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At the AAT: closed hearings, anonymisation and media access

The Administrative Appeals Tribunal (AAT) is responsible for providing independent merits review of certain Commonwealth administrative decisions. As a general rule, hearings in this jurisdiction must be held in public,¹ but there are circumstances in which the hearings will be closed or private. Furthermore, there are a number of anonymisation mechanisms available to parties. The term 'anonymisation' is used here to encapsulate procedures such as pseudonyms for applicants, suppression of witness details, non-disclosure of commercial in-confidence material, and restrictions on publication of decisions. The circumstances in which private hearings and anonymisation mechanisms are available are set out in the *Administrative Appeals Tribunal Act 1975 (Cth)* (AAT Act) and other applicable Acts, as discussed.

Beginning with a general introduction to the AAT and its proceedings, this article addresses when private hearings and anonymisation processes may arise. The focus is then on media access to proceedings and decisions of the AAT. The conclusion is that the Tribunal engages in a delicate balancing act in deciding when confidentiality restrictions need to be applied. There

is a tension between privacy, public interest and public scrutiny and the overarching principle of openness. This can give rise to practical difficulties for the media in reporting on decisions that are in the public domain yet cannot be fully reported.

INTRODUCING THE AAT

Established under the AAT Act, the AAT was a 'unique' administrative review tribunal when it commenced

on 1 July 1976.² The AAT has no general power of review; rather, access to the jurisdiction only arises when an enactment specifically provides for it.³ Nearly 40 years on, the jurisdiction continues to broaden,⁴ with 'more than 400 Commonwealth Acts and legislative instruments'⁵ enabling access to it.

The AAT registries currently manage matters under four divisions – General Administrative, Security Appeals, Taxation Appeals⁶ and Veterans'

Appeals⁷ – with the National Disability Insurance Scheme (DisabilityCare Australia)⁸ commencing as the fifth division on 1 July 2013. Matters under the General Administrative Division are diverse, for example review of decisions of the Minister for Immigration and Citizenship, Comcare, Commissioner of Patents, social security agencies,⁹ Australian Postal Corporation, Anti-Doping Rule Violation Panel, and the Australian Research Council.¹⁰ Some members also (i) perform *persona designata* functions that include being nominated as approved examiners under the *Proceeds of Crimes Act 2002* (Cth) and (ii) issue warrants, orders, authorities and notices under various Acts.

The Tribunal's task

The Tribunal conducts merits review of administrative decisions. That task involves (a) considering the matter *de novo* but applying the same law as the original decision-maker and (b) making the correct or preferable decision. The review process 'involves considering afresh the facts, law and policy relating to that decision'.¹¹ On reaching the correct or preferable decision the Tribunal may (i) affirm the decision under review, (ii) vary it or (iii) set aside the original decision with a substituted decision or direction remitting the matter for reconsideration.¹² This is unlike judicial review in the courts which involves determining the 'legality of a decision'¹³ and unlike the function of the Ombudsman which is limited to making recommendations to decision-makers.¹⁴

Pursuant to the AAT Act, the Tribunal 'must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick'.¹⁵ Achieving these five precepts simultaneously may, at times, prove challenging¹⁶ but management of all Tribunal matters is guided by these overarching principles.

Proceedings

A proceeding is commenced in the Tribunal by an applicant who is often, but not always, a person affected by a government decision. An applicant may be a person acting on that person's

behalf¹⁷ or may themselves have an interest distinct from the person most directly affected. Applications can, and frequently will, be made by corporations, entities and interest groups. The applicant 'may appear in person or may be represented by some other person', who might or might not be a lawyer.¹⁸ Self-representation is common in the AAT and endeavours are made to facilitate that direct access.¹⁹

The respondent in proceedings is always the 'decision-maker' responsible for the decision under review, ie the government minister, delegate, department or agency. Therefore there is an obligation for the respondent to assist the Tribunal to reach the correct or preferable decision.²⁰

When an application has been filed with the Tribunal the respondent is required to lodge what can be a large number of documents. These include a statement of reasons for the decision under review and all other documents relevant to the decision.²¹ Both parties may rely on documentary evidence such as affidavits, expert reports, clinical notes, correspondence and commercial documents²². They can also request the Tribunal issue summonses to compel individuals to appear or for the production of documents.²³

Proceedings in the AAT are distinct from court processes because they are 'conducted with as little formality and technicality, and with as much expedition' as is practicable.²⁴ The Tribunal 'may inform itself on any matter in such manner as it thinks appropriate' and is not bound by the rules of evidence.²⁵ Furthermore, there is a strong emphasis on resolving matters non-adversarially and matters frequently resolve without the need for a hearing. These factors gear the process towards being flexible for the parties and allowing those who might not otherwise be able to become engaged in the process to do so.

