HERBERT SMITH FREEHILLS

UNDERSTANDING THE ADMINISTRATIVE APPEALS TRIBUNAL (AAT) - RECOMMENDATIONS FOR GOVERNMENT REFORM

29 July 2019 | Australia
Legal Briefings – By **Graeme Johnson** and **Julian Vertoudakis**

Ian Callinan has made 37 recommendations for reform of the AAT.

BACKGROUND

In the 1970s the Commonwealth instituted a number of reforms which made it easier to review the decisions of Ministers and agencies. One reform was to simplify judicial review, another was to introduce an Ombudsman and a third was to create the AAT – an independent tribunal that would provide a means to review decisions of a specified nature. In the early 1980s this 'new administrative law' was complemented by the introduction of the Freedom of Information Act.

The AAT was an important reform because it enabled decisions to be reviewed on their merits. Prior to its creation there was little scope for external merits review, the Taxation Boards of Review being a notable exception. While the AAT Act was introduced by the Whitlam Government it had and continues to have strong bipartisan support.

PRESENT DAY

The AAT provides for a powerful form of review. It reviews decisions on their merits. The AAT member can exercise all the powers of the original decision-maker, has all the discretions given to that person and is to reach not just the correct decision, but also the preferable decision. The AAT is part of the Executive arm of Government but it is also meant to provide independent review often involving a process not too different from an adversarial Court process. It holds hearings; parties can be legally represented; it hears evidence; and it provides reasoned decisions that are publicly available.

The AAT's most important jurisdictions by volume are in the migration and social security fields. Before 2015 there also existed other tribunals that dealt with such decisions – the Social Security Appeals Tribunal, the Migration Review Tribunal and the Refugee Review Tribunal. In 2015 the AAT absorbed the jurisdiction of these tribunals to create a super-tribunal. Now over half the applications to the AAT are migration decisions. This is perhaps not surprising as in the 2017-2018 year 8,694,048 temporary visas were issued in Australia.

The jurisdiction of the AAT is enormous. A document describing the various heads of jurisdiction runs for 429 pages. The AAT has an important review role in relation to decisions affecting commercial interests.

THE AAT AND ASIC

ASIC wields extremely potent powers in relation to financial services providers and financial products. Its approval is necessary to operate a financial services business and the guillotine of its enforcement powers hangs precariously over financial services providers, which can be subject to interventions against them and the particular financial products they offer in the form of banning, stop and product intervention orders. Accordingly, achieving favourable outcomes whenever one of ASIC's powers is exercised is a matter of clear commercial significance for any financial services provider. The AAT has extremely broad powers of review in relation to ASIC's regulation of financial products.

For example, the AAT is able to re-exercise ASIC's decision-making power in relation to the:

- grant, variation, suspension or cancellation of an Australian financial services licence, without which it is unlawful to carry on a financial services business in Australia;
- making of banning orders prohibiting a person from providing financial services;
- grant of an exemption from any requirement of the Corporations Act;
- making of stop orders, which prohibit conduct specified in the order in relation to a particular financial product if disclosure documents are defective;
- making of product intervention orders by ASIC against specified persons, which prohibit conduct specified in the order if ASIC is satisfied that a financial product is likely to result in significant detriment to retail clients; and
- registration and deregistration of managed investment schemes, without such registration interests in the funds cannot be offered to retail investors.

THE AAT'S COMMERCIAL REACH

The AAT's jurisdiction extends into the commercial arena in areas including:

- *taxation*, such as the ATO disallowing elections to pay GST by instalments and making declarations to negate or reduce GST disadvantages, refusing to issue or cancelling a tax file number, decisions on objections relating to determinations that particular amounts should have been allowed as deductions;
- *anti-money laundering and counter-terrorism financing*, such as AUSTRAC cancelling a person's registration, requiring certain things of reporting entities or giving directions to a reporting entity;
- *banking, superannuation and insurance*, such as a decision by APRA to grant or revoke an authority to act as an authorised deposit-taking institution, refuse authorisation for a company to carry on an insurance business, or refuse an application for or to impose additional conditions on an RSE licence;
- *registration of business names*, such as a decision by ASIC to register or refuse to register a business name to an entity;
- *customs and excise*, such as a decision to determine the proportion of the value of goods that is the value of a part, component or ingredient in any goods;
- *research and development*, such as registering or refusing to register an entity for activities; and
- *medical devices and pharmaceuticals*, such as a decision by the Therapeutic Goods Administration to refuse to grant consent to import or export therapeutic goods into or out of Australia.

