

What Scope Will Exist For Inquisitorial Procedures In The New South Wales Administrative Decisions Tribunal?

by Fiona Cameron*

The introduction of a new Administrative Decisions Tribunal (ADT) in New South Wales this year (operations expected to commence on 1 January, 1998) will not see the traditional adversarial approach of the courtroom jettisoned. However there are key features of the legislation which it is intended should significantly modify that approach in favour of a more active and inquisitorial role for tribunal members.

Factors which have been identified as responsible for the dominance of adversarial procedure in the Commonwealth AAT, such as a dominance of legally trained participants and the manner in which the Federal Court has interpreted the requirements of natural justice, may similarly hamper an inquisitorial approach in the ADT. In addition, adversarial characteristics will be present in the proposed legislative provisions for public hearings with parties presenting their cases, a right to representation and evidence being given on oath or affirmation. Accordingly, where it is appropriate to the case, full blown adversarial proceedings may be conducted.

However, emphasis has been placed on giving the Tribunal flexibility and a range of procedural options and powers. This will permit members, where appropriate, to take greater control of proceedings in order to give effect to objectives of accessible and fair proceedings, without impinging on the requirements of natural justice. The legislation will also require members to use their more inquisitorial powers in order to elicit all evidence that is necessary for them to be able to make the correct or preferable decision. The inquisitorial powers contained in the Commonwealth AAT Act will also be available to the ADT. However the NSW Act contains a number of innovations which will permit and encourage greater use of an inquisitorial and incremental decision making model.

What scope will exist for inquisitorial procedures in the New South Wales Administrative Decisions Tribunal?

The debates roll on about the relative merits of formal adversarial procedures and informal inquisitorial procedures. Richard Abel argues that informal justice increases State power, constrains choice and confirms existing advantages by encouraging compromise between unequals.¹ On the other hand, Leroy Certoma argues that "the non adversary administrative process of the Romano-Germanic type is the appropriate process for the resolution of public law disputes" as it "is capable of accommodating collective as well as individual interests".²

From among the many voices to be heard in these debates, the one which sums up the solution which has been adopted in establishing an Administrative Decisions Tribunal in New South Wales is that of the Commonwealth Administrative Appeals Tribunal in *Re Hennessy and Secretary, Department of Social Security* (1985) 7 ALN N113:

* Senior Policy Officer, Legislation and Policy Division, New South Wales Attorney General's Department

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“... given the wide variety of issues which arise for decision there is no one level of formality or informality which is appropriate for all cases”.

In the ADT various levels of formality and degrees of judicial participation or intervention will be available to the Tribunal. The *Administrative Decisions Tribunal Act 1997* provides the Tribunal and its members with a range of tools to be utilised according to the requirements of the matter before it. For example, by the end of the year it is envisaged that the Tribunal will have jurisdiction to review decisions made under the Taxation Administration Act. A dispute between a large corporation and Treasury over the application of revenue laws will usually feature strong teams of legal representatives on both sides arguing out the issues in a formal hearing. The parties and their lawyers will be left to determine what the issues are, what evidence should be placed before the Tribunal and in what manner. The Tribunal's role will be strictly adjudicative – the traditional court role of impassivity and non-intervention.

On the other hand, the review of a refusal to arrange a reunion under the Adoption Information Act might best be dealt with by the Tribunal taking a managerial and inquisitorial role in the proceedings. Early and active participation by the Tribunal will assist the parties to identify the real issues in dispute and the information the Tribunal requires, if it is to come to the correct and preferable decision. Alternatively the matter may be amenable to resolution at a preliminary conference or through mediation, or the Tribunal may prefer to make a decision on the papers, after collecting all relevant information and hearing the applicant's arguments over the phone.

The Functions and Role of the ADT

The ADT has two distinct areas of jurisdiction. The first is jurisdiction to review the merits of decisions made by public administrators.³ The second is jurisdiction to make original decisions.⁴ In both instances jurisdiction must be conferred by other legislation.

The Tribunal's original decision making jurisdiction arises from the merger of a number of existing tribunals into the ADT. Examples are the Legal Services Tribunal, which decides professional disciplinary matters, and the Equal Opportunity Tribunal, which resolves complaints under the Anti-Discrimination Act. Initially, procedures for original decision making will be governed by the principal Act conferring jurisdiction and can thus be adapted to the subject matter. This will permit, for example, proceedings before the Legal Services Division to be governed by rules of evidence and for representative actions to be brought before the Equal Opportunity Division. As further professional disciplinary tribunals are merged with the ADT, it is proposed to develop generic procedures for professional disciplinary matters as a separate chapter of the ADT Act to maximise consistency of approach to these matters.

