REFORMS TO THE ADMINISTRATIVE APPEALS TRIBUNAL

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Government Lawyers' CLE Convention

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Introduction

Given the nature of its administrative review jurisdiction, government solicitors play a significant role in the AAT, most obviously as representatives of Ministers and government agencies. AAT jurisdiction is largely concerned with Commonwealth administration but not exclusively. I welcome this opportunity to speak to you and would like to thank the Government Solicitors Committee for inviting me to participate today.

When I was first approached to speak today about reforms to the AAT, an exposure draft of a Bill proposing a range of amendments to the *Administrative Appeals Tribunal Act* had been released for public comment. The Bill was introduced into the House of Representatives on 11 August. The Attorney-General gave the second reading speech. However, with the recent prorogation of Parliament the Bill has lapsed. Whether or not it will be reintroduced will be a matter for the government that is elected.

Given that the Government is in caretaker mode, I will limit what I have to say about the Bill today to identifying a number of the more significant procedural changes that were proposed in the Bill and highlight some changes that may be of particular interest to government solicitors. Many of them were proposed by the AAT to allow the Tribunal to undertake its work more flexibly and efficiently.

Reforms to the AAT are not wholly dependent on legislative change, however. The Tribunal has been active in identifying aspects of its practices and procedures in relation to which change may be necessary or desirable. In consultation with users, the Tribunal has implemented and is working on a number of proposals that are designed to improve the service it provides. In addition to identifying some of these changes, I would also like to discuss a collaborative initiatives involving the Tribunal which is likely to have an impact on the AAT into the future.

The Administrative Appeals Tribunal Amendment Bill 2004

The AAT Amendment Bill contains a significant number of proposed amendments to the AAT Act, none of which fundamentally alter the Tribunal's purpose or functions. I will focus today on four main areas:

- proposed reforms to the alternative dispute resolution options available to the Tribunal;
- proposed changes to the powers of Members and Conference Registrars;
- an amendment relating to the obligation of decision-makers in Tribunal proceedings;
- proposed changes to the powers of the Federal Court when reviewing Tribunal decisions; and
- Qualifications for appointment as President.

Alternative Dispute Resolution Procedures

The Tribunal has a high rate of success in assisting parties to resolve their dispute without proceeding to a formal hearing. In the most recent financial year, 81 per cent of the approximately 9,900 applications finalised by the Tribunal were finalised without the Tribunal making a decision on the merits following a hearing. Seventy per cent of applications finalised without a hearing were finalised by way of an agreement between the parties as to the outcome of the application.

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.

The high rate of settlement in the Tribunal can be attributed in part to the use of alternative dispute resolution techniques in standard Tribunal case management procedures. In most applications before the AAT, the parties attend one or more preliminary conferences. These conferences are conducted by Conference Registrars and Members trained in ADR.

The conference procedure of the Tribunal is an essential part of the AAT's case management system. Parties to an application are assisted by the Conference Convenor to identify issues that are in contention and those that are in agreement as well as identifying what further evidence may be necessary. The identification of the issues in dispute gives the parties a point of reference for settlement negotiations. There is often frank discussion of prospects of success.

In addition to the use of ADR techniques in preliminary conferences, the Tribunal also currently offers mediation. Unlike conferences, mediations can only be held with the consent of the parties.

The Amendment Bill proposed to amend the Act to expand the range of ADR processes that the Tribunal may employ.[1] In addition to conferencing and mediation, the following processes would be available to the AAT:

- neutral evaluation;
- case appraisal; and
- conciliation.

[1] Items 3 and 112 of Schedule 1 to the Administrative Appeals Tribunal Amendment Bill 2004.

Further ADR techniques that are identified as suitable for use within the Tribunal could be specified in the AAT Regulations.

It must be acknowledged that, if the AAT were given a broader range of ADR options, integrating those new processes into the AAT's case management system would involve a significant amount of work. The Tribunal would need to consider carefully the circumstances in which the different techniques may be suitable for use. Relevant factors would include the nature of the dispute and the nature of the parties involved.

New powers for AAT Members and Conference Registrars

In its current form, the Act provides that, prior to the constitution of the Tribunal for hearing, certain powers can be exercised only by Presidential and authorised Senior Members of the Tribunal. This applies, for example, to:

- the power to grant an extension of time within which the lodge an application for review;
- the power to make an order staying or otherwise affecting the implementation of a decision;
- the making of orders in relation to access to documents produced under summons; and
- the dismissal of applications because of a failure to comply with Tribunal directions.

