

Letter 4 Section 23(9)(a) Administrative Appeals Tribunal Amendment Bill 2005

This letter is in response to a request for the Council's views on circumstances in which the President might reconstitute the Administrative Appeals Tribunal 'in the interests of justice' as provided for in proposed s 23(9)(a) of the Administrative Appeals Tribunal Amendment Bill 2004. The Council indicates in its letter that it prefers the words 'in the interests of the administration of justice' to 'in the interests of justice'. It identifies three possible precursors to the exercise of power by the President under proposed s 23(9)(a).

14 March 2005

Ms Amanda Davies
Assistant Secretary
Administrative Law & Civil Procedure Branch
Attorney-General's Department

Dear Ms Davies

Section 23(9)(a) Administrative Appeals Tribunal Amendment Bill 2004 - 'in the interests of justice'

Thank you for seeking the views of the Administrative Review Council on the circumstances that might be embraced by the term 'in the interests of justice' in proposed s 23(9)(a) of the Administrative Appeals Tribunal Amendment Bill 2004.

The Council notes that the request stems from the recommendation made by the Senate Legal and Constitutional Legislation Committee in its report on the Bill that the Bill be amended to provide guidance on the circumstances when the President should exercise the power to remove a member and reconstitute the tribunal 'in the interests of justice' under proposed s 23(2)(b)(iii).

Council consideration

As a preface to its more specific comments, the Council notes that in its view, expressions such as 'in the interests of justice' are only workable if they are couched in fairly broad terms, relying for their appropriate exercise on the sagacity and sense of the persons upon whom they have been conferred.

To seek to spell out the elements of a general discretion of this sort can be to place unnecessary limitations on its use in certain instances and can also result in disputation and possible litigation.

The Council notes that paragraphs 23(9)(a) and (b) were included in the Bill in response to concerns such as those expressed by the Council in its letter to the Department of 19 August 2003 about the need to provide a measure of protection in proposed s 23(2)(b)(iii) for the interests of tribunal members and for the overt independence of the tribunal.

At that time, the phrase suggested by the Department and agreed to by the Council in its letter of 4 September 2003 for inclusion in the Bill was 'in the interests of the administration of justice'.

In the Council's view, that phrase is more directed than 'in the interests of justice' and, with its administrative or procedural focus, more contextually consistent with the exercise of a discretion pertaining to the reconstitution of a tribunal. The Council recommends a return to the phrase 'in the interests of the administration of justice' in proposed s 23(9)(a).

If further guidance were considered necessary, this should be achieved with the assistance of an indicative list rather than by seeking to spell out the meaning of the phrase in exhaustive terms.

The Council notes that conflict of interest is already covered by s 14 of the *Administrative Appeals Tribunal Act 1975* while factors such as illness, delay and an unanticipated lack of expertise in a particular area are covered by proposed s 23(2)(i) or (ii) and s 23A (Reconstitution of the tribunal to achieve the expeditious and efficient conduct of proceedings).

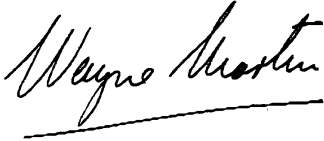
Areas not covered elsewhere in the Act or the Bill include actual and perceived bias and misconduct pertaining to a particular case as distinct from the process for misbehaviour envisaged under s 13 of the Act.

The Council therefore suggests that proposed s 23(9)(a) could be redrafted so that the circumstances in which the President may use his or her power to reconstitute the tribunal under proposed s 23(2)(a)(iii) would include:

- in the case of actual or apprehended bias;
- in the case of misconduct by a member; or
- in any other circumstance in which reconstitution of the tribunal is considered by the President to be in the interests of the administration of justice.

If you have any queries arising from the foregoing, please do not hesitate to contact the Council further.

Yours sincerely

A handwritten signature in black ink that reads "Wayne Martin". The signature is written in a cursive style and is underlined with a single horizontal line.

Wayne Martin QC
President