



**AUSTRALIAN INSURANCE LAW ASSOCIATION -
NORTHERN TERRITORY BRANCH - SEMINAR**

**The Hon. Justice Garry Downes AM
President of the Administrative Appeals Tribunal**

**The Administrative Appeals Tribunal -
Its Role in the Regulation of the Insurance Industry**

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Introduction

It gives me great pleasure to be able to speak to you today about the Administrative Appeals Tribunal and its work. I will begin by outlining the Tribunal's role within the broader context of our system of administrative law before briefly describing how the Tribunal goes about its core work of conducting administrative review. I will then identify the areas of the Tribunal's jurisdiction that are most relevant to the insurance industry and refer to some recent cases and issues in this area.

The establishment of the AAT

The Tribunal celebrates its 30th anniversary this year, a significant milestone for any organisation. As you may 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', (1981) 40 Australian Journal of Public Administration 116.

In undertaking its 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* 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 approach 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.

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 reasons for the decision including any findings on material questions of fact and referring to the evidence for the findings; 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, 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 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 2005, the Act was amended to provide specifically that the Tribunal can also undertake case appraisal and neutral evaluation. The Tribunal is currently reviewing the use of ADR and is developing 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. 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. 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.

Where an application is not resolved, the Tribunal is required to conduct a hearing: section 35 of the Act. The hearing can only be dispensed with when all parties agree and even then the Tribunal has a discretion: section 34B. The hearing must generally be in public: section 35. Although the Tribunal is not bound by the rules of evidence (section 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 the insurance industry and its participants

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. Whether jurisdiction will be conferred on the Tribunal is considered when legislation is being drafted. In general, a right to merits review is provided for in relation to decisions that will, or are likely to, affect a particular person's interests.

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 and other legislative instruments. The Tribunal's workload consists primarily of applications in relation to family assistance and social security, taxation, veterans' affairs and workers' compensation. However, the Tribunal deals with applications for review in a broad range of other areas including bankruptcy, civil aviation, freedom of information and immigration and citizenship. The Tribunal's jurisdiction also extends to decisions made under Acts that regulate the banking, insurance and superannuation industries including the *Insurance Act 1973* and the *Life Insurance Act 1995*.

The Insurance Act provides for merits review of a range of decisions made by the Australian Prudential Regulation Authority (APRA) concerning entities that carry on insurance businesses in Australia as well as individuals working within the insurance industry. Reviewable decisions include:

- to refuse to authorise a body corporate to carry on an insurance business;
- to refuse to authorise a non-operating holding company for the purposes of the Act;
- to give directions to a body corporate with respect to the carrying on of its insurance business during, or after, an investigation into its affairs;
- to refuse to approve the appointment of a person as a general insurer's auditor or actuary; and
- decisions relating to the disqualification of individuals from acting in certain senior positions within regulated entities or from holding appointments as an auditor or actuary.

When compared with other jurisdictions, the Tribunal does not receive a large number of applications for review of decisions made under the Insurance Act. However, regulatory action taken by APRA in the aftermath of the collapse of HIH Insurance Limited has resulted in some increase in the number of applications to the Tribunal in relation to disqualification decisions.

Before referring to some particular issues and cases in relation to these types of decisions, I would note that insurance and superannuation are not the only areas in relation to which the Tribunal conducts reviews of this kind. The Tribunal has jurisdiction to review decisions concerning professional qualifications in a number of areas including:

- decisions under the *Corporations Act 2001* to disqualify persons from being involved in the management of companies, or to cancel or suspend the registration of an auditor or liquidator;
- decisions under the *Migration Act 1958* relating to the registration of migration agents; and
- decisions under the *Income Tax Assessment Act 1936* relating to the registration of tax agents.

The Tribunal has considerable experience in relation to the review of these kinds of decision.

- Stay orders in relation to primary decisions

Under the Acts to which I have just referred, the person who is the subject of a disqualification, suspension or cancellation decision may apply directly to the Tribunal for review. The person can then seek an order under section 41 of the Administrative Appeals Tribunal Act staying or otherwise affecting the operation or implementation of that decision.

