



Administrative Appeals Tribunal Amendment Bill 2004

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Contents

Legislative History	2
Purpose.....	2
Background.....	2
History of the Tribunal.....	2
Proposed reforms	4
Reforms to procedures	4
Removal of restrictive constitution procedures	5
Better use of ordinary members.....	5
Reform of the role of the Federal Court	5
Changes to the qualification requirements for appointment as President and removal of provision for tenure	5
Alternative Dispute Resolution	6
Government position on ADR	6

Alternative dispute resolution—description of the term.....	6
Main Provisions	8
Schedule 1 – Amendments.....	8
Amendments of the AAT Act - General.....	8
Amendments of the AAT Act - proposed Division 3—alternative dispute resolution processes.....	10
Powers of the President	10
Persons eligible to conduct ADR processes	12
Where parties reach an agreement during the ADR process.....	12
Evidentiary issues.....	13
Procedural issues	13
Transitional provisions	14
Amendments of the AAT Act – other matters.....	14
Concluding Comments.....	15
Endnotes.....	16

Administrative Appeals Tribunal Amendment Bill 2004

Date Introduced: 17 November 2004

House: Senate

Portfolio: Attorney-General's

Commencement: The formal provisions commence on Royal Assent. The operative provisions commence on a day to be fixed by Proclamation or, if this is not within six months of Royal Assent, the first day after that period.

Legislative History

The Administrative Appeals Tribunal Amendment Bill 2004 (the Bill) was originally introduced in the House of Representatives on 11 August 2004. It has now been reintroduced into the Senate. No changes have been made to the Bill.

Purpose

The purpose of the Administrative Appeals Tribunal Amendment Bill 2004 is to improve the capacity of the Administrative Appeals Tribunal (the Tribunal) to manage its workload and to make the operation of the Tribunal more efficient.

Background

History of the Tribunal

The Tribunal was established by the *Administrative Appeals Tribunal Act 1975* (the AAT Act) in 1976 as a general tribunal to engage in administrative review of governmental decisions. It was largely the product of the Report of the Commonwealth Administrative Review Committee chaired by the Honourable Mr Justice Kerr (the Kerr Report) in October 1971.¹ The objective was to provide a coherent and integrated system of administrative review that was:

- comprehensive
- accessible to the public
- inexpensive
- fully focussed on substantive rather than procedural issues, and
- committed to ensuring adequate disclosure to applicants of relevant information and reasons for decisions.

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The AAT Act provided for the establishment of the Administrative Review Council (the ARC) to keep the merits review system under ongoing scrutiny by conducting regular reviews of the operation of the AAT Act.

The original conception was that there should be a single tribunal so as to avoid a proliferation of specialist tribunals. However, over the almost 30 years since the establishment of the AAT, a number of Commonwealth specialist tribunals have been created (such as the Social Security Appeals Tribunal and the Immigration Review Tribunal). The breakdown in the notion of a single general tribunal was a significant factor leading to the Commonwealth instituting a major re-examination of the operations of the AAT in 1995 which resulted in the ARC's report *Better Decisions: review of Commonwealth Merits Review Tribunals* ('Better Decisions').² The report was derived from a number of terms of reference but focussed particularly on the requirement that the 'administrative law system should be simple, affordable, timely and fair'.³

The ARC considered that the principal objective of a merits review system should be to ensure that administrative decisions of government are correct or, where there is discretion, preferable. It saw the need for a statutory objective that Commonwealth tribunals should provide mechanisms of review that were fair, just, economical, informal and quick. A significant recommendation of the *Better Decisions* Report was that the various specialist review tribunals and the AAT should be combined into a single Tribunal, to be called the Administrative Review Tribunal (ART).⁴ Other recommendations included the promotion of the resolution of applications through alternative dispute resolution processes.⁵

In response to the *Better Decisions* Report the then Attorney-General, the Hon. Daryl Williams QC, announced in March 1997 the Government's intention to amalgamate into a single tribunal the AAT, the Social Security Appeals Tribunal (SSAT), the Veterans' Review Board (VRB), the Immigration Review Tribunal (IRT) and the Refugee Review Tribunal (RRT).⁶ The new body was to be called the Administrative Review Tribunal. The initial announcement was not welcomed in many quarters where it was feared that it could mean a significant loss of independence for the external review bodies.⁷

General control of the ART was to be located in the Commonwealth Attorney-General's Department, but funding for the high volume jurisdictions was to come from portfolio departments.⁸ It was subsequently reported that 'the departments approached to fund the ART had refused, leaving it in the hands of the Attorney-General's Department'.⁹

Legislation to establish the ART was introduced into the Parliament on 28 June 2000.¹⁰ A cognate Bill, to make transitional and consequential arrangements, was introduced on 12 October 2000.¹¹ Both Bills were passed by the House of Representatives, and were referred by the Senate to the Legal and Constitutional Legislation Committee. That Committee reported on 14 February 2001.¹² Whilst the majority report supported the Bills, Labor and Democrat Senators presented a Minority Report opposing the Bills. The Second Reading of the Bills was defeated in the Senate on 26 February 2001.

