



ADMINISTRATIVE REVIEW COUNCIL

Report No 4

**AMENDMENTS TO
ADMINISTRATIVE
APPEALS TRIBUNAL ACT**

ADMINISTRATIVE REVIEW COUNCIL

Our Reference:

Your Reference:

PRESIDENT

The Hon Justice F.G.Brennan

26 June 1979

My dear Attorney

As you are aware, the Council has at its last four meetings considered a number of proposals for amendments to the *Administrative Appeals Tribunal Act*. It has now concluded its consideration, and I am enclosing a Report which summarises the amendments recommended by the Council and briefly indicates the Council's reason for making each recommendation. The matters marked with an asterisk have already been communicated to you.

Annexed to the Report is a schedule of drafting points which have come to the notice of the Council, and which it suggests could be considered by your Department when the Act is amended.

The President, the Hon. Mr Justice Brennan, is away at present and has asked me to write to you in these terms. I am writing separately to you concerning amendment of the *Administrative Decisions (Judicial Review) Act 1977*.

Yours sincerely,

(Dr G.D.S. Taylor)

Director of Research

Senator the Hon P.D. Durack, QC
Attorney-General,
Parliament House,
CANBERRA ACT 2601

AMENDMENTS TO ADMINISTRATIVE APPEALS TRIBUNAL ACT

Summary of Recommendations

Oath of office¹

The Council is of the view that assumption of office as a member of the Tribunal should be marked by the taking of an oath. It therefore recommends that section 6 of the Act be amended to provide that members appointed to the Tribunal should make an oath of office upon taking up their appointment.

ACT Division of the Tribunal²

2. The Council is of the view that the Divisions of the Tribunal provided by section 19(2) have not proved to be useful, and that an alternative organisation of the Tribunal in Divisions should be made. It is therefore recommended that the subsection be amended to provide that the divisions of the Tribunal are:

(a) General divisions

- (i) general administrative division;
- (ii) Australian Capital Territory division;
- (iii) such other divisions as are prescribed as general divisions;

(b) Special divisions

- (i) insurance division;
- (ii) such other special divisions as are prescribed not being general divisions.

It is also recommended that sub-section (4) of section 19 be amended to provide that a non-presidential member who is not assigned to a special division shall not exercise or participate in the exercise of the powers of the Tribunal in that division, and that a further sub-section in section 19 provide that subject to subsection (4) a non-presidential member may exercise, or participate in the exercise of, the powers of the Tribunal in any division to which he is assigned and with the concurrence of the President in any general division to which he has not been assigned.

Constitution of Tribunal

3. The Council recommends elsewhere that enactments conferring jurisdiction upon the Tribunal should not prescribe that the Tribunal exercising the jurisdiction be solely constituted by presidential members (see paragraph 23). This recommendation derived from the view of the Council that the President's power under section 20 to direct the constitution of the Tribunal for particular proceedings should permit as much flexibility

¹ Communicated 15.12.1977

² Communicated 2A, 1979

as possible. One other limitation upon the achieving of this flexibility at present is that the Act does not permit the possibility of a fully presidential bench. It is therefore recommended that sections 21 and 21A be amended to give effect to a principle that the Tribunal may consist of one or three members, at least one of whom is to be a presidential member or a senior non-presidential member.

4. As was indicated in the Tribunal case of Re: Phillips and the Secretary, Department of Transport, there are doubts whether the Tribunal constituted under section 21(1A) may order that a person whose interests are affected by the decision the subject of an application to the Tribunal be made a party to the proceedings. To clarify this point it is recommended that a reference to section 30(1)(c) be inserted in the introductory words of section 21 (1A).

5. The Registry of the Tribunal has indicated to the Council that the overlap of situations covered by paragraphs (a), (b) and (c) of section 21(1A) has caused difficulties. In particular, the exercise of powers related to the institution of a proceeding, for example: extending time or deciding if a person is affected by the decision, may arise before or after a section 20 direction has been given, or indeed before or after a hearing has commenced. It is therefore recommended that the words now appearing in section 21(1A) (c) be replaced by “in any other case - by a presidential member”.