The significance of the ability to apply for such an order is plain. The decision is likely to impact on the person's ability to work and earn a livelihood. Publication of the making of the decision has the potential to impact adversely on the person's reputation.

Where APRA decides to disqualify a person under section 25A or 44 of the Insurance Act, the person must seek internal review before applying to the Tribunal. This is the case for all reviewable decisions under the Insurance Act. An application for reconsideration must generally be made within 21 days: subsection 63(2). APRA must confirm, revoke or vary the decision within 21 days or the decision is taken to have been confirmed: subsections 63(4) and (5). Application may be made to the Tribunal for review of a decision to confirm or vary the original determination: subsection 63(7).

In general, where internal review is available, the Tribunal has no role until that internal review process has been completed. This is not the case, however, under the Insurance Act and legislation relating to the superannuation industry. A person who has applied for internal review of a decision may apply to the Tribunal for an order under section 41 of the Administrative Appeals Tribunal Act pending the completion of the reconsideration: subsection 63(9).

The Tribunal was dealing with an application of this kind in *Re VBJ and Australian Prudential Regulation Authority* (2005) 87 ALD 747. APRA had disqualified the applicant from being a trustee, investment manager or custodian of a superannuation entity under the *Superannuation Industry (Supervision) Act 1993*. Having reviewed the general case law relating to the exercise of the power to grant a stay order, Deputy President Forgie identified the factors that must be taken into account in deciding whether an order should be made including:

- the prospects of success of the application for review;
- the consequences for APRA in carrying out its functions and for those whose interests are affected by the review;
- the consequences for the applicant; and
- any conditions such as undertakings that could ameliorate any consequences of either granting or refusing to grant a stay.³

In relation to the relevance of the personal circumstances of the applicant, Deputy President Forgie noted:

“... I do not consider that taking account of a person’s personal commercial interests or interests affecting his reputation necessarily leads to the conclusion that a stay order would be appropriate in almost every case in which a disqualification order has been made under s. 120A. That is only one of the factors that must be taken into account. Even then, the extent to which each person’s personal commercial interests or interests affecting his reputation are affected will vary from case to case as will such matters as the nature of the behaviour that led to APRA’s deciding to make its decision and the likelihood of the public’s being affected if a stay order were made.”⁴

In this case, the Tribunal declined to order that the disqualification decision itself should be stayed. However, it determined that particulars of the disqualification decision should not be published in the Commonwealth Government Gazette nor otherwise made public until the reconsideration had been determined. This decision demonstrates the Tribunal’s ability to make orders that are tailored to the matter at hand.

- The nature of the power to disqualify and its exercise

As I noted earlier, the Tribunal exercises the administrative power of the Commonwealth when it undertakes merits review. Neither APRA nor the Tribunal is permitted to exercise judicial power. In the recent case of *Kamha v Australian Prudential Regulation Authority* [2005] FCAFC 248 the Full Court of the Federal Court had to consider whether the power to disqualify a person under the Insurance Act involves the exercise of judicial power.

³ (2005) 87 ALD 747 at [47].

⁴ Ibid at [44].

APRA had made a decision to disqualify Mr Kamha under section 25A of the Insurance Act as it was satisfied that he was not a fit and proper person to be, or to act as, one of the specified senior officers of an insurance business. Rather than exercising his right to merits review of the decision, Mr Kamha sought judicial review of the decision.

One of the arguments advanced on Mr Kamha's behalf was that section 25A invalidly confers judicial power on APRA in so far as it permits APRA to disqualify him as a punishment or penalty for his past conduct. It was contended that such a power can be exercised only by a court.

Justices Emmett, Allsop and Graham rejected this argument. In determining whether a power is administrative or judicial in character, the Court noted that the object of the exercise of the power will be significant. A power determining the existing rights and obligations of parties in dispute may be characterised as judicial. A power determining what legal rights and obligations should be created is more likely to be characterised as administrative.⁵ The fact that the exercise of the power "may have a punitive effect, while not irrelevant, is not determinative of the character of the power exercised".⁶

In relation to the disqualification power in section 25A of the Insurance Act, the Court held:

"The exercise of the power does not involve an adjudication between disputants but involves the imposition of a disability on an individual as distinct from the determination of existing rights. The power is neither a power that is inherently judicial in character nor a power with a character that has historically been exercised by courts of law.

