

## MAKING THE AAT MORE RELEVANT - REFLECTIONS ON ITS 30TH ANNIVERSARY

*The Hon Justice Garry Downes AM\**

### Introduction

On 1 July 2006, the Administrative Appeals Tribunal celebrated its thirtieth anniversary. A commemorative ceremony was held in Old Parliament House to mark what is, for any organisation, a significant occasion. For an organisation that was such a bold experiment at the time of its establishment, I suggest that it is quite an achievement and a testament to the vision of the members of the Kerr and Bland Committees.

While the commemorative ceremony provided an opportunity to reflect on the Tribunal's history, the Tribunal is also firmly focused on the future and has been actively reviewing its operations. The Tribunal must ensure that its review process continues to be effective and efficient and that its decisions are of the highest quality. In this way, the Tribunal will continue to be an institution that is valued and relevant in contemporary Australia.

### Tribunal practice and procedure

The jurisdiction and workload of the Tribunal have grown considerably since it was established in 1976. Presently, the Tribunal has jurisdiction under some 400 Acts and other legislative instruments. In the last financial year, the Tribunal received more than 8,500 applications.

The workload of the Tribunal is diverse. This diversity extends beyond the many different types of decisions that are subject to review. It relates also to the different types of parties that participate in the process and the extent to which they may be represented. The nature of the cases and the type of material that it may be relevant for the Tribunal to consider also vary. To illustrate the point, an application lodged by a self-represented person seeking review of a social security decision is quite different from an application lodged by a large company seeking review of a decision as to its tax liability where all parties have high-level legal representation.

The Administrative Appeals Tribunal is required to provide a mechanism of review that is 'fair, just, economical, informal and quick'.<sup>1</sup> How these objectives will best be achieved for cases of a particular type and in individual cases will necessarily vary. The Tribunal therefore employs considerable flexibility in the procedures it adopts. Let me give you two examples of proposals to meet these objectives.

- *Review of practice and procedure*

The majority of applications lodged with the Tribunal have been managed for many years in accordance with the General Practice Direction. This document sets out the way in which the Tribunal usually progresses cases towards resolution.

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\* *President of the Australian Administrative Appeals Tribunal, Judge of the Federal Court of Australia. This paper was presented at the AIAL National Administrative Law Forum, June 2007, Canberra.*

The Tribunal has decided that the General Practice Direction is no longer the most appropriate means of managing its diverse workload. Each of the Tribunal's major jurisdictions – social security, taxation, veterans' entitlements and workers' compensation – has particular characteristics that impact on the way in which those cases proceed towards resolution. These are not reflected in the procedures specified in the General Practice Direction.

The Tribunal is accordingly conducting a review of practice and procedure in each of its major jurisdictions. The review of each jurisdiction will result in the publication of a guide which sets out general information about the way in which the Tribunal will manage cases in that jurisdiction. Specific requirements to be met in individual cases will be set by Conference Registrars or Tribunal members and tailored to the particular case so that it progresses in the most effective and efficient manner.

The first stage of the review involved a review of practice and procedure in the workers' compensation jurisdiction. The Tribunal released a draft of the proposed guide for comment and received positive responses on the development of jurisdiction-specific guides. The 'Guide to the Workers' Compensation Jurisdiction' was published in March this year and the Tribunal has now commenced its review of practice and procedure in the social security jurisdiction.

Producing jurisdiction-specific guides enables the Tribunal to identify how its procedures will usually operate in that jurisdiction without hindering the flexibility necessary to manage individual cases appropriately. The guides will assist to ensure that the case management process is best adapted to the nature of the case.

- *Concurrent evidence*

When I first addressed this Forum in 2003, I noted that the Tribunal had commenced a study into the use of the concurrent evidence procedure in hearings. As you will be aware, concurrent evidence involves two or more experts giving evidence at the same time. It provides a forum in which, in addition to providing their own evidence, experts can listen to, question and critically evaluate the evidence of other experts.

Concurrent evidence is not a new concept but it is one that has been embraced by the Administrative Appeals Tribunal. It has been successfully employed in several cases that I have decided. One case involved sixteen expert witnesses on animal behaviour. They were collectively examined over four hearing days. Before the hearing, each witness prepared an expert report. They then met to identify areas of agreement and disagreement. At the hearing each witness was asked to outline their argument on areas of disagreement. The process was time-effective, helped to clarify the issues in dispute and assisted in decision-making.

