



## Australian Government

### Australian Law Reform Commission

## ALRC submission to the Senate Legal and Constitutional Legislation Committee on the Administrative Appeals Tribunal Amendment Bill 2004

21 January 2005

1. The Australian Law Reform Commission (ALRC) makes the following submission to the Senate Legal and Constitutional Legislation Committee in relation to the Committee's inquiry into the Administrative Appeals Tribunal Amendment Bill 2004 (AAT Amendment Bill).

### The ALRC's *Managing Justice* report

2. In 2000, following a comprehensive four-year inquiry, the ALRC published its landmark report *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89).<sup>1</sup> The ALRC had been asked to consider the advantages and disadvantages of the existing federal civil justice system, and examined areas having an impact upon the system such as procedure, case management, professional and judicial education, practice standards, alternative dispute resolution, and legal costs. Despite documenting numerous concerns about the system, the ALRC suggested that there was no 'crisis' in civil justice, and the flaws are reparable.

3. The *Managing Justice* inquiry included consideration of the practice, procedure and case management in federal merits review tribunals. At the time of the inquiry the Australian Government had announced its intention to amalgamate the Administrative Appeals Tribunal (AAT), Social Security Appeals Tribunal (SSAT), the Migration Review Tribunal (MRT), and the Refugee Review Tribunal (RRT) into a single tribunal to be called the Administrative Review Tribunal (ART). The ALRC's terms of reference did not allow for consideration of the 'architecture' of the proposed ART, but the ALRC did cast its recommendations with particular reference to the processes and practices for divisions of the proposed ART. As part of the *Managing Justice* Inquiry there was careful consideration of the process and practices of the AAT, and a number of the ALRC's recommendations are relevant to consideration of the AAT Amendment Bill currently before Parliament.

### ADR Processes

4. The AAT Amendment Bill proposes to introduce an expanded definition of ADR processes for use within the AAT. While the ALRC found that the AAT's existing primary ADR method, conferencing, was highly successful in effecting settlement of disputes,<sup>2</sup> it supports increased flexibility in ADR options subject to a number of comments.

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<sup>1</sup> This report is available online at <[www.alrc.gov.au](http://www.alrc.gov.au)>.

<sup>2</sup> Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* ALRC 89 (2000), [9.118]–[9.119].

5. As already noted, the ALRC found that the AAT’s conference program was highly successful and received broad, if qualified, support from agencies and legal practitioners. Initiatives to introduce new ADR programs should be carefully considered, and only introduced where they would enhance the AAT’s overall case management strategies—not merely as cost saving devices. Registrars or others conducting ADR programs must be appropriately trained and supported.

6. One area where the ALRC made recommendations for enhancement of the existing conference program was in relation to improved continuity of responsibility for prehearing case events.<sup>3</sup> Continuity assists with allocating accountability for effective, timely resolution of cases, and consistent dealing with cases. The AAT already uses elements of the ALRC’s recommended approach, in particular maintaining consistency by having the same registrar dealing with conferences and other prehearing decisions, but did not go as far as the ALRC recommendation of a broader team case management approach. The ALRC hopes that introduction of any new ADR processes will not erode the continuity currently provided by using the conference registrar as the ongoing point of contact for parties throughout the process.

### **Authorised members and authorised conference registrars**

7. The ALRC supports the provisions of the AAT Amendment Bill which provide for ‘authorised members’ and ‘authorised conference registrars’ and the subsequent expansion of the persons authorised to exercise certain powers. These provisions are consistent with ALRC recommendations that:

- all members (not just presidential or senior members) should be able to grant a party leave to inspect documents (Rec 126); and
- federal tribunal conference registrars should be given the same statutory powers as judicial registrars of the Federal Court and Family Court to issue directions relating to procedural matters (Rec 125).

8. However, the proposed provisions have a greater limitation than the ALRC recommendations in that the particular member or conference registrar will have to be given the appropriate authorisation. The ALRC is unsure of the proposed mechanisms for granting authorisations, but hopes that it will be flexible enough to allow for appropriate powers to be granted without causing unnecessary delay.

