



**THAILAND-AUSTRALIA MATURE ADMINISTRATIVE LAW PROGRAM
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Case Management in the Administrative Appeals Tribunal*

February 2007

INTRODUCTION

This presentation will focus on the Administrative Appeals Tribunal and the way in which it manages the applications that are made to it. It will cover the procedures used by the Tribunal to move applications towards finalisation. I will briefly refer to the Tribunal's jurisdiction and the parties who are involved in Tribunal proceedings before describing the case management system in some detail.

* This paper was originally delivered in Bangkok in February 2006 on a visit by Justice Downes to the Administrative Court of Thailand.

THE TRIBUNAL'S JURISDICTION AND PARTIES TO THE REVIEW

The Tribunal does not have a general power to review decisions made by Australian Government bodies under Commonwealth legislation. The Tribunal 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.

In general, Parliament confers on the Tribunal jurisdiction to review decisions that will, or are likely to, affect a person's interests. Given the wide variety of activities undertaken by the Australian Government, it is perhaps not surprising that the Tribunal has jurisdiction in relation to many areas of decision-making.

The Tribunal currently has jurisdiction to review decisions made under approximately 400 Acts or statutes and other legislative instruments. The majority of applications made to the Tribunal relate to the following kinds of decisions:

- workers' compensation entitlements for Australian Government employees, employees of certain corporations and seafarers;
- social security entitlements;
- taxation; and
- veterans' entitlements.

The Tribunal also regularly reviews decisions relating to civil aviation, corporations regulation, customs, environment protection, access to documents under freedom of information legislation, immigration and citizenship and professional qualifications.

The Tribunal's jurisdiction is diverse as are the persons who apply to the Tribunal for review of decisions. While most applications are lodged by individuals, applications are also lodged by corporations, public interest organisations and a wide range of other entities. The government body responsible for the decision is a party to the review and is usually referred to as the respondent. Other persons whose interests are affected by the decision may apply to be joined as a party to the review: s 30 of the *Administrative Appeals Tribunal Act 1975* (AAT Act).

Legal representation is allowed under the AAT Act: s 32 of the AAT Act. However, levels of representation vary significantly between the Tribunal's different jurisdictions. For example, in the social security area, only a small proportion of applicants are represented by a lawyer. Government bodies appearing before the Tribunal are represented by external or in-house lawyers or by specially trained non-legal staff.

HOW THE TRIBUNAL MANAGES APPLICATIONS FOR REVIEW

The Tribunal is required to provide a review process that is fair, just, economical, informal and quick: section 2A of the AAT Act. The AAT Act also provides that proceedings are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of the Act and other relevant legislation and a proper consideration of the matters before the Tribunal permit: s 33(1)(b) of the AAT Act.

Given the wide variety of decisions that the Tribunal reviews and the different types of parties involved in applications for review, the Tribunal must have flexible processes which allow each application to be dealt with in an appropriate manner. The Tribunal has developed case management procedures that are designed to achieve this flexibility.

I have included in the materials at Attachment A a flow chart which sets out the way in which most applications for review are dealt with by the Tribunal. Some types of applications are dealt with differently including applications to review security assessments made by the Australian Security Intelligence Organisation and particular decisions relating to the cancellation of visas under the *Migration Act 1958*. However, these are the exception rather than the norm. I will concentrate on the procedures used for most applications.

Making an application

- Applying for review

An application for review must be made in writing: s 29(1) of the AAT Act. The application must contain a brief statement of reasons for the application. While there is a form that applicants can use, there is no requirement that applicants must use this form.

The Tribunal can accept applications in person, by mail or by fax. The Tribunal does not generally accept applications by e-mail. Nor does it have a facility for applications to be made through the Tribunal's internet website.

- Time limit for applying for review

An application must usually be lodged within 28 days after a person is given a copy of the decision: s 29(1)(d) and (2) of the AAT Act. The time limit is longer for some types of applications.

If a person does not lodge the application within the time limit, the person can apply to the Tribunal to extend the time for making the application: s 29(7) of the AAT Act. The Tribunal sends a copy of the application to the respondent and asks the respondent to notify the Tribunal within 14 days as to whether or not they oppose the application to extend time. A letter is sent to inform the applicant of the process.

