Review of the Administrative Decisions Tribunal Act 1997

NSW Attorney General's Department

June 2007

CONTENTS

EXECUTIVE SUMMARY

The Administrative Decisions Tribunal (**the Tribunal**) was established by the *Administrative Decisions Tribunal Act 1997* (**the Act**) and began operations on 6 October 1998. The Tribunal exercises jurisdiction previously spread between a number of jurisdictions and the courts. It is intended to function as an accessible, cost-efficient forum to review the administrative decisions of NSW government agencies, and to determine applications for orders concerning matters such as unlawful discrimination and professional discipline.

The Tribunal exercises its jurisdiction across 6 Divisions: the General Division, the Community Services Division, the Revenue Division, the Equal Opportunity Division, the Retail Leases Division and the Legal Services Division.

The NSW Attorney General's Department carried out this review in accordance with section 147 of the Act, which requires the Minister to review the Act to determine whether its policy objectives remain valid, and whether the terms of the Act remain appropriate for securing those objectives.

The review also considered the Discussion Paper (2001) and Final Report (2002) of the Committee on the Office on the Ombudsman and the Police Integrity Commission on the *Jurisdiction and Operation of the Tribunal.*[1]

As part of the review process, the Department invited government agencies, key stakeholders and the general public to make submissions about the objects and terms of the Act and the functioning of the Tribunal. No submissions queried the objectives of the Act, although a number of submissions proposed minor amendments to the terms of the Act to better support the objectives.

Consistent with the recommendations of the Committee on the Office on the Ombudsman and the Police Integrity Commission, some submissions supported expansion of the jurisdiction of the Tribunal and clarification of the content of its jurisdiction. Submissions also proposed measures to improve the efficiency, accessibility and operations of the Tribunal.

This review has determined that the policy objectives of the Act remain valid and the terms of the Act remain, in substance, appropriate to secure those objectives.

Additionally, this review has found that the Tribunal is an effective administrative review body that has demonstrated a capacity to assimilate new jurisdictions while continuing to deliver accessible justice. The review recommends legislative and operational improvements to enable the Tribunal to continue to meet the policy objectives of the Act.

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[1] See Chapter 2 for discussion.

RECOMMENDATIONS

Recommendation 1

That the NSW Attorney General's Department continue to:

(a) keep the legislation under review; and

(b) encourage the further conferral of review jurisdiction on the Tribunal in appropriate circumstances.

Recommendation 2

That the Attorney General consider amendments to the Act to provide for longer terms of appointment for senior members to reflect the levels of commitment, knowledge and competence required of those members.

Recommendation 3

That Tribunal members be provided with suitable training for their professional development.

Recommendation 4

That the Tribunal be given power to award costs on terms similar to section 109 of Victorian *Civil and Administrative Tribunal Act 1997*.

Recommendation 5

That:

a) the rule making power in the Act be simplified, and

b) the Act authorise the making of Practice Notes by the President.

Recommendation 6

That sections 84 and 74 be amended to:

a) clarify that the Tribunal may elect to refuse to issue a summons, and

b) require that a party objecting under section 74(4)(b) must show that the involvement of a member or assessor in further proceedings is likely to result in prejudice to the party's case.

Recommendation 7

That the Act be amended to allow the joinder of a person to proceedings, on the application of a party or by the Tribunal in its own right.

Recommendation 8

That further consultation occur on:

a) the effectiveness of existing internal review mechanisms, and

b) the circumstances in which a person should be permitted to apply to the Tribunal for review of a decision prior to, or in lieu of, internal review.

1. INTRODUCTION

1.1. The Administrative Decisions Tribunal

General summary

The Administrative Decisions Tribunal began operations in 1998 to provide for the independent, external review of administrative decisions and to deal with other matters such as discrimination complaints and professional misconduct inquiries.

In its administrative review function, the Tribunal plays a key role in promoting high quality decision-making in the provision of government services and programs. It works to achieve the goal set by Parliament - to foster an atmosphere in which administrative review is viewed positively as a means of enhancing the delivery of services and programs to the citizens of New South Wales.

Operating on a limited budget and consisting of mostly part-time members, the Tribunal has creatively and effectively developed an extensive administrative review jurisdiction. Under the active guidance of its President, the Tribunal has developed as an open and accessible forum that promotes, and is seen to promote, equity and access to justice. However, as will be discussed in this report, the Tribunal faces a number of challenges.

Performance of the Tribunal

Overall, the Tribunal's Divisions have performed well in the Tribunal's 8 years of operation. The Tribunal has achieved a consistent finalisation rate of matters of 6.3 months and is working to improve this rate.

Some submissions to the review raised concerns about proceedings in the Equal Opportunity Division and the Legal Services Division. However, the criticisms were often of a topical or technical nature and did not necessarily reflect adversely on the whole Division.

In the case of the Equal Opportunity Division, legislative amendments have largely resolved the particular concerns about 'meritless' proceedings. These provide that a person whose claim has been declared meritless by the President of the Anti Discrimination Board must obtain leave to proceed with the complaint in the Tribunal.

Where appropriate, the Tribunal uses alternative dispute resolution (**ADR**) processes. It expedites the dispute resolution process in civil disputes, which often provides parties with a much greater sense of satisfaction in the negotiated result. ADR is less suited to areas such as professional discipline and merits review, where the public interest is usually better served by a public hearing and adjudication.

The Equal Opportunity Division has, historically, been the main user of mediation. Between 1998 and 2005, 326 mediations were conducted. 268 matters were resolved at or after the mediation session (an 82% success rate), with the balance (58 or 18% of matters) continuing to hearing. This result exceeds those achieved by similar forums, where the range is usually 55% to 75%.

1.2. Terms of reference of the review

Section 147 of the *Administrative Decisions Tribunal Act 1997* (the Act) requires the Minister to review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to the Act. A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

1.3. Conduct of the review

The Attorney General's Department conducted the review at the direction of the previous Attorney General, the Hon Bob Debus MP.

The review was advertised in the *Daily Telegraph* and the *Sydney Morning Herald.* The Attorney General wrote to all NSW government ministers inviting them to make submissions to the review. Tribunal stakeholders were specifically invited to make submissions. In total, more than 40 submissions were received.

Due to competing priorities in the Attorney General's Department the review was delayed. In the intervening period the issues raised by some submissions have been solved by administrative action on the part of the Tribunal or by legislation.

This report is the final outcome of the review process and takes into account issues identified in the submissions that have not been otherwise addressed.

A list of parties invited to make submissions, respondents to the review and parties invited to respond who declined to respond is at Appendix 1.

1.4. Parliamentary inquiry

Section 146 of the Act provides that a joint parliamentary committee must report to Parliament on the jurisdiction and operation of the Tribunal as soon as is practicable after the elapse of 18 months from the Tribunal's establishment.

In June 2000, Parliament asked the Committee on the Office of the Ombudsman and the Police Integrity Commission to inquire into the

jurisdiction and operation of the Tribunal. The Committee released a Discussion Paper in 2001[2] and published its final report in November 2002.[3]

The Committee proposed that pending the establishment of a permanent review council to oversight the development of administrative law in NSW, interim bodies should determine the appropriate scope of the Tribunal's jurisdiction (including recommendations about merging separate NSW tribunals into the Tribunal). The Committee also proposed operational improvements, some of which the Tribunal has implemented.

2. BACKGROUND

The *Administrative Decisions Tribunal Act 1997* (**the Act**) followed over 25 years of debate and reports being published on the subject.

In 1973, the NSW Law Reform Commission (**Commission**) proposed the creation of a Public Administration Tribunal to unify the fragmented system of administrative appeal in NSW. The Commission also recommended the creation of three new public offices, those of Commissioner of Public Administration, Advisory Council on Public Administration and the Ombudsman.[4] The government responded to these recommendations by creating the Office of the Ombudsman.

Subsequently the 'Wilenski reports' provided official backing for the concept of a single tribunal that would exercise jurisdiction in most aspects of administrative law in NSW.[5]

At the end of the 1980s, the NSW Attorney General's Department advocated the establishment of a review body modelled on the Commonwealth Administrative Appeals Tribunal. In its report, the Department emphasised the need to unify 'disparate' jurisdictions, to prevent the 'proliferation' of specialist tribunals and to 'rationalise' the system of administrative review.[6]

The Act was passed in 1997. It commenced on 6 October 1998 and the General, Equal Opportunity and Legal Services Divisions began operations on that date. The Community Services Division commenced on 1 January 1999 followed by the Retail Leases Division on 1 March 1999 and the Revenue Division in July 2001.

The Act has not, however, comprehensively unified the system of administrative law in NSW. As the then Attorney General said when

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[2] *Parliamentary Inquiry into the Jurisdiction and Operation of the Administrative Decisions Tribunal,* Discussion Paper, March 2001.
[3] *Report on the Jurisdiction and Operation of the Administrative Decisions Tribunal,* November 2002.
[4] *Rights of Appeal from Decisions of Administrative Tribunals and Officers*, 1973.
[5] P. Wilenski, *Review of New South Wales Government Administration: Directions for Change* (Interim Report 1977) and *Unfinished Agenda* (Further Report 1982).
[6] J. Dowd, *Discussion Paper on Civil Procedure,* NSW Attorney General's Department, 1989.

introducing the legislation, '[t]he breadth of administrative decisions made in New South Wales is enormous and usually underestimated.'[7] The Act was passed on the basis that it did not definitively establish the scope of the Tribunal's jurisdictions, or indeed its operations.

3. OVERVIEW OF THE ACT

3.1. Policy Objectives of the Act

The objectives of the Act are set out in section 3 of the Act (and in Chapter 6 of this Report) and were elaborated in the second reading speeches introducing the legislation. They are to establish an independent Tribunal to make decisions and review the merits of administrative decisions in an open and accessible way, according to principles of natural justice.

The Tribunal can only adjudicate in matters where jurisdiction is conferred by statute. Its jurisdiction includes the review of bureaucratic decision making such as occupational licensing, state taxation, privacy and freedom of information. In addition, the Tribunal acts as a first instance decision maker in claims including discrimination, serious professional misconduct and retail lease disputes.

3.2. Terms of the Act

A detailed summary of the Act is provided at Appendix 3. A concise explanation of the structure and jurisdiction of the Tribunal is set out below.

3.2.1. Structure of the Tribunal

The Tribunal consists of a President, Deputy Presidents, non-presidential judicial members, and non-judicial members. The President and the Deputy Presidents of the Tribunal are referred to under the Act as presidential judicial members.

Members are appointed by the Attorney General (usually in consultation with relevant ministers, bodies and/or the Tribunal) almost invariably on a part-time basis.

The conceptual classification used by the Act to define the work of the Tribunal – 'review of reviewable decisions' and 'original decisions' – does not precisely capture the difference between the different parts of the Tribunal's business, namely:

- business that can be said to be of an 'administrative' or public law character (proceedings to which a private citizen and a government agency or a body exercising public power are parties); and
- business that is of a 'civil' or private law character (disputes between private parties).

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[7] Hon JW Shaw, Attorney General, second reading speech for *Administrative Decisions Tribunal Bill 1997,* NSW Legislative Council Hansard, 27 June 1997.

Four divisions deal substantially or exclusively with business of an 'administrative' or public law character. These are:

- *The General Division:* operative 6 October 1998. This Division hears most applications by citizens for the review of administrative decisions or administrative conduct. The General Division includes a list devoted to Guardianship and Protected Estate matters. It also deals with professional discipline in relation to certain professions including architects, surveyors and vets.

- *The Community Services Division:* operative 1 January 1999. This Division hears applications for review of various administrative decisions made in the Community Services and Ageing, Disability and Home Care portfolios. It also hears applications for original decisions for exemption from prohibition on being engaged in child-related employment.

- *The Revenue Division:* operative 1 July 2001. This Division hears applications for review of various State taxation decisions.

- *Legal Services Division:* operative 6 October 1998. This Division hears complaints referred under the *Legal Profession Act 2004* against legal practitioners and licensed conveyancers.

  The Division's business is of an 'administrative' or 'public law' character as its ultimate duty is to the public interest, when considering whether a member of a profession should be removed from the public register and prohibited from continuing to practise.

Two Divisions (Equal Opportunity and Retail Leases) are engaged in dealing with disputes of a 'civil' character.

- *The Equal Opportunity Division:* operative 6 October 1998. The main work of the Division is to hear complaints of unlawful discrimination referred to it by the President of the Anti-Discrimination Board under the *Anti-Discrimination Act 1977.*

- *The Retail Leases Division:* operative 1 March 1999. This Division hears claims made under the *Retail Leases Act 1994* by parties to retail shop leases.

Appeal Panel

The Tribunal has an Appeal Panel that hears internal appeals from decisions made by the Divisions of the Tribunal and external appeals from other decision-makers, as prescribed by Chapter 7 of the Act.

Tribunal leadership

The role of the President is (subject to the Act and the rules of the Tribunal) to direct the business of the Tribunal.

The President is required to facilitate the adoption of good administrative practices in the conduct of the business of the Tribunal and may determine the places and times for sittings of the Tribunal.

Divisions are headed by Division Heads who are appointed by the Governor.

In exercising its functions, the Tribunal is constituted by one or more members of a Division.

3.2.2. Tribunal jurisdiction

The Act vests in the Tribunal a review jurisdiction and an original jurisdiction.

Review jurisdiction

In its review jurisdiction, the Tribunal reviews the merits of the administrative decisions of government, as made by an administrator in the exercise of a function conferred by an enactment.

If the relevant legislation provides for review of an administrative decision by the Tribunal, it is a 'reviewable decision'.

An administrator makes a reviewable decision and (where appropriate) gives notice to an interested person of the decision and of their review rights in accordance with Division 1 of Part 2 of the Act.

The Act provides that an interested person may seek reasons for an administrative decision and/or an internal review of the decision. An interested person may also (generally after an internal review) make an application to the Tribunal for a review of the decision.

If the Tribunal has reviewed a reviewable decision, a party to the proceedings may appeal to an Appeal Panel of the Tribunal.

Original jurisdiction

The Tribunal makes an original decision when it makes a decision for which it has jurisdiction under an enactment to act as the primary decision-maker.

In its original jurisdiction, the Tribunal hears (across most of its 6 Divisions):

- complaints of discrimination, vilification, harassment and victimisation referred by the President of the Anti-Discrimination Board (Equal Opportunity Division)

- certain types of professional misconduct cases (for example, matters referred to the Tribunal by the Legal Services Commissioner against a solicitor or barrister) (Legal Services Division)

- retail lease claims (Retail Leases Division).

3.2.3. Appeal system

Decisions of the Tribunal in its original or review jurisdiction and decisions to refuse an application for an original or review decision can usually be appealed to an Appeal Panel. An appeal may be made on any question of law, and, with the leave of the Appeal Panel, may extend to a review of the merits of the decision appealed against.

In a number of the Tribunal's professional discipline jurisdictions, the appeal lies directly to the Supreme Court.

When dealing with a question of law, an Appeal Panel may affirm the Tribunal's decision, remit the matter for rehearing by the Tribunal or substitute a new order. In determining an appeal on the merits, the Appeal Panel may affirm, vary, or set aside the decision or substitute a new decision. An Appeal Panel may, of its own motion, or at the request of a party, refer a question of law arising in the appeal to the Supreme Court for the opinion of the Court.

