The Administrative Appeals Tribunal: why we are here

*Deputy President Peter Britten-Jones**

Sometimes it is helpful to reflect on what we are doing and how we are doing it. This desire to reflect perhaps comes about because we are (hopefully) coming out of a pandemic that has disrupted our daily way of life. On a more personal level, perhaps, it comes about because of my move from Adelaide to Melbourne and the disruption that has caused my family and me. Is it worth all the effort? I certainly believe it is.

I could have made the title of this article 'Why are we here?', but I wanted to avoid the uncertainty of a question. I am a firm believer in the work of the Administrative Appeals Tribunal. What is it that the Tribunal does and why does it do it? There are numerous ways to approach these questions:

1. Taking a narrow approach, Tribunal members are here to make decisions.
2. Taking a broader approach, they are here to provide access to justice for those impacted by administrative decisions.
3. At another level, they are here to improve the quality of, and instil greater public confidence in, public administration.

I wish to expand upon each of these three answers.

Making decisions

Section 25 of the *Administrative Appeals Tribunal Act 1975* (Cth) provides for a review by the Tribunal of certain decisions. When reviewing a decision, s 43 provides that the Tribunal may affirm, vary or set aside and substitute the decision under review. We are to make the correct or preferable decision[1] that balances the need to be fair, just, economical, informal and quick with the obligation to be proportionate to the importance and complexity of the matter.[2]

The High Court considered the nature of merits review in *Frugtniet v Australian Securities and Investments Commission*.[3] Chief Justice Kiefel and Keane and Nettle JJ said:

> The enactment of the AAT Act established a new and substantially unprecedented regime of administrative merits review, distinguished principally by the AAT's jurisdiction to re-exercise the functions of original administrative decision-makers. *The question for determination by the AAT on the review of an administrative decision under s 25 of the AAT Act is thus whether the decision is the correct or preferable decision.* That question is required to be determined on the material before the AAT, not on the material as it was when before the original decision-maker. As Bowen CJ and Deane J held in *Drake v Minister for Immigration and Ethnic Affairs*, however, and has since been affirmed by this Court in *Shi v Migration Agents Registration Authority*, the AAT is not at large. It is subject to the same general constraints as the original decision-maker and should ordinarily approach its task as though it were performing the relevant

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1 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589.

2 The objectives of the Tribunal are set out in s 2A of the *Administrative Appeals Tribunal Act 1975* (Cth).

3 [2019] HCA 16; (2019) 93 ALJR 629.

function of the original decision-maker in accordance with the law as it applied to the decision-maker at the time of the original decision.

Depending on the nature of the decision the subject of review, the AAT may sometimes take into account evidence that was not before the original decision-maker, including evidence of events subsequent to the original decision. But subject to any clearly expressed contrary statutory indication, the AAT may do so only if and to the extent that the evidence is relevant to the question which the original decision-maker was bound to decide; really, as if the original decision-maker were deciding the matter at the time that it is before the AAT. The AAT cannot take into account matters which were not before the original decision-maker where to do so would change the nature of the decision or, put another way, the question before the original decision-maker.[4]

Justices Bell, Gageler, Gordon and Edelman said:

the jurisdiction conferred on the AAT by ss 25 and 43 of the AAT Act, where application is made to it under an enactment, is *to stand in the shoes of the decision-maker whose decision is under review so as to determine for itself on the material before it the decision which can, and which it considers should, be made* in the exercise of the power or powers conferred on the primary decision-maker for the purpose of making the decision under review. The AAT exercises the same power or powers as the primary decision-maker, subject to the same constraints.

…

The AAT and the primary decision-maker exist within an administrative continuum. The AAT has no jurisdiction to make a decision on the material before it taking into account a consideration which could not have been taken into account by the primary decision-maker in making the decision under review.[5]

Providing access to merits review

The Administrative Appeals Tribunal exists to provide redress for persons not satisfied with a government decision. Tens of millions of decisions that affect people's lives are made each year by government decision-makers at various levels. Very few of these decisions are made by our elected representatives; most are made by public servants. The Tribunal is an important mechanism for delivering individual justice to those disgruntled applicants.

