



**AUSTRALIAN GOVERNMENT SOLICITOR
GOVERNMENT LAW GROUP**

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President of the Administrative Appeals Tribunal**

**Government Agencies as respondents in the
Administrative Appeals Tribunal**

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Introduction

1. The role of respondents in applications for review in the Administrative Appeals Tribunal has been the subject of many comments in decisions and papers but has not, so far as I am aware, been the subject of any comprehensive analysis. In its report *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89) the Australian Law Reform Commission did undertake a brief analysis of the “Duties of agency representatives” ([9.72]-[9.83], Rec 121) but this issue formed a very small part of a very substantial report to which it was only incidental. The amendment of the *Administrative Appeals Tribunal Act 1975 (Cth)* to require decision-makers to use their “best endeavours to assist the Tribunal to make its decision” provides a suitable occasion for analysis of the issue.

Administrative Review contrasted with Litigation

Administrative Review

2. Any analysis of the exercise of Commonwealth power requires its constitutional basis to be addressed. Merits review under the Administrative Appeals Tribunal Act, in which the Tribunal substitutes its own decision for the decision of the original decision-maker, is an exercise of the administrative power of the Commonwealth and not of the judicial power of the Commonwealth. 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.

3. Administrative decision-making, which is an important aspect of Executive Government, 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 must always focus on the making of the correct or preferable decision and not upon the resolution of the dispute relating to that decision. Administrative decisions usually have wider impact than their effect on those in dispute. Litigation concentrates on the resolution of disputes between parties. Administrative decision-making is much more closely allied to what the common law calls decisions "in rem", (which are rare) than it is to the usual role of courts of resolving disputes "in personam".

4. A decision as to who should be granted a licence will very often also be a decision as to who should be refused that licence. A decision to grant a visa to enter Australia to one person can be a decision to refuse the same visa to another. Migration decisions can broadly be seen as decisions as to the make up of the people of Australia as much as they can be seen to be decisions about individual claims. The conflict between claims for individual justice on the one hand and public policy based considerations on the other hand is an important aspect of administrative decision-making.

5. One indication that the function of dispute resolution is secondary to the making of the correct or preferable decision in merits review in the Tribunal is the

requirement that a settlement reached between the parties can only be reflected in a new decision if the Tribunal makes a positive finding that the new decision is both within power and appropriate (ss 34D and 42C of the Act).

6. It has many times been said that the Tribunal stands in the shoes of the original decision-maker in making its substituted decision (see, eg, *Costello v Secretary, Department of Transport* (1979) 2 ALD 934 at 943). The substituted decision becomes the decision of the decision-maker being reviewed for future purposes. It is the Commonwealth department or agency in which the original decision was made that deals with enforcement and variation or cancellation of the decision if future circumstances justify this.

7. The making and review of administrative decisions frequently involves the exercise of discretion. This is reflected by the phrase which is usually used to describe the decision-making function of the Administrative Appeals 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.

Litigation

8. The role of litigation is to resolve disputes. It is to determine existing rights and not to confer fresh benefits. There are times when litigation involves limited exercises of discretion such as refusing to grant relief which might otherwise have been justified but these issues of discretion are incidental to the dispute resolution function and will not apply to the resolution of the principle issues in the litigation. Different judges assessing compensation for injury in the same fact

circumstances might arrive at different assessments but they are not exercising a discretion. Their task in each case is to assess the proper amount of compensation for the injury.

9. Litigation is truly adversarial. I am not using the phrase in its popular sense in which it is usually contrasted with “inquisitorial” processes. In that sense it is used to describe a hearing process. All litigation is adversarial, even in civil code countries such as France. Litigation is adversarial because it must result from an assertion by one party which is rejected by another party which the first party then seeks to have adjudicated by a court. The assertion and rejection through a court process is the adversarial process. Since the subject matter for dispute is created by the parties they are equally free to resolve it without curial determination. Accordingly, parties to litigation can resolve their disputes by agreements for the payment of money or for the doing of work or in any other way they find acceptable and to do this without involving the court.

Judicial Review

10. The contrast between merits review of administrative decisions and litigation can be further illustrated by reference to judicial review of administrative decisions. Judicial review is litigation. It involves an assertion by a plaintiff 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. The court hearing the application has no power to consider the merits of the decision. Discretionary considerations can only arise in the limited way referred to above. For example, if a plaintiff has delayed in bringing proceedings so that third parties have acted on a decision to their detriment the court might decline to make a declaration as to invalidity. There cannot be a finding that the decision will be upheld because of the delay. If the decision is unlawful it cannot be made lawful by a court engaged in judicial review (see, eg, *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597).