An Appeal Panel may also hear external appeals, that is, decisions that an Act specifies may be appealed to the Tribunal. The current external appeals jurisdiction relates to decisions concerning guardianship and financial management made by the Guardianship Tribunal under section 67A of the *Guardianship Act 1987*, section 41 of the *Powers of Attorney Act 2003* or by the Mental Health Review Tribunal or a magistrate under section 21A of the *Protected Estates Act 1983*.

3.2.4. Tribunal procedure

A person who is permitted to do so under an enactment may apply to the Tribunal for an original decision or the review of a reviewable decision.

The Tribunal must ensure that every party to proceedings before the Tribunal is given a reasonable opportunity to present the party's case (whether at a hearing or otherwise), and to make submissions in relation to the issues in the proceedings.

A party may appear before the Tribunal without representation. The Tribunal may, subject to the Act and the rules of the Tribunal, determine its own procedure.

The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.

The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

Subject to the Act and rules of the Tribunal, the Tribunal may (in its merits review jurisdiction) award costs in relation to proceedings before it, but only if it is satisfied that there are special circumstances warranting an award of costs. In its original jurisdiction the Tribunal may only award costs if the statute that confers jurisdiction on the Tribunal permits it.

The Tribunal has developed practices and procedures through the active use of Practice Notes.

3.2.5. Tribunal Rules

The Rules governing the practice and procedure of the Tribunal are set out in the *Administrative Decisions Tribunal Rules (Transitional) Regulation 1998.* Matters such as fees, waiver of fees and exclusion of reviewable decisions from internal review are dealt with under the *Administrative Decisions Tribunal (General) Regulation 2004.*

The Tribunal may make 'necessary and convenient' rules on practice and procedure including rules on the commencement of proceedings, the conduct of proceedings, the enforcement of decisions, mediation or neutral evaluation of a matter, and the functions of the Registrar or any other officers under the Act. The Tribunal may prescribe different rules for different Divisions and different classes of proceedings.

Tribunal rules are made by the Rule Committee. The Rule Committee consists of the President, each Divisional Head, such other members of the Tribunal as may be appointed by the Attorney General on the nomination of the President, and such other persons as may be appointed by the Attorney General.

A Rule Subcommittee of each Division of the Tribunal makes recommendations to the Rule Committee in relation to matters affecting the particular Division. The Rule Subcommittee consists of the Division Head, a judicial and non-judicial member of the Division and three members of the public representing community or other interests to which the Division's jurisdiction relates.

The Tribunal prefers to set out rules of practice in Practice Notes rather than formally made Rules. The Tribunal considers that this approach allows for a rapid and flexible response to issues as they arise.[8]

The Tribunal has established Rule Subcommittees for the General, Community Services, Equal Opportunity, Retail Leases and Legal Services Divisions. The President also asked the Professional Discipline Advisory Group, established in 2004, to make recommendations for uniform procedures in all professional discipline matters in the Tribunal as well as any

[8] Annual Report 2003-2004, p.29.

changes to the Act or regulations that are considered necessary. The Advisory Group has completed this work.

3.2.6. Alternative dispute resolution

Matters coming to the Tribunal have usually been the subject of an administrative decision or some attempt at alternative dispute resolution. For instance, an internal review of an administrative decision may have been conducted, professional discipline matters will have been the subject of rigorous assessment by the profession regulator and retail lease disputes will have had mandatory mediation prior to commencing action in the Tribunal.

As a consequence, by the time the matter reaches the Tribunal the issues in dispute can be well defined and the positions of the parties entrenched.

The Tribunal refers matters for mediation or neutral evaluation if the parties to the proceedings concerned agree (except in proceedings in the Legal Services Division or prescribed proceedings). Attendance is voluntary.

In practice, the Tribunal only refers some cases (mainly in the Equal Opportunity Division) to mediation. It may make orders to give effect to any agreement or arrangement arising out of a mediation session if it is satisfied that the agreement or arrangement is in the best interests of the person whose interests are considered by the Tribunal to be paramount.

In 2004, the Tribunal defined mediation process fundamentals in Practice Note 16 (applicable to the Equal Opportunity and Community Services Divisions). The Tribunal has also published an *Agreement to Mediate*, which must be signed by parties to mediation. It monitors the success of mediations through questionnaires.

Tribunal mediations are conducted by Tribunal members who are trained mediators. Mediations conducted in the Tribunal are often successful, with around 80% of cases in the Equal Opportunity Division being settled this way.

Neutral evaluation as a dispute resolution tool has not gained currency in the Tribunal. This situation mirrors that in most civil jurisdictions in NSW. The NSW civil procedure reforms brought about through the *Civil Procedure Act* 2005 have taken this into account and dispensed with neutral evaluation in those Courts where it previously existed.

3.3. The Tribunal Divisions

3.3.1. General Division

The President is Divisional Head of the General Division. The General Division is responsible for dealing with most of the applications for review of decisions or conduct filed in the Tribunal. It is also responsible for making original decisions in some categories of professional discipline matters.

After an application is lodged in the General Division it is referred either to a directions hearing or to a planning meeting.

Decisions reviewed in the General Division include those made pursuant to the *Freedom of Information Act 1989*, decisions of the Commissioner of Police (in relation to firearms and security licences), decisions of the Director General of the Department of Transport (in relation to public passenger authority licences), decisions of the Commissioner of Fair Trading, the Protective Commissioner and Public Guardian, and the Director General of the Ministry for Fisheries (in relation to commercial fishing licences).

In 2005-06, 461 of the 969 applications filed in the Tribunal were referred to the review jurisdiction of the General Division. Professional discipline hearings accounted for another six matters in the General Division.

3.3.2. Revenue Division

The Revenue Division reviews decisions of the Chief Commissioner of State Revenue. Members in the Division have substantial experience in taxation law. The onus is placed on the applicant to demonstrate that the Chief Commissioner's decision is faulty.

In 2005-06, 132 applications were referred to the Division with 118 matters disposed of during the year. Hearings are conducted by a judicial member sitting alone.

3.3.3. Community Services Division

The Community Services Division hears applications for original decisions and the review of reviewable decisions.

Merits review applications are heard by a three member panel, consisting of one judicial member and two members with expertise in the relevant area. In prohibited employment matters, the Division usually sits with one judicial member only.

Up until 31 December 2006, the Tribunal heard applications for original decisions are under the *Child Protection (Prohibited Employment) Act 1998* (CPPEA) to permit applicants to work with persons aged under 18. On 1 January 2007, the CPPEA was repealed and a comparable jurisdiction was conferred on the Tribunal by amendments to the *Commission for Children and Young People Act 1998.*

Applications for review relate to decisions made under a number of NSW Acts concerning community welfare, including decisions about the custody of foster children, disability funding and licensing decisions.

50 applications were referred to the Division during 2005-06, with 21 being for merits review and 29 being applications for an original decision.

3.3.4. Legal Services Division

The Legal Services Division hears applications for disciplinary orders against legal practitioners and other providers of quasi-legal services. Applicants are

the Law Society, the Bar Association or the Legal Services Commissioner. The Division sits as a threemember panel, including one lay member.

29 applications were referred to the Division during 2005-06. 27 matters were pending at the end of the year and 38 were disposed of by final decision.

3.3.5. Equal Opportunity Division

The Equal Opportunity Division consists of 16 judicial and 21 non judicial members and generally sits as a panel of three, two non-judicial and one judicial member. Certain preliminary matters are heard by a single judicial member. The main business of the Division is hearing complaints alleging breaches of the *Anti-Discrimination Act 1977*, which are referred to the Tribunal by the President of the Anti-Discrimination Board (ADB). Parties are offered the opportunity to mediate their matters prior to hearing. The most common form of complaints concern alleged disability, racial, sexual and age discrimination.

The ADB President referred 81 complaints to the Tribunal during 2005-06. Of the 116 referred complaints finalised during the year, 82 were withdrawn, settled or dismissed, 5 were summarily dismissed and 19 were dismissed after hearing. Only 10 applications resulted in orders in favour of the applicant. The low number of matters proceeding to formal orders reflects the fact that meritorious applications are more frequently settled at mediation in the Tribunal or, less frequently, by direct negotiation between the parties. The Tribunal may award a maximum of $40,000 damages.

Procedural amendments made to the *Anti-Discrimination Act 1977* in May 2005 gave the Tribunal jurisdiction to hear other applications, including for leave to proceed; for registration of conciliation agreements made by the Anti-Discrimination Board; for interim orders; and, for review of a decision of the President of the Board. To date, these amendments have not made a substantial impact on the number of matters being determined by the Tribunal.

3.3.6. Retail Leases Division

The Division hears complaints about retail leases usually involving applications by tenants, including claims of unconscionable conduct. A judicial member sitting alone hears retail tenancy claims while a panel headed by an expert judicial member hears unconscionable conduct claims.

In 2005-06, 184 applications were referred to the Division. 156 matters were finalised, 114 of which were settled, withdrawn or discontinued. Of the 40 matters determined following hearing, 16 were dismissed and orders made in the other 24.

The Tribunal's retail lease jurisdiction has been directly affected by amendments made to the *Retail Leases Act 1994* which came into effect on 1 January 2006. The amendments enlarge the range of matters over which the Division has jurisdiction by including claims for damages for misleading or deceptive conduct; a discretion to permit claims over three (but less than six) years old to be made; an increase in the jurisdictional limit, from $300,000 to

$400,000; and, the power to appoint specialist valuers in certain circumstances.

3.3.7. Appeal Panel

An Appeal Panel consists of a presidential member, a judicial member and a non-judicial member. The non-judicial member and one of the other two members must be drawn from the Division under appeal.

The Appeal Panel hears internal appeals (against Tribunal first instance decisions) and external appeals from decisions of the Guardianship Tribunal, pursuant to section 67A of the *Guardianship Act 1987* and section 41 of the *Powers of Attorney Act 2003*. It also has an external appeal jurisdiction pursuant to section 21A of the *Protected Estates Act 1983* with respect to decisions of the Mental Health Review Tribunal and magistrates, that a person be subject to management under that Act.

The Appeal Panel heard 92 appeals in 2005-06, of which 74 were internal appeals and 18 external appeals. 36 internal appeals were dismissed and 22 were upheld in whole or part. The remaining 16 internal appeals were withdrawn or discontinued. Of the external appeals, seven were upheld, six were dismissed and five were withdrawn or dismissed.

4. OTHER JURISDICTIONS[9]

4.1. Developments in domestic jurisdictions

4.1.1. Commonwealth

The Commonwealth government established the Administrative Appeals Tribunal (**AAT**) together with the Administrative Review Council (**ARC**) in 1975. The AAT was created to review Commonwealth government decisions and the ARC was created to monitor and advise on the development of Commonwealth administrative law.

The AAT can review decisions made under 395 Acts and statutory instruments however it does not exercise exclusive review jurisdiction over Commonwealth administrative decisions. Other Commonwealth tribunals, such as the Migration Review Tribunal continue to exercise review jurisdiction.

Reports by the ARC (in 1995) and the Australian Law Reform Commission (in 2000), and legislation introduced by the federal government[10] proposed unifying Commonwealth administrative law jurisdictions in a single Commonwealth Administrative Law Tribunal.

However, the proposed rationalisation did not occur. For a range of reasons the Senate rejected the government's legislation in 2001, even though the

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[9] This section is a brief snapshot of relevant developments in specialist administrative law tribunals as at May 2006.

[10] Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals,* 1995, Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, 2000 and the *Administrative Review Tribunal Bill 2000.*

committee inquiring into the legislation supported in-principle the concept of amalgamation. Concerns about tribunal independence from the executive, budget arrangements, fair process, reduced quality of review and issues of consumer representation in the face of increased government involvement all led the Senate to conclude that the legislation, if implemented, would achieve the opposite of the benefits it was intended to achieve. Concern was also expressed that the benefits in cost and efficiency gains were being emphasised to the detriment of an efficient and fair merit review system.[11]

4.1.2. Victoria

In 1998, the Victorian government created the Victorian Civil and Administrative Tribunal (**VCAT**), in the process merging 14 independent boards and tribunals. These dealt with a range of subject matter, including administrative decision-making, discrimination complaints, building, motoring and liquor licences, residential tenancies, debts and child welfare. The VCAT's jurisdiction has continued to expand since 1998.

The VCAT is divided into three Divisions: Civil, Administrative and Human Rights. Each Division has a number of lists, specialising in particular types of cases, for instance, the Human Rights Division has two lists, Anti-Discrimination and Guardianship.

A President (who is a Supreme Court judge) presides over the VCAT as a whole. In addition, the VCAT has two Vice-Presidents (who are County Court judges) who head Divisions and five other Vice-Presidents (also County Court judges) who can be called on to sit at VCAT. A number of Deputy Presidents are also appointed to manage individual lists, one of whom also heads a Division.

The VCAT has an extensive jurisdiction including in relation to administrative decision making, occupational regulation, building and rental disputes, planning matters and some professional discipline.

The President is a strong advocate of the benefits of merging tribunals to create the VCAT. He has cited budgetary and operational independence, process improvement, improvements in the training of members, members' exposure to the diverse skills and experience of other members, and public accessibility as key benefits arising from the creation of the VCAT.[12]

4.1.3. Western Australia

In 1999, the Law Reform Commission of WA recommended that the government merge a broad variety of tribunals to establish a State civil and administrative tribunal with review and decision-making powers.[13]

In 2004, the WA government created the State Administrative Tribunal (**SAT**) to review decisions, consider disciplinary matters and make original decisions.

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[11] Parliamentary Committee Report, p 9

[12] See *Report on the Jurisdiction and Operation of the Administrative Decisions Tribunal 2002*, Committee on the Office of the Ombudsman and the Police Integrity Commission.

[13] Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia: Project Summary*, September 1999.

The SAT's jurisdiction is governed by more than 130 enabling Acts and it deals with matters ranging from reviews of multi-million dollar tax judgments to dog destruction orders, disciplinary proceedings, guardianship questions and town planning and compensation issues.

It is divided into four jurisdictional streams – human rights, development and resources, vocational regulation and commercial and civil. As is the case with the VCAT, the President of the SAT is a Supreme Court judge, and the two Vice Presidents are District Court judges.

The SAT amalgamated most of the review, civil and disciplinary functions of nearly 50 industry and public sector boards and tribunals, and a number of courts. The government taskforce established in 2001[14] to develop a model for the creation of the SAT looked closely at administrative review systems established by Victoria, NSW and the Commonwealth. It identified the following benefits as the likely results of creating a consolidated, streamlined tribunal for review and decision-making:

- accessibility and recognisable profile
- public accountability
- coherence in administrative law development
- informality and flexibility in proceedings
- best practice in the conduct of matters.

4.2. International Trends

Two major common law jurisdictions have moved towards the amalgamation of tribunals in a unified jurisdiction and the creation of a comprehensive system of administrative law.