The powers cannot be exercised by members who are sometimes referred to as ordinary Members: that is, members who are neither Presidential Members nor Senior Members. I hasten to add that, while the reference to "ordinary Members" may be useful for the purposes of clarification, it does not describe in any way their inherent qualities as members of the Tribunal.

The proposed amendments to the Act would allow the President to authorise members to exercise powers that could previously be exercised only by Presidential Members and authorised Senior Members.[2]

In a similar vein, the Amendment Bill proposed to confer a new power on the President to authorise Conference Registrars to issue binding directions under section 33 of the amended Act.[3] Consequently, during the conference stage of the pre-hearing process an authorised Conference Registrar would be able to direct parties to undertake action in relation to the progress of the application.

Preliminary conferences at the AAT are largely conducted by Conference Registrars. In addition to exploring settlement possibilities, preliminary conferences are the Tribunal's primary mechanism for managing the progress of the application. Currently, the Conference Registrar and the parties can agree on a timetable for the progress of the matter but any deadlines set are not binding on the parties. Failure to comply with the timetable does not give rise to any sanction under the AAT Act. Sanctions arise only if the timetable has been specified in a direction made by a member. If binding directions are to be made, the matter must be referred to a member.

Obligations on the decision-maker

It is clear that the Tribunal has high expectations of parties and their representatives and of legal practitioners, in particular, in relation to their dealings with the Tribunal. It is also true that the expectations are very high for decision-making agencies and their representatives. In part this stems from the requirement that agencies comply with the model litigant standards set out in the Attorney-General's Legal Services Directions and act with complete propriety, fairly and in accordance with the highest professional standards.

[2] Items 4, 48, 49, 50, 133, 134, 135 and 180 of Schedule 1 to the Administrative Appeals Tribunal Amendment Bill 2004.
[3] Items 108, 109 and 110 of Schedule 1 to the Administrative Appeals Tribunal Amendment Bill 2004.

More than this, however, there is an expectation that decision-making agencies will assist the Tribunal in reaching the correct or preferable decision. Such an expectation has been identified in the case law relating to the Tribunal and arises because of the nature of the Tribunal's administrative review function.

The Amendment Bill proposed to amend s. 33 of the Act to make this obligation on decision-making agencies explicit. The new subsection would provide:

> *In a proceeding before the Tribunal for 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.*[4]

As government solicitors, it is important to be aware of this expectation and the difference in role when representing a government agency in the courts and before the Tribunal.

Powers of the Federal Court on appeal

One of the other significant changes proposed to the Act relates to the powers of the Federal Court when dealing with appeals from the Tribunal under s 44 of the Act. The Amendment Bill proposed that the Federal Court would be permitted to make limited findings of fact when reviewing Tribunal decisions for error of law.[5] This implemented a recommendation of the Administrative Review Council in its 1997 report entitled "Appeals from the Administrative Appeals Tribunal to the Federal Court".

Contrary to the strict limitations of traditional judicial review of administrative decisions, the court would be permitted to make findings of fact where:

[4] Item 106 of Schedule 1 to the Administrative Appeals Tribunal Amendment Bill 2004.
[5] Items 173 and 174 of Schedule 1 to the Administrative Appeals Tribunal Amendment Bill 2004.

- the finding of fact is 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.

In making any new findings of fact, the court could have regard to the evidence that was before the Tribunal and receive further evidence.

Qualifications for appointment as President

The Amendment Bill proposed that the President could be appointed for a term and that the following were qualified for appointment:

- Federal judges;
- Retired Federal and State Judges; and
- Legal practitioners of five years standing.

These are just some of the measures contained in the AAT Amendment Bill which, if implemented, would bring about important changes to the way in which the Tribunal operates. We wait with interest for further developments in relation to these proposed changes.

Non-legislative reforms to the AAT

The Tribunal's vision is to be a leader in administrative review providing informal, fast and fair merits review, unfettered by costly and legalistic procedures. Consistent with this vision, the Tribunal has prepared an organisational plan identifying goals and strategies. I am working closely with

members and staff of the Tribunal, with our major users and other organisations to make changes that will improve the Tribunal's performance.

Duty Lawyer Pilot

This year the Tribunal has introduced a duty lawyer pilot program for self-represented applicants. The Tribunal's goal was to establish the program in two registries. Pilots commenced with the assistance of the New South Wales and Victorian Legal Aid Commissions in those state registries in January 2004. A pilot scheme has also been introduced in the Queensland registry.