Proceedings under the *Administrative Decisions (Judicial Review) Act 1977* are no different. Although jurisdiction under the Act is conferred by statute the jurisdiction is part of the judicial power of the Commonwealth and is conferred under Chapter III of the Constitution on courts. Nothing in the *Judicial Review Act* authorises a court to consider the merits of the decision it is considering. The question remains whether the decision subject to review is lawful or unlawful in accordance with the provisions of s 5 of the *Judicial Review Act*.

Practical considerations

11. Although merits review of administrative decisions generally can be contrasted with litigation generally it does not follow that all merits review processes are alike. Applications for the review of decisions relating to licences such as radio and television licences are quite different from applications for the review of decisions relating to Commonwealth employees' compensation. Cases of the former kind have a high level of discretion in decision-making and can involve the need for expertise and reference to policy considerations. It is for this reason that the Tribunal has many members with expertise in areas outside the law such as accounting, aviation, defence, medicine and science. Cases of the latter kind are much closer to curial dispute resolution. Indeed, until comparatively recently most of the states conferred jurisdiction on workers' compensation courts to determine disputes relating to workers' compensation entitlements under State legislation. However, these cases involved true litigation in the sense that there was a dispute between the employer and the employee as to what entitlement the employee had to compensation and that dispute was determined by the court. The Commonwealth system adopts an administrative model so that the entitlement is not fully conferred by the legislation but arises from an administrative decision based on statutory provisions. When a Commonwealth employee's compensation matter is considered by the Tribunal on an application for review of the original decision,

the Tribunal is making a new administrative decision and is not simply resolving a dispute as to what are the applicant's rights under the statute.

Essential aspects of Administrative Review

12. In exercising its function the Tribunal is generally remaking the decision of a respondent or a decision of an intermediate review tribunal. As has already emerged, the Tribunal is generally "standing in the shoes" of the original decision-maker. The Tribunal's new decision, once it has been substituted for the original decision, becomes the decision of the respondent. Enforcement of the decision is for the respondent. Variation and even cancellation, where possible, is for the respondent. The whole object of the process is to reach the correct or preferable decision.

13. It may be useful to look in a little more detail at the precise nature of Commonwealth merits review as it is exemplified in the Tribunal.

14. The process begins with a decision. It may relate to a right or entitlement. It may not. It may relate to the conferring of a licence or permit. The decision will be authorised by statute and have statutory force. A combination of the authorising legislation and s 25 of the Act will confer a right to seek review of the decision.

15. Once the right to review is invoked the fate of the decision is entirely in the hands of the Tribunal. The decision continues in force subject to the grant of a stay (s 41). It generally cannot be altered by the decision-maker and must ultimately be pronounced upon by the Tribunal (s 26). The parties cannot remake the decision. At most they can ask the Tribunal to remake it in accordance with their request (ss 34D and 42C). Even if all parties wish the proceeding to be discontinued the Tribunal has a discretion as to whether to accede to the request (s 42A).

16. This is quite unlike litigation where the parties always have ultimate control except in some special areas where governments have intruded and conferred special discretions on Courts. I think of testators' family maintenance or family provision legislation and infants settlements in personal injury litigation. These are the exceptions that prove the rule. Courts are not in these situations really exercising a judicial function.

Role of the respondent

17. These considerations compel a conclusion that the role of a respondent in the Tribunal is quite different to the role of a defendant in ordinary litigation, even when the defendant is a government department or agency. Once the Tribunal notionally becomes the decision-maker it follows that the decision-maker's and the respondent's interest is for the correct or preferable decision to be made. This is so even if that decision is different to the decision subject to review. Just as the staff of the departments or agencies will have turned their attention to assisting decision-makers in making the original decisions 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.

18. Without the need to resort to the detail of the legislation or to government policy it is clear that the role of a respondent before the Tribunal is:

1. to assist the Tribunal to reach the correct or preferable decision; but
2. not simply to seek to uphold the existing decision, although that might be the approach which would be taken in litigation.

19. This role of the respondent 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 unrepresented but will continue to apply even though the applicant is represented; and
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.

20. In the early days of the Tribunal much of what I have said already had judicial approval. In *McDonald v Director-General of Security* (1983) 6 ALD 6 at 18, 19 Northrop J, forming part of a unanimous Full Federal Court, said:

“The Tribunal is not bound by the rules of evidence. It has before it all the material that was before the person who made the decision under the Act and which is the subject of the review before the AAT. Additional material may be placed before the AAT. As a matter of convenience, the Director normally appears to assist the Tribunal, but the Director-General is not to be treated in the same way as a party to proceedings before a Court. In Sordini v Wilcox (1982) 42 ALR 245, a review under the Administrative Decisions (Judicial Review) Act 1977, the administrative body whose decision was being reviewed appeared before the court. At 255 Northrop J said: “Counsel for the respondents stated that each of the first three-named respondents, being the members of the Review Committee, would abide by the order of the court. Counsel for the respondents, very properly, made substantive submissions on behalf of the Commission. Where there are no adversary parties appearing before an administrative body, as in this case, it is important that the court receive assistance of

counsel appearing for the administrative body making the decision which is being challenged under the Judicial Review Act.”