United Kingdom

Administrative review

In 2000, the Lord Chancellor commissioned the first review of the UK tribunal system since 1957. The review report was delivered in 2001 and recommended progressive amalgamation of 70 UK tribunals in a Tribunal System supported by a Tribunal Service.[15] The guiding principle of rationalisation would be that all tribunals concerned with disputes between citizens and local or central government, and between parties, should be brought together in one organisation.

In the Tribunal System, tribunals were to be grouped by subject matter into identifiable Divisions: education, finance, health and social services, immigration, land and valuation, social security and pensions, transport, regulatory and employment. Tribunal decisions would be appealable to an

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[14] In 2001.

[15] *Tribunals for Users of One System, One Service, Report of the Review of Tribunals,* Sir Anthony Leggat, March 2001

Appeal Division. In party-party matters, the Tribunal would emphasise procedural informality.

The report recommended that a UK Council of Review Tribunals oversight the Tribunal and function in a similar way to the Commonwealth's ARC. The Council's responsibilities would include monitoring of training of the Tribunal's chairmen and members, as well as the Tribunal's administration, considering proposals for procedural change, upholding and reviewing the system of administrative law and proposing changes to improve the operation and accessibility of the Tribunal.

The Report spoke approvingly of the 'thoroughly beneficial effect' of the Commonwealth AAT on the 'development of [Commonwealth] administrative law ... and the improvement in the standards of decision-making at first instance.' The institution of the ARC and AAT had created a tribunal system 'closest to the kind of coherent tribunal system we were contemplating.'

White Paper on administrative law reform

After calling for and considering responses to the report, the British government released a White Paper on administrative reform in 2004.[16] The White Paper called for the creation of a unified tribunal service to replace the existing fragmented arrangement.

The White Paper's themes were efficiency and accessibility. It noted that bringing the largest central government tribunals together in a single service would ensure a more effective and efficient delivery of tribunal justice. To improve access to justice, the service would have an articulated mission - to help prevent and resolve disputes, using any appropriate method, and to help improve administrative justice and justice in the workplace, so that the need for dispute is reduced.

The new organisation would focus on user needs. According to the White Paper, users could expect a range of benefits including:

- tribunal independence from decision-making bodies
- improved accessibility
- more informality and less legalism
- better standards of original decision-making - the new organisation would have a statutory duty to work with decision-makers to improve the system as a whole.

The White Paper recommended a number of other reforms including creating:

- a statutory tribunals rule committee
- a more coherent structure of appeals and reviews

[16] *Transforming Public Services: Complaints, Redress and Tribunals*, a White Paper issued by the Department of Constitutional Affairs, July 2004.

- a unified tax appeals system
- a new and enhanced role for the Council on Tribunals, which would evolve into an Administrative Justice Council.

Government action

On 1 April 2006, the Tribunals Service was launched. The Tribunals Service incorporates the work of 17 tribunals across such diverse areas as social security and immigration, employment law and discrimination, traffic matters and land compensation and taxation disputes.

The White Paper also contemplated that the Council on Tribunals will gradually evolve into an Administrative Justice Council overseeing the development of UK administrative law. This proposal is yet to be implemented.

Canada

In 2001, the Attorney General of British Columbia initiated the Administrative Justice Project, which resulted in the release of a number of discussion papers, and a White Paper on administrative law reform. The White Paper recommended the creation of an administrative justice office in the Attorney General's Ministry to oversight developments in, and improvements to, the system of administrative law.

Other actions proposed included clarification of tribunal powers, processes and procedures, development of a model for vesting individual powers in tribunals and implementation of a merit-based appointment process for tribunal members.

Following receipt of responses to the White Paper, the government began to implement proposals in the White Paper, creating the Administrative Justice Office (**AJO**), introducing a system for merit-based appointment, and requiring the AJO to play a formal role in the review and evaluation of legislative proposals to establish or alter administrative decision-making institutions and processes.

5. PARLIAMENTARY INQUIRY INTO THE JURISDICTION AND OPERATION OF THE ADMINISTRATIVE DECISIONS TRIBUNAL

5.1. Background

In June 2000, the Committee on the Office of the Ombudsman and the Police Integrity Commission, chaired by the Hon Paul Lynch MP (**Parliamentary Committee**), received a referral from both Houses of Parliament to conduct an inquiry into the jurisdiction and operation of the Administrative Decisions Tribunal. The referral was made pursuant to section 146 of the *Administrative Decisions Tribunal Act 1997*. Section 146 provides for a Parliamentary inquiry by a joint committee into the jurisdiction and operation of the Tribunal.

5.2. Conduct of the Inquiry

In July 2000, the Parliamentary Committee advertised the inquiry and called for submissions. The Committee received 12 submissions in response to its advertisement.

In November 2000, the Parliamentary Committee conducted a public hearing at which it took evidence from the President of the Tribunal, the President of the Anti-Discrimination Board, the Public Interest Advocacy Centre, the NSW Law Society and the NSW Bar Association.

In March 2001, the Parliamentary Committee released a Discussion Paper (**Discussion Paper**)[17] which focused on the major issues raised during the inquiry and which was intended to stimulate fuller debate of those issues. The Parliamentary Committee received six responses to the Discussion Paper.

The Parliamentary Committee held further public hearings in August 2001, at which it took evidence from the President of the Victorian Civil and Administrative Tribunal (**VCAT**) and the President of the Guardianship Tribunal, and in October 2001, at which it took further evidence from the President of the Tribunal.

The Parliamentary Committee published its final report in November 2002.[18]

5.3. Report on the Jurisdiction and Operation of the Tribunal

The Parliamentary Committee's *Report on the Jurisdiction and Operation of the Administrative Decisions Tribunal* (**Parliamentary Report**) makes 11 recommendations. The recommendations are listed in Appendix 4. The recommendations relate to:

- the expansion of the Tribunal's merits review jurisdiction and the amalgamation of other tribunals with the Tribunal
- the establishment of an Administrative Review Advisory Council (**ARAC**)
- interim measures pending the establishment of an ARAC
- the professional development and training of Tribunal members
- proposals to improve the operation of the Tribunal.

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[17] Committee on the Office of the Ombudsman and the Police Integrity Commission *Parliamentary Inquiry into the Jurisdiction and Operations of the Administrative Decisions Tribunal Discussion Paper*, March 2001.

[18] Committee on the Office of the Ombudsman and the Police Integrity Commission *Report on the Jurisdiction and Operations of the Administrative Decisions Tribunal*, November 2002.

5.4. Expansion & Amalgamation

The Committee expressed the view that there are potentially significant advantages to be gained from expanding the Tribunal's review jurisdiction and integrating existing tribunals into the Tribunal. The Parliamentary Report identified the following potential advantages:

- greater integration and coherence of Tribunal operations in the delivery of arbitral and quasi-judicial services in NSW
- elevation of the Tribunal's prominence and status
- consistency of Tribunal decision-making through the fostering of a unified approach
- broadening of the skills and knowledge of Tribunal members, and greater variety and flexibility in the work environment of Tribunal members
- improved access to and use of the Tribunal system through greater public recognition and a possible expansion of the Tribunal to more locations
- secure terms of appointment of reasonable length for Tribunal members, with a credible and transparent appointment process and rationalised pay structure, and better funded training program for members
- economies of scale through standardising file management, claims processing, provision of information, assistance to parties and advice on the status of matters.

In light of these perceived benefits, the Parliamentary Committee recommended that:

- separate tribunals should be merged with the Tribunal, unless there are clear reasons why it would be inappropriate or impractical. In particular, consideration should be given to merging all professional disciplinary tribunals with the Tribunal as part of a separate Professional Disciplinary Division (*Recommendation 1*)

- pending the establishment of an ARAC, the Attorney General's Department should, in consultation with the Tribunal, develop criteria for determining those classes of administrative decisions which would appropriately fall within the external merits review jurisdiction of the Tribunal (*Recommendation 2(a)*)

- the Attorney General's Department consult all other agencies to identify those classes of administrative decisions which currently meet such criteria and which should therefore be subject to external merits review by the Tribunal (*Recommendation 2(b)*)

- legislation should be introduced to confer review jurisdiction on the Tribunal in respect of those decisions which currently meet the external review criteria (*Recommendation 2(c)*)

- there should be a presumption that all classes of administrative decisions provided for under new legislation that meet the Attorney General's Department criteria, should be the subject of external merits review by the Tribunal (*Recommendation 3*).

5.5. Administrative Review Advisory Council (ARAC)

As noted in Chapter 1, the *Administrative Appeals Tribunal Act 1975 (Cth)* (**AAT Act**) created the Administrative Review Council (**ARC**). The ARC comprises the President of the AAT, the Commonwealth Ombudsman, the President of the Australian Law Reform Commission, and no fewer than three and no more than 10 other members with extensive experience in areas such as industry, commerce, public administration, and the practice of a profession, or direct knowledge and experience of the needs of people significantly affected by government decisions.

The ARC has a fairly broad role in oversighting the Commonwealth administrative law system. Its functions are specified in s.51(1) of the AAT Act and include:

- keeping the Commonwealth administrative law system under review, monitoring developments in administrative law, and making recommendations for improvements to the system
- providing advice to agencies to ensure that administrative discretions are exercised and administrative decisions are made in a just and equitable manner
- keeping under review the classes of administrative decisions that are not the subject of review by a court, tribunal or other body and recommending whether any of those classes should be the subject of review
- recommending improvements to the law and practice relating to the review by courts of administrative decisions
- inquiring into the qualifications required by people reviewing administrative decisions, the extent of the jurisdiction to review administrative decisions conferred on those people, and the adequacy of procedures used in exercising that jurisdiction, and recommending improvements
- making recommendations as to the manner in which tribunals engaged in the review of administrative decisions should be constituted, and as to whether administrative decisions that are the subject of review by other tribunals should be made the subject of review by the AAT
- facilitating the training of people exercising administrative discretions or making administrative decisions, and promoting knowledge about the Commonwealth administrative law system.

The Parliamentary Committee considered that there would be merit in establishing a body similar to the ARC in NSW. The Committee recommended that:

- the Act should be amended to establish an Administrative Review Advisory Council (**ARAC**), whose functions would include: (a) further developing criteria for determining the classes of administrative decisions which should fall within the Tribunal's external merits review jurisdiction; (b) ongoing review of the Tribunal's jurisdiction, including assessing whether other tribunals should be merged with the Tribunal; (c) oversight of the NSW administrative law system; and (d) providing advice on Tribunal practices and procedures (*Recommendation 4*)
- the ARAC should monitor progress achieved in merging existing tribunals with the Tribunal and have an ongoing role in reviewing and developing criteria for defining the Tribunal's merits review jurisdiction (*Recommendation 5*)
- the ARAC should comprise a President, the Ombudsman, the President of the NSW Law Reform Commission (**LRC**) and at least three members with: (a) experience in industry, commerce, public administration, industrial relations, the practice of a profession or government service; (b) knowledge of administrative law or public administration; or (c) experience or knowledge of the needs of people affected by government decisions (*Recommendation 6*)
- the ARAC should report to the Attorney General, who in turn should table each of the ARAC's reports in Parliament, and the ARAC should prepare an annual report to the Attorney General for tabling in Parliament (*Recommendations 7a & 7b*).

The Parliamentary Committee also made recommendations for interim measures, pending the establishment of the ARAC. Specifically, the Committee recommended that:

- the Attorney General assume responsibility for the performance of the functions proposed for the ARAC, pending the establishment of the ARAC (*Recommendation 8a*)
- the proposed membership of the ARAC be convened as a working group to assist the Attorney General, pending the establishment of the ARAC (*Recommendation 8b*)
- the LRC conduct a review of existing tribunals to determine whether it is feasible and appropriate to merge them with the Tribunal (*Recommendation 8c*)
- the LRC report to the Attorney General on the outcome of its review and that the report be tabled in Parliament (*Recommendation 8d*).

Discussion

ADT: Accretion of jurisdiction

Jurisdiction and ARAC

The Tribunal's jurisdiction has increased gradually. Government agencies have recognised their public obligation to support the review of decision-making, which has led to additional review jurisdiction being conferred on the Tribunal. This process will continue as other legislation confers jurisdiction on the Tribunal.

It is not necessary to create an independent advisory body – such as the ARAC – to review the jurisdiction of the Tribunal.

The NSW Attorney General's Department undertakes this role as part of its ongoing role to keep the legislation under review and to review legislative proposals brought forward by other Ministers. In considering whether an administrative decision is appropriate for review by the Tribunal, the Department has regard to modern administrative law policy, including the categories developed at the time the proposal to establish the Tribunal was considered.[19]

Recommendation 1

That the NSW Attorney General's Department continue to:

(a) keep the legislation under review; and

(b) encourage the further conferral of review jurisdiction on the Tribunal in appropriate circumstances.

5.6. Selection and tenure of members

Under the Act, the Governor appoints presidential judicial members and the Minister appoints non-presidential judicial members and non-judicial members.[20] Schedule 3 of the Act provides that a member holds office for a period not exceeding 3 years, but is eligible for re-appointment. Temporary members may be appointed for a term not exceeding 12 months.[21]

One submission[22] suggested that security of tenure linked to merit selection would enhance public confidence in the Tribunal, presumably on the basis

[19] The Hon JW Shaw, QC, MLC, Second Reading LC Hansard, 27/06/97 p 11279-80
[20] Section 13.
[21] Section 15(3).
[22] UNSW Council for Civil Liberties, 27 December 2002

that competent members appointed for a long term would perform more effectively and independently than short-term appointees. Under the VCAT Act, all members are appointed for 5 year terms.

The Parliamentary Committee supported the view of the President of the Tribunal that full-time appointments of senior members, for longer terms, would better support the Tribunal.[23] The President's opinion was that these strategies would give career structure and predictability and remove the tension and morale issues surrounding reappointment periods.'[24]

Legislative implications

Amend the Act to provide for longer terms of appointment for senior members of the Tribunal.

Discussion

Selection of members

The Tribunal values the concept of merit selection of its members and has implemented strategies to achieve this. Since 2001, the Tribunal has advertised for expressions of interest. It has interviewed selected applicants and made recommendations to the Attorney General.

In the professional discipline jurisdiction, the Tribunal generally recommends people from among the nominees of the relevant professional body. In some cases, other Ministers are consulted in accordance with special requirements in Acts that confer jurisdiction on the Tribunal.

Appointments to the VCAT follow a merit selection process, augmented with a memorandum of understanding about appointment based on merit, between that VCAT and the Victorian Attorney General.[25]

*In the UK, the Judicial Appointments Commission (**JAC**) selects candidates for judicial and tribunal appointments. The JAC is an independent, non-departmental body set up by the Constitutional Reform Act in 2005. Once appointed, judges have security of tenure.*

Given the size and budget of the Tribunal, it would not be necessary to create an independent body to select Tribunal members.

