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President of the Administrative Appeals Tribunal

FUTURE DIRECTIONS

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As some of you may recall, I spoke at the AIAL Administrative Law Forum in 2003. In February of that year, the then Attorney-General, Daryl Williams, had announced that the Government would not proceed in the short term with the proposal to create the Administrative Review Tribunal. Instead, the Government would introduce reforms to the Administrative Appeals Tribunal. The aim of the reforms would be to enable the Tribunal "to flexibly manage its workload and to ensure that reviews are conducted as efficiently as possible". I noted at the time that the amending legislation was likely to be introduced in the spring sittings of Parliament in 2003.

This prediction proved to be accurate in part. The Administrative Appeals Tribunal Amendment Bill was in fact introduced in the spring sittings of Parliament but in 2004 rather than 2003. Following the election and a Senate Committee inquiry into the Bill, it was passed by the Parliament on 17 March this year. The operative provisions of the *Administrative Appeals Tribunal Amendment Act 2005* (Amendment Act) commenced on 16 May 2005.

I would like to take the opportunity today to refer to some of the amendments that may be of particular interest to administrative law practitioners. These are:

- some of the new provisions in the *Administrative Appeals Tribunal Act 1975* relating to alternative dispute resolution processes;
- the new statutory requirement that decision-makers must assist the Tribunal in reaching the correct or preferable decision;
- the expanded powers of the Federal Court when dealing with appeals from Tribunal decisions.

I will also refer to a number of other developments and initiatives within the Tribunal.

Alternative Dispute Resolution Processes

The use of alternative dispute resolution techniques has been an important part of the Tribunal's case management approach for a considerable period of time. In most applications before the Tribunal, the parties attend one or more conferences conducted by Conference Registrars or Members trained in ADR. Only a relatively small proportion of applications lodged with the Tribunal proceed to a full hearing. For example, in the 2003/04 year, only 19% of applications were finalised by way of a decision of the Tribunal following a hearing on the merits.

Prior to the commencement of the amendments, the Act provided for the Tribunal to conduct conferences and mediations. The amending legislation has introduced a specific Division relating to ADR processes. ADR processes are defined in section 3 of the Act to mean procedures and services for the resolution of disputes including conferencing, mediation, conciliation, neutral evaluation, case appraisal and other procedures or services specified in the regulations. Arbitration and court procedures or services are specifically excluded. I note that no additional ADR procedures or services are currently specified in the regulations.

While the Tribunal has significant experience in conferences, mediation and conciliation, neutral evaluation and case appraisal are new concepts for the Tribunal. The Tribunal will be examining what is involved in these processes and how they may best be applied in an administrative review context.

A committee comprising members and staff has been formed to look at the use of ADR in the Tribunal in light of the amendments. One of the committee's tasks will be to develop a referral policy which will assist the Tribunal to identify when different processes may be suitable for use. Relevant factors are likely to include the nature of the dispute and the nature of the parties involved.

The use of ADR processes can have significant benefits for the parties, as well as for the Tribunal. They can reduce the costs that the parties and the Tribunal incur in relation to a proceeding and bring a dispute to a conclusion earlier. The Tribunal also recognises, however, that ADR will not necessarily be suitable for use in every case. The Tribunal is keen to ensure that ADR processes are not simply an obligatory extra step in the process but are held where they are likely to assist in the efficient and effective management of an application.

Before moving on from ADR processes, I would like to note two other aspects of the new provisions. Firstly, the Act imposes a requirement on parties that they must act in good faith in relation to the conduct of an ADR process: subsections 34A(5) and 34B(4) of the Act. Secondly, the Act now provides for a 7-day cooling-off period where the parties reach an agreement in the course of an ADR process: section 34D of the Act. Within 7 days after the terms of agreement are lodged, either party may notify the Tribunal in writing that it wishes to withdraw from the agreement. The Tribunal can only give effect to an agreement that has been reached in the course of an ADR process if the cooling-off period has expired and neither party has withdrawn from the agreement.

The Tribunal will be monitoring how these new provisions operate in practice and, as appropriate, will provide guidance to the parties on the Tribunal's approach to their implementation.

Role of the decision-maker in Tribunal proceedings

As is evident from the new requirement that parties must act in good faith in ADR processes, the Amendment Act was not concerned solely with the way in which the Tribunal operates. The amending legislation also introduced a provision relating to the role of decision-makers in Tribunal proceedings. New subsection 33(1AA) provides:

> *In a proceeding before the Tribunal for a review of a decision, the person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding.*

The first and most important thing to say about this new provision is that it may not create any new obligation. The duty of a decision-maker to assist the Tribunal existed already and arises from the very nature of administrative review on the merits. This was recognised by the Federal Court in *McDonald v Director-General of Social Security*: (1984) 6 ALD 6.

Unlike ordinary litigation, administrative decision-making is not concerned with dispute resolution as such. There may be a dispute as to the decision which should be made but administrative decision-making focuses on the making of the correct or preferable decision and not upon the resolution of the dispute relating to that decision. The parties do not have exclusive control over the issues to be decided.