If the respondent does not oppose the application, the Tribunal usually makes a decision on the papers as to whether or not to grant the extension of time. If the respondent opposes the application, a preliminary hearing is listed to give the parties the opportunity to present any evidence and submissions before the Tribunal makes its decision. A document setting out the Tribunal's decision is sent to both parties with a covering letter.

- Application fee

A fee must be paid only in relation to some applications to the Tribunal. Whether a fee is payable depends on the type of decision to be reviewed and the circumstances of the applicant. For many types of decisions, no application fee is payable: for example, applications for review in relation to social security and veterans' entitlements. Even if a fee is usually payable for a particular type of decision, certain applicants are not required to pay a fee. These include applicants who are under the age of 18. The Tribunal can also decide to waive the payment of the fee if its payment would cause the person financial hardship.

- Provision of documents relevant to the review

When the Tribunal is satisfied that it has received a valid application, the Tribunal sends the applicant a letter acknowledging receipt of the application and providing basic information in relation to the review process. The Tribunal also sends a notice to 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. These documents are commonly referred to as the “T documents”.

- Applying for a stay order and other preliminary applications

Lodging an application for review has no effect on the operation or implementation of the decision that is to be reviewed: s 41(1) of the AAT Act. However, the applicant may apply to the Tribunal for an order staying or otherwise affecting the operation or implementation of the decision: s 41(2) of the AAT Act. If the Tribunal considers it desirable to do so after taking into account the interests of any persons who may be affected by the review, the Tribunal may make an appropriate order.

There are a range of other preliminary applications that may be made in relation to an application for review. These include:

- an application to shorten or extend the time for lodging the T documents under s 37 of the AAT Act;
- an application for a confidentiality order in relation to a person’s identity or in relation to documents that must be provided to the Tribunal under s 35 of the AAT Act;
- an application to be joined as a party to the application under s 30 of the AAT Act.

In relation to these preliminary applications, the Tribunal generally follows the process outlined above in relation to an application for extension of time. The Tribunal provides a copy of the application to the other party or parties with a request to notify the Tribunal within 14 days as to whether or not they oppose the application. If a party opposes the application or the Tribunal otherwise considers it appropriate to do so, a preliminary hearing will be listed.

- Outreach program and the legal advice scheme

Where an applicant is not legally represented, the Tribunal contacts the person by telephone to provide information about the Tribunal and its processes. This is known as Outreach and it usually takes place shortly after the T documents have been received by the Tribunal.

The officer conducting Outreach explains what the T documents are, what will happen next and other procedural matters. The Tribunal can arrange for the person to see a DVD about the Tribunal and its procedures. The Outreach officer also identifies whether the person may need the assistance of an interpreter when dealing with the Tribunal or whether the person has any other needs relating to a physical, psychological or intellectual disability. The person is also referred to other agencies that may be able to help the person.

The Tribunal has also established legal advice schemes with the cooperation of legal aid bodies. A legal aid solicitor attends the Tribunal once each week or each fortnight. During Outreach, the Tribunal invites self-represented parties to make an appointment to see the solicitor. If the person expresses interest, an appointment is made. The Tribunal makes the T documents available to the solicitor for the purposes of the appointment. The legal aid solicitor can provide advice and minor assistance and, in appropriate cases, may invite the person to apply for legal aid for further assistance including representation.

These measures are designed to enhance the accessibility of the Tribunal for people who do not have legal representation.

Conferences, other ADR processes and directions hearings

The Tribunal's case management strategy is to pursue 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. The Tribunal's goal is to finalise applications within 12 months of lodgement.

The Tribunal has a high rate of success in assisting parties to resolve their matters without proceeding to a formal hearing. In the 2005-06 financial year, 81 per cent of the approximately 8,000 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.

For many years, the Tribunal has relied on a General Practice Direction issued by the President to set out the procedures that the Tribunal will usually follow in managing applications for review where the applicant is represented. The Tribunal is currently in the process of developing and issuing guides for each of its major jurisdictions which will replace the General Practice Direction. These guides are designed to provide more particular detail in relation to how applications will be managed in different areas.

- Conferences

In most applications before the Tribunal, the parties attend one or more conferences conducted by a specialist officer known as a Conference Registrar or by a Tribunal member. The same person will generally conduct all conferences for a particular application.

Where both parties are represented, conferences are generally held by telephone. If an applicant is not legally represented, conferences are held in person at the Tribunal's premises unless this would not be convenient for one of the parties because of geographic or other reasons.