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[23] *Parliamentary Report*, p.48
[24] ibid, p.37.
[25] Parliamentary Report, p 36

Tenure

*The issue of tenure is, according to the Commonwealth Administrative Review Council (**ARC**), a difficult one.*

The ARC reached the conclusion that members of tribunals should not be tenured (appointed to retirement age) and proposed that appointments to tribunals should be for terms of 3 to 5 years. Terms shorter than 3 years were 'undesirable', since they gave members no sense of security and it might be appropriate to appoint some senior members for longer terms, initially or on reappointment, to promote continuity and attract high quality candidates. So far as the issue of independence is concerned, while the independence of review tribunals and their members is 'essential ... there is no reason why protecting that independence need detract from the ability of review tribunals to respond to the changing needs of their users.'[26] The issue of tenure has also been canvassed in the report of the Commonwealth Access to Justice Advisory Committee, 'Access to Justice: An Action Plan'.[27]

In NSW, the framers of the Act originally contemplated that the term of appointment of members would be open-ended. Schedule 3 of the Administrative Decisions Tribunal Bill 1997 stated that members were appointed "for such period as is specified in the instrument of appointment". But on the motion of the Opposition, when the Bill was debated in Committee, this phrase was replaced by the phrase "for a period of 3 years".[28]

The arguments for and against tenure or lengthy terms of appointment are finely balanced.

To gain the necessary experience and effectively discharge quasi-judicial functions, Tribunal members need to have certainty that an appointment continues for a fixed and not insubstantial period. More senior members, especially presidential members, of the Tribunal, need the security of a reasonable term to promote public confidence that the Tribunal is independent of government and free from executive interference. A reasonable term is more likely to attract and retain experienced lawyers amongst the senior membership and allow them to develop and maintain the skills required to effectively discharge their duties as senior members of the Tribunal. Taking into account the view of the ARC that the minimum term of appointment should be 3 years and the fact that members of the VCAT are appointed for 5 years, there is a case for considering appointment periods for the Tribunal that are graduated according to the level of expertise and involvement required by a member's role.

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[26] *Ibid.*
[27] Access to Justice Advisory Committee, *Access to Justice: an action plan*, 1994.
[28] NSW Legislative Assembly debate in committee, *Administrative Decisions Tribunal Bill 1997*, *Hansard*, 19 June 1997.

Recommendation 2

That the Attorney General consider amendments to the Act to provide for longer terms of appointment for senior members to reflect the levels of commitment, knowledge and competence required of those members.

5.7. Professional Development & Training

In its report, the Parliamentary Committee emphasised the importance of professional development and training for Tribunal members. The Committee was impressed with the focus given by the VCAT to the professional development of its members. The Parliamentary Committee therefore recommended that the statutory functions of the President and Deputy Presidents of the Tribunal be amended, in line with section 30 of the *Victorian Civil and Administrative Tribunal Act 1998*, to include responsibility for directing the professional development and training of Tribunal members (*Recommendation 9*). According to the Parliamentary Committee's report, the amendment would recognise that the professional development of Tribunal members is a critical factor to the success of the Tribunal.

Legislative implications

Amend the Act to provide that the President and Deputy Presidents are responsible for directing the professional development and training of members.

Discussion

An emphasis on professional development and training is desirable in a body made up of mostly part-time members with disparate professional training. In particular, there is a recognised need in the Tribunal for developing the particular skills required to be an effective Tribunal member.

As part of their administrative functions, the President and Divisional Heads of the Tribunal have delivered professional training and development by a variety of means including members' training days, specialist divisional training and the development of a members' intranet. The professional development days have generally been designed to develop the generic skills required to be an effective Tribunal member. Specialist workshops have also been run to accommodate the needs of members in the specialist Divisions.

Professional development day themes have included Good Decision Writing, Good Conduct of Proceedings, Fact Finding in Tribunal Proceedings, Maintaining Quality, Providing Access and Tribunals In Practice. In 2004 and 2005, instead of providing a single 'whole of Tribunal' training experience, the Tribunal moved to practical workshops and seminars for members. Decision writing was revisited as the main theme of these events. Regular Divisional meetings have also been used as training opportunities in some divisions,

most notably in the Equal Opportunity Division, and more recently, in the Revenue Division.

Section 25(1) of the Act grants the President broad authority to '(subject to this Act and the rules of the Tribunal) to direct the business of the Tribunal.' In order to properly conduct the business of the Tribunal, members must be adequately trained. Therefore, it is reasonable to suggest that the President has the power to direct professional training and development of members. Accordingly, the statutory amendment proposed by the Parliamentary Committee is probably unnecessary.

On the other hand, it is important to note that providing suitable training for the professional development of members may be expected to bring benefits to the management of the Tribunal's business, including the timeliness and quality of decision-making by the Tribunal.

Recommendation 3

That Tribunal members are provided with suitable training for their professional development.

5.8. Improving Operations

In the course of its inquiry the Parliamentary Committee examined various aspects of the Tribunal's operations. Based on submissions and evidence received during the first stage of the inquiry, the Parliamentary Committee put forward a number of proposals regarding the Tribunal's operations. These proposals related to the rules of the Tribunal, the role and functions of the Tribunal's Rule Committee, consultation with Tribunal user groups, legal representation, Tribunal membership, and resources.

The Tribunal generally supported the Committee's proposals and has largely implemented them on an administrative basis.

However, one of the Committee's proposals requires legislative amendment if it is to proceed. This proposal is that the Act be amended to provide that: (a) the Tribunal is to be constituted for the purposes of any particular proceedings by one, two or three members, (b) if a Tribunal panel is constituted at a proceeding by one member only, that member must be a legal practitioner, (c) if a Tribunal panel is constituted by more than one member, at least one must be a legal practitioner, and (d) the President or relevant Divisional Head should determine how the Tribunal is to be constituted for the purposes of each proceeding (*Recommendation 10* in the Parliamentary Report).

In relation to its proposals, which do not require legislative action, the Parliamentary Committee recommended that the Tribunal report on any initiatives taken towards implementing the proposals and related outcomes in its annual report (*Recommendation 11*).

Legislative implications

Amend the Act to provide that:

- *the Tribunal is to be constituted for the purposes of any particular proceedings by one, two or three members*
- *if a Tribunal panel is constituted at a proceeding by one member only, that member must be a legal practitioner*
- *if a Tribunal panel is constituted by more than one member, at least one must be a legal practitioner*
- *the President or relevant Divisional Head should determine how the Tribunal is to be constituted for the purposes of each proceeding.*

Discussion

Recommendation 10 of the Parliamentary Committee's report

The Administrative Decisions Tribunal Amendment Act 2004 (which commenced 1 January 2005) partly implemented Recommendation 10. The Act confers on the President (or any Division Head directed by the President) authority to direct that in an interlocutory matter, the Tribunal may be constituted by a single judicial member. Additionally, the President may direct that a single presidential judicial member may constitute an Appeal Panel to deal with an interlocutory matter.

The Tribunal relies on part-time members and constituting panels of three (as required in most Divisions under the Act) may prove a difficult and time-consuming endeavour. Giving the President or relevant Division Head the flexibility to direct that one member constitute a panel allows matters to be managed more efficiently.

The requirement that a single member must be a judicial member is designed to ensure that the sitting member is capable of effectively managing the evidentiary and procedural aspects of the proceedings. This in turn suggests that the matter calls primarily for procedural rather than specialist technical knowledge.

The most commonly expressed counter argument to this proposition is that in multi-disciplinary tribunals, Tribunal deliberations are assisted by members who, although not lawyers, are able to inform the decision making process by using their expert knowledge of their field or community. Such experts can make a contribution to fair decision making, particularly in areas where they bring relevant technical expertise to the Tribunal or where an understanding of the issues facing a particular class of people may be required.

The Amendment Act balances these competing views, as they relate to interlocutory proceedings, by allowing the use of single members for more

procedural matters and requiring the use of a full panel on substantive questions where it is important to have the input of members with technical expertise.

Recommendation 11 of the Parliamentary Committee's report

The Tribunal reported on progress in implementing proposals 5-9, 12 and 14-15 of the Parliamentary Committee's Discussion Paper (which do not require legislative action) in its 2002-2003 Annual Report. The proposals concerned consultation by the Tribunal with user groups, the standardisation and utility of Tribunal rules, the creation of a trial duty solicitor scheme, review of Tribunal resources and review of Legal Services Division rules.

In the 2002-03 Annual Report, the Tribunal pointed to the operation of a Freedom of Information and Privacy Users Group, and the creation of the Professional Discipline Advisory Group; noted that the Divisional sub-committees were to report to the Rule Committee on the standardisation and utility of Tribunal rules; noted that a duty solicitor scheme existed in the Equal Opportunity Division but the Tribunal did not have budgetary capacity to finance a trial duty solicitor scheme; noted that this statutory review would consider the question of Tribunal resources; and reported that the Professional Discipline Advisory Group would review the rules of the Legal Services Division in 2004[29].

The Annual Report for 2003-2004 reports generally on the Tribunal's operations including changes to its practice and procedure.

Each of these matters, other than Tribunal consultation with user groups is dealt with in the following chapter.

6. OBJECTIVES OF THE ADMINSTRATIVE DECISIONS TRIBUNAL ACT 1997 (THE ACT)

6.1. Legislative statement of objectives – the Act

The objectives of the Act are set out in section 3:

3 Objects of Act

The objects of this Act are as follows:

(a) to establish an independent Administrative Decisions Tribunal:

(i) to make decisions at first instance in relation to matters over which it is given jurisdiction by an enactment, and

[29] The subsequent commencement of the Legal Profession Act 2004 has meant that the review of the Legal Services Division Rules has been deferred.

(ii) to review decisions made by administrators where it is given jurisdiction by an enactment to do so, and

(iii) to exercise such other functions as are conferred or imposed on it by or under this or any other Act or law,

(b) to ensure that the Tribunal is accessible, its proceedings are efficient and effective and its decisions are fair,

(c) to enable proceedings before the Tribunal to be determined in an informal and expeditious manner,

(d) to provide a preliminary process for the internal review of reviewable decisions before the review of such decisions by the Tribunal,

(e) to require administrators making reviewable decisions to notify persons of decisions affecting them and of any review rights they might have and to provide reasons for their decisions on request,

(f) to foster an atmosphere in which administrative review is viewed positively as a means of enhancing the delivery of services and programs,

(g) to promote and effect compliance by administrators with legislation enacted by Parliament for the benefit of the citizens of New South Wales.

6.2 Object (a)

6.2.1 Relevant submissions

Only one submission concerned object (a).[30] The submission argued that it 'is essential that the public perception of the independence of the Tribunal and its members is maintained.' To this end, the submission suggested that the government should investigate options for reform of the process of appointment and renewal of members to ensure they are based on merit, carried out in a transparent manner and based on some form of tenure. The respondent also proposed that the Act be amended to provide that 'any decision made under an enactment is reviewable by the Tribunal, unless an Act expressly states otherwise.' The reason advanced for the proposal was that 'the public expect an automatic right to the review of administrative decisions.'

6.2.2 Parliamentary Report

Recommendations 1-4 of the Parliamentary Report, proposing expansion of the Tribunal's jurisdiction (through merger of tribunals and expansion of the scope of external merits review) and the creation of the ARAC, (and as discussed in Chapter 2) are relevant to object (a).

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[30] University of NSW Council for Civil Liberties, 27 December 2002.

6.3 Object (b)

6.3.1 Relevant submissions

Object (b) is 'to ensure that the Tribunal is accessible, its proceedings are efficient and effective and its decisions are fair'. A number of submissions related specifically to this object although the majority related to both objects (b) *and* (c). These submissions are grouped together, as appropriate, under relevant headings.

Disciplinary proceedings

Respondents suggested that the Tribunal's professional discipline jurisdiction, exercised in the Legal Services and General Divisions, is compromised by the limited extent of the jurisdiction and the Tribunal's emphasis on procedural informality.[31]

These respondents supported the creation of a separate Professional Disciplinary Division of the Tribunal for two reasons. The first is that the informal approach to procedure and evidence adopted in most Tribunal proceedings is, in their view, inappropriate to professional disciplinary matters.[32] The second is that a single Division merging disparate professional disciplinary tribunals is likely to promote efficient use of resources, leading to uniformity in procedures and standards, and consistent decision-making.[33]

Legislative implications

Amend the Act to create a Professional Disciplinary Division; amend the legislation governing the conduct of professionals, to confer review jurisdiction on the Tribunal.

Discussion

In general, the submissions contemplate the creation of a quasi-court enforcing strict rules of evidence, although veterinarians reject legal formalism in disciplinary proceedings.

Reconciling the different, even opposing, views of professional associations is a key element in the merging of disciplinary tribunals in a single Division. Nevertheless, the creation of a distinct Professional Disciplinary Division is recognised as a sensible objective. The Parliamentary Report proposed that 'particular consideration [be] given to merging all disciplinary tribunals with the ADT, as part of a separate professional disciplinary Division.' (Recommendation 1) and the Tribunal President supports such a development.

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[31] Submissions of the Bar Association, 18/2/03 and Hon John Nader QC, 26/5/03 and Office of the Legal Services Commissioner (OLSC), 20/12/02.
[32] Bar Association and Hon John Nader, QC submissions.
[33] OLSC submission, following the arguments of the Parliamentary Report.

*In this context, the Tribunal's Annual Report records the establishment of the Professional Discipline Advisory Group (**PDAG**) in early 2004 to consider matters relevant to practice and procedure in connection with professional discipline proceedings in the Tribunal.*

A subcommittee of the PDAG was formed to develop proposals for uniform rules, practice notes and guidelines for application to all classes of professional disciplinary proceedings in the Tribunal and to advise on whether any statutory or rule amendments are required to achieve uniformity. The subcommittee presented its report and draft practice note and forms for application and reply to the PDAG in July 2004. Following consultation on the report with those professions whose disciplinary processes are overseen by the Tribunal Practice Note 17 was published in 2005. It applies uniform processes to the conduct of professional discipline matters in the General Division of the Tribunal. Its aim is stated to be "to simplify and unify practices and procedures in professional discipline proceedings".

This work illustrates the general acceptance of the need for a common approach to the management of the professional discipline jurisdiction of the Tribunal. Changes to the legislation governing the professional discipline of lawyers will necessitate separate consideration of the Tribunal's practice and procedure in that area.

Unrepresented parties

About half of the Tribunal's applicants are self-represented[34]. This may be interpreted as indicative of the Tribunal's accessibility however various respondents pointed out that unrepresented parties in proceedings are usually at a considerable disadvantage to parties with legal representation.[35]

Some respondents suggested that the Tribunal dispense with any procedural legalism that might place the unrepresented at a disadvantage in proceedings,[36] others suggested that the Tribunal retain a duty solicitor to help Tribunal users understand their rights and manage cases.[37]

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[34] Tribunal records reveal that in the 05/06 year 270 of 467 applications in the General Division; 83 of 107 in the Equal Opportunity Division and 82 of 132 in the Revenue Division were self-represented at the time of first filing.

[35] Submissions, NSW Freedom of Information and Privacy Practitioners Network, 16/12/02, Privacy New South Wales 6/1/03, Anti-Discrimination Board of New South Wales (ADB), 31/3/03, Colin Chapman (recording the perspective of one unrepresented litigant), 29/11/02. NSW Commission for Children and Young People submission 22/1/03.

[36] Colin Chapman, submission *id*, proposed that section 3(b) of the Act be amended to require the Tribunal to provide comprehensive information setting out procedural steps.

[37] Privacy New South Wales, ADB, NSW Commission for Children and Young People, submissions. The duty solicitor concept is put forward also in proposal 9 of the Discussion Paper.

