



# ADMINISTRATIVE REVIEW COUNCIL

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Our ref: 04/6780

21 January 2005

Ms Kelly Paxman  
Acting Secretary  
Senate Legal and Constitutional Committee  
Department of the Senate  
Parliament House  
Canberra ACT 2600

Dear Ms Paxman,

## **Administrative Appeals Tribunal Amendment Bill 2004**

Thank you for your letter of 7 December 2004. The Administrative Review Council is pleased to be able offer its comments on the Administrative Appeals Tribunal Amendment Bill (the Bill) to the Committee.

The Council is a statutory body, established under Part V of the *Administrative Appeals Tribunal Act 1975* to advise the Commonwealth Attorney-General on a broad range of matters relating to the Commonwealth system of administrative law. The Committee's inquiry into legislation to amend the AAT Act and related legislation is of obvious interest to the Council.

### *General comments*

The Council broadly supports the objective of the Bill to make the AAT more efficient, flexible and responsive to the environment in which it operates. A large number of the Bill's provisions are clearly directed at that objective and will enhance the ability of the President of the AAT to manage the AAT's workload if enacted.

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Wayne Martin QC  
Professor John McMillan  
Robert Cornall  
Stephen Gageler SC  
Andrew Metcalfe  
Major General Paul Stevens AO (rtd)

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Justice Garry Downes AM  
Professor David Weisbrot  
Professor Robin Creyke  
Richard Humphry AO  
Melanie Sloss SC  
Sue Vardon AO

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The Council considers the removal of restrictions on the constitution of the Tribunal and on the powers of ordinary members proposed in the Bill to be appropriate. Many of the existing limitations reflect the earlier history of the AAT, when ordinary members were generally appointed on a part-time basis to provide specialist assistance in some cases to more senior members. The composition of the Tribunal has since changed and members at all levels of the Tribunal now preside over hearings on a regular basis.

#### *Implementation of Council recommendations*

The Council is particularly pleased to see that the recommendation made in its 41<sup>st</sup> report that the power of the Federal Court should be expanded to include making findings of fact not inconsistent with findings made by the AAT<sup>1</sup> has been incorporated into the Bill, along with an equivalent power for the Federal Magistrates Court (items 173 and 174 of Schedule 1).

The Council considers that this amendment will greatly reduce the costs and delays for a small but significant number of matters that, under the current legislation, are remitted to the AAT following a court appeal. While remittals will not cease, the Council is confident there will be matters that the courts can dispose of satisfactorily by filling minor gaps in the Tribunal's findings.

The Bill also implements two recommendations from the Council's joint report with the Australian Law Reform Commission on the *Freedom of Information Act 1982*, to ensure the AAT can obtain documents claimed to be exempt but also to prevent disclosure of these documents to any other person (items 213 to 217 of Schedule 1).<sup>2</sup> Again, the Council is pleased to see these recommendations reflected in the Bill and considers they will clarify the law for reviews of FOI decisions conducted by the AAT if enacted.

#### *Qualifications for appointment as President and tenure of judicial members*

The proposal in the Bill that the Council does not support concerns the range of people who may be appointed as President of the AAT be expanded.

Currently the President must be a serving judge of the Federal Court.<sup>3</sup> Item 15 of Schedule 1 of the Bill would allow the appointment as President of:

- a current judge of any federal court
- a former judge of any federal court

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<sup>1</sup> Report no.41, *Appeals from the Administrative Appeals Tribunal to the Federal Court*, [6.15]

<sup>2</sup> Report no.40 (ARC)/ no.77 (ALRC), *Open government: a review of the federal Freedom of Information Act 1982*, recommendations 85 and 86 (pp.175-6).

<sup>3</sup> Section 7(1) of the AAT Act.

- a former judge of the Supreme Court of a state or territory, or
- a person enrolled as a legal practitioner of the High Court or a Supreme Court for at least 5 years.