The benefits of the use of concurrent evidence are obvious in large and complex cases of the kind that I have referred to. However, the Tribunal's study related to the use of concurrent evidence in Tribunal hearings more generally. Almost all of the cases included in the study were veterans' entitlements or workers' compensation cases involving expert medical evidence.

The Tribunal released its report on the study in November 2005. The study found that Tribunal members were satisfied with the procedure in almost all of the 48 cases in which it was used. Most Tribunal members reported that the process improved the quality of the expert evidence presented, made the comparison of evidence easier and enhanced the decision-making process. In relation to its impact on the overall hearing time, the study revealed that the procedure led either to time savings or was neutral in most cases. It was

noted, however, that individual experts tended to spend longer giving evidence which can have an impact on costs for the parties. A majority of representatives and experts expressed general satisfaction with the process and support for its continued use.

The Tribunal is currently developing guidelines relating to the use of the concurrent evidence procedure. The guidelines will address how the Tribunal will identify and select cases in which the procedure will be used and the actual processes to be followed in taking concurrent evidence.

### **Communicating effectively with Tribunal users**

Communicating effectively with the parties and their representatives is an essential aspect of ensuring that the review process operates efficiently. The review process will proceed more smoothly if the parties understand how the Tribunal operates and what is expected of them.

There is great diversity among the users of the Tribunal. There are self-represented parties from a wide range of backgrounds who are likely to be applying to the Tribunal for the first time. There are representatives of parties who may not usually practice in the Tribunal and there are representatives of individuals and decision-makers who appear frequently in the Tribunal. Each of these groups has diverse information needs.

In light of this diversity, the Tribunal communicates with its users in a variety of ways and using different media. Parties are provided with a range of written materials during the course of the review process, including leaflets and letters, many of which are tailored specifically for self-represented parties. The Tribunal contacts self-represented parties by telephone at different stages of the review process to provide information about the Tribunal's processes and answer questions they may have about procedural issues. A DVD showing how the Tribunal operates is also made available to self-represented parties. Practice directions, leaflets and a range of other written information are available on the Tribunal's website.

The Tribunal is currently undertaking a review of the way in which it communicates with its users. The first stage of the review has involved engaging a consultant to assess the Tribunal's existing communication strategies and information products. The Tribunal received the consultant's report last week. The report appears to confirm that the Tribunal's general approach is sound and emphasises the value of personal contact with self-represented parties. The report does identify, however, a number of ways in which existing strategies and products can be improved as well as a number of additional strategies and products that would address particular information gaps. These include further jurisdiction-specific material.

The Tribunal will now consider the report's recommendations and commence the development of an implementation plan. The review has been a valuable exercise that will assist the Tribunal to ensure it is providing parties and their representatives with relevant and helpful information.

### **Making high-quality decisions**

The effectiveness of the Tribunal's review process is crucial to its successful operation, particularly given that only a relatively small proportion of cases are determined by way of a Tribunal decision following a hearing. However, this is not to diminish in any way the significance of the decision-making function of the Tribunal. It is the presence of predictable, high-quality decision-making which facilitates earlier consensual resolution. I would now like to refer to a number of developments that will ensure the continued quality and relevance of the Tribunal's decisions.

- *Expertise of the Tribunal membership*

The Tribunal's jurisdiction is very broad. While the majority of the work relates to social security, taxation, veterans' entitlements and workers' compensation, the Tribunal is called upon to review many other kinds of decisions. A few examples include agricultural and veterinary chemicals, civil aviation and environmental matters.

One of the Tribunal's strengths has been the appointment of members who have special knowledge or skill in areas that are relevant to the Tribunal's jurisdiction. Current members have expertise in a range of areas including accountancy, aviation, engineering, medicine, pharmacology, science more generally, military affairs and public administration. The Tribunal's ability to draw on this expertise when reviewing decisions contributes significantly to the quality of its decisions. It is also valuable for alternative dispute resolution processes, such as neutral evaluation and case appraisal, where the issues in dispute are specialised in nature.

I have been keen to increase the range of expertise available to the Tribunal. Recent advertisements for membership vacancies in the Tribunal have included reference to specific types of expertise that are desirable. I have also been exploring other ways of bringing vacancies to the attention of potential candidates, including making contact with relevant professional organisations. These particular initiatives have resulted in the recent appointment of an actuary and a vet. I will continue to monitor the needs of the Tribunal for members with particular expertise.

- *Professional development of members*

The Tribunal clearly benefits from the appointment of members from a range of backgrounds and with a range of skills and experience. Many of the members appointed to the Tribunal will not have worked in a tribunal previously and some will not have worked in a legal environment. Members need to be adequately trained and supported over time to carry out their role effectively. Providing adequate training and support will contribute significantly to high-quality outcomes in relation to both the procedural and substantive aspects of cases.