Discussion

The submissions suggest that there are polarised views about unrepresented litigants in the Tribunal. Some submissions (often from government agencies) characterise them as difficult people, who, in the context of an application made to the Tribunal, take up a disproportionate amount of the available time and resources of the respondent government agency and the Tribunal. Other submissions, from experienced litigants-in-person or advocates for such applicants, characterise them as disadvantaged people with the unfettered right to the support of the Tribunal, in their quest for redress against the unlimited resources of the State.

The Tribunal's statutory obligation to be accessible and to determine proceedings in an informal and expeditious manner can be interpreted to imply that at least some of the Tribunal's resources should be directed at facilitating applications by unrepresented litigants.

Likewise, section 73(4) of the Act requires the Tribunal to ensure that parties to proceedings understand the nature and implications of assertions in the proceedings, to explain to parties – on request – aspects of Tribunal procedures or reasoning, and to allow parties full opportunity to be heard or have their submissions considered.

The Tribunal has commented that in some cases, respondent government agencies have far greater resources available to conduct matters than applicants. The Tribunal has articulated principles governing the acceptance of expert evidence presented by agencies and has pointed to the 'great power and... great responsibility [of agencies] in choosing which experts to refer an applicant to and which reports to produce to the Tribunal.'[38] At the same time, there is nothing in the Act that compels the Tribunal to ensure that the greater legal resources of one party do not confer on that party a practical advantage over its opponent.

In some circumstances it is of benefit to the Tribunal and both parties if unrepresented parties are given early assistance to present their cases efficiently and clearly. While it may be argued that this is a point in support of the proposal for the creation of a of duty solicitor scheme, it should also be kept in mind that much of the business of the Tribunal is satisfactorily conducted by self-represented applicants.

The Parliamentary Committee's Discussion Paper proposed the institution of a trial duty solicitor scheme (where a government agency is the respondent), and that further consideration be given to the creation, on a permanent basis, of a duty solicitor scheme. The creation of such a scheme is likely to enable unrepresented parties to better understand the procedures and requirements of the Tribunal.

[38] Administrative Decisions Tribunal Annual Report 2003-04, p.13. The relevant section cites *FD v Commission for Children and Young People* [2003] NSWADT 261, in which principles involved in accepting and considering expert evidence are discussed.

The President of the Tribunal has observed that duty solicitors could play a valuable role in 'reality-checking' unrepresented parties. They could, in this role, help the Tribunal and the represented respondent to resolve a matter more quickly by advising the applicant that his or her case has little prospect of success. Conversely, they could also assist applicants with good grounds for pursuing proceedings to clarify and present their cases.

The Tribunal has been proactive in ensuring that initial legal advice is available in some areas of its jurisdiction. Currently, the Tribunal utilises the assistance of a duty solicitor provided by the Legal Aid Commission in its Equal Opportunity Division to assist in defining the issues in dispute at an early stage in the proceedings. On some occasions, the Mental Health Advocacy Service is able to advise the protected person in proceedings in Guardianship and Protected Estates list. The Tribunal is also, in conjunction with the Public Interest Advocacy Centre, exploring ways of providing a pro bono duty solicitor service to FOI/Privacy applicants at the crucial planning meeting phase – when negotiation between the parties often results in a narrowing of the matters in dispute or even its resolution.

Simply narrowing the range of matters in dispute often has positive ramifications for the future conduct of the matter in the Tribunal, and increases the likelihood of a speedy, more satisfying (to the parties) conclusion to the matter.

6.3 Objects (b) and (c)

6.4.1 Relevant submissions

The majority of submissions related to *both* objects (b) and (c).

The two objects overlap - object (b) is 'to ensure that the Tribunal is accessible, its proceedings are efficient and effective and its decisions are fair', while object (c) is 'to enable proceedings before the Tribunal to be determined in an informal and expeditious manner'.

Costs

A number of submissions queried the Tribunal's general policy against awarding costs[39] and advocated a new policy of awarding costs to penalise irresponsible or frivolous actions[40] or to encourage compliance with procedural orders.[41] Judicious awarding of costs would allow the Tribunal to function more quickly and efficiently.[42] A separate submission proposed that if applications heard in the Revenue Division are successful, the Tribunal should have the power to award costs against the Chief Commissioner of State Revenue, without the need to be satisfied as to special circumstances.

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[39] See Tribunal Practice Note 12.
[40] Submissions, Board of Veterinary Surgeons of New South Wales VSIC, 31/12/02 and January 2003, Crown Solicitor's Office, 20/12/02, Department of Education and Training, 23/2/03.
[41] Bar Association, Hon John Nader QC, submissions *supra.*
[42] *Id.*

Legislative implications

Adopt a provision like section 109 of the Victorian Civil and Administrative Tribunal Act 1997 instead of section 88 of the ADT Act.

Discussion

Under section 88 of the Act, the Tribunal may award costs, but only if satisfied that that there are special circumstances warranting an award. The Tribunal cannot order costs in matters in its original jurisdictions unless the Act under which the matter has been lodged specifically provides for such an order. In practice, the Tribunal rarely awards costs. In professional discipline proceedings there is typically a power to order costs against a practitioner who is found guilty of misconduct.

In Practice Note 12[43], the Tribunal gives examples of special circumstances that might justify a costs order.[44]

While costs awards are invariably linked to the facts of each case, it appears that the Tribunal's policy is to award costs, on the application of a party or of its own motion, when a party has deliberately compromised the conduct of a matter.

To a large extent, the 'special circumstances' identified in Practice Note 12 cover the types of conduct impugned in the submissions. In particular, the power to award costs against a party that has 'disadvantaged another party ... by failing to comply with an order or direction of the Tribunal without reasonable excuse' is consistent with the power proposed in two submissions.[45]

If it is applied without undue reserve, Practice Note 12 provides a basis for the Tribunal to exercise its discretion to achieve the objectives sought in most submissions: that is, to deter applicants from initiating unmeritorious (or bad faith) proceedings and respondents from failing to comply with Tribunal directions. Used appropriately, the costs power allows the Tribunal to deter unethical conduct and to secure compliance with its orders or directions.

The real question is whether Practice Note 12 is effectively applied to the satisfaction of the public. Generally speaking, the answer is yes.

For the most part, submissions on costs expressed concern at the Tribunal's perceived unwillingness to punish procedural non-compliances and wasteful litigation that puts respondents to unnecessary expense and effort. But these complaints should be considered in the context of the Tribunal's policy (derived from its statutory obligations) of encouraging access to justice through simplified proceedings.

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[43] Published subsequent to submissions made to this Review.
[44] These include non-compliance with Tribunal orders or directions, non-compliance with rules and legislation, unreasonably causing delays in proceedings, conducting proceedings vexatiously or deceptively and lodging appeals without a reasonable prospect of success.
[45] Submissions of the Bar Association and Hon John Nader.

Additionally, if taken in isolation, the criticisms can present a distorted picture of how the Tribunal functions in practice. A large number of matters are not especially complex. Many of them do not involve damages claims at all and in those that do, the sums at issue are not particularly large, although the ability of a person to earn a living (by the granting or refusal of an occupational licence) is often in issue. In these circumstances, in a forum designed to allow ordinary people without significant legal resources access to administrative review, an over-eagerness to award costs for procedural or other defaults is undesirable.

*Conversely, some matters in the Tribunal are complex and expensive, with large sums of money at issue, and in some instances, unequal legal resources. For instance, the NSW Law Society has pointed out that in revenue cases, the outcomes of which may have significant taxation implications, the Office of State Revenue (**OSR**) invariably commits considerable resources to opposing an application. Whether or not as a direct result of the resources committed, the OSR is usually successful in Revenue Division matters. In these cases, the Law Society considers that the Tribunal ought to be in a position to award costs against the OSR without consideration of 'special circumstances'. However matters in the Revenue Division, which are mainly about an applicant's tax obligations to the State, suggest applicants of some sophistication, who are not without means. In this context, the explanation for the imbalance in outcome (in favour of the respondent OSR) in Revenue matters requires further examination.*

It is relevant that Practice Note 12 reproduces much of section 109(3) of the Victorian Civil and Administrative Tribunal Act 1997, which one respondent suggested as a precedent for defining 'special circumstances' under section 88 of the Act.[46] *The Tribunal has declared itself in favour of legislative amendment to create a clear statutory basis for awarding costs, and there seems to be merit in incorporating in the Act a provision similar to section 109(3), that provides such a basis.*

Section 109(3) permits the VCAT to make a costs award by reference to criteria related to conduct, delay, the 'relative strengths of claims made', the nature and complexity of proceedings, and 'any other matter the Tribunal considers relevant'. The grant of costs is still discretionary, but the bases on which an award may be made are unambiguously stated in the principal legislation.

While introduction in the Act of a provision similar to section 109 is unlikely to have a radical effect on Tribunal costs practice, its potential effect should not be underestimated. By deleting the term 'special circumstances' the new provision would remove a source of interpretive ambiguity, and the enumerated grounds for awarding costs would provide members with a mandate for making awards in some of the circumstances referred to in submissions.

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[46] Department [now Office] of Fair Trading submission (23/12/02).

Recommendation 4

That the Tribunal be given power to award costs on terms similar to section 109 of Victorian Civil and Administrative Tribunal Act 1997

Delay

Various respondents expressed dissatisfaction with the rate at which the Tribunal disposed of matters.[47] Their collective view is expressed in the comment that the Tribunal's slowness 'compromises the achievement ... of the objects of the Act under s.3(b) ... and under s.3(c)'.[48] Examples were provided.

Discussion

External factors can compromise the Tribunal's ability to dispose of a matter quickly, for example, appeals may interrupt proceedings, evidence may be unavailable for a period for reasons outside a party's control, and aspects of orders may require a matter that is substantially completed to remain before the Tribunal. An examination of the matters cited in the submissions as exemplifying inappropriate delay often revealed that the delay could be attributed to such factors.

In some cases, parties have found Tribunal proceedings to be frustratingly slow. However an examination of its Annual Reports reveal that the Tribunal is working toward achieving an efficient rate of finalisation across all its Divisions. Amendments to the Act, changes to practice and procedure and the vigilant application of time standards all have a role to play in this process.

It should be emphasised that the Tribunal, for the most part, as its reported figures demonstrate, disposes of matters in a timely way.[49] It continues to provide efficient access to justice.

As noted, the Tribunal currently reports on the performance of all Divisions in finalising matters in each financial year. In this regard, the President employs a number of strategies to facilitate the timely provision of decisions by members. He reports that, over time, these strategies have had a positive impact on timely delivery of decisions.

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[47] Submissions, Departments of Fair Trading, of Health (16/12/02) and Transport (12/3/03), Minister for Education and Training (23/2/03), New South Wales Bar Association, Timmins Consulting (undated) and the VSIC.

[48] Department of Health, submission.

[49] See Administrative Decisions Tribunal Annual Reports, Appendices reporting on Time Standards for 2001-2002 to 2005-2006.

Resources

Three respondents pointed to efficiency deficits caused, they said, by under-funding of the Tribunal.[50] One complained that the absence of dedicated court staff to perform administrative duties meant that parties' legal representatives were forced to act as de facto clerks in proceedings.[51] The respondent claimed that the result was time wasted and possibly a public perception that the legal representatives were not independent of the Tribunal.

Respondents also highlighted the practical difficulties caused to members and legal representatives by non-timely production of transcripts, the absence of a Tribunal library and the non-availability of electronic case management and other online services. [52] One respondent specifically called for resources to be made available to permit an increase in the number of full time and part time members in the Equal Opportunity Division.[53]

Discussion

Transforming the Tribunal to more closely resemble courts with their formal hierarchy of functions and procedures might to some extent subvert the Tribunal's purpose.

Although some of the facilities called for in the submissions may be features of other jurisdictions, it could be argued that the fact that they do not exist at the Tribunal tends to indicate that the Tribunal is simply delivering the type of justice its objectives envisage.

For instance, complaints about legal representatives being obliged to assist the Tribunal during hearings may reveal that the Tribunal's mandate to provide cheap, accessible justice comes with the requirement of a reciprocal commitment from Tribunal users to facilitate those objectives. In fact, legal representatives, as officers of the court, might be regarded as having a higher duty to facilitate the Tribunal's objectives than lay parties.

The issue of resources is one that needs to be treated with care. The Tribunal operates effectively on its budget and would no doubt welcome increased funding. While it might be helpful to advocates appearing at the Tribunal if staff were available to undertake administrative tasks during hearings it is not a significant obstacle to the efficient conduct of proceedings. In the Tribunal environment, dedicating scarce Registry resources to individual hearings on a regular basis is not viable or desirable.

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[50] Proposal 15 of the Discussion Paper raises the need for adequate resourcing of the Tribunal.
[51] Submission of Bar Association.
[52] Submissions of Bar Association, Hon John Nader, Department [Office] of Fair Trading, and ADB.
[53] Submission ADB.

Further, the Tribunal maintains an adequate library resource for members and, if the occasion demands it, practitioners are able to access it. The Attorney General's Department and other government agencies also provide public access to information in a number of easily accessible ways, such as via the Lawlink website and public libraries.

In relation to developing an electronic case management system and online services, the Attorney General's Department's current focus is on developing and implementing JusticeLinkNSW. This system is being developed for the Supreme, District and Local Courts, which together deal with most legal proceedings in NSW. Once the system is operating in those courts, the Attorney General's Department will consider whether it can be made available in other courts and tribunals.

Rules and procedure

Respondents expressed concern that the Tribunal has not enunciated comprehensive and consistent procedures and rules of practice.[54] One government department reported that in proceedings in which it was involved, both parties, and the appeal panel itself, were unsure of the scope of the panel's powers under the Act.[55] Another respondent indicated that the Tribunal's members sometimes took an inconsistent approach to evidentiary matters.[56] A third submission, concerned with the operation of the Legal Services Division, suggested that the Tribunal 'underutilised' its Rule Committee and should adopt a 'robust' approach to rule-making.[57] All respondents pointed to the need for a flexible, active, and systematic approach to rule-making that recognises the different circumstances in which the different Divisions operate, but also creates general uniformity in the procedures and documents of the Tribunal.[58]

Respondents also identified a specific need to disseminate practice notes,[59] and approved forms,[60] to instruct parties by publishing explanatory information (such as sample points of claim and witness statements),[61] to identify significant cases in the collection of reported cases, to cross-reference other published material to these cases,[62] and to report on conciliation meetings.[63]

[54] Proposal 8 of the Discussion Paper calls for the Rule Committee to consider the scope for rules standardisation, the rules' possible encouragement of alternative dispute resolution procedures and their encouragement of accessibility of informality of proceedings.
[55] Submission, New South Wales Department of Corrective Service, 24/12/02.
[56] Submission Department [Office] of Fair Trading.
[57] OLSC submission - 20/12/02.
[58] Bar Association, Hon John Nader QC, and OLSC submissions. Proposal 5 of the Discussion Paper calls for review of the rules by the Rule Committee in consultation with a broad range of interested groups.
[59] The Department [Office] of Fair Trading submission referred to Practice Note 10, which deals with the use of video and telephone links to present evidence at hearings, and called for a detailed practice note setting out requirements for the presentation of evidence.
[60] Submission the Hon John Nader, QC.
[61] Submission, Minister for Education and Training 23/2/03.
[62] Submission, Timmins Consulting Australia Pty Limited.
[63] FIPPN submission.