It is equally important that in reviews by the AAT of decisions by administrative bodies such as the Director-General, or his delegate, in which there were no adversary parties, the AAT receive the assistance of persons acting on behalf of the administrative body. Likewise, in appeals of this court from the AAT on questions of law, it is important that the court receive the assistance of counsel appearing for the administrative body. This practice, however, which gives the outward appearance of an adversary system, should not be allowed to obscure the true position, and in particular to justify the introduction of concepts of onus of proof in to the determination of claims under the legislation where no onus of proof in the legal sense arises. This view, quite correctly, has been acted upon by the AAT in the past. The AAT has not departed from that practice in the present case.’

21. In a hearing relating to a radio or television licence the respondent or authority might provide demographic evidence not available to the applicant which is not part of the respondent’s case but is part of the applicant’s case.

22. In an aviation matter the respondent authority might provide specialist evidence relating to matters not available to the applicant even though they assist the applicant.

23. In a security appeal, particularly where the applicant is not permitted to be present, the respondent should virtually adopt the role of counsel assisting and actively present evidence on all issues, particularly where this is requested by the Tribunal.

24. Where the Tribunal requests information on issues not considered to have arisen by the decision-maker but which the Tribunal considers to be relevant the respondent should present that material.

25. In a Veterans claim the respondent will present material both favourable and unfavourable to the applicant to which the applicant does not have access.

26. In a Comcare case where the respondent has material not favourable to the respondent but not available to the applicant the material will be presented.

27. In every case the object of the respondent should be to assist the Tribunal in coming to the correct or preferable decision and not to “win” or uphold a doubtful decision.

The New Statutory Obligation

28. This analysis has so far drawn only upon the nature of administrative review to draw its conclusions. However, the recent amendment to the Act recognises them and gives them statutory effect. The Model Litigant Policy of the Commonwealth is also relevant.

The Administrative Appeals Tribunal Amendment Act 2005

29. This Act was assented to on 1 April 2005 and its operative provisions took effect on 16 May 2005. It introduced, among other things, a range of changes to the way in which the Tribunal may deal with applications for review.

30. One of the amendments is particularly relevant to this topic. A new subsection has been introduced into s 33 of the Act which provides:

Decision-maker must assist Tribunal

(1AA) 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.”

31. This provision probably has its origins in Recommendation 21 of the Australian Law Reform Commission’s *Managing Justice* report:

“Recommendation 121.

The federal Attorney-General should specify in the model litigant obligations, set down in legal services directions under the Judiciary Act 1903 (Cth), that agencies and agency representatives in the conduct of federal review tribunal proceedings have duties to assist the tribunal to reach its decision.”

32. The Office of Legal Services Coordination (OLSC) has issued Guidance Note No. 1 of 2005 in relation to this amendment. The OLSC states that the new provision is consistent with and builds on this ALRC recommendation which was made in response to concerns that Australian Government departments and agencies, and their legal representatives, were overly adversarial in their approach to Tribunal proceedings. Behaviours that were said to be indicative of an overly adversarial approach included deliberate late disclosure of material and focussing solely on defeating the application during the hearing. I hope the above analysis shows that the obligation to assist is much more extensive than merely avoiding such negative practices.

33. To my mind, the provision serves the dual purpose of reminding parties, and particularly respondents, of the matters I have discussed and imposing a positive statutory obligation to that end. As the OLSC notes in its Guidance Note, the new provision will enable the Tribunal to reach its decision more efficiently by eliminating overly adversarial approaches such as late disclosure of relevant material.

The Model Litigant Policy

34. Strictly, this policy does not apply to Tribunal review because it relates to litigation. The Policy itself, however, does purport to extend to “litigation ... before ... tribunals”. This terminology demonstrates a misunderstanding of what Tribunal review is.

35. Not only is a reference to Tribunal litigation misleading, but equating merits review with litigation may cause parties and lawyers to think that the role of respondents in merits review is no different to their role in litigation. The whole of the burden of this paper so far has been to correct any such misapprehension. Respondents in merits review need to be more than model litigants; they need actively to assist the Tribunal.

36. Accepting the limited application of the Model Litigant Policy, these rules can still be of assistance in merits review. However, they must be understood as a minimum and as not covering the critical aspect of the role of a respondent in merits review, namely assisting the Tribunal.

