

Letter 7 Reform of Administrative Appeals Tribunal

This letter highlights the Council's concerns at proposed amendments to the *Administrative Appeals Tribunal Act 1975* that would allow the appointment of someone other than a Judge of the Federal Court as President of the Tribunal, and for the appointment of the President of the Tribunal for a fixed term.

19 August 2003

The Hon Daryl Williams AM QC MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney-General

Reform of Administrative Appeals Tribunal

I refer to my letter of 17 February 2003, relating to the proposal to amend the Administrative Appeals Tribunal Act.

On 12 August 2003 the Council received an indication of the changes that were proposed from your Department. I have today written to the relevant officer in your Department enclosing a number of comments in relation to the proposed changes, some of which are more of a technical or drafting nature.

There is, however, one issue of a more substantive kind, in relation to which I consider it appropriate to convey the views of the Council directly to you.

That issue concerns the changes proposed relating to the appointment to the office of President of the Tribunal.

The Council has noted that the amendments proposed will make two substantial changes to the current arrangements pertaining to the appointment of the President, namely:

- (a) it will no longer be necessary that the President be a Judge of the Federal Court of Australia;
- (b) the President will be appointed for a limited term.

In the view of the Council, the appointment as President of a Judge of the Federal Court has been a significant factor in establishing the authority and status of the Tribunal. Removal of that qualification for appointment would

be inconsistent with a trend which is now well established in other jurisdictions in relation to the creation of umbrella merits review tribunals – notably in Victoria, New South Wales and the proposed Western Australian Tribunal and the proposed United Kingdom Tribunal.

Apart from the continuation of the authority and status of the Tribunal, in the view of the Council there are at least two enduring advantages to be derived from continued membership of the Tribunal by Federal Court Judges.

The first advantage lies in the opportunity to compose a Tribunal of personnel whose independence and security of tenure cannot be questioned, to deal with cases which have significant political implications. The second advantage lies in the flexibility and efficiency which is achieved by, for example, enabling the same person to sit as a member of the Tribunal and as a member of the Court in managing cases in which merits review and judicial review are undertaken simultaneously, and in areas of parallel jurisdiction such as tax appeals.

The Council notes that these objectives can of course be achieved without necessarily requiring the President to be a Judge of the Federal Court, as long as at least some members of the Tribunal are Judges of the Federal Court. Indeed, as those members of the Federal Court already appointed to the Tribunal will maintain their membership of the Tribunal until their retirement from the Court, that position is likely to pertain for some time into the future.

However, the Council is concerned that a circumstance in which some members of the Tribunal are members of the Federal Court, but the President of the Tribunal is not, is less than desirable, especially given the increased power of direction to be reposed in the President under the proposed amendments.

The removal of unlimited tenure from the office of the President seems to Council to be related the issue of qualification for appointment. If the President is not a member of the Federal Court, and accordingly does not enjoy the security of tenure that goes with that office, there is an increased risk that appointment for a limited term with eligibility for reappointment might be seen to compromise the independence of the office of President.

Accordingly, while Council supports that portion of the proposed amendments which will provide greater flexibility in the composition of the Tribunal, in its view those steps are best achieved under the continued direction and supervision of a President who is also a Judge of the Federal Court.

I would also like to point out that although Justice Downes participated in some part of the discussion pertaining to these issues, he was not involved in the formulation of the views expressed in this letter.

I would of course be pleased to discuss any aspect of this letter with your at your convenience. My direct line is (08) 9220 0468, or after hours I can be contacted on (08) 9386 9844.

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