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The then Attorney-General, the Hon Daryl Williams QC, indicated in February 2003 that he would not seek to reintroduce legislation to establish the ART during the current Parliament. However, he indicated that the Government remained committed to ‘sensible reform of the existing tribunals on an individual basis’ starting with the AAT. He also stated that ‘[w]hile details of the amendments are being settled, areas of amendments could include procedures of the tribunal, constitutional requirements and allowing greater use of ordinary members’.¹³

The reforms proposed in this Bill have been described by the Attorney-General as ‘modest’.¹⁴ An exposure draft of the Bill was released for public comment, and the Attorney-General subsequently stated that ‘[w]e received invaluable input from stakeholders and other interested parties which resulted in significant improvements to the Bill’.¹⁵ Submissions were received from a number of Commonwealth agencies and Departments, as well as from interested bodies such as the Australian Council of Social Services and the Law Council of Australia.¹⁶ However, submissions have not been made publicly available.

Proposed reforms

Five areas of reform were identified as significant in the Attorney-General’s News Release:

- reforms to Tribunal procedures
- removal of restrictive constitution procedures
- better use of ordinary members
- reform of the role of the Federal Court, and
- changes to the qualification requirements for appointment as President.¹⁷

Reforms to procedures

The powers of the President of the AAT to manage the case-load of the Tribunal will be expanded. In particular, the President will have power to give directions regarding the operations of the Tribunal, the procedure of the Tribunal and the conduct of reviews by the Tribunal.

The range of alternative dispute resolution (ADR) processes available to the Tribunal will be expanded and the President will have power to direct that a proceeding, or a class of proceedings, be referred to an ADR process. The emphasis on an increased use of ADR to resolve administrative disputes is possibly the most significant aspect of the reforms to the Tribunal procedures proposed in the Bill. Issues relating to ADR are further considered below.

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Removal of restrictive constitution procedures

Current provisions of the AAT Act impose requirements on the constitution of the Tribunal when it is exercising powers under certain provisions of the Act. Also, some other legislation also restricts the manner in which the Tribunal is to be constituted when hearing matters arising under that legislation.¹⁸ These restrictions will generally be removed and instead the President will have power to determine who is to constitute the Tribunal for the purposes of a particular proceeding, having regard to such matters as the complexity of the matters to which the proceeding relates and the degree to which it is desirable for the members constituting the Tribunal to have particular knowledge of the matters to which the proceeding relates.

The President will also have power to add, remove or substitute a member of the Tribunal during the course of a proceeding.

Better use of ordinary members

The President will be able to authorise ordinary members to exercise powers that can currently only be exercised by presidential and / or senior members.

Reform of the role of the Federal Court

Currently the Tribunal, as constituted for the purposes of a proceeding, may refer a question of law arising in the proceedings to the Federal Court. The Bill introduces a requirement that the consent of the President be obtained before a question is referred. Under this proposed amendment, the situation may occur where the President of the AAT is asked to consent to a referral in a matter dealt with by the President personally.

The Bill provides for the Federal Court to make findings of fact in appeals from decisions of the Tribunal in certain circumstances. This implements a recommendation of the Administrative Review Council in its report [*Appeals from the Administrative Appeals Tribunal to the Federal Court*](#).¹⁹

Changes to the qualification requirements for appointment as President and removal of provision for tenure

Currently only a judge of the Federal Court may be appointed as the President of the Tribunal. The Bill removes this requirement and provides that a current or former judge from any federal court, a former judge from any state or territory Supreme Court, or a person who has been enrolled as a legal practitioner for at least five years may be appointed as President of the Tribunal.

The Bill removes provisions of the Act either conferring tenure or allowing for appointment with tenure. Under the Bill, all future appointments will be for fixed terms.