A problem identified by the Tribunal is the 'cumbersomeness' of the Rule Committee provisions in the Act. The relevant part of the Act (Chapter 6, Part 3) sets out a complicated procedure for Tribunal rule-making. The Rule Committee must establish Subcommittees for each Division of the Tribunal and must, in ordinary circumstances, undertake public consultation prior to the making of a rule.

Legislative implications

Amend the Act to streamline the process for making rules to secure procedural flexibility and informality.

Comment

The rules of the Tribunal are found in the Administrative Decisions Tribunal (Interim) Rules 1998 contained in the Administrative Decisions Tribunal Rules (Transitional) Regulation 1998.

The process for making rules is set out in Chapter 6 Part 3 Division 1 of the Act, while the constitution and operation of the Rule Committee and Subcommittees are set out in Part 3 Division 2.

The Rule Committee is to be comprised of the President and each Division Head, other Tribunal members appointed by the Minister on the President's recommendation, and any other persons appointed by the Minister. It is to establish a Subcommittee for each Division to make recommendations on its functions in respect of a Division. A Subcommittee is to comprise the relevant Divisional Head, one other judicial member of the Division, and one non-judicial Division member, and three people (not being members of the Tribunal) who represent community and other relevant special interests in the area of the Division's jurisdiction. Taking account of Subcommittee recommendations, the Rule Committee is to make 'flexible and informal' Tribunal rules. However, in ordinary circumstances, the Committee must consult publicly on proposed rules over a period of at least two months.

Given these requirements, it is not surprising that the Tribunal has complained of the 'cumbersomeness' of the provisions. The requirement to publicly consult on proposed rules for a period of at least two months militates against the timely development of rules.

In both second readings speeches, the responsible Ministers commented that in regard to rule-making, the legislation took 'account of the criticism which has been levelled against the Commonwealth and Victorian tribunals that despite legislative prescription for informality and flexibility the actual hearings have become formal and adversarial.'

The Rule Committee, they said, was intended to promote the informality and flexibility seen to be lacking in these jurisdictions. 'To overcome such problems the New South Wales ADT will have a rules committee which includes community and stakeholder representation to ensure that the procedures do not become stultified.'

The aim, identified in the second reading speeches, of ensuring that Tribunal rules work to promote procedural and informality and flexibility is captured in the Act. It is a 'function' of the Rule Committee 'to ensure that the rules it makes are as flexible and informal as possible.' (section 93(1)(b)). However, it is open to question whether the provisions of the Act actually assist the Tribunal to fulfil this function. It is not obvious, for instance, that the requirement for community and stakeholder representation actually stops procedures from becoming 'stultified'. Rather, the relative inertia of the Rule Committee, and the use of Practice Notes to develop procedural guidance, are clear indications that the provisions are not working.

The Parliamentary Committee's Discussion Paper made three recommendations in relation to the Rule Committee. The first called for review of the rules of the Legal Services Division. The second recommended that the Committee consider the feasibility of amending Legal Service Division rules to provide for a period of three months between a decision to take disciplinary action and filing in the Tribunal. The third proposed that the Rule Committee look at further standardisation of Divisional rules, the use of the rules to encourage the use of alternative dispute resolution procedures, and whether the rules encourage procedural accessibility and informality.

These proposals were referred to Divisional Rule Subcommittees.[64] Subsequently, the President formed a Professional Discipline Advisory Group to make proposals for uniform procedures in all professional discipline matters in the Tribunal.[65]. Practice Note 17, published in January 2005 is the outcome of deliberations of that Group. In 2004, the Legal Profession Act was passed. The revisiting of rules in the Legal Services Division has been deferred, to allow a period of settling in for the procedures prescribed in the new Act.[66]

Consistent with the objects stated in section 3(b) and (c) of the Act, the Tribunal has tried to avoid an unduly prescriptive approach to rule-making. This approach is practical. The Tribunal is not a court and at least half of Tribunal applicants are self-represented. Complex procedural and documentary requirements impose cost and do not necessarily facilitate the coherent presentation of evidence.

The Tribunal has not prescribed the use of specific forms as most of the documents required in a hearing are relatively simple. Additionally, government agencies will usually present evidence in a concise and methodical way without requiring the Tribunal's guidance or direction.

To some extent the submissions on these issues are reflective of a period in the evolution of the Tribunal's practice and procedure that has passed. Practice Notes are now regularly used to provide clarity in relation to Tribunal practice. As at July 2006 the Tribunal had published 20 Practice Notes, relating to various aspects of the Tribunal's practice and procedure.

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[64] See the Administrative Decisions Tribunal *Annual Report 2002-03.*
[65] *Annual Report 2003-04*, p. 29.
[66] Also see footnote 29.

Finally, it is clear that a fundamental reason for the relative inactivity of the Rule Committee is the unnecessary complexity of the provisions in the Act concerning the composition and operation of the Rule Committee. The provisions constrain efficient rule-making.

To ensure that the Rule Committee functions effectively to better secure the procedural flexibility and informality sought by Parliament, it is necessary to revise the Rule Committee provisions in the Act and formalise the use of Practice Notes.

Recommendation 5

That:

a) the rule making power in the Act be simplified, and

b) the Act authorise the making of Practice Notes by the President.

Availability of members with specialised expertise

The non-availability at short notice of some expert members raised concerns about the accessibility and responsiveness of the Tribunal. Respondents cited examples of urgent hearings postponed because of the unavailability of legal members (in the Legal Services Division), public health members (in the General Division) and members with retail leasing expertise (in the Retail Leasing Division).[67]

In relation to urgent hearings, solutions proposed included instituting a 'duty member' position in the Legal Services Division,[68] and expanding the pool of medical and retail leasing experts to assist in hearing public health and unconscionable conduct applications.[69]

Discussion

It general, it does not appear that the Tribunal has been noticeably ineffective in securing the attendance of members for hearings at short notice. Because the Tribunal has limited resources and relies on the services of part-time members it must accept that members are available to attend hearings for restricted periods. The Tribunal therefore plans for hearings with foresight and care. Inevitably, when hearings are sought at short notice, the Tribunal

[67] Submissions the Bar Association, Hon John Nader QC, Department of Health, and Minister for Small Business submission 31/3/03.
[68] Bar Association submission.
[69] Department of Health and Minister for Small Business submissions. The latter submission noted that the 'Department has already taken steps to expand the advisory membership panel.'

may occasionally be unable to secure the attendance of members and be forced to postpone the hearing.

In this context, some caution needs to be exercised when assessing the Tribunal's response to applications or motions for urgent hearings. For example, if a motion for the extension of a public health order is filed within days of the expiry of the order, the likelihood increases that a relevant expert public health member will be unable to attend the hearing. In this instance, poor planning on the part of the party seeking the hearing is the cause of the non-availability of the necessary expert member or members.

In the Legal Services Division, either the President or a Deputy President is usually available at short notice to hear matters if a member in that Division becomes unable to hear the matter. The President has substituted for the sitting member at directions hearings in this Division on a number of occasions. In these circumstances, the proposal that the Division requires a 'duty member' is redundant.

It should be noted that the problem of expert member availability has been partly resolved by the passing in 2004 of legislative amendments to allow the President to appoint a single member to hear interlocutory applications.

Vexatious litigants

Two respondents asserted that the Tribunal's accessibility, reflected in the high incidence of self-representation, means that respondents (usually government departments) can repeatedly be exposed to proceedings lacking merit.[70] The result is waste of public resources.

One respondent proposed legislative amendments to provide that costs follow the event in significant commercial matters, and to grant the Tribunal the power to dismiss proceedings that have substance but are undertaken for an ulterior or collateral purpose. The other respondent proposed that the Tribunal develop precedents to allow the self-represented to conduct proceedings more quickly, place strict time limits on conferences and mediation, and introduce 'realistic' filing fees.[71]

More recently, the President of the Tribunal has identified the issue of vexatious litigants as having an impact on the resources of the Tribunal. He notes that the problem for the ADT, appears to be mirrored in many Tribunals across Australia.

[70] Crown Solicitor's Office (CSO) submission, 20 December 2002, Minister for Education and Training submission. According to the CSO: '[c]ertain litigants, particularly unrepresented litigants, continually bring meritless proceedings to the Tribunal ... the same litigants appeal every decision (interlocutory or final) to the Appeal Panel, which considerably delays the resolution of matters. These type of applications and appeals waste the time and resources of both the Tribunal and the defendant.' The Minister noted that a 'considerable number' of discrimination cases referred to the Tribunal (in which the Department of Education and Training was a respondent) were 'frivolous'.

[71] Submission the Department of Education and Training.

Discussion

The case for dismissal of vexatious actions is the reverse of the argument for encouraging and supporting self-representation in the Tribunal. Balancing the concerns of both sides of the argument is a crucial requirement in ensuring that the Tribunal satisfies in practice the objects stated in section 3(b) and (c) of the Act. The required balance is suggested in the statement of objects. The Tribunal must balance accessibility with efficiency, effectiveness with fairness and informality with expeditiousness. The Tribunal is rightly concerned to promote accessibility and avoid – without surrendering adjudicative rigour – the trappings and formality of a court.

Pre-hearing procedures such as planning meetings and directions hearings are proving useful in exposing non-meritorious cases at an early stage and, as discussed earlier, appropriate awarding of costs may deter some potential applicants from bringing vexatious actions. On the other hand, it is important to remember that the Tribunal does not have discretion to declare proceedings meritless. If an application is properly made, the Tribunal must hear it.

Recent amendments:

- *to the ADT Act so that appeals from interlocutory decisions of the Tribunal can only proceed with leave*
- *to the Anti-Discrimination Act 1977 so that where a complaint has been declined by the President of the Anti-Discrimination Board, the complainant must first seek leave to proceed in the Tribunal,*

may usefully address some of the issues raised by vexatious litigants. However, the issue is clearly one that is troubling many Tribunals and Courts. Additional strategies for managing this class of litigant bear further examination.

<u>Summons and veto</u>

The Tribunal has requested legislative amendments to:

- allow it to refuse to issue a summons
- limit the circumstances in which a party to proceedings can require that a member who conducted any preliminary conference held prior to the hearing be disqualified from joining in or determining the proceedings.

It has been the Tribunal's experience that the language of the Act has created an expectation that applications for a summons will automatically be approved by the Registrar. To dispel this expectation, and provide the Registrar with unambiguous authority to refuse to issue a summons, the Tribunal sought modification of section 84 of the Act, which deals with the issuing of summons.

In relation to disqualification of members after preliminary conference, the Tribunal is concerned that disqualification without legitimate cause compromises the hearing of a matter because conduct or participation in a preliminary conference often considerably assists a member in further conduct of the matter.

The Tribunal sought modification of section 74 ('Preliminary conferences'). Section 74(b) provides that if a matter is not resolved in preliminary conference, the member or assessor who conducted the conference is disqualified from further involvement in the proceedings if any party to proceedings objects to their continued participation.

Legislative implications

Amend sections 84 and 74 of the Act to provide the Tribunal with unambiguous power to refuse to issue a summons and to require that a party objecting to a member's participation in a matter after a preliminary conference must show that the member's continued participation would be likely to prejudice the party's case.

Discussion

The Tribunal's request in relation to power to refuse to issue a summons involves a technical clarification of the apparent intent of section 84(1). It is uncontroversial and supported.

As to disqualification of members after the preliminary conference, it is sensible to amend the Act to require that a party objecting to a member's continuing role in, or conduct of, a matter should be required to show that continuation would result in probable prejudice to the party's case. This mirrors the situation in courts, where the same judge might manage every aspect of the case.

The Tribunal relies on preliminary conferences to efficiently manage cases. A preliminary conference may result in resolution of a matter, and even if it does not, it allows the relevant member or assessor to refine and better understand the issues. This process typically leads to quicker hearings. The Tribunal's approach is consistent with many modern jurisdictions where there is extensive case management.

There is no obvious reason to suppose that a member's conduct of a conference will cause prejudice to a party in subsequent proceedings, although the member may at the conference stage see substantive flaws in the party's case. It is to be expected that a member would continue to act impartially at the hearing even though he or she has noticed flaws in arguments and evidence adduced by a party.

Recommendation 6

That sections 84 and 74 be amended to:

a) clarify that the Tribunal may elect to refuse to issue a summons and

b) require that a party objecting under section 74(4)(b) to show that the involvement of a member or assessor in further proceedings is likely to result in prejudice to the party's case.

Joinder

A number of respondents raised concerns about the accessibility of Tribunal proceedings.[72] The Act does not allow for a party to proceedings to apply for the joinder of a new party, and it does not provide for joinder of a person standing in the position of *amicus curiae.*

Proposals included amending the Act to allow parties to apply to have non-parties joined to proceedings[73] and making legislative provision for statutory officers (such as the Privacy Commissioner) to join proceedings as *amicus curiae* 'assisting the Tribunal.'[74]

Section 67(4) of the Act provides that the Tribunal may, on its own motion, or on application of a non-party, order that the non-party be joined to proceedings. The section does not, however, allow a party to apply for a non-party to be joined to proceedings.

Legislative implications

Amend section 67(4) to allow the Tribunal to order, on application of a party, that another person be joined to proceedings, or, on application of a statutory office holder, that that person be joined to proceedings as amicus curiae.

Discussion

The proposals amplify the scope for joinder in a way that is consistent with object (b) and offers flexibility to the Tribunal and parties. It should, however, be noted that an amicus curae or intervener would rarely, if ever, need to be

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[72] Two of the submissions, from the Bar Association and Hon John Nader QC, proposed amending the *Legal Profession Act 1987* (now *Legal Profession Act 2004)* to allow the Tribunal to order that any number of informations be joined to legal professional disciplinary hearings. However, while the practical difficulties caused in the Legal Services Division by the restrictions on joinder can be noted, consideration of proposals to change another Act lies outside the scope of this review.

[73] Submission, Department of Health 16/12/02.

[74] Submission, Privacy New South Wales (Office of the Privacy Commissioner), 6/1/03.

joined to proceedings. The Attorney General and Privacy Commissioner occasionally appear in the Tribunal as interveners but are careful to do so without being joined to proceedings.

Recommendation 7

That the Act be amended to allow the joinder of a person to proceedings, on the application of a party or by the Tribunal in its own right.

6.5 Object (d)

Two submissions dealt with the issue of internal reviews. One proposed that 'internal review could be removed as the norm in respect of disciplinary decisions affecting licences made pursuant to a notice to show cause procedure.'[75] The other proposed giving 60 days instead of 21 days to complete an internal review.[76] The reason given for this proposal was that the 21 day period does not allow sufficient time to review complex administrative decisions.

