Alternative Dispute Resolution Processes in the Administrative Appeals Tribunal (AAT) in the light of recent amendments to the *Administrative Appeals Tribunal Act (1975)*

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Introduction

On 17 March 2005, the Senate passed the *Administrative Appeals Tribunal Amendment Act* ('the Act'). This Act was proclaimed in May 2005. The Act:

- reforms the Administrative Appeals Tribunal ('AAT'), particularly in relation to procedures including alternative dispute resolution ('ADR');
- removes restrictions on the constitution of the AAT for particular matters;
- increases the power of ordinary Members;
- authorises Conference Registrars to issue directions;
- clarifies the role of the Federal Court; and
- removes the provision for tenured appointments for AAT Members.

The Act inserts for the first time a specific objects clause for the Tribunal in the following terms:

> *In carrying out its functions the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.*[2]

This paper analyses and discusses these amendments as they relate to ADR processes within the AAT. It postulates how the availability of additional ADR procedures might be implemented in practice within the AAT in a cost efficient and effective manner.

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2 Section 2A

Role and functions of the AAT

The AAT is a merits review tribunal which substitutes its own decision for the decision of the original decision-maker. It is an exercise of the administrative, and not 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.

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 simply upon the resolution of the dispute relating to that decision. Administrative decisions usually have wider impact than their effect on those in a particular dispute. Litigation concentrates on the resolution of disputes between parties. Administrative decision-making is much more closely aligned to what the common law calls decisions *in rem* (which are rare) as compared to the usual role of courts to resolving disputes *in personam*.

A decision as to who should be granted a licence will very often also effectively be a decision as to who should be refused that licence in the future. 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.

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.[3]

It has many times been said that the Tribunal stands in the shoes of the original decision-maker in making its substituted decision.[4] 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 the enforcement and variation or cancellation of the decision if future circumstances justify this. Thus the AAT has no power to enforce its own decisions. Decisions of the Tribunal, whilst they may relate to individual matters, because of the policy ramifications that can flow from them, have a powerful normative effect on decision making within the Commonwealth Executive.

The making and review of administrative decisions frequently involves the exercise of discretion – the Tribunal is expected to make the 'correct or preferable decision'.[5] The conjunction is used to accommodate the difference between a matter in which the 'correct' decision must be made, and that which requires the exercise of discretion or a selection between more than one available decision, in which case the word 'preferable' is appropriate.

3 Section 42C *Administrative Appeals Tribunal Act* ('AAT Act').

4 See for example *Costello v Secretary, Department of Transport* (1979) 2 ALD 934 at 943.

5 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591 per Bowen CJ and Deane J.

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. However, 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.

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 that 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. They can do this without involving the court approving or agreeing to the terms of settlement.

The method by which the Tribunal goes about its business has been recently stated as follows:

> *Whilst the Tribunal is a merits review body, it is based on the judicial model. Although s 33(1)(c) of the Administrative Appeals Tribunal Act 1975 provides that it is not bound by the rules of evidence and may inform itself of any matter as it may think fit, the Tribunal is, in practice, bound to follow the same principles that underpin the rules of evidence in the courts. Whether they do so by applying the rules of evidence or they do so through a more flexible procedure, both the courts and tribunal seek to make decision on " ... a body of proof that has rational probative force ..." [*Consolidated Edison Co v National Labour Relations Board *(1938) 305 US 1977 197 at 229 per Hughes CH cited with approval by Brennan J in* Re Pochi v Minister for Immigration and Ethnic Affairs *(1979) 26 ALR 247] while making "... every attempt ... to administer substantial justice" [see* R v War Pensions Entitlement Appeal Tribunal; ex parte Bott *(1933) 50 CLR 228 at 256 also cited with approval by Brennan J in Re Pochi.] By adopting this approach, the courts and the Tribunal seek to ensure that every case that they hear is resolved by reference to a set of standards and procedures that is consistently applied to all regardless of the parties involved, their wealth or influence in the community, regardless of the issue that is to be resolved and its consequences and regardless of the publicity that may or may not surround the case.*[6]

6 See *Re Skase and Minister for Immigration and Multicultural and Indigenous Affairs* (8 April 2005, Deputy President Stephanie Forgie at p22).