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Alternative Dispute Resolution

Government position on ADR

In light of increasing litigation costs and the enormous complexity of legal procedures, ADR is an increasingly important aspect in access to justice for the community.²⁰ The Government has stated that it is committed to the use of ADR. For example, in a media release following the launch of an Alternative Dispute Resolution Standard Discussion Paper, the then Attorney-General, the Hon. Daryl Williams QC, stated that:

the Government has committed to providing alternatives to the courts and to providing faster, cheaper and simpler means to resolve disputes ... Alternative Dispute Resolution is an integral part of almost every aspect of Commonwealth activity in areas as diverse as administrative law, native title, workplace relations and trade practices.²¹

Similarly, in a speech to the ADR International Conference, the then Minister for Employment, Workplace Relations and Small Business, the Honourable Peter Reith MP, referred to:

the benefits of alternative dispute resolution mechanisms such as mediation, and how they can effectively be utilised to resolve disputes in a wide range of areas, which up to now, have predominantly been confined within the domain of courts and specialist tribunals.²²

The Government also maintains the National Alternative Dispute Resolution Advisory Council (NADRAC) which is a non-statutory body with members appointed by the Attorney-General. NADRAC is the result of recommendations made by the Access to Justice Advisory Committee in its report *Access to Justice - an Action Plan*.²³ It provides independent advice to the Attorney-General on the development of ADR and ADR processes in Australia and comprises experts from commercial ADR, family and community ADR, courts and tribunals, research and academia.²⁴

Alternative dispute resolution—description of the term

Alternative dispute resolution (ADR) is a term that is difficult to *define*, but it has been *described* by NADRAC as:

An umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.²⁵

The proposed amendments to the AAT Act would also stay clear of providing a *definition* of this term to be used in **proposed new Division 3** of the Act. Instead, **Item 3** of the Bill provides a *description* of the term ADR, listing various ADR processes from which the Tribunal's President can choose if the resolution of a dispute by means of ADR is directed. The following are the ADR processes listed in **item 3** of the Bill, complemented

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by a description of each process as suggested by NADRAC in their 2003 publication *Dispute Resolution Terms—The use of terms in (alternative) dispute resolution*.²⁶

- conferencing

Conference/Conferencing is a general term, which refers to meetings in which the parties and/or their advocates and/or third parties discuss issues in dispute. Conferencing may have a variety of goals and may combine facilitative and advisory dispute resolution processes.²⁷

- mediation

Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.²⁸

- neutral evaluation

NADRAC has described **early neutral evaluation** as:

a process in which the parties to a dispute present, at an early stage in attempting to resolve the dispute, arguments and evidence to a dispute resolution practitioner. That practitioner makes a determination on the key issues in dispute, and most effective means of resolving the dispute without determining the facts of the dispute.²⁹

Neutral evaluation, as used in the Bill, can be described similarly, the process, however, is available at any stage of the dispute resolution.

- case appraisal

Case appraisal is a process in which a dispute resolution practitioner (the case appraiser) investigates the dispute and provides advice on possible and desirable outcomes and the means whereby these may be achieved.³⁰

- conciliation

Conciliation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.³¹

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This list of different ADR processes is not conclusive it can be easily extended by including further or new ADR processes. To some degree, the processes overlap and often, parties to an ADR process transgress seamlessly from one process to another where the situation requires it.

Main Provisions

Schedule 1 – Amendments

Amendments of the AAT Act - General

Item 1 inserts (as new **section 2A**) a statutory objective for the Tribunal: to provide ‘a mechanism of review that is fair, just, economical, informal and quick’. This implements Recommendation 3 of the *Better Decisions* Report.

Item 15 makes provision for the qualifications required for appointment as the President or Deputy President of the Tribunal. Currently a person cannot be appointed as the President unless he or she is a Judge of a Federal Court. Under new **subsection 7(1)** a person can be appointed as the President if he or she is or has been a judge of a Federal Court, has been a judge of the Supreme Court of a State or Territory, or has been enrolled as a legal practitioner of the High Court of Australia or one or more of the States’ Supreme Courts for more than five years.

Provisions specifying the qualifications required for appointment as a Deputy President, a senior member or a non-presidential member have been redrafted to ensure consistency of style.

Item 21 repeals **subsections 8(1)** and **(2)** which have the effect of providing for tenured appointments for presidential members who are Judges and allowing for tenured appointments for a Deputy President or a senior member who is not a judge. Based on this repeal, **all future appointments to the AAT will therefore be for a fixed term**. **Item 22** provides for those members who currently have tenure to retain that status.

Item 33 repeals **section 16** of the Act. This section provides for the application of the *Judges Pensions Act 1968* to a non-judicial presidential member of the AAT who has been appointed with tenure. The section will not be required following the abolition of tenured appointments. **Item 34** provides for those members who currently have entitlements under the *Judges Pensions Act 1968* to retain those entitlements.

Item 36 amends **subsection 19(3)** to provide for the assignment of a non-presidential member to a particular division or divisions of the AAT to be made by the Minister administering the Act (currently the Attorney-General) rather than by the Governor-General.