Discussion

The Act contains a regulation-making power in relation to internal reviews. The regulations may prescribe requirements (in guideline form if required) to be observed in the conduct of an internal review. They may also exclude any class of reviewable decisions from the application of the Act, or alter the period within which an internal review must be conducted or a notice given under this section.[77]

This provides scope for altering the internal review requirement or making associated changes. As the internal review function is widely seen as a necessary component of administrative review[78]*, proposed changes to that function need to be considered with care.*

A review of the efficacy of internal review could include:

- *An investigation of the extent to which internal review works to limit the number of merit review applications made to the Tribunal;*
- *The impact of any extension of the current time periods for internal review, with particular attention to occupational licensing decisions.*

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[75] Submission the Department [Office] of Fair Trading. The submission noted that the Tribunal will hear an external appeal relating to a reviewable decision even though an internal review has not taken place.

[76] Department of Corrective Services submission, 24/12/2002.

[77] Sections 53 and 54, *Administrative Decisions Tribunal Act 1997.*

[78] See eg *Better Decision: Review of Commonwealth Merits Review Tribunals,* Report No 39, 1995, Administrative Review Council.

- *The usefulness of the current provisions which enable the Tribunal to grant a stay of a decision pending internal review and order that an internal review be discontinued or not carried out.*

Recommendation 8

That further consultation occur on

a) the effectiveness of existing internal review mechanisms, and

b) the circumstances in which a person should be permitted to apply to the Tribunal for review of a decision prior to, or in lieu of, internal review.

6.6 Object (e)

No submissions were received on object (e).

6.7 Object (f)

Object (f) is 'to foster an atmosphere in which administrative review is viewed positively as a means of enhancing the delivery of services and programs'.

Submissions discussed in relation to objects (a),(b) and (c) are also relevant to this object, particularly those relating to member competence and training, merit selection, length of appointment and independence.

Some respondents pointed to the necessity for the public to have confidence that the Tribunal imposes appropriate performance standards on legal practitioners appearing before it,[79] and to have access to comprehensive reports on the Tribunal's comparative performance.[80]

6.8 Object (g)

Object (g) is to promote and effect compliance by administrators with legislation enacted by Parliament for the benefit of the citizens of New South Wales. One respondent suggested that to advance objects (f) and (g), the government develop a coherent policy on the Tribunal's merits review jurisdiction.[81] A second submission observed that provision for respondents to appeals to file notices of contention would promote object (g) by

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[79] Submission of the Bar Association. The Bar Association considered that the Legal Services Division was too ready to condone non-compliance by legal practitioners with procedural directions.

[80] Submission of Timmins Consulting Australia Pty Ltd. The submission called for comparative performance reporting, clear articulation in case reports of the legal principles discussed or decided, and reporting of mediation results and statistics in annual reports.

[81] NSW Commission for Children and Young People submission. The Commission stated that an appropriate policy would provide the basis for progressive enlargement of the Tribunal's jurisdiction over categories of administrative decisions that affect the welfare of children and young people. See Recommendation 2a of the Parliamentary Report.

encouraging the Tribunal to refine its reasoning process where necessary. Principles developed would then presumably inform administrators' decision-making.[82]

A third respondent suggested that the government could advance object (g) by establishing an administrative review council to monitor and evaluate administrative law and practice in NSW.[83] A fourth recommended that the protection and preservation of human rights be made an object of the Act, both to reinforce object (g) and to "strengthen the Tribunal's commitment to the common law principles of natural justice and procedural fairness."[84]

Discussion

Where appropriate, the policy issues raised in submissions on objects (f) and (g) are addressed in the discussion and recommendations made in Chapter 5 and in reference to objects (b) and (c) above.

7 CONCLUSION

It is apparent from comments made by respondents to the review that the objectives of the Act remain valid.

Recommendations have been made throughout this report that are designed to improve the operation of the Tribunal.

Areas of concern raised in the submissions relate to:

- The accessibility of the Tribunal including the assistance which is available to unrepresented parties
- The Tribunal's approach to awarding costs
- Delays in finalisation of matters
- The rules and procedure of the Tribunal
- The availability of members with specialised expertise
- Vexatious proceedings
- The joinder of parties to proceedings
- Exemptions from the requirement for internal review

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[82] Crown Solicitor's Office submission. A notice of contention allows the respondent, although benefiting from a favourable decision at first instance, to apply to correct reasoning of the Tribunal, in the original decision, with which the respondent disagreed.

[83] Department [Office] of Fair Trading submission. See Recommendation 2a of the Parliamentary Report.

[84] Submission of the University of New South Wales Council for Civil Liberties.

- The scope of the Tribunal's professional discipline jurisdiction and the conduct of proceedings
- The appointment and tenure of members
- The professional development and training of members.

This report recommends a number of legislative amendments and operational improvements to address the concerns raised in the submissions.

This report also examines the findings of the Parliamentary Committee in its Discussion Paper of 2001 and its final report (the Parliamentary Report) of 2002. The Parliamentary Report recommended that criteria be developed to clarify (and amplify) the scope of the Tribunal's merits review jurisdiction, and that a systematic approach be adopted towards merging NSW tribunals with the Tribunal.

However, this report proposes a simplified approach to the task of implementing the recommendations of the Parliamentary Report.

APPENDIX 1

PARTIES INVITED TO RESPOND TO THE REVIEW, RESPONDENTS AND NON-RESPONDENTS

The Attorney General wrote to all NSW Ministers advising them of the review and inviting them to make submissions. The Attorney General's Department sent letters inviting submissions to key identified clients, regular users, the Tribunal and many other government and non-government organisations. Parties notified by mail included:

- Anti Discrimination Board of NSW
- Administrative Review Council
- Australian Institute of Judicial Administration
- Board of Veterinary Surgeons of NSW
- Chief Judge of the District Court of NSW
- Chief Judge of the Land and Environment Court of NSW
- Chief Justice of the Supreme Court of NSW
- Chief Magistrate, Local Courts of NSW
- Combined Community Legal Centres Group (NSW) Inc
- Commissioner for Children and Young People
- Council of Australasian Tribunals
- Community Services Commissioner
- Crown Advocate of NSW
- Crown Solicitor's Office (NSW)
- Director of Equal Opportunity in Public Employment
- Disability Discrimination Legal Centre (NSW)
- Ethnic Affairs Commission of NSW
- Foster Care Association (NSW) Inc
- Intellectual Disability Rights Service
- Legal Aid Commission of NSW
- Law Council of Australia
- Law Society of NSW
- Office of the Legal Services Commissioner
- National Children's and Youth Law Centre
- NSW Bar Association
- NSW Department of Community Services
- NSW Department of Corrective Services
- NSW Department of Education
- NSW Department [now Office] of Fair Trading
- NSW Department of Health
- NSW Department of Primary Industries (Agriculture)
- NSW Director of Public Prosecutions
- NSW Ombudsman
- NSW Police
- NSW Solicitor General
- Office of the Board of Studies NSW
- People With Disabilities (NSW) Inc

- President of the Industrial Relations Commission of NSW
- President of the NSW Administrative Decisions Tribunal
- Privacy NSW
- Property Owners Association of NSW Inc
- Public Interest Advocacy Centre
- Royal Society for the Prevention of Cruelty to Animals
- Victims' Services
- Women Lawyers Association

Responses to the review were received from the following individuals and organisations:

- Administrative Review Council
- Attorney General of NSW
- Australian Institute of Judicial Administration Inc
- Board of Veterinary Surgeons of NSW
- Chief Judge of the Land and Environment Court of NSW
- Crown Solicitor's Office (NSW)
- Disability Safeguards Coalition
- Family Advocacy (Institute for Family Advocacy and Leadership Development Assoc, Inc)
- Industrial Relations Commission of NSW
- Interim Board of the Australasian Tribunals
- Law Council of Australia
- Law Society of NSW
- Members of the public who have appeared before the Tribunal
- Planning NSW
- President Anti Discrimination Board of New South Wales
- Privacy NSW
- Judicial member of the Administrative Decisions Tribunal (Legal Services Division)
- NSW Bar Association
- NSW Commission for Children and Young People
- NSW Council for Intellectual Disability
- NSW Department [now Office] of Fair Trading
- NSW Department of Health
- NSW Department of Primary Industries (Agriculture)
- NSW Disability Discrimination Legal Centre (Inc)
- NSW FOI and Privacy Practitioners Network
- NSW Minister for Corrective Services and Minister for Agriculture
- NSW Minister for Education and Training
- NSW Minister for Gaming and Racing
- NSW Minister for Industrial Relations
- NSW Minister for Mineral Resources and Minister for Fisheries
- NSW Minister for Public Works and Services
- NSW Minister for Regional Development, Rural Affairs and Local Government
- NSW Ministry of Transport

- NSW Ombudsman
- NSW Solicitor General
- Office of the Board of Studies NSW
- Office of the Legal Services Commissioner
- Office of the Minister for Community Services, Ageing, Disability Services and Youth
- Timmins Consulting Australia Pty Ltd
- Treasurer of NSW
- University of NSW Council for Civil Liberties
- Veterinary Surgeons Investigating Committee.

APPENDIX 2

LEGISLATION CONFERRING JURISDICTION ON THE TRIBUNAL

Principal Legislation

Administrative Decisions Tribunal Act 1997
Administrative Decisions Tribunal Legislation Further Amendment Act 1998
Administrative Decisions Tribunal (General) Regulation 2004
Administrative Decisions Tribunal Rules (Transitional) Regulation 1998

Ancillary legislation

Reviewable Decisions

Community Services Division
Adoption Act 2000
Children (Care and Protection) Act 1987
Children and Young Persons (Care and Protection) Act 1998
Children and Young Persons (Care and Protection) Regulation 2000
Children's Services Regulation 2004
Community Services (Complaints, Reviews and Monitoring) Act 1993
Community Services (Complaints, Reviews and Monitoring) Regulation 2004
Disability Services Act 1993
Youth and Community Services Act 1973

General Division
Agricultural Livestock (Disease Control Funding) Act 1998
Agricultural Tenancies Act 1990
Animal Research Act 1985
Apiaries Act 1985
Architects Act 2003
Births Deaths and Marriages Registration Act 1995
Boxing and Wrestling Control Act 1986
Building and Construction Industry Security of Payment Act 1999
Business Names Act 2002
Charitable Fundraising Act 1991
Child Protection (Offenders Registration) Act 2000
Commercial Agents and Private Inquiry Agents Act 2004
Community Justices Centres Act 1983
Co-operative Housing and Starr-Bowkett Societies Act 1998
Dangerous Goods Act 1975
Dental Practice Act 2001
Education Act 1990
Electricity Supply Act 1995
Entertainment Industry Act 1989
Explosives Act 2003
Fair Trading Act 1987
Firearms Act 1996
Firearms (General) Regulation 1997
Fisheries Management Act 1994

Food Act 2003
Food Production (Dairy Food Safety Scheme) Regulation 1999
Food Production (Meat Food Safety Scheme) Regulation 2000
Food Production (Seafood Safety Scheme) Regulation 2001
Forestry Act 1916
Freedom of Information Act 1989
Game and Feral Animal Control Act 2002
Gas Supply Act 1996
Guardianship Act 1987
Guardianship Regulation 2005
Health Records and Information Privacy Act 2002
Home Building Act 1989
Hunter Water Act 1991
Impounding Act 1993
Licensing and Registration (Uniform Procedures) Act 2002
Local Government Act 1993
Motor Dealers Act 1974
Motor Vehicle Repairs Act 1980
Motor Vehicle Sports (Public Safety) Act 1985
Mount Panorama Motor Racing Act 1989
Native Title (New South Wales) Act 1994
Non-Indigenous Animals Act 1987
Occupational Health and Safety Act 2000
Occupational Health and Safety Regulation 2001
Optometrists Act 2002
Passenger Transport Act 1990
Pawnbrokers and Second-hand Dealers Act 1996
Pesticides Act 1999
Petroleum Product Subsidy Act 1997
Plant Diseases Act 1924
Police Act 1990
Privacy and Personal Information Protection Act 1998
Private Hospitals and Day Procedure Centres Act 1988
Property, Stock and Business Agents Act 2002
Protected Estates Act 1983
Protected Estates Regulation 2003
Public Health Act 1991
Public Lotteries Act 1996
Rail Safety Act 2002
Registration of Interests in Goods Act 1986
Road and Rail Transport (Dangerous Goods) Act 1997
Road Transport (General) Act 2005
Road Transport (Safety and Traffic Management) Act 1999
Security Industry Act 1997
Shops and Industries Act 1962
State Water Corporation Act 2004
Stock (Artificial Breeding) Act 1985
Surveying Act 2002
Sydney Water Act 1994
Sydney Water Catchment Management Act 1998

Timber Marketing Act 1977
Tow Truck Industry Act 1998
Trade Measurement Act 1989
Trade Measurement Administration Act 1989
Travel Agents Act 1986
Valuers Act 2003
Veterinary Surgeons Act 1986
Vocational Education and Training Accreditation Act 1990
Weapons Prohibitions Act 1998
Wool Hide and Skin Dealers Act 2004
Workplace Injury Management and Workers Compensation Act 1998
Revenue Division
Betting Tax Act 2001
Debits Tax Act 1990
Duties Act 1997
First Home Owner Grant Act 2000
Gaming Machine Tax Act 2001
Insurance Protection Tax Act 2001
Land Tax Management Act 1956
Parking Space Levy Act 1992
Payroll Tax Act 1971
Stamp Duties Act 1920
Taxation Administration Act 1996
Equal Opportunity Division
Anti-Discrimination Act 1977
Legal Services Division
Conveyancers Licensing Act 1995
Legal Profession Act 2004

Original Decisions
Community Services Division
Child Protection (Prohibited Employment) Act 1998
Equal Opportunity Division
Anti-Discrimination Act 1977
General Division
Aboriginal Land Rights Act 1983
Environmental Planning and Assessment Act 1979
Local Government Act 1993
Ombudsman Act 1974
Public Health Act 1991
Veterinary Surgeons Act 1986
Retail Leases Division
Retail Leases Act 1994
Legal Services Division
Legal Profession Act 2004

External Appeals
Guardianship Act 1987
Powers of Attorney Act 2003
Protected Estates Act 1983

APPENDIX 3

TERMS OF THE ADMINISTRATIVE DECISIONS TRIBUNAL ACT 1997

This Appendix summarises in detail the parts and provisions of the Act. Chapter and Schedule headings are reproduced as they appear in the Act.

Chapter 1: Preliminary

- Section 3 specifies the objects of the Act.
- Section 4 is the definition section.

Chapter 2: Establishment of Tribunal

Part 1 provides that the Tribunal is established by the Act and has the functions conferred or imposed by the Act or any other Act or law.

Part 2 deals with membership.

Section 12 provides that the Tribunal consists of a President, Deputy Presidents, non-presidential judicial members and non-judicial members.

Section 13 provides that:

- the Governor appoints presidential judicial members
- the Minister appoints non-presidential judicial members and non-judicial members
- members may be appointed on a full time basis or part time basis.

Part 3 provides for the organisation of the Tribunal.

Section 19 provides that the Tribunal exercises its functions in Divisions. The Divisions of the Tribunal are:

- Community Services Division
- Equal Opportunity Division
- General Division
- Legal Services Division
- Retail Leases Division

- Revenue Division.

The Divisions are specified in Schedule 1 of the Act, which may be amended by regulation, either by deletion of addition of a new Division or deletion of a previously existing Division.

Section 20 provides that each Division of the Tribunal exercises the functions allocated to that Division by Schedule 2.