Decisions

There are two components to a Tribunal decision – (i) the decision itself, the form of which is dictated, and restricted, by the powers given to the Tribunal pursuant to s43 of the

AAT Act, and (ii) the written reasons that must clearly identify the issues, evidence considered and reasoning applied by the Tribunal.²⁶

AAT decisions may be delivered orally and/or in writing. The oral decision, announced by the Tribunal after the hearing, includes the decision and the reasons for decision. It is then open to the parties to request written reasons.²⁷ In the alternative, the Tribunal may reserve the decision and publish it at a later date. 'Publication' of a reserved decision is a procedural matter and neither the parties nor their representatives are required to appear.²⁸ The practice is that, where appropriate, both email and hard copies are issued.²⁹ Unless there is a basis for confidentiality, decisions are then made publicly available within a few days on legal databases.³⁰

CLOSED HEARINGS AND ANONYMISATION

Authority of the Tribunal

The default position is that the Tribunal conducts hearings that are open to the public and that 'evidence given... and the contents of documents lodged with the Tribunal or received in evidence...should be made available to all the parties'.³¹ Given the open nature of proceedings, and all it may entail, this may inform an applicant's decision to pursue the review option. Privacy afforded to the applicant in the proceeding before the original decision-maker does not usually extend to an appeal before the AAT. The practical effect of this is that information provided to the Tribunal during the course of the process may be referred to in the decision and access to the file may be sought by any member of the public.³² However there are circumstances in which the Tribunal will take steps to provide some protection of personal and commercial information.

General discretion

The Tribunal's discretion to make an order with respect to confidentiality can be enlivened when special circumstances are determined to exist. Section 35 of the AAT Act requires the >>

Tribunal to:

... pay due regard to any reasons given to the Tribunal why the hearing should be held in private or why publication or disclosure of the evidence or the matter contained in the document should be prohibited or restricted.³³

It is open to the Tribunal to:

- direct that a hearing shall take place in private and direct who may be present;
- prohibit or restrict the publication of the names and addresses of witnesses appearing before the Tribunal;
- prohibit or restrict the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal; and
- prohibit or restrict the disclosure to some or all of the parties to a proceeding of evidence given before the Tribunal, or the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceeding.³⁴

The threshold is lower in the AAT than for courts issuing suppression orders. It is important to note that any protections afforded in the AAT do not automatically follow a matter if it is taken on appeal to the Federal Court of Australia.³⁵

Application for directions

Parties may request, under s35 of the AAT Act, a direction with respect to hearings, evidence, names of people and contents of documents. The Tribunal is required to give due consideration to the request, being informed by the views of all the parties, within the context of what is anticipated by the provision and the overarching principle of openness. When a party makes an application pursuant to s35 the other party will be asked to provide their position with respect to the request – whether they consent, oppose or neither consent nor oppose.

Private hearings

In some instances, because of the information dealt with in the hearing,

parties may apply for the hearing to be closed. In considering such a request, and making the resultant order, the Tribunal must be 'satisfied that it is desirable... by reason of the confidential nature of any evidence or matter or for any other reason'³⁶ that proceedings should be in part or in full held in private. Therefore, if such an order is made, only certain individuals will be permitted to attend the hearing, or parts of it. This means that those who might be excluded, or have restricted access, include some people with a degree of involvement in the matter, members of the public and the media.³⁷

Anonymising applicant details

There is no express power within s35 of the AAT Act for the Tribunal to make an order prohibiting publication of an applicant's name.³⁸ However, the 'power is a concomitant of the power in s35(2)(b)'³⁹ regarding prohibiting or restricting publication of evidence.

