

17 January 2005

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The Secretary
The Legal and Constitutional Legislation Committee
Parliament House
CANBERRA ACT 2600

and by email: legcon.sen@aph.gov.au

Dear Sir/Madam

Inquiry into the *Administrative Appeals Tribunal Amendment Bill 2004*

I refer to your letter of 7 December 2004 in which you invited the Society to review the provisions of the *Administrative Appeals Tribunal Amendment Bill 2004* and to provide any comment to the Senate Legal and Constitutional Legislation Committee. The Bill has been considered by the Society's Administrative Law Committee.

The Society has been unable to consider the proposed legislation in detail, however overall the proposals appear to be of a positive nature. There are many procedural and structural improvements to the layout and scheme of the Act to make the workings of the AA Tribunal more efficient. The better use of Tribunal time and that of its members, and the greater flexibility in the operation of the Tribunal's powers by expanding the role of alternative dispute resolution ('ADR') powers of the Tribunal to include neutral evaluation, case appraisal and conciliation, as well as conferencing and mediation, will encourage the resolution of disputes.

However, the Society is concerned that the amendments to the Act will permit the Tribunal to direct parties to enter into dispute resolution processes, with or without the parties' consent and furthermore impose an obligation on the parties to act in good faith in relation to those processes (Item 112, new section 34A).

It is noted that no sanctions are to be imposed against a party that does not act in good faith, which is appropriate where the party has not consented to the process. The Society considers that the requirement to act in good faith, but without sanctions, is unlikely to result in effective dispute resolution and suggests that the imposition of penalties in the form of a costs order should be

available to the Tribunal in cases where the parties have agreed to the process and then fail to act in good faith.

The second area of concern is that of the tenure of members of the Tribunal, and replacement of such tenure by fixed-term appointments, (eg, see items 21 and 22). It is felt that such changes may well compromise the standing and independence of the Tribunal, whereas permanent statutory appointments or appointments for a fixed term and no longer, are more likely to achieve those objectives. Furthermore, the Society is aware of anecdotal evidence to suggest that the appointment of Tribunal members for short fixed terms (1 or 2 years) is disruptive and does not assist the Tribunal to effectively manage its caseload and, whilst the Bill contains provisions which are designed to assist the replacement of members during the currency of a matter before the Tribunal, this will not always be an effective remedy, particularly where the member in question has an area of expertise.

Other points of interest are:-

1. Item 73 – new subsection 25 (4A) enables the Tribunal to dismiss a party's request for consideration of, and/or determination on issues of law/fact which are not relevant.

Concern has been expressed that, in cases where Tribunal members are not legally qualified, the nature of such issues may not be fully appreciated or considered, giving rise to further disputes and/or appeals.

2. Items 91 and 94. It is queried whether there is any reason why subsection 29(1A) is being amended using the word “provided” whereas the balance of the Act is being amended so that the word “given” is used.
3. Item 112 – Concern has been expressed by some parties at the inclusion of a cooling-off period in relation to settlements achieved following the ADR process. The ability for parties to cool off for a period of 7 days following the entering into an agreement arising out of ADR may undermine the philosophy underlying ADR and might be considered to be inconsistent with the requirement (discussed above) to act in good faith.
4. Item 9 – The definition as expanded probably does not add anything to the meaning of the word “decision”.

Yours sincerely

Alexander Ward
PRESIDENT