

## The New Administrative Decisions Tribunal of NSW

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In July 1997 the NSW Parliament passed 2 Acts establishing and giving jurisdiction to a new State Tribunal styled the Administrative Decisions Tribunal of New South Wales ("ADT"). The Acts have not yet commenced operation. At the time of writing, the ADT will commence on 1 October 1998. The passage of the legislation through Parliament was supported by all major political parties in NSW.

The 2 Acts are:

- *Administrative Decisions Tribunal Act 1997*; No 76 of 1997 ("**the Act**") – establishing the Tribunal, providing for membership and creating its structure. The Act also provides for ADR, hearing procedures & rules, appeals and abolishes a number of State tribunals; and
- *Administrative Decisions Legislation Amendment Act 1997*; No 77 of 1997 ("**the cognate Act**") – Stage 1 of a 4 part conferral of jurisdiction to the Tribunal. Three more amending bills will be introduced in to NSW Parliament in the next 3 sessions of Parliament.

Since July 1997 there has been another "ADT Amendment Act" passed, the *Administrative Decisions Tribunal Legislation Amendment Act 1998*; No 48 of 1998. It adds further jurisdiction to the ADT and it has not yet commenced.

In the context of merits review tribunals familiar to us in Australia, such as the Commonwealth Administrative Appeals Tribunal and the Victorian Administrative Appeals Tribunal (now, the Victorian Civil and Administrative Tribunal ("**VCAT**")), the main features of the Tribunal of interest to note are:

- It is not simply a merits review body. It will make original decisions in relation to, *inter alia*, lawyers and anti-discrimination matters;
- Its structure and membership provisions are very flexible;
- There are substantial provisions which provide for an emphasis on ADR, inquisitorial procedures, and the following of government policy;
- There is a requirement for a statement of reasons to be provided in respect of reviewable decisions;
- There is a requirement that reviewable decisions first be reviewed by an different decision maker before the ADT may hear the matter (internal review) (similar to FOI Acts);
- There are new and flexible Rules Committee provisions with input from stakeholders and community groups provided for;

- There is a right for applicants to be legally represented before the Tribunal. The Tribunal (not the Appeals Panel) has a discretion to order that an applicant not be represented by an agent for the purpose of the presentation of oral submissions to it – section 71(2).

### ***History of Reform Proposals***

New South Wales has a long history of proposals for some form of merits review tribunal. These include the following:

- In December 1972, the New South Wales Law Reform Commission published its *Report on Appeals in Administration*, LRC 16, which provided for, and enclosed a draft bill in respect of, a Public Administration Tribunal.
- The Commission Reviewing New South Wales Government Administration, which made two reports, one in 1977 and one in 1982. A preference for the adoption of a model based upon the Commonwealth AAT was expressed there.
- The New South Wales Tax Task Force reported in 1988. It recommended a general taxation appellate body in the area of taxation in respect of State matters.
- In 1989 the New South Wales Attorney General's Department issued a discussion paper on civil procedure. That discussion paper made a number of favourable comments towards the establishment of a general administrative appeals tribunal type of body in New South Wales.
- In March 1995 the Carr Labor Government came to power in NSW on a stated policy of Mr Jeff Shaw QC, then Shadow Attorney-General, of establishing an independent Administrative Appeals Tribunal to review government decisions.

As to general merits review tribunals in other Australian jurisdictions, in 1975 the Commonwealth Parliament enacted the *Administrative Appeals Tribunal Act 1975*. The AAT commenced operation on 1 July 1976.

Since 1976, two other Australian jurisdictions broadly adopted the Commonwealth administrative appeals tribunal model. In 1989, the Australian Capital Territory enacted AAT legislation modelled expressly on the Commonwealth AAT. Queensland rejected the recommendation of the Queensland Electoral and Administrative Review Commission's 1992 *Report on Administrative Appeals* and did not establish an AAT type of body. There was some activity in South Australia and Tasmania on the issue last year.

In New South Wales, the Act and the cognate Act were drafted in the first half of 1997 after more than a year of extensive (and presumably heated) discussions between the various State government departments and authorities and the Attorney-General's department. An Expert Panel of about 10 members from the legal profession, tribunals, academe and the public sector provided input into the formation of the 2 Bills before their introduction into Parliament.