Notification of Appeal Rights

6. The Act does not currently require that persons entitled to apply to the Tribunal for a review of a decision are to be informed of that right. The Council has sought the views of Departments whose decisions are subject to appeal to the Administrative Appeal Tribunal, and their responses have generally indicated that they foresaw no difficulties if they were required automatically to notify a person affected of his right of appeal when they communicated a decision to him. The Administrative Law Committee of the Law Council of Australia has recommended to the Council that the Act provide for an obligatory notification of rights under the Act. The Council agrees with this proposal, but would not wish the Act to specify a particular form or content of a notification, although it would appear necessary for a notification to draw attention to the right to request a statement under section 28 of the Act, the presence of time limitations under the Act, and the existence of a right of review by the Administrative Appeals Tribunal. It is therefore recommended that the Act provide that the maker of a reviewable decision who furnishes to a person affected thereby a written notification of the decision shall include with it a notice relating to the person's right to seek review under the AAT Act.

Obtaining Reasons for Decision

7. Section 28 of the Act allows a person whose interests are affected by a decision reviewable by the Tribunal to request the decision-maker to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the

decision. Unless certain circumstances stated in the section exist, the decision maker is required to furnish such a statement. Although the person who may request such a statement would usually have notice of the terms of the decision, no provision in the Act allows a person to require a decision-maker to furnish a written statement of the terms of a decision. It is therefore recommended that the section be amended to allow a person entitled to request a statement also to request, and be furnished with, a copy of the full terms of the decision.

8. The Council has reviewed the times specified in section 28 for the making of a request for a statement, and for the furnishing by the decision-maker of the statement or a response to the request. The Council has obtained the views of the Administrative Law Committee of the Law Council of Australia, and of the Departments whose decisions are reviewable by the Tribunal, on these times. The Departments indicated that they have frequently had difficulty meeting the present 14 day time limit, particularly when they must obtain documents and information from distant offices and when they wished to use the occasion of preparing a statement for some reconsideration the decision. It is recommended that section 28 be amended to require a decision-maker to respond to a request for a statement as soon as possible, but in any case not more than 28 days after receiving the request.

9. In comparing the provisions of section 28 of the Administrative Appeals Tribunal Act and section 13 of the Administrative Decisions (Judicial Review) Act the Council has become aware of several inconsistencies for which it can see no reason. Consequently, the Council makes several recommendations for amendment to the latter Act, and these are set out in a separate communication to the Attorney-General. The Council also recommends that section 28 of the Administrative Appeals Tribunal Act be amended to allow the Attorney-General's certificate to relate only to part of the information required to be contained in a statement of reasons.

Review of a Failure to Decide

10. Where an enactment specifies a period for the making of a decision, and there is a right of appeal to the AAT from the decision, section 25(5) of the Act deems a decision of refusal to have been made on the date of expiration of the period if the decision-maker has made no decision. A person affected may then apply for a review to the Tribunal. However, where no time is prescribed for the exercise of the power, a person affected by a failure to decide may not apply for review to the Tribunal unless and until he obtains a certificate from the Ombudsman under section 10 of the *Ombudsman Act 1976* which certifies that there has been unreasonable delay by the decision-maker in exercising the power and has the effect of deeming a decision of refusal. The Council has accepted a suggestion that a similar provision to section 10 of the Ombudsman Act could be made in the Administrative Appeals Tribunal Act so that a person affected by failure to exercise such a power might obtain review by a single application to the Tribunal. It is therefore recommended that the Tribunal be given power to decide that there has been unreasonable delay in making a reviewable decision not required to be made in a

definite time, and thereupon to deem a decision of refusal.

Preliminary Conferences

11. The Council considers that there may be occasions when proceedings in the Tribunal might be fairly and efficiently resolved by the use of a power to direct parties to a conference presided over by a member or officer of the Tribunal. At present section 34 provides a power for a conference to be directed, but it is conditioned upon the parties agreeing to such a direction and only a presidential member may make a direction. It is therefore recommended that section 34 be amended to allow the compulsory holding of a preliminary conference at the direction of the President or the Tribunal as constituted under section 21.

Lodging of Documents with the Tribunal

12. As part of a general reconsideration of the time limits in the Act, the Council has considered the time within which decision-makers must lodge relevant documents and a statement of findings and reasons with the Tribunal after receiving notice of an application for review. It has accepted the submission of the Departments referred to above in paragraph 8 that the present time is frequently impossible to comply with. It is therefore recommended that the time prescribed under section 37(1) of the Act be altered to 28 days and be stated in the Act.

Hearing Officers³

13. The Council has considered the appropriate procedures for the Tribunal to adopt in jurisdictions where informal hearings may be necessary, for example Social Security. It considers that at times it would be an advantage for hearing officers of the Tribunal to be able to receive evidence in the absence of the parties, and to report upon it to the Tribunal.

It is therefore recommended that section 40(5) and (6) be amended to permit hearing officers to receive evidence otherwise than in the presence of all parties.