The review jurisdiction of the ADT, on which I will concentrate today, will be available where other legislation provides that an application may be made to the Tribunal for the review of a decision made by an administrator.⁵ Over the next 18 months the Government will be reviewing all administrative decisions which are made or required to be made under State legislation to determine which decisions should be amenable to review.⁶

In conducting reviews the Tribunal is to decide what the correct and preferable decision is having regard to the material then before it.⁷ The Tribunal may exercise all of the functions conferred or imposed on the relevant administrator.⁸ The Tribunal may affirm or vary the decision, substitute its own decision or remit the matter for reconsideration.⁹ By placing the Tribunal in the shoes of the administrator, it is clear from the very nature of the task the Tribunal is called on to perform that the task should be characterised as an exercise of administrative rather than judicial power. The Tribunal is charged with reviewing and remaking an administrative decision. While in some situations the best way to review the decision may be to adopt adversarial procedures, it is clearly

intended that considerable flexibility be given to the Tribunal and that an alternative to the traditional adversarial role of a court be available. Scott Henchcliffe has argued that this role of the Administrative Appeals Tribunal is the only compelling justification for that Tribunal adopting an investigative role.¹⁰ The Federal Court has also recognised that, as the function of the Tribunal is one of administrative inquiry, its procedure must be adapted in order to permit that function to be properly exercised.¹¹

I will now examine four aspects of the ADT which will contribute to maximising its potential for procedural flexibility – the ADT's divisional structure, its adversarial features, its inquisitorial features and the provisions for assessors.

Procedural flexibility – Divisions

By structuring the ADT in divisions the potential for procedural flexibility will be maximised. The ADT will be headed by a President and will be comprised initially by the General, Community Services, Legal Services and Equal Opportunity Divisions each with a Divisional Head. The ADT Act itself contains a minimum of procedural provisions – the intention is to leave procedure largely to the Tribunal to determine through its rules.

A Rules Committee is charged with making rules as flexible and informal as possible¹² and may make different rules for each of the Divisions and for different classes of matters.¹³ The Rules Committee may only make rules for the Divisions on the recommendation of Divisional subcommittees.¹⁴ These subcommittees will be comprised of the Divisional Head, one other judicial member of the Division, one non judicial member of the Division and three non-members who represent community and other relevant special interests in the area of the Division's jurisdiction.¹⁵ By ensuring that a majority in each of the rules subcommittees will be non-lawyers it is intended to avoid a legalistic approach in developing Tribunal procedures. New rules must be the subject of public consultation before they come into operation.¹⁶ In any event the Tribunal can make any amendments to the proceedings that it considers necessary in the interests of justice.¹⁷

Procedural flexibility – Adversarial features

Like the AAT, the ADT Act contains a significant number of features which are associated with the adversarial court room model of fact finding and decision making. These include a tendency to characterise matters before the tribunal as a dispute between parties to proceedings¹⁸ which will be formally resolved or determined at a hearing.¹⁹ There is also provision for hearings in public,²⁰ a clearly adjudicative role for the tribunal,²¹ recognition of a party's right to present his or her case and make submissions²² and a right to legal representation.²³

The persistence of these features throughout the Act ensure that where it is appropriate to a particular case, full blown adversarial proceedings may be conducted.

However attempts have been made to water down the rigid pre-hearing/hearing distinction present in the AAT Act. The ADT Act makes provision for Alternative Dispute Resolution in Part 4. By consent the Tribunal may refer parties to voluntary mediation or neutral evaluation. There is also provision for directions hearings and preliminary conferences. Each of these procedures is clearly characterised as pre-hearing, and as distinct from formal hearings and formal determination. However it is equally clear that the emphasis of this group of procedures is on early resolution. The Tribunal may make orders to give effect to any agreement or arrangement arising out of ADR processes and members and assessors are empowered to reach determinations by agreement in preliminary conferences.²⁴ Even in a hearing, the power of adjournment is specifically linked to the purpose of enabling parties to negotiate a settlement.²⁵

The intention is to permit incremental decision making, with as many issues as possible being resolved along the way, whether or not this avoids a final determination by the Tribunal.

Procedural flexibility – Inquisitorial features

Alongside what may be perceived as an adversarial framework are provisions which open doors for the Tribunal to take a more interventionist, inquisitorial approach.

