

## **Letter 9 Administrative Appeals Tribunal Amendment Bill 2004**

The letter responds to an invitation to comment on proposed amendments to *Administrative Appeals Tribunal Act 1975* by the Administrative Appeals Tribunal Amendment Act 2004. In the letter the Council indicates its continued support for a judicial President of the Tribunal and for a minimum term of appointment of three years for tribunal members. The letter also indicates the Council's support for proposed provisions in the Bill relating to the assignment by the President of members to Divisions of the Tribunal.

10 March 2004

Dr James Popple  
Assistant Secretary  
Administrative Law and Civil Procedure Branch  
Attorney-General's Department  
Robert Garran Offices  
Barton ACT 2600

Dear Dr Popple

### **Administrative Appeals Tribunal Amendment Bill 2004**

Thank you for your letter of 26 February 2004 inviting the Council to comment on the proposed reform of the Administrative Appeals Tribunal (AAT) and providing a copy of the AAT Amendment Bill 2004.

The Council has considered the Bill and offers the following comments. Item numbers refer to the items in Schedule 1 of the Bill.

#### *Item 3 – Definition of alternative dispute resolution processes*

The Council suggests that some of the terms used in this definition relate to alternative dispute resolution processes that are not generally well understood, and may themselves require definition. The terms 'neutral evaluation' and 'case appraisal' in particular do not, in the Council's view, correspond to clearly understood dispute resolution processes.

The Council considers there would be value in providing for the definition of alternative dispute resolution processes utilised by the Tribunal. This could be achieved, for example, through practice directions issued by the President or through regulations under the Act.

*Item 16 – Qualifications for President of the Tribunal*

The Council notes that the Bill will expand the range of persons qualified to be President of the Tribunal. The Council has already commented on the desirability of maintaining judicial leadership of the Tribunal in its letter of 19 August 2003 (to which you refer) and does not resile from those previous comments.

In addition, the Council is concerned at the effect the expansion of qualifications would have on its own membership. At present, the *ex officio* membership of the Council by the President of the Tribunal guarantees that the Council will include at least one Federal Court Judge. As presently drafted, the Bill will remove that guarantee and create the potential for there to be no Federal Court Judges on the Council. The Council is of the view that the legislation should provide for the appointment of a Federal Court Judge to the Council in the event that the President of the Tribunal is not a Federal Court Judge.

A judicial member is able to, and invariably does, make a unique and valuable contribution to the Council's work, especially on topics that concern the courts such as its present project examining the scope of judicial review. The Council's functions under section 51(1) of the AAT Act include recommendations regarding review of administrative decisions by the courts.

*Items 18 to 21 – Terms of appointment*

The Council also considers that it would be desirable to provide a minimum term of appointment of 3 years for all members of the Tribunal, including the President of the Tribunal. This would continue to provide considerable flexibility as to the term of appointment while also giving a sense of security to members and assisting in maintenance of the perception that the Tribunal is independent from Government. The Council recommended in its *Better Decisions* report that members of tribunals generally be appointed for terms of 3 to 5 years (recommendation 41).

*Item 29 – Assignment of members to Divisions of the Tribunal*

The Council notes that the Bill would give the power to assign members to a particular Division or Divisions of the Tribunal to the Minister. While the Council suggested in its letter of 4 September 2003 that this power be given to the President of the Tribunal, it considers the Bill's provision is satisfactory and an improvement on the current situation where assignment of members is the responsibility of the Governor-General.

*Items 40 and 41 – Constitution of the Tribunal for a proceeding*

The Council welcomes the increased flexibility in the constitution of multi-member Tribunals provided for in these amendments.

The Council believes there may be circumstances where it would be desirable for the Tribunal to be constituted by more than 3 members. One possible example is a proceeding under a trans-Tasman scheme, such as the one relating to therapeutic goods that is currently being developed. However, the Council considers that these scenarios could be dealt with by specific legislation. Indeed section 21(1) of the AAT Act states that it is subject to any provision in other legislation with respect to the constitution of the Tribunal.

*Item 81 – Power of Tribunal to request amendment of insufficient statement of reasons for the application*

On two occasions the amendments to be made by this item refer to the “correct and preferable decision”. Whilst the Council did promote this expression in its *Better Decisions* Report in preference to “correct or preferable decision”, the formulation found in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589, the Council subsequently resolved that it should return to using the *Drake* expression. Accordingly the Council considers the Bill should be altered.

*Items 174 to 178 – Amendments to the Freedom of Information Act 1982*

The summary of proposed amendments provided with the Bill describes these as implementing recommendations of the Australian Law Reform Commission’s *Open Government* Report. This was in fact a joint report of the Australian Law Reform Commission and the Council (ALRC 77, ARC 40).

Thank you for the opportunity to comment on the Bill. I trust that the Council’s comments will be of assistance. The Council would be happy to discuss these issues further – contact can be made with the Council’s Executive Director, Margaret Harrison-Smith on (02) 6250 5801.

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