Anonymisation may involve the use of a randomly generated pseudonym or a generic term like 'Confidential', 'Applicant', 'Taxpayer', 'Gambler' or 'Private Tutor'. In *X and Defence Force Retirement and Death Benefits Authority*⁴⁰ the Tribunal took steps to protect the identity of the applicant with the pseudonym 'X' and the term 'Applicant' was used in the decision. Paragraphs addressing the applicant's military service and the cause of injury were also omitted.⁴¹ Although the findings⁴² summarised the applicant's health and employability, the information was not sufficient to enable identification of him.

Pearce has identified the following bases for anonymisation of an applicant's details:

- protection of an applicant's employment prospects;
- to benefit an applicant's rehabilitation;
- to protect the interests of an applicant's child;
- to not deter others from accessing the AAT due to negative publicity;
- to avoid irreparable damage to a business name;
- to avoid unnecessary disclosure of information about an applicant; and

- to ensure consistency with the purpose of an Act.⁴³

There must be a balance between providing details that are relevant to a key issue being determined by the Tribunal and personal information about the applicant. The current trend appears to be that information, the removal of which would have little, if any, practical implications on the reasoning process, can be excluded.

XZTT and Anti-Doping Rule Violation Panel,⁴⁴ which involved a cyclist's alleged use of a prohibited drug, is an example of a matter that the media were constrained from fully reporting. The hearing was closed and the identity of the cyclist was protected through to publication of the decision which happened to coincide with the Lance Armstrong controversy.⁴⁵ Although there was potentially sufficient information contained in the decision for a journalist to identify XZTT, the media reports were restrained by the protective orders. In such a situation the real function of the AAT must be remembered: that is, it is reconsidering a decision and making the correct or preferable decision to the one made in private by the original decision-maker – it is not conducting a trial.

Other parties

Confidentiality protections can also be afforded to witnesses. The Tribunal must be 'satisfied that it is desirable... by reason of the confidential nature of any evidence or matter or for any other reason' to prohibit or restrict the names and addresses of witnesses.⁴⁶

Commercial in-confidence

There may be instances where the contents of documents produced in the Tribunal have a commercially sensitive quality warranting specific s35 orders being made about how they are to be dealt with and by whom. It may well be that the information is useful for the Tribunal but should not be seen by others. In such instances, an application can be made requesting an order be given that restricts access to this material in such a way that the documents remain confidential during and after the proceeding.

On appeal

There is a right of appeal to the Federal Court.⁴⁷ However, this is restricted to questions of law or refusals to grant standing.⁴⁸ The low threshold for s35 anonymisation orders does not follow a matter on appeal. It is possible, but rare, to obtain confidentiality orders withholding the names of parties in the Federal Court.⁴⁹ Generally, such orders will only be made when it is 'necessary' to protect the administration of justice.⁵⁰ However, *XZTT* is currently on appeal to the Federal Court and the pseudonym, so far in those proceedings, has been retained.⁵¹

Specific powers

In addition to the general discretion under s35, various statutes provide additional confidentiality powers with respect to some of the jurisdictions conferred on the Tribunal. Taxation and Security Appeals Division matters are briefly discussed below.

Tax matters

Section 14ZZE of the *Taxation Administration Act 1953* (Cth) (TAA) confers on an applicant the right to request that any hearing (other than in relation to a proceeding in the Small Taxation Claims Tribunal)⁵² be in private. If the hearing is held in private, the associated provision, s14ZZJ of the TAA, requires that the applicant is not to be identified in the Tribunal's reasons for decision. In these tax cases the Tribunal will also protect information such as company names. This can be problematic for a journalist wanting to report on a topical tax matter that has been highly anonymised.⁵³

Security Appeals Division

Another exception arises for matters heard in the Security Appeals Division. These are appeals to the AAT with respect to adverse and qualified security assessments made by the Australian Security Intelligence Organisation (ASIO). These proceedings are kept highly confidential and are heard in private and are subject to particular restrictions.⁵⁴

Section 35AA of the AAT Act allows the Tribunal to make directions that

restrict or prohibit publication of evidence, particulars of witnesses, matters contained in documents lodged or received in evidence and 'the whole or any part of its findings on the review'. This is to be read in the context of s43AAA of the AAT Act, which deals with the applicant's entitlement to publish the findings.