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Item 39 varies the responsibility of the President in **subsection 20(1)** from ensuring the ‘orderly and expeditious’ discharge of the business of the Tribunal to ensuring the ‘expeditious and efficient’ discharge of the business of the Tribunal. It is considered that an efficient discharge of business includes an orderly discharge of business.³²

Item 40 repeals provisions of **section 20** that currently give the President power to give directions on a range of matters and substitutes new provisions which retain the existing powers and also add broader powers to give directions relating to the operations of the Tribunal and the conduct of reviews. **Items 41** and **42** make transitional provision in relation to directions that are in force at the commencement of the items.

Item 47 repeals **subsection 21(1AB)** which provides that where the Tribunal is constituted by more than one member, at least one of the members must be a presidential member or a senior member. The repeal of this provision will allow for a multi-member review to be constituted wholly by ordinary members of the Tribunal. This amendment will have the effect that the Tribunal may be constituted entirely by members that hold no legal qualification.

However, the proposed amendments will provide some guidelines setting out what the President must have regard to when constituting or reconstituting the Tribunal for a proceeding. New **section 23B** (which is inserted by **item 66**) sets out the matters, including, for example, the public importance or complexity of the matters involved, the status or office of the person who made the decision to be reviewed, the degree to which the matters involved relate to Australia’s security, defence or international relations, the financial importance of the matters involved and the desirability of the members constituting the Tribunal having particular knowledge of the matters involved.

Under new **subsection 25(4A)** (which is inserted by **item 73**) the Tribunal will have power to determine the scope of the review of a decision. It will be able to limit the questions of fact, the evidence and the issues that it considers.

Item 95 inserts new **subsection 29(1B)** into the Act. This section will enable the Tribunal to request a further statement of reasons from an applicant where the statement provided with the application for review of a decision does not assist the Tribunal to determine why the applicant considers the relevant decision is not the correct or preferable decision. The fact that the Tribunal requests a further statement of reasons will not affect the validity of the initial application.

Under **subsection 29(7)**, the Tribunal may extend the time for the making of an application for review of a decision. **Item 99** amends **subsection 29(7)** to provide that the Tribunal may only extend the time where it is satisfied that to do so is reasonable in all the circumstances.

Item 106 inserts new **subsection 33(1AA)**, which requires the maker of a decision that is under review to assist the Tribunal to make its decision. The Explanatory Memorandum

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notes that this obligation is consistent with the Commonwealth's obligation to act as a model litigant.³³

Item 110 amends **section 33** to provide for the appointment of authorised Conference Registrars. Authorised Conference Registrars will be able to issue directions relating to procedures under **subsection 33(2)** and to revoke or vary such directions under **subsection 33(3)**.

Amendments of the AAT Act - proposed Division 3—alternative dispute resolution processes

Item 112 of the Bill proposes to introduce a **new Division 3—alternative dispute resolution processes** into the AAT Act. This new division will consolidate and expand the current ADR regime under the Act. Under this Division, ADR will generally be available to resolve disputes, except for disputes which come within the jurisdiction of the Security Appeals Division (**proposed section 34**).

Powers of the President

The proposed amendments will confer two new powers on the President—the power to refer matters or parts of matters to ADR and the power to make directions in relation to the ADR process.

Referral of matters to ADR (proposed sections 34A and 34B)

Proposed sections 34A and 34B are the key provisions of the new ADR regime. **Proposed section 34A** deals with the referral of administrative disputes generally, while **proposed section 34B** makes provisions in relation to matters brought before the Small Taxation Claims Tribunal.

Proposed subsection 34A(1) confers on the Tribunal's President the power to direct the parties to a dispute to attempt resolving the dispute through ADR processes. The President may exercise the power either by directing the parties:

- to participate in a conference to resolve their issues, or
- to use a specific form of ADR process other than conferencing to settle their dispute.

The power to make such directions will arise in relation to the 'proceeding, or any part of the proceeding or any matter arising out of the proceeding'. The provision will allow the the President to direct that certain elements of a dispute can be dealt with separately. (**proposed paragraphs 34(1)(a) and (b)**). It is envisaged that the power to separate these elements could be a very effective tool to maximise the efficiency of the Tribunal and minimise the parties' expenses for the dispute.

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To avoid directions having to be issued in relation to every individual application for review, **proposed subsections 34A(2) and (3)** enable the President to issue directions specifying that certain *categories of disputes* must be resolved through ADR. Where such a direction is given, the referral would occur automatically. However, the President will retain the power to issue further and different directions at any stage of the process.