The Bill would also reduce the tenure of future judicial members of the Tribunal. Currently, judges appointed to the AAT hold office until the age of 70 so long as they continue to be judges.<sup>4</sup> The Bill would place them in the same position as all other members, with a maximum term of 7 years but with eligibility for reappointment.

The Council considers that judicial leadership of the AAT has been an important factor in establishing the authority and status of the Tribunal. While acknowledging that it might be argued the Tribunal is now firmly established, the Council is of the view that many of the benefits of judicial leadership are ongoing.

There are occasions when the AAT hears matters with significant political implications. The security of tenure of judicial members enables such matters to be heard by a Tribunal consisting of persons whose independence is not in question.

The Council is concerned that public perception of the independence of the AAT could be adversely affected by the changes proposed in the Bill. While it would still be possible to have judges as AAT members with a non-judicial President, the Council considers that this situation risks its own dilemmas, particularly with the increased power of direction to be given to the President under the Bill.

Having a Federal Court judge preside over the AAT also assists coordination of matters between the Court and the Tribunal. In some circumstances, there can be proceedings at both levels relating to the same subject matter. The capacity for the same judicial officer to preside over related cases in the Court and the Tribunal can save a lot of time and the resources of both the parties and Government and avoid the risk of inconsistent decisions. Questions of law may also be referred from the Tribunal to the Court in the midst of a Tribunal review,<sup>5</sup> and it is currently possible for the President of the Tribunal to participate in the full Federal Court's determination of such questions.<sup>6</sup>

A move away from judicial leadership would be very much against the trend for tribunals in other jurisdictions that are comparable to the AAT. The respective legislation for the Victorian Civil and Administrative Tribunal (VCAT), the

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<sup>4</sup> Section 8(1) of the AAT Act.

<sup>5</sup> Section 45 of the AAT Act.

<sup>6</sup> See for example *Tio v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 53; 126 FCR 185; 197 ALR 117; 73 ALD 351; 36 AAR 549.

Administrative Decisions Tribunal (ADT) in New South Wales and the new State Administrative Tribunal (SAT) in Western Australia requires that the President be a judge. The proposed unified tribunals service in the United Kingdom would also have extensive judicial leadership.

Finally, the Council notes that the proposed change will affect its own membership. The President of the AAT is currently an *ex officio* Council member, thereby guaranteeing the presence of at least one judge on the Council. Given that the Council's functions include inquiring into the law and practice relating to review by the courts of administrative decisions,<sup>7</sup> the Council considers the presence of a judicial member as essential. If the proposed changes to the qualifications of the AAT President are implemented, the Council would wish the legislation to also ensure that a judge of the Federal Court is appointed to the Council when the AAT President is not a member of that court.

#### *Length of terms of appointment*

As already noted, the AAT Act currently provides for a maximum term of 7 years for non-judicial members,<sup>8</sup> and the Bill would also apply this term to judicial members. However, no minimum term is set. The Council has previously recommended terms of between 3 and 5 years for membership of review tribunals.<sup>9</sup> The Council was and remains of the view that terms of less than 3 years do not provide a sufficient sense of security to members. At the same time, a minimum term of at least 3 years does not unduly hamper the ability of the Tribunal to be flexible in response to changing demands.

Thank you once again for the opportunity to provide a submission to the Committee. If the Committee wishes to discuss any aspect of this submission further, contact can be made in the first instance with the Council's Executive Director, Ms Margaret Harrison-Smith, on tel. no. 02 6250 5801.

Yours sincerely

A handwritten signature in black ink, reading "Wayne Martin", is written over a horizontal line.

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<sup>7</sup> Section 51(1)(c) of the AAT Act.

<sup>8</sup> Subject to an exception in section 8(2) of the Act which the Council understands is no longer utilised.

<sup>9</sup> Report no.39, *Better Decisions: review of Commonwealth merits review tribunals*, recommendation 41, p.83.

Wayne Martin QC  
President