All of the inquisitorial and interventionist features available to the AAT will be available to the ADT. The Tribunal will have the power to determine its own procedure,²⁶ a duty to proceed with a minimum of formality and technicality and according to equity, good conscience and the substantial merits of the case,²⁷ a duty to act as quickly as practicable²⁸ and power to depart from the rules of evidence and to inform itself as it thinks fit, subject to the rules of natural justice.²⁹ The Tribunal may require a Department to produce relevant documents³⁰ and can summons witnesses to give evidence or produce documents of its own motion.³¹ The ADT is not confined to consider only the material that was before the original decision maker, as it can consider all new information available to it.³²

The intention in the ADT Act has been to emphasise the availability of these more inquisitorial powers and to both permit and require the ADT to be more interventionist in the conduct of proceedings.

A series of Federal Court decisions have imposed a limited obligation on the AAT to consider issues relevant to the decision which have not been raised by the parties and to make further inquiry to ensure that relevant matters are addressed.³³

Apart from this limited obligation, in the AAT the flexibility created by inquisitorial provisions is permissive, not mandatory. In a new and innovative response to criticisms of the AAT, the ADT Act enlarges on this common law duty and imposes an obligation on the ADT to ensure that all relevant material is disclosed to enable it to determine all the relevant facts.³⁴ As Joan Dwyer has noted,³⁵ the public interest aspect of public administration should not have to rely on the skills and resources of parties engaged in adversarial processes. It is envisaged that this obligation will be fulfilled by the ADT taking a managerial role, particularly during the preliminary stages of a matter in order to clarify the issues and to ensure that adequate evidence is produced for the satisfactory resolution of those issues. To assist in the exercise of its fact finding functions the Tribunal is given explicit permission to “inquire into” the matters before it³⁶ and to call, examine and cross examine witnesses of its own motion.³⁷

The Tribunal will also be required to exercise considerable control over proceedings, particularly where a party is unrepresented, by its obligation to ensure that parties understand the nature and legal implications of the assertions being made and the relevant procedure and decisions or rulings of the Tribunal.³⁸ The Tribunal will also be required to ensure that parties have the fullest opportunity practicable to be heard or otherwise have their submission considered in the proceedings.³⁹

Additional powers enabling the Tribunal to exercise control over proceedings include the power to require material to be placed before it in writing, to decide which matters will be dealt with by oral evidence or argument and to require the presentation of parties’ cases to be time limited.⁴⁰

The Tribunal may also in appropriate cases avoid a full hearing, whether by resolution of the matter in preliminary phases or by making a decision on the papers and without holding a hearing if it appears to the Tribunal that the issues for determination can be adequately determined in the absence of the parties.⁴¹

Procedural flexibility – Assessors

The ADT Act makes provision for the appointment of assessors, based on the model provided by the NSW Land and Environment Court. There is potential for the assessors to play a strong role in the inquisitorial and investigative functions of the ADT. Assessors may be appointed to inquire into any issue and provide a report to the Tribunal,⁴² may have matters delegated to them for determination,⁴³ or may sit with, assist and advise the Tribunal, without participating in the adjudication of the matter.⁴⁴ They may also be appointed to conduct preliminary conferences.⁴⁵ These provisions will enable the Tribunal to undertake its own inquiries into matters and will permit it to be equipped with staff having the relevant expertise to conduct such inquiries.

Gillian Osborne has advocated⁴⁶ that assistance should be provided to the AAT by allocating an officer to cases, who would prepare the case for hearing but would not participate in the judgment. The officer would be responsible for the initial analysis of the matter and for briefing members of the Tribunal and would ensure that all relevant evidence would be placed before the Tribunal. She suggests that the officer might also assist in eliciting evidence at the hearing, like counsel assisting a Royal Commission. The officer could identify whether matters should be referred to ADR, and by providing a ready channel for informal consultation with Tribunal members could facilitate early resolutions and determinations by agreement.

By establishing a routine of appointing an assessor to conduct preliminary conferences, and conferring on the assessor such additional roles of inquiry and determination as are appropriate to the case, assessors in the ADT could come to fulfil a role, as advocated by Osborne, similar to that of the *rapporteur* in the French administrative courts. The assessor would be responsible for the management of the process, reviewing the documentation to assess what gaps exist, conferring with the parties in relation to further evidence and identification of the issues, and providing such assistance as may be necessary for an unrepresented applicant. If it is considered desirable to separate the inquisitorial and judicial functions, this can readily be achieved by having the assessor inquire and report to the Tribunal, and/or sit with the Tribunal to assist it without the assessor having a deliberative role.

So, what scope will exist for inquisitorial procedures in the ADT?

The commentators have attributed the failure by the AAT to make full use of its inquisitorial powers to:

1. the legislative expressions of intent that there be adversarial proceedings;
2. the views of the Federal Court;
3. the prevailing legal culture; and
4. the lack of structure and resources to facilitate their use within the Tribunal.