According to proposed **subsection 34A(5)**, the parties would be under an obligation to ‘act in good faith in relation to the conduct’ of the ADR process. However, while the Bill uses mandatory language, the new ADR regime does not impose sanctions if a party chooses not to comply with this obligation.³⁴ The [Explanatory Memorandum](#) notes that:

no sanction applies to a party who does not act in good faith in an alternative dispute resolution process. The provision is intended to educate parties about the importance of alternative dispute resolution processes and encourage them to participate fully in such processes.³⁵

Proposed subsection 34B(2) obliges a Registrar, a District Registrar or a Deputy Registrar to provide the parties before the Small Taxation Claims Tribunal (STCT) with information about the available ADR procedures. Depending on the nature of the proceeding brought before the STCT, the information has to be given either:

- when an application for review is made (**proposed paragraph 34B(2)(a)**), or
- at the time the applicant notifies the Tribunal of the amount of tax in dispute (**proposed paragraph 34B(2)(b)**).

Proposed subsection 34B(3) confers upon the Tribunal the power to direct the holding of a conference or the conduct of an ADR procedure in relation to the matter or any part of the matter at any time.

Proposed subsection 34B(3) obliges the parties ‘act in good faith in relation to the conduct’ of the ADR process, but again, while the language is mandatory, the Bill does not propose to impose sanctions if a party should not comply with the obligation.³⁶

Powers to give directions with respect to ADR processes

Proposed subsection 34C(1) confers the power to give directions with respect to the ADR processes on the President. This power is distinct from the powers conferred under proposed section 34A in that it would allow the President to give directions modifying the actual ADR process. To reflect the flexibility of ADR processes generally, this power is not limited even though **proposed subsection 34C(2)** provides three examples of areas which may be covered by the President’s directions.

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Persons eligible to conduct ADR processes

Proposed subsection 34C(5) expressly limits the pool of persons eligible to conduct ADR processes under the Act. Eligibility is limited to:

- a member (**proposed paragraph 34C(5)(a)**)
- an officer of the Tribunal (**proposed paragraph 34C(5)(b)**), or
- a person engaged under **proposed section 34H (proposed paragraph 34C(5)(c))**.

Persons engaged under **proposed section 34H** are persons that have been engaged by the Registrar to conduct a particular type or various kinds of ADR processes. Before engaging a person, the registrar must be satisfied that the particular person is sufficiently qualified and experienced to conduct the relevant ADR process.

Where parties reach an agreement during the ADR process

The ultimate aim of referring matters or parts of matters to ADR processes is that the parties to a dispute are able to reach an agreement in relation to one, many or even all the issues in question. Where the parties should reach an agreement as to the terms of a decision to be made by the Tribunal, **proposed section 34D** will provide that this agreement can be adopted by the Tribunal if it thinks that the adoption of the agreement is appropriate. Before the Tribunal can adopt the agreement, **proposed subsection 34D(1)** sets out several requirements that the agreement must fulfil, including that:

- the agreement was reached during the course of the ADR process
- the agreement is acceptable to the parties
- the agreement is reduced to writing and was signed by the parties
- the agreement was lodged with the Tribunal
- no withdrawal from the agreement was filed in writing within a ‘cooling-off’ period,³⁷ and
- the agreement is consistent with the powers of the agreement.

Should the Tribunal decide to adopt the agreement, it can do so without conducting a hearing in relation to that issue. If this is done in relation to the *entire* dispute between the parties, the Tribunal can make a determination in relation to the entire dispute. Where an agreement was reached in relation to a *particular issue*, for example costs, then the Tribunal can adopt the agreement in relation to *this issue* and decide the remaining issues of the dispute without rehearing the already determined issue.

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Evidentiary issues

The amendments propose to regulate the use of evidence introduced during an ADR process, for example in subsequent court proceedings. **Proposed section 34E** would provide that the evidence used in the ADR process is generally not admissible in:

- any court
- any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory to hear evidence, or
- any proceedings before a person authorised by the consent of the parties to hear evidence, for example an arbitrator.

The provision reflects the need for confidentiality in ADR processes to provide the parties with a safe forum to achieve maximum outcomes. However, the amendments will also acknowledge that it is sometimes necessary to allow certain evidence in a subsequent proceeding. To accommodate these situations despite the operation of **proposed subsection 34E(1)**, **proposed subsection 34E(2)** provides that evidence adduced during an ADR procedure could be admissible if the parties reach an agreement to that effect.

A further exception would apply to any reports prepared as a result of a case appraisal procedure or a neutral evaluation. Unless a party formally objects to the use of such report, it will be admissible despite the operation of **proposed subsection 34E(1)** (**proposed subsection 34E(3)**).