The Tribunal is generally "standing in the shoes" of the original decision-maker and the Tribunal's new decision, once it has been substituted for the original decision, becomes the decision of the respondent. Once the Tribunal notionally becomes the decision-maker, it follows that the decision-maker's interest is for the correct or preferable decision to be made.

Just as the staff of departments or agencies will have assisted decision-makers in making the original decision, so too it is natural that they should adopt the same role so far as the Tribunal is concerned. The role of the support teams in the department or agency when the original decision was made was not a partisan role and it should not become a partisan role when the Tribunal is seeking to undertake precisely the same task as was undertaken by the original decision-maker.

What is the content of the duty to assist the Tribunal in reaching its decision? In my view, it has at least three aspects.

1. Reconsidering the original decision at the time of the Tribunal review for the purpose of determining whether it continues to represent the correct or preferable decision. This practice may involve informally referring the decision back to the decision-maker although that should not be allowed to delay review in the Tribunal

2. Furnishing evidence and submissions to the Tribunal to ensure that the Tribunal is in the best position to make the correct or preferable decision. This may involve special assistance being given when an applicant is self-represented but will continue to apply even though the applicant is represented.

3. Responding to requests for assistance on particular issues from the Tribunal. In undertaking this task the respondent will simply be acting in the way that it would have acted if a similar request had been made by the original decision-maker.

Of course, testing the case of an applicant and subjecting it to critical examination is one important way in which respondents can assist the Tribunal. In the Tribunal's experience, this is not an area in which respondents have generally been falling short.

I hasten to add that, while the decision-maker has a special role to play in Tribunal proceedings, the Tribunal has high expectations of all parties and their representatives. Parties are expected to assist the Tribunal in progressing applications in the most efficient and effective manner possible.

Role of the Federal Court

In terms of administrative law principle, one of the most interesting changes introduced by the Amendment Act relates to the powers of the Federal Court when dealing with appeals from Tribunal decisions under s 44 of the Act. Contrary to the strict limitations of traditional judicial review of administrative decisions, the courts may now make limited findings of fact when reviewing Tribunal decisions on a question of law.

This change implements a recommendation of the Administrative Review Council in its 1997 report entitled “Appeals from the Administrative Appeals Tribunal to the Federal Court”. In relevant cases, there will be no need for a matter to be remitted to the Tribunal for further consideration. The overall efficiency of the review process will be enhanced.

The courts may make findings of fact where:

- the findings of fact are not inconsistent with findings of fact made by the Tribunal (other than findings made by the Tribunal as the result of an error of law); and
- it appears to the court that it is convenient to make the findings of fact having regard to a number of matters including:
  - the extent to which it is necessary for facts to be found and the means by which those facts might be established;
  - the expeditious and efficient resolution of the whole of the matter;
  - whether any of the parties considers that it is appropriate for the court, rather than the Tribunal, to make the findings of fact: subsection 44(7) of the Act.

In making any new findings of fact, the court may have regard to the evidence that was before the Tribunal as well as receive further evidence: subsection 44(8) of the Act.

The Tribunal will follow with interest how these new provisions are applied by the courts.

Other trends and developments

There are two other trends that I would like to mention briefly before closing.

First, the Tribunal is observing some changes in the make-up of its caseload. The major jurisdictions have traditionally been Commonwealth employees workers' compensation, social security, veterans' entitlements and taxation. While these continue to be the major areas of work, the number of applications in particular jurisdictions is shifting somewhat. For example, there is an increase in the number of applications relating to taxation decisions and a decrease in applications relating to veterans' entitlements.

As you would expect, the Tribunal keeps a close eye on these changes. One reason for doing so is to monitor whether the Tribunal will have sufficient members with appropriate expertise to deal with its caseload. In my view, the availability and use of expert members continues to be one of the Tribunal's major strengths. Changes in the nature of the caseload can be relevant in the selection and appointment of new members to the Tribunal.

The second trend I would like to mention briefly is the increasing variety in the work undertaken by Tribunal members. While administrative review of government decisions remains the Tribunal's core work, this is not the only work undertaken by members. Over time, a range of other functions have been conferred on members of the Tribunal that are quite separate from their work under the Act.

Certain legally-qualified members of the Tribunal are authorised to issue telecommunications interception warrants and surveillance device warrants. In fact, Tribunal members issue the majority of warrants under the *Telecommunications (Interception) Act 1979*.[1] Members also review certificates that authorise controlled operations under the *Crimes Act 1914*.

Certain legally-qualified members of the Tribunal are approved examiners for the purposes of the *Proceeds of Crime Act 2002*. 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 an examination before the member.

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*. Prescribed authorities have certain 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 certain terrorism offences. I note that, at this stage, no Tribunal member has been appointed as a prescribed authority.

Most recently, I note that the Senate Foreign Affairs, Defence and Trade References Committee made a recommendation relating to the Tribunal in its inquiry into the effectiveness of Australia's military justice system. 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.[2] Noting the Tribunal's expertise and facilities, 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.

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

This trend of conferring tasks and powers on Tribunal members unrelated to administrative review reflects the confidence of Parliament in the ability of the Tribunal to undertake these diverse and significant functions. It also provides a range of interesting work for Tribunal members to undertake. However, the Tribunal is very concerned to ensure 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.

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