37. It is to be noted that the Model Litigant Policy is directed to the attitude of the Commonwealth, and its agencies, to their opponents, not their attitude to the Court. This is the natural consequence of the distinctions I have drawn above. It is because of the adversarial nature of litigation. The Policy does not address the relationship of the Commonwealth with Courts or Tribunals. It is useful to look at the key obligations outlined in the Policy:

“2. The obligation requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency by:

(a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation,

(b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid,

(c) acting consistently in the handling of claims and litigation,

(d) endeavouring to avoid litigation, wherever possible,

(e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:

(i) not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true, and

- (ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum,*
- (f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim,*
- (g) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement,*
- (h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and*
- (i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.*

38. What emerges clearly is that this standard is dealing with litigation controlled by the parties not the making of an administrative decision.

39. The Model Litigant Policy provides a useful context in which to consider the role of respondents in the Tribunal, and sets some minimum standards in one area. Although it does not address the fundamental issue of the way in which the respondent should relate to the Tribunal itself, this is now dealt with squarely in new s 33(1AA) of the Act.

40. The OLSC makes clear in its Guidance Note No. 1 of 2005 that s 33(1AA) is consistent with the obligation for Australian Government Departments and agencies, and their legal representatives, to act as model litigants.

41. It seems to me, in all the circumstances, that now is an appropriate time for some reconsideration to be given to the drafting of the Model Litigant Policy in the way it applies to Tribunals.

The Judicial Model

42. None of the above affects the essential independence of the Tribunal or the fact that the means by which the Tribunal is required to go about its task can be said to be based on the judicial model. The Tribunal is required to conduct a hearing (s 35). This 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). The Tribunal is bound by the rules of natural justice.

43. In the very earliest days of the Tribunal the first president, Brennan J, in *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”.

44. 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 identified five such qualities (*Mason, “Administrative Review: The Experience of the First Twelve Years”* (1989) 18 Fed L Rev 122 at 130):

“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 have to give reasons for his decision. Fourthly, 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.”

45. The five qualities are:

1. Independence of the Tribunal;
2. Decision-making in public;
3. Requirement for reasons;
4. Natural justice applies; and
5. Individual justice will not be subordinated to public policy.

46. 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. I have been involved in hearings which took days where the time that could be devoted by the original decision-maker must have been very much less.

47. 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 which ought to continue to possess attributes appropriate to that process.

The Uniqueness of the Australian System

48. The fact that the Tribunal proceeds in accordance with the “judicial model” is one of its great virtues. It was an essential aspect of its uniqueness at the time it was created. The burgeoning number of similar tribunals now seen in the states of Australia mean that it is no longer unique here. However, it remains unique in the rest of the world.

49. Review of administrative decision-making elsewhere in the world is either confined to judicial review or is limited to specific subjects. Review on the European continent is generally confined to judicial review even though carried

out by a separate court structure. In the United Kingdom there is limited merits review but only before specialist tribunals. However, all that is about to change as the United Kingdom adopts a system of general tribunal review substantially influenced by the Australian system.

50. The unique aspect of the Australian system is to give to a court-like body some of the functions of the Executive. It is not part of the conventional Executive although it exercises executive power. It exercises some executive power which is denied to the conventional Executive. The part of the executive function which the legislature has seen fit to confer upon court-like Tribunals is generally that part where individuals are making claims against Government. It is when, for example, they are seeking to make a claim for a licence to operate aircraft or for a social security payment or for compensation for injury in a motor accident while delivering the mail.

51. The importance of the court-like process should not mask the essential nature of the exercise in the Administrative Appeals Tribunal, namely administrative decision-making. It does not undermine any of the conclusions I have drawn about the process. It should not be allowed to confuse participants into thinking that the court analogy is more complete than it is.

Conclusion

52. The burden of this paper has been to demonstrate that respondents in the Administrative Appeals Tribunal have a positive obligation to assist the Tribunal in its process of forming its opinion of what is the correct or preferable decision in the matters before it.

53. This paper has necessarily been preoccupied with generalisations. Generalisations are always subject to qualifications. All of the observations I have made must be tempered with practical realities. The grant of a commercial

licence must be dealt with differently to a compensation case where there are experienced counsel on both sides. Both must be dealt with differently to a social security case in which the applicant is unrepresented and may be mentally ill. One important way in which respondents can assist the Tribunal is by testing applicants' cases and subjecting them to critical examination. That is not, however, an area in which respondents' activities before the Tribunal have generally been lacking. The purpose of this paper has been to highlight and examine another aspect of the respondent's role. If respondents address the issues I have covered in this paper and frame their preparation and evidence to take account of them and, where necessary, to act on them, administrative decision-making will be the beneficiary.