### ***The Tribunal – Jurisdiction***

The Tribunal will exercise only the jurisdiction given to it by other Acts - Chapter 3, ss 36-40.

Other legislation yet to be introduced will provide for:

- Original decisions to be made by the Tribunal as the primary decision-maker (at present provided for in areas such as the Legal Services Division and the Equal Opportunity Division of the Tribunal); and
- Reviewable decisions (at present provided for in areas such as freedom of information (“**FOI**”), certain taxing and licencing decisions; public health orders and decisions presently reviewed by the Community Services Appeals Tribunal).

The enabling Acts giving jurisdiction can provide for a matter which is expressly contrary to the provisions of the ADT Act - s 40 - as has already occurred in many cases in the cognate Act.

### ***The Tribunal – Membership & Structure***

The Tribunal will have a President (full-time) and Deputy Presidents (“presidential judicial members”) - s 12; and non-presidential judicial members and non-judicial members. Presidential judicial members are appointed by the Governor and non-presidential judicial members and non-judicial members are appointed by the Minister (the Attorney-General).

In August 1998 the NSW Attorney-General appointed District Court Judge Kevin O'Connor as the first President of the Tribunal. Judge O'Connor was Chairperson of the NSW Commercial Tribunal and the former Commonwealth Privacy Commissioner.

There are extensive and flexible provisions which operate to “deem” acting State judicial officers to act as members for particular proceedings subject to the permission of the relevant chief judicial officer - s 14. Acting members may also be appointed for

a period of under 12 months - s 15.

A Deputy President may be appointed as the Divisional Head of a Division of the Tribunal by the Governor - s 16.

The full-time President must first be a NSW judge in order to be appointed. The Deputy Presidents and the non-presidential judicial members must be either a NSW judge or magistrate or a lawyer of 7 years standing. The non-judicial members may be non-lawyers - s 17.

There are provisions for full-time, part-time and acting assessors of the Tribunal to deal with inquiries and reports of those inquiries - Part 5, ss 29-35.

Schedule 3 sets out the provisions relating to the members of the Tribunal.

Schedule 4 set out the provisions relating to the assessors of the Tribunal.

The Tribunal is cast into 4 Divisions set forth in Schedule 1 - s 19. Presently, they are:

- Community Services Division;
- Equal Opportunity Division;
- General Division; and
- Legal Services Division.

The particular composition of the Tribunal and its functions in respect of those divisions is set out in Schedule 2.

At this stage, the functions allocated under Schedule 2 to the General Division are relevant reviewable decisions made under the following Acts:

- Boxing and Wrestling Control Act 1986;
- Education Reform Act 1990;
- Freedom of Information Act 1989;
- Ombudsman Act 1974;
- Public Health Act 1991; and
- Veterinary Surgeons Act 1986.

There is also constituted an Appeal Panel of the Tribunal - s 24 & Chapter 7, ss 112 to 123. The Appeals Panel will hear appeals from original decisions of the Tribunal where there is specific provision for such an appeal (now called appealable decisions) and appeals as of right from decisions of the Tribunal on reviewable decisions (also now called appealable decisions) - Chapter 7, ss 112-118.

There is provision for a Registrar, Deputy Registrars and other staff of the Tribunal -

ss27-28.

The following bodies will be abolished on commencement of the Act and the cognate Act:

- Boxing Appeals Tribunal;
- Community Services Appeals Tribunal;
- Equal Opportunity Tribunal;
- Legal Services Tribunal;
- Schools Appeals Tribunal; and the
- Veterinary Surgeons Disciplinary Tribunal.

### ***Future Jurisdiction of the Tribunal***

According to the second reading speech of the ADT Bill, the jurisdiction of the Tribunal was to have been vested in defined stages. It was said that the NSW Government was reviewing over the next 18 months all administrative decisions which are made or required to be made under State legislation to determine which decisions should be amenable to review by the Tribunal.

Unfortunately, this process appears to have slowed. The jurisdiction of the Tribunal will still be introduced in stages. However, it seems to me it may take many years for the tribunal to accumulate a further significant body of review jurisdiction.