⁵ [2005] FCAFC 248 at [68].

⁶ Ibid. at [69].

While punishment of a criminal offence is the exercise of judicial power, the imposition of disciplinary penalties does not necessarily entail the exercise of judicial power (...). Disciplinary jurisdiction is significantly protective and does not involve a punitive element in the nature of the punishment of a criminal offence. Jurisdiction in disciplinary matters is exercised to protect the public, not to punish the person disciplined.”⁷

In addressing further contentions put by Mr Kamha, the Full Court confirmed that the power to disqualify may be exercised whether or not the person is currently holding one of the prescribed positions with an insurance business or has any intention to hold such a position in the future.⁸ To construe the power otherwise would not be consistent with the statutory purpose of protecting the interests of policy holders. Further, the Full Court held that APRA, and the Tribunal standing in the shoes of APRA, may lawfully take into account the potential for a disqualification decision to deter others from acting in a similar way.⁹ This too is consistent with the object of protecting the public which is the primary basis for the exercise of powers in disciplinary matters.

- Conduct of the review by the Tribunal

The Tribunal recently published a decision relating to the disqualification of an actuary under the Insurance Act: *Re Slee and Australian Prudential Regulation Authority* [2006] AATA 206. This particular case offers the opportunity to note a number of issues relating to the review of these types of decisions and the way in which the Tribunal operates.

Pursuant to section 44 of the Insurance Act, APRA may disqualify a person from holding any appointment as an actuary of a general insurer. The power may be exercised if the person:

⁷ Ibid. at [72] - [73]. (Citations omitted)

⁸ Ibid. at [48].

⁹ Ibid. at [64].

- has failed to perform adequately and properly the functions and duties of such an appointment as set out in either the Insurance Act or the prudential standards;
- otherwise does not meet one or more of the criteria for fitness and propriety set out in the prudential standards; or
- does not meet the eligibility criteria for such an appointment as set out in the prudential standards.

Mr Slee was the consulting actuary for HIH Insurance Limited for a number of years including between 1 January 1997 and March 2001. APRA contended that Mr Slee had not demonstrated competence in the conduct of business duties within the meaning of the General Prudential Standard issued by APRA under section 32 of the Insurance Act. More specifically, it was argued that he had not complied with the professional standards set out in the Code of Conduct for Actuaries and Professional Standard 300 issued by the Australian Institute of Actuaries.

The Tribunal examined Mr Slee's conduct in relation to three financial periods during 1999 and 2000 and considered reports that he had prepared during that time. The Tribunal was satisfied that Mr Slee was required to comply with the relevant professional standards and that he had failed to exercise the professional care and diligence expected of a reasonable and competent actuary. In particular, the Tribunal was satisfied that Mr Slee had underestimated central estimates of outstanding claims liability and inappropriately assessed future claims handling costs. He had not undertaken his work with the appropriate degree of care and made errors that should not have been made. The Tribunal decided to affirm the decision to disqualify Mr Slee.

In its reasons for decision, the Tribunal noted the nature of its task in the following terms:

“... the application requires that the issue of disqualification or not is to be considered anew. The Tribunal is not to examine the original decision and discern if a mistake was made in the findings of fact or the reasoning. The task before it is to consider the material tendered in evidence and the submissions made in relation to it and then reach its own decision in accord with the Act.

Much of the evidence before the Tribunal was not available to the original decision-makers. In addition, we have had the benefit of the Applicant giving evidence in chief and being subject to cross examination. It is also apparent that contentions made on behalf of APRA are in a number of respects different from those considered by the delegate responsible for the decision under review.”¹⁰

This quote identifies succinctly a number of the issues that I referred to earlier in relation to the nature of merits review as a de novo review and the relationship between administrative decision-making within agencies and external merits review by the Tribunal. In this context, I believe it is also important to refer to the particular role that APRA as the respondent plays in the context of Tribunal proceedings.