The Legal Aid Commissions are making a lawyer available to attend the Tribunal one half-day each week. The Tribunal informs self-represented parties of the availability of the legal aid lawyer and can make an appointment for the person prior to the first conference. The lawyers provide initial advice, assistance and make any appropriate referrals. If the person is eligible, Legal Aid may represent the person in the proceeding.

The aims of the pilot schemes are to:

- promote early settlement of matters by providing applicants with access to high-quality legal advice at an early point of time;
- increase client satisfaction; and
- reduce the number of self-represented applicants in the Tribunal.

The initial response to the schemes has been positive. Self-represented parties are making use of the service. The pilot schemes will continue to the end of 2004 and will then be evaluated. If the pilot program proves to be successful, the AAT envisages liaising with other State and Territory legal aid bodies to investigate the possibility of providing the service in each of the Tribunal's registries. The Tribunal will also consider making submissions to the Attorney-General's Department regarding the current legal aid guidelines if it can be demonstrated that they are an impediment to the efficient conduct of matters in the AAT.

In my view, this program provides a valuable service to some of the Tribunal's more disadvantaged users. Self-represented applicants can face significant difficulties in a court or tribunal environment and it is important to develop and implement systems and procedures that can assist them in relation to their application. The Tribunal should be keen to implement programs that make the process somewhat less daunting and more tolerable (even if not more enjoyable).

Concurrent evidence pilot

Another area of practice and procedure in which the Tribunal has instituted a pilot relates to the method of eliciting expert evidence at hearings. In late 2002 the AAT implemented a study in the New South Wales Registry into the use of concurrent evidence procedures. Rather than relying on traditional methods of taking the evidence separately and sequentially, this procedure involves the taking of sworn evidence of more than one expert at the same time. This procedure may be known to some of you as a "hot tub".

The potential benefits of concurrent evidence are threefold:

- it enables superior critical evaluation of the evidence and opinion of expert witnesses;
- it can narrow the issues in contention between numerous experts and allow the experts to question and comment on the evidence of their peer; and
- it can reduce the time taken to take expert testimony into evidence.

The Tribunal is seeking to use concurrent evidence procedures in 50 cases before commencing its evaluation. Although it is taking some time to complete the desired quota, this number of cases is expected to provide a sufficient sample for a detailed analysis and assessment of a number of factors. Those will include:

- the criteria for the selection of a case as suitable for concurrent evidence;
- the procedures involved in the taking of concurrent evidence;
- the overall effectiveness of the method as a technique for taking evidence within the Tribunal.

During the evaluation phase, the Tribunal will also seek the views of those involved in the concurrent evidence procedure. Those surveyed will include: members conducting the hearings, experts involved in giving the evidence and legal practitioners conducting cases that employed concurrent evidence.

We are looking forward to evaluating the pilot and identifying the extent to which it achieves the potential benefits and in what circumstances it may be effective. If the concurrent evidence pilot study proves successful, the concurrent evidence procedure will be another tool at the Tribunal's disposal to assist it reach the correct or preferable decision. The pilot has attracted significant interest from other jurisdictions as will the results of the evaluation.

Addressing non-compliance

In the past year the AAT has decided to take a more targeted approach to the issue of parties not complying with legislative requirements and Tribunal timeframes. Non-compliance can cause significant delay in the finalisation of applications and lead to non-offending parties incurring unexpected, unnecessary costs. Further, non-compliance can have consequences for other applications before the Tribunal. The need to vacate a conference or hearing close to the event and re-list the event can lead to delay in listing other matters.

Non-compliance with statutory and Tribunal requirements without a reasonable excuse is not something that the AAT is willing to accept. While the Tribunal operates in a more informal manner than the courts, this should not have the consequence that users do not feel the need to comply strictly with the timeframes set by the Tribunal. The Tribunal has begun to take a

firm stance on this issue and a range of measures exist in different registries to deal with non-compliance in individual applications.

The Tribunal has also implemented procedures to identify parties and representatives who regularly fail to comply with legislative and Tribunal requirements across the AAT's registries. Repeated delay, inaction or non-appearance by parties is recorded and brought to my attention on a regular basis and may be dealt with in a number of ways. I have written to individuals and agency heads and held a number of directions hearings in relation to particularly problematic matters. That being said, I am pleased to report that the instances of serious non-compliance are few. Most parties and representatives involved in matters before the Tribunal are diligent and responsive to the timetables set by the Tribunal.