Other areas of new jurisdiction for the ADT, when they are introduced might include, among other things, NSW taxation decisions made under the Taxation Administration Act 1996 (NSW) which include decisions made under the following Acts:

- Debits Tax Act 1990;
- Health Insurance Levies Act 1982;
- Land Tax Act 1956;
- Land Tax Management Act 1956;
- Parking Space Levy Act 1992;
- Pay-roll Tax Act 1971; and
- Revenue Laws (Reciprocal Powers) Act 1987.

### ***Rules of the Tribunal***

There are detailed provisions for the making of rules of the Tribunal by a Rule Committee established under section 92. Novel features include that the mandatory Subcommittees of the Rule Committee which must be set up in respect of each Division of the Tribunal must include, *inter alia*, 3 persons (not being members of the Tribunal) who represent community and other relevant special interests in the area of

the Division's jurisdiction - s 97. There must also be public consultation on the draft proposed rules - s 98.

Also new is the express requirement in section 93 for the rules to be as “flexible and informal as possible”.

### ***Legal Representation before the Tribunal***

There is a right for applicants to be legally represented before the Tribunal. The Tribunal (not the Appeals Panel) has a discretion to order that an applicant not be represented by an agent for the purpose of the presentation of oral submissions to it. Section 71 relevantly provides:

**“71 Representation of parties**

- (1) A party to proceedings before the Tribunal may:
  - (a) appear without representation, or
  - (b) be represented by an agent, or
  - (c) if the party is an incapacitated person—be represented by such other person as may be appointed by the Tribunal under subsection (4).
  
- (2) Despite subsection (1), the Tribunal may order that the parties to the proceedings before it may not be represented by an agent of a particular class for the purpose of the presentation of oral submissions to it (whether in relation to the whole proceedings or any part of the proceedings) if the Tribunal considers it appropriate to do so.
  
- (3) In making an order under subsection (2), the Tribunal is to have regard to the following matters:
  - (a) the complexity of the matter and whether it involves a question of law,
  - (b) whether each party has the capacity to present the party's case by oral submissions without representation,
  - (c) the stage that the proceedings have reached,
  - (d) the type of proceedings,
  - (e) such other matters as the Tribunal considers relevant.”

An adverse decision as to representation is an appealable decision - s 112(2)(b).

### ***Application of Government Policy in the Tribunal***

Parliament has attempted to resolve the vexed question of the application of government policy by a special provision dealing with it. The issue has caused much conflict in the Commonwealth AAT in the past.

Section 64 provides:

**64 Application of Government policy**

- (1) In determining an application for a review of a reviewable decision, the Tribunal must give effect to any relevant Government policy in force at the time the reviewable decision was made except to the extent that the policy is contrary to law or the policy produces an unjust decision in the circumstances of the case.
- (2) The Premier or any other Minister may certify, in writing, that a particular policy was Government policy in relation to a particular matter.
- (3) The certificate is evidence of the Government policy concerned and the Tribunal is to take judicial notice of the contents of that certificate.
- (4) In determining an application for a review of a reviewable decision, the Tribunal may have regard to any other policy applied by the administrator in relation to the matter concerned except to the extent that the policy is contrary to Government policy or to law or the policy produces an unjust decision in the circumstances of the case.
- (5) In this section:

***Government policy*** means a policy adopted by:

- (a) the Cabinet, or
- (b) the Premier or any other Minister,

that is to be applied in the exercise of discretionary powers by administrators.”

***Right to a Statement of Reasons***

Sections 49 to 52 provide for a statement of reasons to be provided to interested persons by the “administrator” on written request, the contents of such reasons, and application rights to the Tribunal if reasons are refused or if made out of time.

Reasons must be requested within 28 days after the person was provided with the reviewable decision - s 50(1)(b).

Reasons must be requested within a reasonable time after the decision was made if there was no notification of the decision - s 50(1)(c).

The administrator must provide written reasons “as soon as practicable (and in any event within 28 days) after receiving such a request” - s49(2).

Section 49(3) provides the statement of reasons must set out the following:

- “(a) the findings on material questions of fact, referring to the evidence or other material on which those findings were based,
- (b) the administrator's understanding of the applicable law,
- (c) the reasoning processes that led the administrator to the conclusions the administrator made.”

### ***Internal Review of Reviewable Decisions***

A new and interesting feature of the Act in sections 53 to 54 is a requirement for the administrator to appoint another appropriate person to internally review the decision within 28 days after the applicant received the decision or the reasons for the decision.