Stay Powers of the Tribunal

14. Section 41 of the Act provides that making an application for review by the Tribunal does not affect the operation of the decision, unless the Tribunal exercises its power under the section to stay that operation. The Council considers that the stay power of the Tribunal should be framed to give the Tribunal the maximum possible flexibility in framing an order appropriate to any circumstance. Without such a power there may be situations where the applicant faces substantial injustice caused by the

³ Communicated 23.12.1978

necessary period between the making of an application to the Tribunal and the final resolution of the application. The Council also considers that it may be necessary for the Tribunal to make an interim order on an ex parte application by a party. It is therefore recommended that section 41 be amended to ensure that the stay power of the Tribunal extends to all or any part of or the implementation of a decision subject to review, may be made on such terms and conditions as the Tribunal thinks fit, may operate for such a period of time up to the determination of the application for review as the Tribunal thinks fit, and may be revoked by the Tribunal at any time⁴. It is also recommended that the Tribunal be given power in appropriate cases to make such interim decisions in relation to the decision under review as are necessary to give effect to the right of review, and to allow the Tribunal to make a stay or interim order in cases of urgency without giving reasonable opportunity to the decision-maker to be present if it is impractical to do so.

15. The Council also considers that the Tribunal should have power to make a stay or interim order after it has made a decision whether this is appropriate to allow the right of appeal to the Federal Court properly to be availed of. It is therefore recommended that the Tribunal be given power in appropriate cases to exercise its stay power for 28 days after making its decision and pending the lodging of an appeal to the Federal Court. Since the Federal Court cannot be given power to make interim orders, as against stay orders, it is recommended that the Tribunal be given power to exercise its power to make interim orders to preserve the status quo pending the final determination of an appeal to the Federal Court.

Withdrawal of Applications

16. The Council has accepted a recommendation by the Registry of the Tribunal that there be provision for proceedings to be concluded by an applicant giving notice of withdrawal before his application is decided. At present when such a notice is received the Tribunal can only end the proceedings by acting under section 42A, which requires that the consent of all parties be obtained prior to the dismissal of the application. It is therefore recommended that the Act permit the withdrawal of an application for review by an applicant giving written notice of withdrawal before his application is decided.

Return of Exhibits⁵

17. The Council has noted that section 43A concerning the return of documents at the conclusion of proceedings does not cover the return of exhibits. It considers that it should do-so to provide protection for the Registry. It is therefore recommended that section 43A be amended to permit the return of non-documentary exhibits.

4 Communicated 23.12.1978

5 Communicated 10.10.1977

Appeal to Federal Court

18. The Act gives a right of appeal to the Federal Court on questions of law in respect of “any decision of the Tribunal”. The word “Tribunal” includes a member exercising power of the Tribunal. However even with this definition it would seem that “any decision of the Tribunal” would not include a decision of the President exercising powers specifically vested in him, even when he had delegated those powers under section 10A. Such a power is given by section 36 (3) with respect to the disclosure of information subject to a certificate of the Attorney-General. The presence of section 36 (6) seems to indicate that the Act intended section 44 (1) to apply to these decisions, and it is therefore recommended that section 44 be amended to provide that the right of appeal cover decisions of the President under section 36 (3).

19. The Council recommends that the Federal court so far as is possible be given the same powers of stay in relation to decisions of the Tribunal pending the determination of an appeal as the Tribunal has under section 41, including those recommended in paragraph 14 above. It also recommends that the stay power in section 44 should allow the Court to suspend or stay not only the decision of the Administrative Appeals Tribunal which is the subject of appeal but also the original decision under review where it is still operating.

Qualifications of Members of the Administrative Review Council

20. The Council considers that the qualifications at present prescribed in section 50 may prevent the appointment of members with suitable qualifications, for instances, with knowledge of or experience in political science or government. It is therefore recommended that section 50 be amended to provide qualifications for membership of the Administrative Review Council in categories of experience similar to those listed in section 7(2)(b).

Contempt of Tribunal

21. The Council has considered that it would be desirable for the Tribunal to have some power itself to initiate proceedings against persons in contempt of the Tribunal. It is therefore recommended that the Act confer power on the Tribunal to summon a person who may be in contempt of the Tribunal to show cause by proceedings should not be taken against him. And that, upon the Tribunal deciding that proceedings should be taken, the Registrar should be empowered to apply to the Federal Court for that Court to determine whether there has been a contempt and to fix a punishment.