### **Obligations on decision makers**

9. The ALRC supports Item 106 of the AAT Amendment Bill which aims to impose a new ongoing obligation on the person who made the decision to assist the Tribunal. Concerns regarding the role of government agency representatives were raised throughout the *Managing Justice* inquiry by the AAT (in submissions to the inquiry), individual members of the AAT and solicitors representing individual applicants.<sup>4</sup> The AAT has suggested (and was supported in this by the Law Council of Australia) that a form of ‘counsel assisting’ role should be explicitly mandated in legislation. The ALRC adopted a less prescriptive option by recommending the amendment of the Legal Services Directions. It was recommended that the duty to assist the tribunal in reaching a correct decision, and an explanation of what this means in practical terms, should be set out in a clear manner. The ALRC found that, while it may be a well-established principle, it is not always

<sup>3</sup> ALRC, *Managing Justice*, [9.124]–[9.132].

<sup>4</sup> ALRC, *Managing Justice*, [9.72]–[9.83], Rec 121.

well known or widely publicised. The aim is to ensure that government agency representatives (whether from within the agency itself or the private sector) are aware of the role and responsibilities of the government in tribunal proceedings.

10. The ALRC supports inclusion of the obligation in the legislation, but believes there is still a role for the Office of the Legal Services and the Legal Services Directions to reflect and publicise this obligation.

### **Disclosure of relevant documents**

11. The ALRC notes that Item 124 of the AAT Amendment Bill aims to alter the basis for refusal to give documents to the Tribunal as set out in s 37(1)(b) from a subjective test to an objective one. The ALRC supports this amendment, but notes that a further related matter dealt with in *Managing Justice* is not covered in this Bill.

12. The ALRC found that there is some doubt over whether there is a continuing duty to provide other relevant documents that subsequently come into the decision maker's possession or control. The AAT has held that s 37(2) of the AAT Act enables the tribunal to require a decision maker to lodge copies of certain documents which were not subject to the initial obligation to provide documents under s 37(1), including documents that were not in the possession of the decision maker at that time.<sup>5</sup> However, the Federal Court has stated that the rationale of s 37 is that it is necessary for the tribunal to have all of the material which was before the original decision maker, and this rationale does not extend to material which has since come into existence.<sup>6</sup> It is clear that the requirement to lodge relevant documents only applies to the decision maker and provides no basis in law for the AAT to require the applicant to produce a document.<sup>7</sup>

13. The ALRC recommended that legislation should provide a continuing obligation on both applicants and respondents in review proceedings to lodge relevant documents with the tribunal. To encourage frank disclosure between applicants and their lawyers, the ALRC further recommended that client legal privilege should be retained, subject to the exception of expert medical reports.<sup>8</sup> The ALRC made the recommendation in relation to the proposed ART, but considers that it should be applied to the AAT.

14. Adoption of this recommendation would provide the AAT with clear power to order prehearing disclosure to it of all relevant documents, including video surveillance evidence.<sup>9</sup> The recommendation is not intended to prevent the tribunal from subsequently making a direction restricting access to the documents by the other party in exceptional circumstances where disclosure would result in a denial of procedural fairness.

<sup>5</sup> *Re McMaugh and Australian Telecommunications Corporation* (1991) 22 ALD 393; *Re Velovski and Telstra* (1998) 26 AAR 454.

<sup>6</sup> *Australian Postal Corporation v Hayes* (1989) 23 FCR 320, 328.

<sup>7</sup> For further discussion of this issue see ALRC, *Managing Justice*, [9.187]–[9.193].

<sup>8</sup> ALRC, *Managing Justice*, Rec 131. This exception was set out in Recommendation 137

<sup>9</sup> There were particular concerns expressed about this type of evidence: see ALRC, *Managing Justice*, [9.191]–[9.192].

## Expert evidence

15. The ALRC made a number of recommendations for change to the admission of expert evidence in tribunal proceedings.<sup>10</sup> Expert evidence (usually medical) is routinely required in the AAT. Repeat use of the same experts may result in inappropriate partisanship and experts becoming identified as ‘applicant’ or ‘government’ experts, reducing the credibility and sometimes, the quality, of their evidence. In this context, the ALRC recommended encouraging parties to agree to the instruction of a single agreed expert in cases. The ALRC also recommended more widespread adoption of a panel model for adducing expert evidence (‘hot tubbing’), which the AAT agreed could be an effective mechanism in some AAT jurisdictions.<sup>11</sup>

16. While some of the relevant recommendations were directed to changes to practice directions, such changes would need to be supported by changes to legislation. The ALRC notes that its recommendations on this matter have not been adopted, despite major changes to the admission of expert evidence, consistent with ALRC recommendations, in each of the federal courts.

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<sup>10</sup> ALRC, *Managing Justice*, [9.194]–[9.220] and Recs 132–138.

<sup>11</sup> ALRC, *Managing Justice*, [6.113]–[6.122], Rec 67.