The internal review procedure may occur once only and is a new concept which will potentially place a significant resource burden on NSW administrators while increasing review options for an applicant.

### ***Appeals***

Appeals to an Appeals Panel and in some cases to the Supreme Court are provided for in Chapter 7 ss 112 - 123.

Appeals do not stay the operation of a decision and there is power to obtain a stay - s 116. Stays ordered by the Tribunal generally are provided for in sections 60 to 62.

Appeals on “any question of law” are heard as of right - s 114.

Appeals on “the merits” are to be heard with leave - s 115.

Section 115 provides:

#### **“115 Appeals on the merits**

- (1) If an appeal under this Part extends to a review of the merits of an appealable decision, the Appeal Panel is to decide what the correct and preferable decision is having regard to the material then before it, including the



following:

- (a) any relevant factual material,
  - (b) any applicable written or unwritten law.
- (2) The Appeal Panel may exercise all the functions that are conferred or imposed by or under any relevant enactment or this Act on the Tribunal at first instance to make the appealable decision concerned.
- (3) In determining any such appeal, the Appeal Panel may decide:
- (a) to affirm the decision, or
  - (b) to vary the decision, or
  - (c) to set aside the decision and make a decision in substitution for the decision it set aside.”

### ***The Future of the Tribunal***

In addition to new jurisdiction being given to the Tribunal over future sessions of Parliament which is discussed above, the Tribunal might in future be vested with jurisdiction to conduct judicial review of administrative decisions. Such jurisdiction would be concurrent with the judicial review jurisdiction of the Supreme Court of NSW. In the second reading speech, the major benefits of this approach and of codification of the grounds of judicial review were said to include:

- “● it allows the tribunal in judicial review proceedings to focus on the substance of an applicant’s grievance free of technical issues as to the availability of common law remedies;
- it provides for an array of flexible remedial powers; and
- by prescribing the most important grounds of review in summary form and reasonably comprehensive language, it has educational and presentational advantages for administrators and citizens, as to the matters that would render an administrative decision contrary to the law.”

It was also said that:

“It will also permit an additional option to provide that for certain matters not considered suitable for merit review to nevertheless be reviewable in the ADT as a cheaper and quicker review mechanism than going to the Supreme Court.”

### *Sources & Notes*

This paper is a revision of my paper delivered to the Administrative Law Committee of the NSW Bar Association on 10 September 1997 in Sydney.

The 2 Acts are able to be downloaded from the internet in plain text format or Rich Text Format. The address is [http://www.austlii.edu.au/legis/nsw/consol\\_act/](http://www.austlii.edu.au/legis/nsw/consol_act/) or <http://www.austlii.edu.au/databases.html>

The Hansard debates can be downloaded in Adobe Acrobat format (\*.pdf) from the following internet address <http://www.parliament.nsw.gov.au/>

The Second Reading in the Legislative Assembly was on 29 May 1997 (Proof Hansard pp 72-76. The debates and committee were conducted on 19 June 1997 (Proof Hansard pp 6-10).

The Second Reading in the Legislative Council was on 27 June 1997 (Proof Hansard pp 16-20 with debate and committee on the same day (Proof Hansard pp 20-27 and 39-46).

The 2 Bills with proposed amendments returned to the Legislative Council on 27 June 1997 with the amendments agreed to (Proof Hansard p 10 and pp 16-17).

Jill Anderson "Something Old, Something New, Something Borrowed... The New South Wales Administrative Decisions Tribunal" (1998) Australian Journal of Administrative Law 97

Fiona Cameron, "Scope for Inquisitorial Procedures in New Administrative Decisions Review Tribunal" 1997 Law Society Journal 41 (August 1997, No. 7)

Centre for Legal Process, *Model tribunal procedures: Summary of survey of NSW tribunals*, June 1997.

Amanda Cornwall, "Trouble with government decisions: New rights to review government decisions in NSW" August 1997, Alternative Law Journal.

Hon. Jan Wade MP, Attorney General Discussion Paper, *Tribunals in the Department of Justice: a principled approach*, October 1996, esp, chapter 2.

Administrative Review Council, *Better decisions: review of Commonwealth merits review tribunals*, Report No. 39, 1995