The issue of general publication of Security Appeals Division decisions has recently been considered by the Federal Court. There has been a shift towards the default position favouring publication, even if what is ultimately released is highly edited. In *RJCG v Director-General of Security*,⁵⁵ Foster J remarked that:

'Notwithstanding the terms of s 43AAA of the AAT Act, there is apparently a practice within the AAT not to make available to members of the public Reasons for Decision handed down by the AAT in its Security Appeals Division. There is no foundation in the AAT Act for that practice.'

In *TCXG and Director-General of Security*⁵⁶ the Tribunal regarded itself as bound to follow *RJCG*. It determined that redacted and anonymised reasons for decision should be published as is the AAT's practice for other matters. The Tribunal stated:

'Publication of the Tribunal's reasons, even in the very redacted form required in this case, would permit

the public, the legal profession and others with an interest in the rule of law to have available to them a limited but still intelligible account by the Tribunal of its understanding of its duty and some insight, in so far as the law allows, into how it is discharging that public duty in the Security Appeals Division. There is a well-recognised public interest in courts and tribunals publishing their reasons. In the ordinary course that is the Tribunal's duty. There is a legitimate public interest in making known to the community how the Tribunal goes about its work even if, as in the present case, the Tribunal is constrained to reveal few details of the facts of the case.'⁵⁷

This is supported by the approach of the Tribunal in *JTMJ and Australian Securities and Investments Commission*:⁵⁸

'Principles provide for a consistent pattern rather than a single outcome. What it means is that the principles will have been applied consistently so that the reason for the variation can be seen and the place of the particular case can be seen in the overall pattern of cases.'⁵⁹

MEDIA

The media has increasingly taken interest in and reports on AAT decisions. This is important because it makes the community aware of the role and function of the AAT, informs >>



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about how matters are handled, and it helps reiterate the importance of having a body with the capacity to conduct independent merits review of decisions. As the jurisdiction expands, for example review of decisions made by DisabilityCare Australia, this focus is likely to continue.

Media standing

There are circumstances in which the media may be heard on the issue of closed hearings and anonymisation. Such applications are entertained on the basis there is sufficient public interest in the matter and, therefore, access to material should be provided. In *Kanina Banner and Minister for Health and Ageing*⁶⁰ the Tribunal considered an application from the Herald Weekly Times regarding the s35 order imposed. Deputy President Forgie considered that s35 requires that the Tribunal consider and determine 'where the balance lies between competing public interests'.⁶¹ Furthermore:

'... the parties cannot be considered to be the only persons who are in a position to express an opinion as to where the public interest should lie when considering issues relating to s35. The very fact that the section has at its heart disclosure, or otherwise, of the Tribunal's proceedings to the public must mean that there may well be members of the public who are not parties and who would not have interests affected by the decision to warrant their being made parties to the proceeding pursuant to s30(1A) should they apply but who can reasonably be said to have sufficient interest in the matter to entitle them to be heard as to whether the Tribunal should exercise its powers...'.⁶²

In *Kanina* the Tribunal determined that the Herald Weekly Times could be said to 'represent aspects'⁶³ of the public interests and it was appropriate to hear it in relation to the s35 orders. However, in that case the balance of public interest was found to weigh in favour of a private hearing, until the decision of the Tribunal was handed down and at that time the confidentiality orders ceased.⁶⁴

CONCLUSION

Media attention appropriately opens the AAT up to public scrutiny. However, while commentary and debate is important, it is essential that it is based on an understanding of the jurisdiction. The range of matters dealt with and the variety of pertinent statutes mean that there is no hard and fast rule about closed hearings and anonymisation. In fact there are times when the Tribunal has little or no discretion about these processes. Furthermore, it should be kept in mind that the Tribunal is not a court and hearings are not trials; rather, it acts as the substitute decision-maker in matters that generally would be dealt with privately by a government decision-maker.