Thus, whilst the Tribunal is in theory to a large extent free to adopt such processes as it thinks fit, in reality, when a matter comes on for determination, there is very little to distinguish the process adopted from a traditional court hearing. Parties may be represented by legal counsel; evidence is given by witnesses orally, through examination in chief and is then subject to cross-examination. The requirements of procedural fairness limit the capacity of the Tribunal to radically depart from the well-known and developed model used within the courts.

Existing ADR processes within the Tribunal

Essentially there are three existing processes within the Tribunal which could be characterised as ADR processes. They are:

- conferences;
- conciliation conferences; and
- mediations.

Conferences and mediation are available in all AAT jurisdictions. Conciliation conferences are only used in the workers' compensation jurisdiction.

Conferences

Conferences are the centrepiece of the current AAT's pre-hearing program. They provide the AAT and the parties with an opportunity to clarify the issues in dispute, identify further evidence that may be required and explore prospects of settlement. Where it is obvious from the outset that settlement is either inappropriate or unlikely to be achieved, the focus for the conference process is to prepare the application for hearing. Typically, an application will have two conferences. The first is held within six to ten weeks after the application has been lodged and the second conference is held once further material to be submitted by the parties has been lodged.

Conferences serve the dual purpose of attempting to obtain an agreed resolution where possible, and ensuring that appropriate steps are taken to prepare those matters which will not settle for hearing. They are an effective case management tool, regardless of the nature of the decision under review and irrespective of whether the non-government party is an individual or body corporate, and whether or not the non-government party is represented. Conferences allow the AAT to assess an application and determine the most appropriate way of assisting its resolution. It is for these reasons that the AAT holds at least one conference in every application for a review unless an application requires urgent determination.

In 2003/2004 the Tribunal held 9,422 preliminary conferences.

Conciliation Conferences

The Tribunal introduced conciliation conferences into its workers' compensation jurisdiction on 1 July 1998. If an application fails to settle during the conference process, a conciliation conference is held. In general, the parties will have lodged and exchanged all material that they would rely on at any hearing of the application. It is not listed until both the parties have lodged and exchanged all material that they would rely on. The parties and their representatives must be present, and each party must

certify that they have the authority to settle the application. The conference convenor takes an active role, setting out options and discussing the merits of their respective cases in an attempt to facilitate settlement. If the matter fails to settle at a conciliation conference, it proceeds to a hearing. Conciliation conferences are compulsory in applications where the non-government party is represented, unless the AAT certifies that a conciliation conference would not be appropriate. This would be the case if the only issue in dispute is a legal issue. The Tribunal may decide to hold a conciliation conference with an unrepresented non-government party, but only where the Tribunal considers that the party would not be at any disadvantage participating in that process.

The primary reason for introducing conciliation conferences in the workers' compensation jurisdiction was to attempt to reduce the number of applications settling close to or on the day of a hearing. Conciliation conferences were considered the suitable form of ADR process in this context for a number of reasons:

- applications in the workers' compensation jurisdiction are generally amenable to settlement. In addition, their resolution can be affected by issues relating to the workers' employment with the Commonwealth which do not fall strictly within the scope of the decision under review. Conciliation conferences provide a useful forum for the consideration of these issues;
- the majority of non-government parties in the workers' compensation jurisdiction have legal representation which can facilitate settlement negotiations; and
- there was agreement from key stakeholders in the jurisdiction that the process should involve the AAT participating in taking an interventionist role.

In 2003/2004 the Tribunal held 779 conciliation conferences.

Mediation

Mediation was formally introduced into the Tribunal through the *Administrative Appeals Tribunal Amendment Act 1993*, following a major internal review of all Tribunal operations in 1991. Mediation has been theoretically available in all jurisdictions and in all registries since March 1993. It is the third form of ADR process that the Tribunal uses. Mediation in the Tribunal is defined as a voluntary, confidential dispute resolution process in which a Tribunal Member or Conference Registrar assists the parties to isolate the issues in dispute, develop options and reach a mutually agreeable settlement. It is considered an alternative to hearing and generally takes place after the conference process.

Mediation is only used occasionally within the Tribunal. In 2003/2004, the Tribunal held 84 mediations. As both parties must consent to mediation, it is conducted most often at the request of parties to an application. Mediation is unlikely to be held in applications that raise questions of public importance. Nor is it likely to be conducted in applications in which the non-government party is unrepresented, or if the only issue in dispute involves the interpretation of law.