The inadmissibility of evidence before a subsequent decision-maker has a further consequence: to avoid the possibility that a member, who conducted an ADR procedure and heard the evidence, could be influenced by that evidence in a subsequent hearing, the proposed amendments to the Act confer on a party the right to object to the selection of a member to the Tribunal. This objection must be taken prior to the hearing (**proposed section 34F**).

Procedural issues

Proposed section 34G stipulates that the dispute resolution practitioner may permit a party to the ADR process to participate by utilising modern communication forms, such as telephone or closed-circuit television. Further, the provision already contemplates technological developments, permitting the use of ‘any efficient means of conveying information that may become available for use in the Tribunal’ to conduct an ADR procedure.³⁸ The most obvious application of this provision will possible be in the area of Online Dispute Resolution. In this new area of law, processes are adapted to suit the online environment to provide disputants with fast, easy and extremely cost-effective ways to settle their dispute.³⁹

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Transitional provisions

As the current legislation contains provisions allowing the use of ADR procedures in the context of administrative review, **items 113 to 120** contain proposed transitional provisions, for example to enable the continuation of already commenced ADR processes in the changeover period.

Amendments of the AAT Act – other matters

Item 151 substitutes a new **section 42** of the Act, which sets out how disagreements between members of the Tribunal about matters arising in a proceeding are to be resolved. The note in the Explanatory Memorandum in relation to this item incorrectly states that new subsection 42(1) applies if a Tribunal is constituted by two or more members; in fact it applies only if a Tribunal is constituted by two members.⁴⁰

Item 160 adds new **subsections 42D(5), (6), (7) and (8)** of the Act. These provide that where the Tribunal exercises its power under subsection 42D(1) to remit a matter to the original decision-maker for reconsideration, the original decision-maker is required to reconsider the matter within a certain period. Where the original decision-maker fails to reconsider the matter within the applicable period, he or she will be taken to have affirmed the decision and the proceedings in the Tribunal will resume.

Item 173 adds new **subsections 44(7), (8), (9) and (10)** of the Act. These will allow the Federal Court to make findings of fact in appeals from decisions of the Tribunal, where these are consistent with the findings made by the Tribunal. It is intended to allow the Court in appropriate cases to fully deal with a matter rather than having to remit it to the Tribunal for it to make further findings, and implements a recommendation of the Administrative Review Council in its report *Appeals from the Administrative Appeals Tribunal to the Federal Court*.⁴¹ New **subsections 44AA (11) and (12)** will ensure that where an appeal to the Federal Court is transferred to the Federal Magistrates Court it will be able to make findings of fact in similar circumstances.

Item 176 will insert new **paragraph 45(1)(a)** which provides that a question of law can only be referred to the Federal Court with the approval of the President. This is intended to ensure that referrals are only made in exceptional circumstances which, it is expected, will reduce costs and speed up decision making.⁴² The Amendments will not provide any guidance how to determine whether exceptional circumstances are present.

Items 187 to 189 insert re-drafted versions of **sections 61, 62, 62A, and 63**, which establish offences. The provisions are substantially redrafts in the style of the *Criminal Code*. However, they provide for both increased monetary penalties and terms of imprisonment, and allow a Court to impose both a monetary penalty and a term of imprisonment (whereas currently a Court may impose either a monetary penalty or a term of imprisonment, but not both). These increases are consistent with Commonwealth criminal policy.⁴³

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Concluding Comments

The proposed amendments to the Act incorporate a number of changes to the functioning of the Tribunal. In comparison to the changes propose in 2000 in the context of creating the Administrative Review Tribunal, the proposed amendments appear to be less far reaching.⁴⁴ They are designed primarily to increase the flexibility of management of the Tribunal and to facilitate quicker decisions in certain circumstances. However, the following issues are worth noting:

- Changes to the ADR processes (**Item 112**, p 11)

The greatest potential for significant change in the operation of the Tribunal arising out of these amendments relate to the increased opportunity for use of ADR. The proposed amendments consolidate and expand the use of ADR processes in the resolution of disputes arising from or under administrative decisions in line with the Government's approach to furthering the use of ADR to resolve disputes. However, the decision to make the obligation to conduct the ADR processes in good faith unenforceable may substantially weaken the development of ADR as it deprives the decision-makers of an opportunity to develop comprehensively the scope and content of the principle of good faith.⁴⁵

- Multi-member tribunals (**Item 47**, p.9)

The proposed amendments will abolish the requirement that multi-member Tribunals must be chaired by a presidential or senior member holding legal qualifications. Rather, after the amendments became effective, the new legislation would permit a Tribunal comprised entirely of ordinary members without a legal qualification. This new scheme will require a thorough assessment of each matter before deciding the composition of the Tribunal pursuant to new **section 23B**. Any underestimation of the complexity of a matter can easily lead to high levels of dissatisfaction with the new system and increased costs for the parties caused by the delay necessary to reconstitute a more appropriate, that is better qualified Tribunal.

