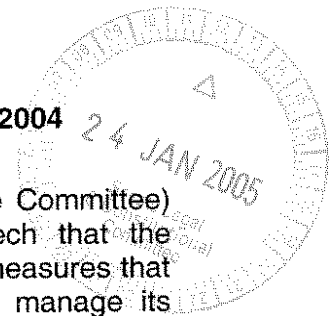


## INQUIRY INTO THE ADMINISTRATIVE APPEALS TRIBUNAL AMENDMENT BILL 2004



The Litigation Law and Practice Committee of the Law Society of NSW (the Committee) agrees generally with the view expressed in the Second Reading Speech that the Administrative Appeals Tribunal Amendment Bill 2004 "introduces a series of measures that will improve the capacity of the Administrative Appeals Tribunal (AAT) to manage its workload and ensure that reviews are conducted as efficiently as possible." Also, the Committee agrees, subject to one exception (tenure of appointments), with the Attorney-General's comments that "taken individually, each of the measures contained in the bill is relatively modest." However, they improve the readability of the *Administrative Appeals Tribunal Act 1975* (the *AAT Act*) and the operations of the AAT.

The Bill intends to implement the five key reforms as outlined in the Explanatory Memorandum:

1. more efficient conduct of reviews in the procedures of the AAT and the expansion of processes for alternative dispute resolution;
2. flexible arrangements to constitute tribunals to assist in the management of workload and ensuring that members have appropriate expertise and experience;
3. better use of tribunal members by the exercise of powers to grant applications, extensions of time before hearings and granting leave to inspect documents produced under summons;
4. questions of law requiring the consent of the President for referral to the Federal Court of Australia and powers for the Federal Court and the Federal Magistrates Court to make findings of fact when conducting appeals on a referral from the AAT on a question of law; and
5. qualifications requirements for the appointment of President are expanded to provide for the inclusion of other judicial qualifications and qualifications as a legal practitioner.

Other drafting measures under the Bill are also acceptable as they improve the understanding of the Act and its readability. Making criminal offences and penalties consistent with the Criminal Code also assist the better operation of the legislation.

### **Better direction in the performance of AAT functions**

The important change introduced by the Bill is defining the objective of the AAT. This will set direction for the functions of the AAT.

### **Appointment of President and Permanent Members**

The Committee is opposed to the amendment to sections 7(1) and 8 contained in the Bill. The term of the President, Deputy President and permanent members should not be based on the practices within the public service. While the Tribunal is not a court, it is nonetheless a forum for the resolution of disputes between parties. This process requires particular skills and abilities which are not dissimilar to those required of the judiciary. Confidence, discernment and tact are developed over time from dealing with the Tribunal's business. The Tribunal should not lose this expertise by limiting tenure. Security of tenure is one of the cornerstones of independence, whether for a court or tribunal, and that independence should not be compromised. The Committee would though support an amendment whereby

the qualifications for appointment of the President is expanded to include a judge of the Supreme Court of a State or Territory or a Federal Magistrate.

### **Performance of the AAT**

The functions of the President to give directions have been expanded to include directions about the operations, procedure and conduct of tribunals. This is more management focused and less process oriented. Directions can be promulgated to make the performance of the AAT more efficient. The operation of proposed section 20(4) permits more direct intervention by the President where this is needed in particular matters. The venues for sittings are also made more flexible under the proposed section 20A.

The constitution of tribunals is important to the efficient operations of the AAT. The powers under the proposed section 20B are supported. This also applies in relation to the constitution of tribunals under proposed subsection 21A(3). The redrafting of section 23 in relation to an unavailable Member (who later resumes being a Member) clarifies the process for continuing matters despite the unavailability and later availability of a Member. The criteria expressed in proposed section 23B are helpful for the management of tribunal constitution and their application will increase the confidence of parties. Similar processes adopted in relation to the constitution of tribunals carrying out taxing review proceedings bring consistency in the operations of the AAT.

The procedure to review decisions under Part IV will be more effective with the inclusion of the power under proposed subsection 25(4A) to limit "questions of fact, the evidence and the issues" considered by the AAT. In doing so, the tribunal must ensure that its functions accord with the objective to ensure that the review is fair and just in its pursuit of an economical, informal and quick hearing of a matter.

