the detention and questioning of persons under a warrant issued for the purposes of assisting the collection of intelligence that is important in relation to terrorism offences. I note that, at this stage, no Tribunal member has been appointed as a prescribed authority.

Most recently, it has been proposed that the President and Deputy Presidents of the Tribunal would be included in the class of persons who may be authorised to make and extend continued preventative detention orders under the *Criminal Code* set out in the *Criminal Code Act 1995* (Cth). The Anti-Terrorism Bill (No. 2) 2005 also includes a proposed role for the Tribunal in relation to the review of preventative detention orders: proposed section 105.51 of the *Criminal Code*. Once an order has expired, a person may apply to the Tribunal for review of a decision to make, extend or further extend a preventative detention order. The Tribunal will have power to declare the order to be void and, if it does so, to determine that the Commonwealth must pay an assessed amount of compensation in relation to the person's detention.

Finally, I noted with interest the recommendation of the Senate Foreign Affairs, Defence and Trade References Committee relating to the Tribunal in its inquiry into the effectiveness of Australia's military justice system. As you may be aware, the Committee recommended the establishment of an Australian Defence Force Administrative Review Board (ADFARB) which would deal with the review of military grievances and conduct investigations and inquiries into major incidents.[4] The Committee also recommended that the chairperson of the ADFARB could refer certain matters to a newly created military division of the Tribunal to conduct a more formal inquiry. While the Government ultimately did not accept this proposal, the Tribunal was pleased that the Committee considered that the Tribunal had the facilities and expertise to undertake such a task.

The conferral of powers on the Tribunal and its members to carry out a range of functions beyond its core work of administrative review reflects the confidence of Parliament in the ability of the Tribunal to undertake these diverse and significant tasks. The Tribunal is concerned to ensure, however, that these additional responsibilities do not have a negative impact on the Tribunal's ability to carry out its core function of providing administrative review that is fair, just, economical, informal and quick.

Conclusion

The Tribunal has played a significant role in relation to the availability of administrative justice in Australia during its almost 30 year history. I am confident that it will continue to offer individuals and others independent and high-quality review of administrative decisions into the future. The availability of merits review is an important aspect of a democratic system of government.

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[4] Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, pp. lv-lviii.

The availability to our nation's military commanders of the best legal advice is also a significant function. Providing advice that is consistent with the relevant law but is also practical and operationally workable is not always an easy task. No doubt this conference will offer an opportunity for you to reflect on your work and gain new skills to meet this challenge.