The only bar to journalists attending or reporting on proceedings in the AAT arises when the general discretion or another power is exercised by the Tribunal. Although there may be standing, on public interest grounds, for a media agency to be heard on the appropriateness of closed hearings or anonymisation it is in limited circumstances. One result for the media, when exceptions to open proceedings are exercised, is the practical difficulty of reporting decisions that are in the public domain but subject to confidentiality orders. ■

Notes: **1** *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) s35. **2** AAT Annual Report 2011-2012, President Kerr, President's Overview. **3** AAT Act, s25. **4** For example review of government decision-making on Norfolk Island is a recent addition to the jurisdiction. **5** AAT Annual Report 2011-2012, Phillip Kellow, Registrar's Overview, 11. **6** The Small Taxation Claims Tribunal is a subdivision of the Taxation Appeals division. **7** Kellow, above n 5. **8** Review of decisions made by DisabilityCare Australia under the *National Disability Insurance Scheme Act 2013* (Cth) include decisions about who is eligible to access the scheme; supports provided under the scheme; and the registration of providers of supports. <http://www.aat.gov.au/ApplyingForAReview/DisabilityCareAustralia.htm> **9** This includes the Department of Families, Housing, Community Services and Indigenous Affairs and the Department of Education, Employment and Workplace Relations. **10** For a full jurisdiction list see <http://www.aat.gov.au/AboutTheAAT/>

[IntroductionToTheAAT.htm](#). **11** Kellow, above n 5. **12** AAT Act, s43. **13** Dennis Pearce, *Administrative Appeals Tribunal* (2007, 2nd ed) LexisNexis Butterworths, 1. **14** *Ibid*. **15** AAT Act, s2A. **16** Forgie DP in *Re The Australian and Department of Families, Community Services and Indigenous Affairs* (2006) 92 ALD 179. **17** AAT Act, s27. **18** *Ibid* s32. **19** Annual Report, 19. **20** AAT Act, s33(1AA) requires the respondent to use 'their best endeavours to assist the Tribunal to make its decision...' and generally they are bound to comply with the model litigant approach. **21** *Ibid* s37 requires the respondent to compile the 'T Documents'. **22** *Ibid* s39(1) provides that a party is to be given a reasonable opportunity to present their case and make submissions on the documentary evidence. The Tribunal may request other documents be provided (s37(2)) or additional statements obtained (s38). **23** *Ibid* s40(1A). **24** *Ibid* s33. **25** *Ibid* s33(c). **26** *Ibid* s43(2B). **27** *Ibid* s28. If requested this must be done within 28 days. **28** In contrast to court-made judgments that are 'delivered'. **29** AAT Act s43(3). **30** AAT decisions are available on Austlii. **31** AAT Act, s35(1). **32** *Ibid* s35(3). **33** *Ibid* s35. **34** *Ibid* s35(2)(a) to (c). **35** See *RJCG v Director General of Security* [2013] FCA 269. **36** AAT Act s 35(2)(a). **37** See Pearce above n 13, at 754. **38** *Ibid* at 755. **39** *Ibid*. **40** [1980] AATA 81 (23 December 1980). **41** Paragraphs 2 to 17 were omitted. **42** At [18]. **43** See Pearce, above n 13, at 755. **44** [2012] AATA 728 (23 October 2012). **45** October 2012. **46** AAT Act, s35(2)(aa). **47** *Ibid* s44. Appeal to the Federal Court may also be via the using the ADJR Act. **48** *Ibid* s44(2). **49** See Part VAA, *Federal Court of Australia Act 1976* (Cth). **50** *Hogan v Australian Crime Commission* (2010) 240 CLR 651. **51** The matter was listed in May 2013. **52** In Small Taxation Claims Tribunal matters, s35 of the AAT Act can be exercised but there is no automatic right for a private hearing. **53** See for example *ZZGN and the Commissioner for Taxation*. **54** AAT Act ss39A and 39B; *Australian Security Intelligence Organisation Act 1979* (Cth). **55** [2013] FCA 269. **56** [2013] AATA 377 (5 June 2013). **57** Justice D Kerr (President), Mr RP Handley (Deputy President) and Ms JF Toohey (Senior Member) at [17]. **58** [2010] AATA 471 (25 June 2010). **59** **60** [4]. **61** [12]. **62** [13]. **63** [14]. **64** [43].

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