### **Members' Professional Development Program**

The Tribunal has developed a Members' Professional Development Program. It comprises induction and mentoring for new Members and an appraisal scheme for all Members which is supported by regular professional development activities and training and development opportunities.

The Professional Development Program is based on a Framework of Competencies which sets out the skills, knowledge and behavioural attributes required of Tribunal members to perform their functions competently. Adapted from a set of competencies originally developed by the United Kingdom Judicial Studies Board, the Tribunal's competencies were the subject of extensive consultation with the membership. There are seven key competencies for Members:

- law and procedure;
- fair and equal treatment;
- communication;
- conduct of hearing;
- evidence;
- decision-making; and
- facilitation and case management.

Shortly after appointment, new Members attend a three-day seminar outlining the operation of the Tribunal and the role and duties of Members. The seminar is presented by Members and registry staff of the Tribunal. The induction program involves both theoretical and practical elements. The topics typically covered include:

- overview of the Tribunal and the operation of the *Administrative Appeals Tribunal Act 1975*;
- the Tribunal's case management process;
- conducting a hearing;
- decision-writing and giving oral reasons; and
- law and practice in the major jurisdictions.

New Members undertake a practical orientation program involving observation of pre-hearing events and hearings and participating in hearings with more experienced members. New Members may also undertake internal or external training on specific skills such as alternative dispute resolution. New Members are matched to an experienced Member who acts as a mentor throughout the induction phase.

The appraisal scheme assesses Members' competence across the seven key competencies listed above. It involves self-appraisal and peer review with the aim of identifying current competency and devising a self-development plan to enhance competence. The appraisal is conducted by a Member at an equivalent or more senior level. The process is confidential. Only the President has access to material relating to each appraisal.

Tribunal Members are involved in regular professional development activities. Professional development meetings on topics of interest are held at the Tribunal on a regular basis. In addition, the Tribunal holds a national conference every two years. Members are also able to attend internal courses presented on relevant topics as well as external courses, seminars and conferences on an ad hoc basis.

The Professional Development Program is designed to be a holistic program which provides appropriate training and support on appointment, assists Members to develop skills and reflect on their own practice over time and offers a range of opportunities for continuing education.

### *Decision-writing*

Decision-writing has been a particular focus of professional development within the Tribunal in recent times. Tribunal Members have attended external courses and a number of internal courses have been offered, the majority of which have been led by Professor James Raymond, a leading thinker and trainer in this area.

Decision-writing is an important aspect of the work of a Tribunal Member. In my view, reasons for decision should provide a simple, clear explanation of the issues and their resolution. A well-written decision should:

- be easily readable;
- interest the reader;
- state the issues at the outset, not the history of the litigation; and
- resolve the issues with the minimum of detail.

Adopting this approach will be of greatest benefit to the parties to the proceeding, particularly in assisting the party that is not successful to understand why the decision was made. However, it will also assist those who may otherwise read the decision, including those

undertaking case law research who will be able to identify whether a case is relevant to their purpose.

*COAT Practice Manual and induction course*

In addition to being President of the Tribunal, I was the Chair of the Council of Australasian Tribunals from June 2003 until last week. In April 2006, the Council published the COAT Practice Manual for Tribunals. The manual was designed to be a practical resource for tribunal members and covers topics that are relevant to a broad range of tribunals, such as statutory interpretation, procedural fairness, conduct of hearings and decision-making. From the positive feedback that the Council has received, it appears that the manual will be a useful resource for members, including the members of the Administrative Appeals Tribunal.

The Council's next major project will be the development of an online induction course for new Tribunal Members based on the content of the Practice Manual. The precise content of the course, how it will operate and the method by which it will be delivered will be investigated in the coming months. This is another area in which the Council is developing resources that will benefit a broad range of tribunals but particularly those smaller tribunals that may not have resources to invest in significant amounts of training or other professional development.

**Conclusion**

These are some of the recent initiatives of the Administrative Appeals Tribunal directed towards ensuring that it provides effective and efficient administrative review. We are continually reviewing and adapting our review process to the needs of Tribunal users. We provide resources and support for Tribunal Members to ensure that Tribunal decisions are of the highest quality. With these and other developments, hopefully the Tribunal will be well-positioned to celebrate further landmark anniversaries in the future.

**Endnote**

1 Section 2A of the *Administrative Appeals Tribunal Act 1975* (Cth).