Costs before the Tribunal

22. The Council has canvassed possible provisions for empowering the Tribunal to award costs in proceedings before it. It has agreed that as a general rule there should be no change to the present provision in the Act concerning costs, but that the Council does not reject the possibility of the introduction of a costs provision in particular

jurisdictions. However, it does recommend that section 67(3) should be amended to provide that the power to order witnesses costs may also be exercised by the person with power to issue a summons in the proceedings, and may be exercised whether or not the witness was the subject of a summons.

Provisions conferring Jurisdiction⁶

23. The Council has considered provisions in enactments conferring jurisdiction on the Tribunal which limit the flexibility given by the Act to the President in constituting a Tribunal with members of any category. It recommends that existing prescriptions that the member should be repealed, and that no such provision should be enacted in the future.

24. The provision in section 22 of the Schedule to the Administrative Appeals Tribunal Act which confers jurisdiction in relation to certain decisions under the Migration Act, and which limits the Tribunal to a power to affirm the decision or remit the matter for consideration in accordance with a recommendation of the Tribunal, has been considered by the Council. It recommends that this provision be amended to allow the Tribunal to exercise all its normal powers under section 43 of the Act in reviewing decisions under the Migration Act.

⁶ Communicated 23.12.1978 and 19.02.1979

**AMENDMENTS TO ADMINISTRATIVE APPEALS TRIBUNAL ACT
DRAFTING POINTS**

Sections 21A(6), 21A(7)

Sub-section (6) refers to a record of any evidence taken “in” the proceeding whilst sub-section (7) refers to evidence “under” the proceeding. The two should be consistent.

Section 25(5)

This provision may not achieve its apparent purpose. It is expressed to deem a “decision” for the purposes of the section. However the purpose of the section is to enable enactments to provide for rights of review and to empower the Tribunal to conduct that review which they provide. Thus, where rights of review are conferred in other enactments, the provision cannot operate to widen the scope of those rights.

Section 28(1)

The word “and” in the second last line should be followed by the words “subject to the following sub-sections”.

Sections 28(2), 28(3)

Sub-section (2) says that the decision-maker “is not required” to furnish a statement where the Attorney-General has issued a certificate, whereas sub-section (3) “will not be furnished”. The introduction to sub-section (3) should be changed to “where by reason of sub-section (2) a statement is not furnished” (vide section 14(3) of the Administrative Decisions (Judicial Review) Act).

Sections 29(2), 29(3)

The expression of the reference in section 29(2)(a) and (b), and in section 29(3)(b), to a “statement setting out findings on material questions of fact and the reasons for the decision”, should be amended to conform with the expression used in section 28, i.e. “a statement in writing setting the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision”.

Section 29(8)

This sub-section might seem to refer to a time fixed for applying under section 29(7), although no time is fixed. It could more clearly read:

“An application for an extension of time under sub-section (7) may be made although the time prescribed by sub-sections (2) and (3) have expired”.

Section 34(3)

Should not the protection provided in section 34(3) be extended expressly to the contents of documents disclosed at a conference?

Section 35(2) (C)

Paragraph (c) should include “or received in evidence” as does (b).

Section 36(6)

This sub-section might seem to apply to section 35(2)(c). Perhaps it should be made clear that the sub-section was intended only to apply to a decision under section 36(3). Also see the observation in the following paragraph.

Section 36A

Section 36A(2)(a) implies that the Court has jurisdiction on an appeal under section 44 or a reference under section 45 to examine the certificate or information of the Attorney-General that answering a question would be contrary to the public interest by reason of the two matters mentioned in section 36(1)(a) and (b). Query whether the Act anywhere confers such jurisdiction on the Federal Court. Section 36A itself does not seem to confer jurisdiction; section 44 gives rights to appeal on the questions decided only by the Tribunal, which could not cover a decision of the Attorney under section 36A(1); and section 45 concerns only questions arising in a proceeding before the Tribunal, which could not include the correctness of an Attorney-General’s certificate. If it is intended that the Federal Court have this jurisdiction it should be made clear, and to be consistent also should cover decisions of the Attorney General under section 36(1).

Section 39

Should not this section being “subject to sections 35, 36 and 36A...?”

Section 40(1A)

Should this section talk about “document or thing” to avoid any debate about whether “document” includes photos, films, tapes and records? Relevant also to other sections e.g. section 36, 43A and 46, although bulky items should not be covered by section 37(1)(b). Perhaps the Act needs a general definition of “document”.

Section 40(1A)

This sub-section might make it clear that a separate summons to produce documents might be issued, and that documents might be produced in answer to it to the Registry prior to the hearing.

Section 62

Section 62(b) might also refer to “part of a question”.