In a proceeding before the Tribunal for review of a decision, the person who made the decision is required to use his or her best endeavours to assist the Tribunal to make its decision. The special nature of this role has been noted in the case law and is now also a specific requirement under the Administrative Appeals Tribunal Act: subsection 33(1AA). The obligation comprises a number of aspects including the following:

- 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;

¹⁰ [2006] AATA 206 at [4] - [5].

- furnishing evidence and submissions to the Tribunal to ensure that the Tribunal is in the best position to make the correct or preferable decision; and
- responding to requests for assistance on particular issues from the Tribunal, acting in the way it would have acted if a similar request had been made by the original decision-maker.

The role of the respondent is not simply to seek to uphold the existing decision even though that might be the approach which would be taken in ordinary litigation.

The Tribunal may consist of one, two or three members for the purposes of conducting a hearing and determining an application for review. When deciding how the Tribunal should be constituted for a particular matter, 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: subsection 23B(f) of the Act.

One of the Tribunal's 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. The inclusion of a specialist member on the Tribunal enhances its ability to understand the issues and the evidence and to reach the correct or preferable decision. By way of example, the Tribunal in *Re Slee* was constituted by two members who collectively have experience in relation to accountancy, banking and corporations law. The Tribunal is mindful of the need to ensure that it has access to members with expertise in the diverse areas of its jurisdiction.

The final issue I would like to discuss which was dealt with in *Re Slee* concerns publication of the Tribunal's reasons for decisions in these type of matters.

Subsection 63(14) of the Insurance Act provides that:

The hearing of a proceeding relating to a reviewable decision of the Treasurer or APRA shall take place in private and the Administrative Appeals Tribunal may, by order:

- (a) give directions as to the persons who may be present; and*
- (b) give directions of a kind referred to in paragraph 35(2)(b) or (c) of the Administrative Appeals Tribunal Act 1975.*

Provisions similar to this are found in a number of Acts that confer jurisdiction on the Tribunal including the *Industry, Research and Development Act 1986* and the *Superannuation Industry (Supervision) Act 1993*.

In a number of earlier cases where the effect of provisions of this kind were considered, the Tribunal reasoned that the legislative purpose of providing for a hearing in private would be defeated if details identifying an applicant were included in its published reasons for decision.¹¹ As a result, Tribunal decisions have generally been prepared in a way that does not disclose the identify of the applicant. It is understandable that an applicant to the Tribunal may wish to have their name and other details suppressed in matters where the capacity of a person to earn a living and reputation are at stake.

In *Re Slee*, the Tribunal considered whether the decision should be released in full and sought submissions from the parties on the issue. The Tribunal held that subsection 63(14) of the Insurance Act does not prohibit the Tribunal from publishing its reasons with the applicant being identified. In fact, to construe the provision otherwise would be contrary to public policy, open justice and the policy of the Insurance Act in enabling disqualification. The Tribunal also reasoned that, given the protective nature of a disqualification decision, it is important for the insurance industry and other interested parties including the general public to be informed of the status of participants.

¹¹ See, for example, *Re X and Insurance and Superannuation Commissioner* (1992) 27 ALD 343 at 344-345.

As is clear from the references I have made to the identify of the applicant in the case, the Tribunal decided that the applicant's name should not be suppressed.

In light of this decision and other decisions on confidentiality issues in this area, the Tribunal will need to review its practices in this area. Of course, there may well be circumstances in which it will be appropriate to suppress the name of an applicant or other identifying details in a published decision. It remains open to the Tribunal to make confidentiality orders to this effect. On the approach taken in *Re Slee*, this will be a decision to be made in the particular circumstances of an application rather than one that flows from the fact that proceedings have taken place in private.

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.

Events of recent years have led to increased activity in courts and tribunals in relation to the insurance industry and its regulation. I hope that I have been able to offer you some insight into the Tribunal and its role as well as some of the issues that have arisen in this area.