The proposed subsection 25(6) broadens the scope of an enactment to exclude or modify the operations of certain provisions of the AAT Act. The existing subsections 25(6) and (6A) specify the circumstances by which an enactment can make such modifications and exclusions. The broadening of the provision allows for improved operation of other enactments as future legislation can be drafted to make modifications and exclusions easily. However, there are risks as future legislation (or amendments to existing legislation) could severely limit the operations of the AAT. Some balance is probably needed to ensure that the essence of the existing provisions to restrain other enactments from making severe modifications or exclusions is maintained.

### **Involvement of the decision maker in reviewing decisions**

The involvement of the decision-maker in the AAT's procedure is a useful device in the informality required in considering matters. The proposed subsection 33(1AA) does not require that the decision-maker be present but only that the decision-maker use their "best endeavours to assist" the AAT in making a decision. The use of "best endeavour" as a criterion allows for flexibility in the circumstances of each matter. It should avoid issues of conflict of interest or the involvement of persons who for whatever reason should not be involved in the review of the decision made by the person.

### **Alternative dispute mechanisms**

The broadening of alternative dispute mechanisms necessitates enhancing the functions and offices as proposed in the Bill. In particular, proposed subsections 33(4)-(7) and Division 3 of Part IV are necessary. These new provisions provide processes for administering alternative dispute mechanisms and the powers needed for directions.

## **Resolving disagreements**

The manner in which questions to be decided under section 42 is replaced by processes with greater clarity for 2 and 3 member tribunals. This approach is supported. It will be clear to the parties how disagreements on matters will be resolved and this will contribute to the more effective operations of the AAT remitting matters to decision-maker for further consideration.

The requirements under section 42D to remit matters to the decision-maker for further consideration are enhanced by the inclusion of proposed subsections 42D(5)-(8). The process for limiting time (with variations) is essential to the efficient operation of the AAT and its proceedings.

## **Contempt of Tribunal**

The Committee supports the redrafting of section 63. Proposed section 63 clarifies the circumstances in which contempt of Tribunal will arise and the applicable penalties.

## **Giving of documents to persons**

The processes for serving documents under proposed section 68AA are supported. By linking electronic communications to the provisions of the *Electronic Transactions Act 1999* the procedures of the AAT are enhanced and provide an additional and more effective mechanism for serving documents.

## **Dealing with questions of fact on appeal on a question of law**

The Committee has long supported powers for the Federal Court to deal with matters of fact and law in certain circumstances. It is emphasised that referring a matter back to the AAT to reconsider issues of fact tends to be costly to parties and time consuming for the AAT. The AAT is required under section 33(1)(b) to conduct matters "with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit".

It is recognised that section 33(1)(b) does not bind the Federal Court in its procedures for the hearing of appeals from the AAT. However, the provisions of the proposed section 44(7) and the referring of matters to the Federal Magistrates Court should accord with the objective of clause 2A of Schedule 1 of the Bill. In particular, the mechanism for review should be "fair, just, economical, informal and quick" after the question of law has been resolved and the facts are determined on appeal. The same standards should be applied to findings of fact made by the Federal Magistrates Court under proposed subsections 44AA(11) and (12).

Consideration might be given to the processes and procedures of the Federal Court and the Federal Magistrates Court in making findings of fact where the resolution of the question of law raises further issues for consideration. Under section 33(1)(c) the AAT "is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate". The situation in relation to the rules of evidence may need clarification where further consideration is needed in the matter when applying the law as determined by the courts. Where substantial consideration is needed, the matter may be referred to the AAT for a rehearing or new hearing.

## **Use of the word “justice” in the context of merits review**

The use of the word “justice” in proposed sections 23(9)(a), 23(11)(a), 23F(5) and 23F(6) needs further consideration. It is a judicial term and should not be confused in a tribunal context. Administrative tribunals such as the AAT are required to administer fairness in reviewing the merits of the matter. It is recognised that the provisions will insert an objective into the *AAT Act* which refers to its functions being “just”. However, this reference does not necessarily apply to making decisions. Decisions of the AAT need to be made according to law and, as an Executive body, in consideration of government policy. The use of the word “justice” could send the wrong message to Tribunal members about the role of the AAT. It is not there to hear questions of law but to apply the law.

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