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 including expert medical reports; and
- explore whether the matter can be settled.

Conference Convenors may offer frank advice in relation to the prospects for success in an application.

At the first conference, the Conference Convenor usually sets a timetable for the parties to lodge further material and for the holding of another conference. Later conferences provide an opportunity for the Tribunal and the parties to review the further material that has been lodged and explore the possibility of settlement. Represented parties may be required to lodge and exchange a Statement of Facts and Contentions outlining their case to assist in this process.

Conferences also provide the opportunity for the Tribunal to discuss with the parties the future conduct of the application and, in particular, whether another particular form of alternative dispute resolution (ADR) may assist in resolving the matter. Where the Conference Convenor is satisfied that an application is unlikely to settle, arrangements for preparing the matter for hearing are discussed with the parties. The Conference Convenor will issue directions as necessary to ensure that any further material is lodged in a timely manner.

- Other ADR processes

In addition to conferencing, the AAT Act provides for the following specific types of ADR processes: conciliation, mediation, case appraisal and neutral evaluation: s 3(1) of the AAT Act. Conciliation and mediation have been used by the Tribunal for many years. Represented parties in the workers' compensation area have been required to attend a conciliation since 1998. While techniques associated with case appraisal and neutral evaluation may have been employed by the Tribunal on occasion, they are more recent additions to the Tribunal's established case management options.

The Tribunal has undertaken considerable work to clarify the definitions of these different forms of ADR which encompass both advisory, facilitative and hybrid dispute resolution processes. Process models have been developed for each form of ADR. Each process model sets out a definition of the process and then provides a range of information relating to the conduct of the process including:

- the stage of the proceedings at which the process is likely to be undertaken;
- a description of the way in which the process will proceed;
- the role of the person conducting the process as well as the role of the parties and their representatives; and
- what is likely to occur at the conclusion of the process.

The Tribunal has also developed a set of guidelines designed to assist Conference Registrars and Tribunal members to determine when it may be appropriate to refer an application to a particular type of ADR process. The guidelines set out a range of considerations to be taken into account including such things as:

- the capacity of the parties to participate;
- the attitudes of the parties;
- the nature of the issues in dispute;
- the likelihood of reaching agreement or reducing the issues in dispute; and
- the cost to the parties.

The guidelines identify factors that may make a particular form of ADR suitable for use. For example, mediation may be suitable where flexible options need to be explored or there will be an ongoing relationship between the parties.

ADR processes may be conducted by a Tribunal member, a Conference Registrar or another person engaged by the Tribunal: s 34C(5) of the AAT Act. Given the different nature of the processes that are available, the AAT Act does not contain a blanket prohibition on a Tribunal member who has conducted an ADR process from proceeding to hear a matter. However, the parties have the right to object to that member participating in the hearing: s 34F of the AAT Act.

In general, ADR processes are conducted in private. Evidence of anything said or done during an ADR process is not admissible in a hearing without the consent of the parties: s 34E(1) and (2) of the AAT Act. The AAT Act recognises, however, that it may be helpful for the report of a case appraisal or neutral evaluation to be admitted at a hearing. This may occur unless one of the parties objects to the report being admitted: s 34E(3) of the AAT Act.

- Directions hearings

The Tribunal can hold a directions hearing at any stage of a proceeding: s 33(1A) of the AAT Act. This may be at the request of a party or on the Tribunal's own initiative. In general, directions hearings are held to deal with issues relating to:

- the progress of an application including any failure to comply with requirements to lodge documents or other material;
- access to documents required to be produced under summons; and
- the conduct of the hearing.

Directions hearings must be conducted by a Tribunal member.

- Finalising matters during the pre-hearing process

As noted above, the Tribunal's case management strategy is to encourage the parties to settle an application where possible. The parties may lodge terms of agreement as to the outcome in the application at any stage during the review process. Where terms of agreement are lodged, the Tribunal can issue a decision that is consistent with the terms of the agreement provided that the following conditions are met:

- the decision would be within the powers of the Tribunal; and
- the Tribunal considers that it is appropriate to make a decision in those terms: s 34D and 42C of the AAT Act.

The Tribunal may decline to give effect to terms of agreement if there is doubt as to the correctness of the decision requested by the parties.