- Involvement of the decision-maker in the review process (**Item 106**, pp.9 – 10)

Under the proposed amendments, the original decision-maker will be required to *assist* the Tribunal in reviewing the original decision. However, the Bill does not provide expressly that assistance must be provided in a non-adversarial manner aiming at defending the decision-makers decision. Further, it is arguable that this 'overlap' between original decision process and review process lessens the independence of the review process. This also appears to be a change in the Government's policy generally. The proposed legislation setting up the Administrative Review Tribunal, the ART Bill, made it optional for a decision-maker to participate in the review. The Bills Digest to the ART Bill noted:

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A new and significant development is that a decision-maker may decline to be a participant, or may be directed by the head of the agency not to participate in the review before the ART (**proposed section 85**).⁽⁷⁸⁾ This reflects a policy that in many cases the review can be undertaken more efficiently without agency participation. Where the decision-maker does choose to participate in the review, he or she must not behave in an adversarial manner and defend the decision, but must 'use his or her best endeavours in assisting the [ART] to make its decision on the review' (**proposed section 94**).⁴⁶

- The proposed amendments may generate the potential for a conflict of interest. (**Item 176**, p. 14)

Under the Bill, the President of the Tribunal must consent to the referral of a matter to the Federal Court where a question of law is challenged. A conflict of interest may arise where the President is required to make such a decision pertaining to one of the President's own determinations.

- Referral to the Federal Court (**Item 176**, p. 14)

It is expected that the new requirement that a referral to the Federal Court can only occur with the consent of the President will reduce costs and speed up the review process generally. However, it is conceivable that in some cases the failure to refer a question could result in an appeal to the Court which would ultimately increase costs and lengthen the time taken to reach a final decision.

Endnotes

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- 1 *Commonwealth Administrative Review Committee Report 1971* (Kerr Report), Parliamentary Paper No. 144 of 1971.
 - 2 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39, 1995
 - 3 *ibid.*, Appendix A, p. 181.
 - 4 *ibid.*, Chapter 8, pp. 136-160 and Recommendation 87, p.170. 'Administrative Review Tribunal' was the title for the generalist merits review body originally chosen by the Kerr Committee.
 - 5 *ibid.*, Chapter 3, p. 54, Recommendation 20.
 - 6 The Hon. Daryl Williams AM, QC, Commonwealth Attorney-General and Minister for Justice, *Reform of Merits Tribunals*, News release, Canberra, 20 March 1997.
 - 7 R. Creyke 'Whither the Review System?' in R. Creyke and M. Sassella (eds), *Targeting, Accountability and Review: Current Issues in Income Support Law* ANU Centre for International and Public Law, 1998, pp. 128-129.

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- 8 Including, for example, the migration and social security jurisdictions. K. Del Villar, 'Administrative Review Tribunal Bill 2000', *Bills Digest*, No. 40, Parliamentary Library, Canberra 2000-2001, pp. 3-4.
- 9 E. Meryment, 'Tribunal revamp on hold', *Courier Mail*, 22 April 1999, p. 9.
- 10 Administrative Review Tribunal Bill 2000. A Digest in respect of this Bill can be found at <http://www.aph.gov.au/library/pubs/bd/2000-01/01BD040.htm>, accessed 19 November 2004.
- 11 Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000. A Digest in respect of this Bill can be found at <http://www.aph.gov.au/library/pubs/bd/2000-01/01BD080.htm>, accessed 19 November 2004.
- 12 Inquiry into the Provisions of the Administrative Review Tribunal Bill 2000 and the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000, 14 February 2001, Parliamentary Papers 2001 Volume 12.
- 13 The Hon Daryl Williams AM QC, Commonwealth Attorney-General, *Improving the Federal Merits Review Tribunal System*, [Archived media release](#), 6 February 2003.
- 14 The Hon. Philip Ruddock, Commonwealth Attorney-General, *Release of AAT Amendment Bill 2004 for Public Comment*, [Media Release](#), No 88/2004, Canberra, 8 June 2004.
- 15 The Hon. Philip Ruddock, Commonwealth Attorney-General, *A More Efficient Administrative Appeals Tribunal*, [Media Release](#), No. 144/2004, Canberra, 11 August 2004.
- 16 Information supplied by the Commonwealth Attorney-General's Department, 26 August 2004.
- 17 Senator Ian Campbell, 'Second reading speech Administrative Appeals Tribunal Amendment Bill 2004', Senate, Speech, 17 November 2004, p. 2. Similar: The Hon. Philip Ruddock MP, Commonwealth Attorney-General, 'Second reading speech: Administrative Appeals Tribunal Amendment Bill 2004', House of Representatives, Speech, 11 August 2004, p.2006.
- 18 For example, the *Commonwealth Electoral Act 1918*.
- 19 Administrative Review Council, *Appeals from the Administrative Appeals Tribunal to the Federal Court Report*, No.41, Canberra, 1997
- 20 It also provides for an increasingly important aspect of resolving international commercial disputes in a timely, flexible and cost-efficient manner. The Australian Government has recognised the increasing importance of commercial alternative dispute resolution, noting that 'The increasing use of alternative dispute resolution in commercial disputes in Australia is leading to recognition internationally of the benefits of other forms of dispute resolution, such as expert determination and mediation.' The Hon. Philip Ruddock, Commonwealth Attorney-General, *New Website Promotes Commercial Dispute Resolution*, [media release](#), No. 177/2004, Canberra, 3 November 2004.
- 21 The Hon. Daryl Williams AM QC, 'Launch of Alternative Dispute Resolution Standard Discussion', speech delivered at the launch of NADRAC's discussion paper, [archived speech](#), Sydney, 30 March 2000.