Review of the Practice Directions

The Tribunal demands a high standard of the agencies and representatives that appear before it. However, the Tribunal must also ensure that it is providing a high quality service.

As many of you will be aware, the vast majority of applications to the Tribunal are dealt with in accordance with the Tribunal's Practice Directions and, most importantly, the General Practice Direction. The Tribunal's Practice Directions have not been reviewed for some time.

The Tribunal has decided to review the way in which it manages applications for review and will consider, in particular, how the Tribunal communicates to parties its expectations and requirements in relation to the review process. If the Tribunal expects a high level of compliance with its procedures and directions, it must communicate its expectations and requirements clearly.

The first part of the review will involve an examination of practice and procedure in the workers' compensation jurisdiction. The review will include consultation with the Tribunal's users including government agencies and

practitioners. While some preliminary work has been undertaken, the review will be primarily be conducted in the coming year.

The process will allow the Tribunal to identify possible reforms to its case management processes so that the AAT can continue to provide a high level of efficient service to its users. Ultimately it is anticipated that the review will ensure that the Tribunal's management of applications for review is consistent, orderly and timely.

Council of Australasian Tribunals

While the AAT has jurisdiction to review the majority of reviewable decisions made by the Australian government, there are four other merits review tribunals at the Commonwealth level. As you will be aware, merits review tribunals exist in various shapes and sizes in the States and Territories and there are a broad range of tribunals dealing with inter-partes and other disputes in the Commonwealth and in the States and Territories. Opportunities exist for cooperation between the AAT and other tribunals and these opportunities have been pursued with increasing vigour in recent times. I would like to identify for you one initiative in this area, the Council of Australasian Tribunals.

The Council was established in June 2002 as a peak body for Commonwealth, State, Territory and New Zealand tribunals. Its broad aims are to:

- facilitate liaison and discussion between tribunals, tribunal members and staff and others interested in tribunals; and
- undertake projects and activities of relevance and assistance to tribunals.

The AAT has been an active member of the Council since its inception and since June 2003 I have been the Chair of the National Council.

COAT operates with a federal structure consisting of a National Council and Executive, together with State, Territory and New Zealand chapters. Membership of the National Council is open only to tribunals represented by their presiding officer. Membership of the local chapters, however, is open to individuals including tribunal members, practitioners, academics and other interested persons.

Local chapters are active in a number of States and Territories including New South Wales which held a full-day conference in May this year. If you are interested in tribunals, I would encourage you to join the NSW chapter of COAT.

The Council's objects are specified in the Council's constitution. Those objects include:

- to establish a national network for members of tribunals to consult and discuss areas of concern or interest and common experiences;
- to provide training and support for members of tribunals, particularly of smaller tribunals which may not have the resources to undertake such activities alone;
- to provide a forum for the exchange of information and opinions on aspects of tribunals and tribunal practices and procedures;
- to develop best practice or model procedural rules based on collective experience of what works;
- to develop performance standards for tribunals;
- to provide advice to governments on tribunal requirements;
- to publish and encourage the publication of papers, articles and commentaries about tribunals and tribunal practices and procedures; and
- to co-operate with institutions of academic learning, and with other persons having an interest in tribunals and tribunal practices and procedures, in promoting the objectives of the Council.

The objects provide a clear sense of direction for the Council and identify a wealth of potential work that the Council may undertake.

Local chapters have been active in presenting seminars and conferences. Papers from some of these events are available on the COAT website. Such seminars and conferences provide the opportunity for a diverse range of people to come together to discuss issues relating to tribunals and create a dialogue on tribunals.

At the national level the Council is currently investigating the development of a practice manual which would assist tribunal members to carry out their duties in the broad range of tribunals that exist in Australia and New Zealand. It is anticipated that such a practice manual will aid in the provision of a consistently high level of service by members of tribunals.

The Tribunal has been enthusiastic in its involvement with the Council. It offers the opportunity to share knowledge, learn about different ways of operating and undertake cooperative projects that will benefit not only the AAT and its users but the broad range of tribunals operating in Australia and New Zealand and their users.

Conclusion

I hope that I have been able to give you a taste of recent changes and potential reforms to the AAT and its practices and procedures. I also hope that I have given you a feel for the dynamic environment within which the AAT operates. While the Tribunal awaits any further developments in relation to the proposals for legislative change, the Tribunal will continue to examine its practices and procedures to ensure that it is providing informal, fast and fair merits review, unfettered by costly and legalistic procedures. It will engage with its users and other organisations to inform and support this strategy.