Of course, it is open to the applicant to withdraw an application at any time. The Tribunal also has a range of powers to dismiss an application including where the applicant fails to appear at a case event, fails to proceed with the application or fails to comply with a direction given by the Tribunal: s 42A of the AAT Act. The Tribunal can also remit a matter to the decision-maker for further consideration if it considers that this is the appropriate course: s 42D of the AAT Act. The decision-maker must either affirm, vary or set aside the decision within the period specified by the Tribunal.

Hearings

Where an application is not resolved, the Tribunal is required to conduct a hearing. The hearing is usually conducted in person but parties and witnesses may participate by telephone at the Tribunal's discretion: s 35A of the AAT Act. The Tribunal can dispense with the hearing and determine the application on the papers if all parties agree and the Tribunal is satisfied that the issues can be adequately determined in the absence of the parties: s 34J of the AAT Act.

- Constituting the Tribunal for hearing

For the purposes of a hearing, the Tribunal may be constituted by one, two or three members: s 21(1) of the AAT Act. In rare cases, the legislation conferring jurisdiction on the Tribunal determines that the Tribunal must be constituted in a particular way. In practice, most hearings are conducted by single-member Tribunals.

How the Tribunal will be constituted for a particular application relates primarily to the legal and factual issues to be determined. The AAT Act sets out a list of factors that must be taken into account including the degree to which it would be desirable for the Tribunal to be constituted by members with knowledge, expertise or experience in relation to the matter to be determined: s 23B.

Tribunal members have a range of professional expertise - including accounting, engineering, medicine, law and science - and the Tribunal is constituted bearing this expertise in mind.

Once a decision has been made as to which member or members will constitute the Tribunal, that member or the presiding member of a multi-member tribunal is generally responsible for managing the application.

- Conducting the hearing

The hearing gives the parties an opportunity to present their case to the Tribunal and gives the Tribunal the opportunity to obtain sufficient material to enable it to make the correct or preferable decision. The Tribunal is empowered to take evidence under oath or affirmation and can summon a person to give evidence or produce documents to the Tribunal: s 40 of the AAT Act. The Tribunal is not bound by the rules of evidence and may inform itself on any matter as it thinks appropriate, subject to the requirements of procedural fairness: s 33(1)(c) of the AAT Act. Material that is relevant to the decision under review may be admitted in evidence.

In general, each party is given an opportunity to present evidence to the Tribunal and to make submissions after the evidence has been presented. However, the way in which a particular hearing proceeds will vary according to the nature of the decision under review and the parties involved in the hearing. The Tribunal will adapt its procedures to ensure that the hearing proceeds in the most effective manner possible. For example, evidence from particular witnesses may be given by telephone rather than in person. Where both parties are calling experts to give evidence, the Tribunal may decide to hear the evidence from those experts together. Where the hearing involves a party who is not legally represented, more informal and flexible procedures are used to assist the person to present their case to the Tribunal.

The Tribunal's hearings are generally conducted in public: s 35 of the AAT Act. However, the Tribunal has a broad power in appropriate circumstances to make orders protecting the identity of parties and witnesses as well as restricting or prohibiting the disclosure of oral evidence or documents given to the Tribunal.

Decisions

The Tribunal must either affirm, vary or set aside the decision under review: s 43(1) of the AAT Act. Where the Tribunal sets aside a decision, it may either substitute a new decision or send the matter back to the decision-maker for reconsideration in accordance with the Tribunal's directions.

The Tribunal may give its decision and reasons orally at the end of a hearing or it may issue its decision and reasons in writing at a later time. Most decisions are issued in writing after the hearing. When giving its reasons for the decision, the Tribunal must include:

- its findings on material questions of fact; and
- a reference to the evidence or other material on which those findings were based: s 43(2B) of the AAT Act.

A person who is not satisfied with the Tribunal's decision may appeal against it to the Federal Court of Australia on a question of law: s 44 of the AAT Act.

CONCLUSION

I hope this presentation has given you an insight into the way in which the Administrative Appeals Tribunal deals with its caseload. Its case management approach is closely related to its role as an administrative decision-maker with an overarching responsibility to reach the correct or preferable decision. The Tribunal is an active participant in the review process ensuring that each application is managed appropriately and proceeds in a timely manner.

ADMINISTRATIVE APPEALS TRIBUNAL: DISPUTE RESOLUTION FLOW CHART