The COVID-19 pandemic has provided challenges to the Tribunal in terms of providing access to the public services we offer. The Tribunal has had to adapt to ensure that we can continue to provide access to the extent possible and in as fair a way as possible. The physical constraint of not being able to offer in-person hearings raised real concerns as to whether procedural fairness could be achieved using telephone and video facilities. The Tribunal reacted quickly by improving its processes and its technology such that remote hearings have been largely accepted by the parties and their representatives, who have an overarching preference to have their matter heard rather than delayed. The new processes adopted by the Tribunal were set out in the COVID-19 Special Measures Practice Direction. Members now have access to a fully digitised file and parties can lodge all documents electronically. An example of the practical approach taken by members and staff in delivering a remote hearing via MS Teams is helpfully set out in the decision of Members Ward, Durkin and Stephan in *Chugha and Comcare* (Compensation).[6]

4 Ibid [14] (emphasis added and footnotes removed).
5 Ibid [51]−[53] (emphasis added).
6 [2020] AATA 2835.

Improving the quality of, and instilling greater public confidence in, public administration

The establishment of the Tribunal over 40 years ago and the progressive expansion of its jurisdiction since then are each the result of successive, parliamentary value judgements as to a need to improve the quality of, and instil greater public confidence in, public administration.[7]

It was Sir Anthony Mason, when Commonwealth Solicitor-General, who put to the then Commonwealth Attorney-General, Sir Nigel Bowen, in 1968 that there was such a need. This was a view shared by Sir Nigel. The result was the establishment of the Commonwealth Administrative Review Committee, of which Sir Anthony was a member. Though this occurred during a period of Coalition government, the work of that committee and a successor was taken up and enacted as the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) during a period when a Labor government held office. In turn, the AAT Act commenced, and its first President, Sir Gerard Brennan, took office on 1 July 1976 when a Coalition government was again in office. The point of mentioning this history is that the existence of the Tribunal is the result of a bipartisan consensus.

Sir Anthony Mason wrote a paper recalling this history and the experience of the first dozen years of the Tribunal and reforms during that period. He identified five features of administrative decision-making by ministers and their departments which fell short of the judicial model and led to such decision-making never achieving the level of acceptance of the judicial model:

> First, it lacks the independence of the judicial process. The administrative decision-maker is, and is thought to be, more susceptible to political, ministerial and bureaucratic influence than a judge. Secondly, some administrative decisions are made out in the open; most are not. Thirdly, apart from statute, the administrator does not always observe the standards of natural justice or procedural fairness. Fourthly, the administrator does not have to give reasons for his decision.
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> That is not surprising; he is not trained to do so. Finally, he is inclined to subordinate the claims of justice of the individual to the more general demands of public policy and sometimes to adventitious political and bureaucratic pressures.[8]

The Tribunal was deliberately established with features of the judicial model to address these deficiencies. In general, we sit in public, we are required to observe procedural fairness, we must give proper reasons for our decisions and base them on material before us which is logically supportive of them, we have power to stay the operation of decisions under review and we have power to summon persons to give evidence or to produce documents. Conduct which would amount to a contempt of court if the Tribunal were a court is made a federal offence. The judicial analogy is not complete, as the model adopted for the Tribunal places a member(s) constituting the Tribunal in place of the administrator who made the decision under review and confers on the member all the powers and discretions of that administrator.

7 Material in this section was sourced from a letter to members and staff from Acting President Justice Logan in 2017.

8 Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989) 18 *Federal Law Review* 122, 130.

The need to instil greater confidence in public administration is all the more important in these times when pressure on our democratic model is rising. Professor Grayling, in his book *Democracy and its Crisis*, raises concerns about growing dissatisfaction in western democracies, citing the election of Donald Trump in the USA and the Brexit referendum in the UK. He says that democracy is only part of what makes for sound government. Representative democracy is important but not by itself sufficient. More is needed. He refers to the need for constitutional checks and balances placing limits on the power of both legislature and executive, and providing remedies when the limits are breached.[9]

The Administrative Appeals Tribunal is part of the 'more' that is needed. It plays an important role as an institution that not only provides checks and balances on the power of the executive but also results in improved decision-making. An individual can take comfort that there is an independent body to exercise a review of the merits of a decision made by the executive. The decision made by the Tribunal on review and its reasons will shape the future exercise of power by the executive. It is important that we take a comprehensive and diligent approach to every review carried out so that applicants are satisfied that they have been heard and their issue has been properly considered; and so that the decision-maker can learn from the outcome.

9 AC Grayling, *Democracy and its Crisis* (Oneworld Publications, 2018).