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- 22 Speech of the Hon Peter Reith MP to the ADR International Conference, Sydney, LEADR 2000.
- 23 Access to Justice Advisory Committee, *Access to Justice: an Action Plan*, Canberra, National Capital Printing, 1994
- 24 The National Alternative Dispute Resolution Advisory Council can be visited online at www.nadrac.gov.au.
- 25 National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms—The use of terms in (alternative) dispute resolution*, Canberra, 2003, p. 4.
- 26 These definitions are also used in a similar manner in the [Explanatory Memorandum](#), Administrative Appeals Tribunal Amendment Bill 2004, p. 5.
- 27 National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms—The use of terms in (alternative) dispute resolution*, p. 6.
- 28 *ibid.*, p. 9.
- 29 *ibid.*, p. 6.
- 30 *ibid.*, p. 4.
- 31 *Ibid.*, p. 5.
- 32 [Explanatory Memorandum](#), Administrative Appeals Tribunal Amendment Bill 2004, *op. cit.*, note to item 39, p.12.
- 33 [Explanatory Memorandum](#), Administrative Appeals Tribunal Amendment Bill 2004, *op. cit.*, p. 28. The Commonwealth's model litigant obligations are set out in Appendix B of the Legal Services Directions issued by the Attorney-General's Department.
- 34 *ibid.*, p. 32.
- 35 *ibid.*, p. 32.
- 36 *ibid.*, p. 32.
- 37 *ibid.*, p. 34.
- 38 *ibid.*, p. 35.
- 39 See for example Melissa Conley-Tyler and Professor Di Brerethon, 'Lessons for eGovernment: Online Dispute Resolution', paper, available at http://www.public-policy.unimelb.edu.au/egovernance/papers/10_ConleyTyler.pdf, accessed 18 November 2004, or the Centre for Information Technology and Dispute Resolution CITDR at www.odr.info.
- 40 [Explanatory Memorandum](#), Administrative Appeals Tribunal Amendment Bill 2004, *op. cit.*, p.40
- 41 Administrative Review Council, *op. cit.*, n.18.
- 42 [Explanatory Memorandum](#), Administrative Appeals Tribunal Amendment Bill 2004, *op. cit.*, pp. 45-46

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- 43 [Explanatory Memorandum](#), Administrative Appeals Tribunal Amendment Bill 2004, op cit., p.48, citing guidelines issued by the Minister for Justice and Customs (*A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*)
- 44 The proposed legislation that aimed at creating the Administrative Review Tribunal was the Administrative Review Tribunal Bill 2000. For the digest in relation to this Bill, see Del Villar, op. cit.
- 45 This emerging trend may be discerned from the decision in *Western Australia v Taylor* (1996) 134 FLR 211. Member Sumner of the Commonwealth Native Title Tribunal considered in detail the issue statutory good faith, distilling eighteen indicia assisting in determining whether a negotiation has taken place in good faith. See also Einstein J's discussion in *Aiton v Transfield* (1999) 135 FLR 236. D. Spencer, 'Complying with the Requirements to Negotiate in Good Faith—Further Developments', (2000)(11)(1) *Australasian Dispute Resolution Journal* 5, p. 9.
- 46 Del Villar, op. cit., pp. 13-14.

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