The Administrative Decisions Tribunal Act has attempted to address the first obstacle by reducing the adversarial cast and increasing the legislative emphasis on inquisitorial features. As discussed, this includes providing a power to inquire, a duty to ensure that all relevant material is disclosed to the Tribunal to enable it to determine all the relevant facts and other provisions permitting the Tribunal to intervene in the conduct of proceedings – to ensure parties understand and have the fullest opportunity to be heard; to limit the extent of oral evidence and argument; and to make a decision “on the papers”.

Importantly, the structural obstacles faced by the AAT will be minimised for the ADT by the divisional structure and provisions for assessors, which will provide an infrastructure within which inquisitorial procedures may operate.

As for the other impediments to inquisitorial procedure in the AAT, the impact of:

1. the Supreme Court's supervision of the ADT;
2. the prevailing legal culture; and
3. resource issues,

will only be able to be observed after 1 January, 1998.

Notes

- ¹ R L Abel *The Politics of Informal Justice Vol I The American Experience*, Academic Press, New York, 1982.
- ² L Certoma "The Non-adversarial Administrative Process and the Immigration Review Tribunal" (1993) 4 PLR 4.
- ³ Section 38
- ⁴ Section 37
- ⁵ Where that decision is made in the exercise of functions conferred or imposed by or under the enactment or in the exercise of any other functions of the administrator identified by the enactment. Section 38(1)
- ⁶ The following categories provide a general indication of matters which may be within the jurisdiction of the ADT, subject to the matter arising from a statutory decision;
 1. The granting or refusal to grant a licence, permit, registration, authority or approval for an activity or item.
 2. Suspension, termination, revocation or cancellation of a licence, permit or authority.
 3. Service of a notice directing or requiring the doing of an act or the ceasing to do an act in order to comply with a legislative requirement.
 4. Determination of an entitlement or eligibility for a (financial or like) benefit or assistance.
 5. Satisfying of safety or other standards.
 6. Exclusion of persons from property, places or institutions.
 7. Determination of an entitlement to moneys.
 8. Remittance of penalties, interest, debts or fees.
 9. Consenting to, or refusal of consent, and the imposition of conditions relating to lending, guarantees, or leasing.

10. The selection or appointment of receivers or administrators.
11. The acquisition, disposal or dealing with property.
12. Certification or refusal to certify matters.
13. The protection of vulnerable persons.

These categories are indicative for the purpose of assisting in identifying decisions which may be amenable to inclusion in the jurisdiction of the ADT. This list is not exhaustive but neither is it prescriptive of matters to be included, which must be determined subject to general exclusions. (Second Reading Speech)

- 7 Section 63(1)
- 8 Section 63(2)
- 9 Section 63(3)
- 10 S Henchcliffe "Theory, Practice and Procedural Fairness at Administrative Appeals Tribunal Hearings" (1995) 13 ABR 243.
- 11 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 596. Also *Kuswardana v Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 186.
- 12 Section 93(1)
- 13 Section 90(3)
- 14 Section 93(2)
- 15 Section 97
- 16 Section 98
- 17 Section 81(1)
- 18 AAT section 30, ADT section 67 and for example the language of Part 4 Alternative Dispute Resolution.
- 19 AAT sections 33, 35, ADT section 74(1)
- 20 AAT section 35, ADT section 75
- 21 AAT section 43, ADT section 63
- 22 AAT section 39, ADT section 70
- 23 AAT section 32, ADT section 71
- 24 ADT section 74
- 25 ADT section 73(5)(f)
- 26 AAT section 3(1)(a), ADT section 73(1)
- 27 AAT section 33(1)(b), ADT section 73(3)
- 28 AAT section 33(1)(b), ADT section 73(5)(a)
- 29 AAT section 33(1)(c), ADT section 73(2)
- 30 AAT sections 37, 38, ADT section 58(4)
- 31 AAT section 40, ADT sections 83, 84

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- 32 ADT section 63(1)
- 33 *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549; *Sullivan v Secretary, Department of Transport* (1978) 1 ALD 383; and *Drake and Kuswardana* (see note 11)
- 34 Section 73(5)(b)
- 35 J Dwyer "Overcoming the Adversarial Bias in Tribunal Procedures" (1991) 20 Fed L R 252
- 36 Section 73(2)
- 37 Sections 83 and 84
- 38 Section 73(4)(a) and (b)
- 39 Section 73(4)(c)
- 40 Section 73(5)
- 41 Section 76
- 42 Section 33
- 43 Section 34
- 44 Section 35
- 45 Section 74
- 46 G Osborne "Inquisitorial Procedure in the Administrative Appeals Tribunal – A Comparative Perspective" (1982) 13 FLR 150. Also H Whitmore (1981) 12 FLR 117.