Expanded ADR Processes introduced by the Administrative Appeals Tribunal Amendment Act 2005

The *Administrative Appeals Tribunal Amendment Act 2005* passed by the Senate on 17 March 2005 expands the scope of ADR processes available in the Tribunal in the following major ways:

- s 3(1) of the AAT Act is amended to define 'alternative dispute resolution processes' as including –
  - conferencing;
  - mediation;
  - neutral evaluation;
  - case appraisal;
  - conciliation; and
  - procedures or services specified in the regulations.

  ADR is not confined to the above but does not include –
  - arbitration; or
  - court procedures or services;
- s 34A(1) authorises the President to direct that a proceeding, or any part of a proceeding, be referred for a particular ADR process;
- s 34A(5) requires the parties who are directed to participate in an ADR process to act in good faith;
- s 34B authorises the Tribunal to direct that an application in the Small Taxation Claims Tribunal (STCT) must be referred to an ADR process and the parties must act in good faith;
- s 34C authorises the President to make directions about –
  - the procedure to be followed in the ADR process;
  - the person who is to conduct the ADR process (must be a member or officer of the Tribunal or a person engaged under s 34H; and
  - what will happen following the conclusion of an ADR process;
- s 34D allows the Tribunal to make a decision in accordance with an agreement reached by the parties during an ADR process if it is within power and otherwise appropriate. A seven-day cooling off period applies for any agreement reached by the parties in an ADR process during which either party may withdraw consent before the Tribunal makes its decision;
- s 34E(3) provides an exemption to the general inadmissibility of any evidence in connection with an ADR process by allowing the admission of a case appraisal report or a neutral evaluation report in the absence of an objection from either party;
- s 34F permits a member who has conducted an ADR process to sit on a hearing of the matter unless a party objects; and
- s 34H permits an ADR process to be carried out by a Member of the Tribunal, an officer of the Tribunal, or a person who possesses appropriate qualifications engaged by the Registrar.

These reforms clearly indicate that the government envisages that there will be an expansion in the frequency and variety of ADR processes within the Tribunal resulting in 'informal, quick, fair, just and economical' merits review. No doubt it is hoped that more matters will be settled at an earlier point of time with less expense than at present. In addressing the capacity of the Tribunal to deliver these

desired outcomes, it needs to be remembered that in 2003/2004, 81% of applications that were finalised did so without the Tribunal determining the matter following a hearing. The challenge for the Tribunal will be to introduce processes that build on this existing high rate of settlement without adding to the costs of the parties or detracting from public policy imperatives.

The Tribunal's Response

The issue was recently considered at a meeting of the Practice and Procedure Committee of the Tribunal on 5 April. It was resolved that the Tribunal will develop an ADR referral policy which will guide the Tribunal as to:

- the types of matters to be referred to ADR using a combination of specific matter types and an assessment of individual matters;
- the type of ADR a matter is to be referred to; and
- who identifies matters for referral and at what stage should a referral take place.

Given the high rate of settlement, it appears that referral will need to take place at an early point of time if ADR is to be cost effective. The methods of ADR that, at first blush, appear to be most attractive are neutral evaluation and case appraisal. This could be done on the papers without the need for a formal hearing and require only a brief explanation of the reasons for the view formed, compared to the detailed reasons required for a decision following a hearing. A difficulty for the Tribunal is that, with the exception of the compensation area, costs are not awarded to a successful party. In curial proceedings, the rejection of an offer of settlement may result in a costs penalty if the matter goes on to a hearing that results in a less favourable outcome. Thus the incentive to accept the outcome of a case appraisal or evaluation is not as great. This is particularly so for a self represented party in the Tribunal.

Conclusion

The expansion in the types of ADR processes open to the Tribunal's use offers some opportunities to reduce costs and increase satisfaction with outcomes. A great deal of care will be needed to ensure that the Tribunal adopts a balanced response by building ADR into current processes in a positive manner, reducing cost and increasing the capacity of the Tribunal to finalise matters quickly, informally and in a just manner, without adding to the costs of the parties.

* This paper was delivered at the IAMA 30th Anniversary Conference, "Celebrating ADR", Canberra, May 2005