Section 25 confers on the President executive responsibility for the business of the Tribunal. The President is (subject to the Act and rules of the Tribunal) to:

- facilitate the adoption of good administrative practices by the Tribunal.
- determine the places and times for sittings of the Tribunal.

Part 4 provides for the appointment of a Registrar, Deputy Registrar and such other staff as may be necessary, under the *Public Sector Management Act 1988* and sets out the functions of Registrars and Deputy Registrars.

Part 5 provides for the appointment of assessors of the Tribunal and specifies the functions of assessors.

Chapter 3: Jurisdiction of the Tribunal

Section 36 describes the principal kinds of decisions the Tribunal may make: it may make original decisions and may review reviewable decisions.

Section 37 confers jurisdiction to make original decisions. The section states that the Tribunal has jurisdiction under an enactment to act as a primary decision maker if the enactment provides that applications may be made to it for decisions made in the exercise or functions conferred or imposed on the Tribunal by or under that enactment.

Section 38 confers review jurisdiction. The section states that the Tribunal has jurisdiction under an enactment to review a decision (or a class of decisions) if the enactment provides that applications may be made to it for a review of any such decision (or class of decisions) made by the administrator:

- in the exercise of functions conferred or imposed under the enactment, or
- in the exercise of any function of the administrator identified by the enactment.

Section 39 sets out the interrelationship between the Tribunal and Ombudsman including arrangements for referral of matters between the two bodies.

Chapter 4: Process for Original Decision Making

Part 1 provides an overview of the original decision making process:

- an interested person applies for an original decision
- a party to the proceedings may seek written reasons for the decision if they are not provided
- a party may appeal the decision to an Appeal Panel if the relevant enactment provides for an appeal
- a party may appeal to the Supreme Court against the Appeal Panel's decision on question of law.

Part 2 sets out the procedure for making applications for an original decision.

Chapter 5: Process For Review of Reviewable Decisions

Part 1 provides an overview of the process for reviewing reviewable decisions:

- an administrator makes a reviewable decision and (where appropriate) gives notice to an interested person of the decision and of review rights
- an interested person may seek either or both of the following:
    - reasons for the decision, or
    - an internal review of the decision
- an interested person may (generally after an internal review) make an application to the Tribunal for a review of the decision.
- if the Tribunal has reviewed a reviewable decision, a party to the proceedings may appeal to an Appeal Panel of the Tribunal.
- a party to proceedings before an Appeal Panel may appeal against the panel's decision to the Supreme Court and a question of law.

Part 2 sets out the obligations of administrators to provide information concerning decision and review rights. An administrator who makes a reviewable decision must take reasonable steps to give an interested person

notice in writing of the decision (except as provided for under **section 48**) and the person's right to have the decision reviewed.

Section 49 provides that if the administrator makes a reviewable decision, an interested person may make a written request to the administrator for the reasons for a decision. As soon as practicable (and in any event within 28 days) after receiving a request the administrators should prepare a written statement of reasons for the decision and provide it to the person who requested the reasons. The statement of reasons is to set out:

- the finding on material questions or fact
- the administrators understanding of the applicable law
- the reasoning process that led the administrator to the conclusions made.

Section 50 states that an administrator may refuse to prepare and provide a statement of reasons if:

- the administrator is of the opinion that the person is not entitled to be given the statement, or
- the request is not made within 28 days after the person has provided with the decision, or
- the request was not made within a reasonable time after the decision was made.

Section 52 provides that the Tribunal may order an administrator to provide a statement of reasons or adequate statement of reasons.

Section 63 describes how the Tribunal is to determine an application for review of reviewable decision. It must decide what the correct and preferable decision is having regard to the material before it including:

- any relevant fact or material
- any applicable written or unwritten law.

The Tribunal may:

- affirm the reviewable decision, or
- vary the reviewable decision, or
- set aside the reviewable decision and make a decision in substitution for the reviewable decision that is set aside, or

- set aside the reviewable decision and remit the matter for reconsideration by the administrator in accordance with any directions or recommendations of the Tribunal.

Section 64 states also that in determining an application for review, 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 was contrary to law or the policy produces an unjust decision in the circumstances of the case.

Section 65 provides that at any stage the proceedings to determine the application the Tribunal may remit the decision to the administrator who made it for reconsideration of the decision.

Chapter 6: Procedure of the Tribunal Generally

Part 1 This Part provides (among other things) that:

- the Tribunal may, by order make a person who is not a party to proceedings for an original decision or a review of a reviewable decision or an external appeal, a party to the proceedings either by its own motion or any written application of the person
- the Attorney General may, on behalf of the state, intervene any proceedings before the Tribunal
- the Tribunal must ensure that every party to the proceedings before the Tribunal is given reasonable opportunity to present the party's case and to make submissions in relation to the issues in the proceedings
- a party to proceedings before the Tribunal may appear without representation or be represented by an agent.
- If a party is an incapacitated person, the tribunal may appoint any other person the Tribunal thinks fit to represent the party (**section 71**).
- the Tribunal may order that the parties to proceedings before it may not be represented by another person.

Part 2 This Part states that the Tribunal may, subject to the Act and the rules of the Tribunal, determine it own procedure. The Tribunal is not bound by rules of evidence but is subject to the rules of natural justice. The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience, considering the substantial merits of the case without regard to technicalities or legal forms.

Section 73 sets out key obligations of the Tribunal in conducting proceedings. The Tribunal must (among other things) so far as is reasonably practicable:

- conduct proceedings so that parties understand the nature of proceedings and are given the fullest opportunity to present their case
- act as quickly as practicable
- conduct proceedings in the way that best ensures that evidence is disclosed and presented fully, effectively and efficiently
- dismiss at any stage any proceedings before it if:
    - the applicant withdraws the application to which the proceedings relate, or
    - the Tribunal considers the proceedings to be frivolous or vexatious or otherwise misconceived or lacking in substance.

Section 83 provides that the Tribunal may call any witness, examine any witness on oath or affirmation, examine or cross examine any witness, compel any witness to answer questions which the Tribunal considers to be relevant in the proceedings before it.

Section 86 provides that the Tribunal may at any stage of proceedings before it make such orders including an order dismissing the application, as it think to fit to give affect of any settlement agreed to by the parties.

Section 88 provides that the Tribunal may award costs in relation to proceedings before it but only if it is satisfies that there are special circumstances warranting an award of costs.

Part 4 governs Tribunal rule-making.

Under **section 91** a Rule Committee is to make rules of the Tribunal relating to its practice and procedure. The functions of the Rule Committee, as described in **section 93**, are to make the rules for the Tribunal and to ensure that the rules are as flexible and as informal as possible.

Part 5 governs alternate dispute resolution in the Tribunal.

The purpose of this part is to enable the Tribunal to refer matters for mediation or neutral evaluation if the parties to the proceedings concerned have agreed to this course of action.

Chapter 7: Appeals

Part 1 – Internal Appeals

Original or review decisions of the Tribunal may be appealed if the enactment under which the Tribunal has jurisdiction to make the decision expressly provides for an appeal to an Appeal Panel of the Tribunal.

If an appeal is restricted to questions of law, the Appeal Panel may determine the appeal and may make such orders as it thinks appropriate including an order affirming or setting aside the decision of the Tribunal, an order remitting the case to be heard and decided again by the Tribunal or an order made in substitution for an order made by the Tribunal.

Part 1A – External appeals

The Tribunal may hear external appeals against a decision or a class of decisions if the Act under which the relevant decision was made provides for appeal to the Tribunal.

External appeals to the Tribunal may be made under section 67A of the *Guardianship Act 1987*, section 41 of the *Powers of Attorney Act 2003* and section 21A of the *Protected Estates Act 1983*.

An external appeal may arise on any question of law or by leave of the Appeal Panel hearing the appeal on any other ground (**section 118B**).

Part 2 – Appeals to the Supreme Court

A party to proceedings before an Appeal Panel of the Tribunal may appeal to the Supreme Court, on a question of law, against any decision of the Appeal Panel in those proceedings. Appeals against decisions in relation to interlocutory decisions, decisions made with the consent of the parties or decisions as to costs may only be made with the leave of the of the Supreme Court.

Part 3 - This part sets out procedures for appeals from the Tribunal to the Supreme Court (**sections 122-123**).

Chapter 8: Miscellaneous

Part 1 – This Part governs the disclosure of information and privileged documents and sets out the power of the Tribunal to prohibit publication of proceedings before the Tribunal.

Part 2 – This Part sets out matters that may be reported to the Supreme Court for the purposes of proceedings for contempt (**section 131**) and procedure relating to the use of the tribunal seal (**section 133**), authentication of documents (**section 134**), notices, service and lodgement of documents (**section 138**), return of documents after proceedings conclude (section 140) and the allowances and expenses of witnesses (**section 141**).

Schedule 1: Divisions of Tribunal

Provides that the Divisions of the Tribunal are the:

Community Services Division
Equal Opportunity Division
General Division
Legal Services Division
Retail Leases Division
Revenue Division

Schedule 2: Composition and functions of Divisions

Describes the composition and functions of each of the Divisions of the Tribunal and specifies the enactments conferring jurisdiction on the Tribunal. Each Division exercises the jurisdiction of the Tribunal under the enactment allocated to that Division.

Schedule 3: Provisions relating to members of Tribunal

A Senior Deputy President may be Acting President in periods of absence of the President. Subject to this Schedule and Part 2 of Chapter 2, a member holds office for a period not exceeding 3 years specified in the member's instrument of appointment, but is eligible for re-appointment (**clause 2**). A member of the Tribunal has, in the performance of functions performed as a member, the same protection and immunities as a Judge of the Supreme Court (**clause 5**). A member of the Tribunal appointed on a full-time basis is entitled to be paid remuneration in accordance with the *Statutory and Other Offices Remuneration Act 1975.*

The schedule also provides for the removal of members, retirement, seniority, leave and superannuation entitlements of members.

Schedule 4: Provisions relating to assessors of Tribunal

Sets out the terms of office of assessors, their remuneration and leave entitlements, and the manner in which they may be removed or retire from office.

Schedule 5: Savings and transitional provisions

Schedule 5 states that Tribunals exercising jurisdiction under the enactments specified in the Schedule are abolished at the commencement of the Act and the jurisdiction is transferred to the Tribunal.

APPENDIX 4

RECOMMENDATIONS OF THE COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE INTEGRITY COMMISSION'S REPORT ON THE JURISDICTION AND OPERATION OF THE ADMINISTRATIVE DECISIONS TRIBUNAL

Recommendation 1

Legislation should be brought forward to merge separate tribunals with the Administrative Decisions Tribunal (**ADT**), unless there are clear reasons why such inclusion would be inappropriate or impractical, with particular consideration being given to merging all professional disciplinary tribunals with the ADT, as part of a separate professional disciplinary Division.

Recommendation 2

a. Explicit criteria for determining those classes of administrative decisions which would appropriately fall within the external merits review jurisdiction of the ADT should be developed by the Attorney General, in consultation with the ADT, in the first instance, as an interim measure pending the establishment of an Administrative Review Advisory Council.

b. The Attorney General's Department should consult all departments and agencies to identify those classes of administrative decisions which currently meet such criteria and which should, therefore, be subject to external merits review by the ADT, having regard to the work done by the Commonwealth Administrative Review Council in this area.

c. Legislation should be introduced to confer review jurisdiction on the ADT in respect of those decisions that currently meet the agreed external review criteria.

Recommendation 3

There should be a presumption in future that all classes of administrative decisions provided for under new legislation, so long as they meet the criteria developed by the Attorney General should be subject to external merits review by the ADT.

Recommendation 4

The *ADT Act* should be amended to provide for the establishment of an Administrative Review Advisory Council with the following functions:

a. to further develop explicit criteria for determining the classes of administrative decisions that would appropriately fall within the ADT's external merits review jurisdiction

b. ongoing review of the ADT's jurisdiction with particular focus on the assessment of tribunals and similar bodies in New South Wales, for the purpose of recommending whether they can appropriately be merged with the ADT;

c. oversight of the administrative law system in New South Wales, through performing functions analogous to those of the Administrative Review Council under Part V of the *Administrative Appeals Tribunal Act 1975* (Cth).

The Committee further recommends that the proposed Administrative Review Advisory Council, where necessary, should be able to make general observations and provide advice on the practices and procedures of the ADT in relation to its handling of applications and case disposals. The ADT should continue to report to the Attorney General on matters of operational efficiency, effectiveness and performance, and relevant information should be included in the ADT's Annual Report.

Recommendation 5

The proposed Administrative Review Advisory Council should, in particular, monitor the progress achieved in merging existing tribunals with the ADT and also have an ongoing role in the further review and development of criteria for defining the appropriate extent of the ADT's merits review jurisdiction.

Recommendation 6

The membership of the proposed Administrative Review Advisory Council should
comprise a President, two ex officio members (the Ombudsman and the President of the Law Reform Commission), and at least three members with special qualifications. A person appointed in the special qualifications category should have:

a. Extensive experience at a high level in industry, commerce, public administration, industrial relations, the practice of a profession or the service of a government or of an authority of a government; or

b. Extensive knowledge of administrative law or public administration; or

c. direct experience, or direct knowledge, of the needs of people, or groups of people, significantly affected by government decisions.

Recommendation 7

a. The proposed Administrative Review Advisory Council should report to the Attorney General, who in turn should present each of the Council's reports to Parliament within fifteen sitting days of receiving the report.

b. The proposed Administrative Review Advisory Council should prepare an annual report on its operations to the Attorney General for tabling in Parliament.

Recommendation 8

a. Pending the establishment of the proposed Administrative Review Advisory Council (**ARAC**), the Attorney General should assume responsibility for the performance of the functions recommended for ARAC.

b. The Committee further recommends that to assist the Attorney General in this role the proposed membership of the ARAC should be convened as a Working Group, pending the establishment of the ARAC.

c. The NSW Law Reform Commission (**LRC**) conduct a review of existing tribunals and similar bodies in New South Wales, with a particular focus on disciplinary tribunals, to determine whether it is feasible and appropriate to merge them with the ADT.

d. The Committee further recommends that the LRC report to the Attorney General on the outcome of the review and that the Attorney General table the report in Parliament upon its receipt.

Recommendation 9

The statutory functions of the President and Deputy Presidents of the NSW ADT should be amended, in terms similar to s.30 of the *Victorian Civil and Administrative Tribunal Act 1998,* to include responsibility for directing the professional development and training of tribunal members.

Recommendation 10

That the *ADT Act* be amended to provide:

(a) the ADT is to be constituted for the purposes of any particular proceedings by 1, 2 or 3 members;

(b) if a Tribunal panel is constituted at a proceeding by one member only, that member must be a legal practitioner;

(c) if a Tribunal panel is constituted by more than one member, at least one must be a legal practitioner; and

(d) the President, or relevant Divisional Head, should determine how the ADT is to be constituted for the purposes of each proceeding.

Recommendation 11

In relation to Proposals 5-9, 12 and 14-15 of the Discussion Paper, which do not require legislative action, the Committee recommends that the ADT report on any initiatives taken towards implementing the proposals and related outcomes in its Annual Report.