REVIEW OF THE AAT – THE CALLINAN REPORT

When the amalgamation of the social security and migration tribunals took place in 2015 the legislation required the Attorney to cause a review of the AAT's operations arising from the amalgamation within 3 years. In July 2018 Christian Porter announced that ex-High Court Justice Ian Callinan AC had been appointed to undertake this task. He duly conducted a review and reported in December 2018 although the Report was only made available to the public on 23 July 2019.

The Report is lengthy, thoughtful and makes 37 recommendations for reform. Callinan has not restricted himself to considering matters of great legal moment. He has descended to the level of recommending basic matters such as making hearing rooms more available and making sure that Government Departments properly prepare and organise their files for delivery to the AAT when a decision is challenged.

A number of other suggested measures are at a much higher level, some involving an increase in funding for the AAT. For example, it is recommended that more members be appointed to the AAT and that more senior members of the Tribunal should be allocated clerks. Offsetting such need for funds might be the recommendation that the AAT cease to engage external consultants to do or assist in administration and that instead the AAT registry staff perform administrative work themselves. This suggestion, if taken up in other areas of Government, might work a revolution in how modern governments implement policy decisions and justify some of their actions.

At a fundamental level Callinan is highly critical of the role of the registry staff (public servants) in 'helping' the independent members reach their decisions and write their reasons. He suggests they be put back in their place and that the community would not expect an independent review of a decision to be influenced by the administration itself. On a similar theme, he recommends (with possibly some limited exceptions) that the AAT members all be qualified lawyers and that they be appointed purely on the basis of merit.

When the AAT was created back in 1975 a body known as the Administrative Review Council (**ARC**) also came into existence. Its role included keeping the Commonwealth administrative law system under review, monitoring developments in administrative law and recommending to the Attorney improvements that might be made to the system Unfortunately the Abbott Government, while unsuccessful in its attempt to amend the legislation and abolish the ARC, did the same thing in a de facto manner by starving it of funds and having it swallowed up by the Attorney-General's Department. Callinan recommends that it be restored to its former glory.

One important general suggestion applying across all fields, including in relation to decisions affecting corporate entities, is that there no longer be a right for an applicant on review to provide evidence and material to the AAT that was not before the original decision-maker. Instead the AAT would have a wide discretion whether to receive or refuse such evidence. If implemented this measure would render a significant change, and not necessarily for the better. It is not always the case that a person will have all the necessary material available to give to the Government official especially when the likelihood of an adverse decision is not fully appreciated and time periods may be very short. It has been a fairly cardinal rule that the AAT decides matters on the merits on the basis of evidence before it at the time it makes its decision. It is not a body that reviews the decision making process of the original decision-maker. It comes to the matter afresh and shorn from having necessarily to understand the thought processes that lay behind the original decision. This applies equally to the Government who are free to justify the original decision on new grounds and on the basis of fresh evidence. To limit the evidence before the Tribunal is to make it more like a Court looking for error although it still would be deciding a matter on its merits.

It is true that the recommendation includes a discretion to admit new evidence, but the exercise of that discretion may itself engender appeals and challenges and add to cost and delay. This recommendation should be given careful thought, particularly if it is to apply generally across the entire jurisdiction of the Tribunal.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

GRAEME JOHNSON
PARTNER, SYDNEY

+61 2 9225 5405
Graeme.Johnson@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2021

SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE
Close

© HERBERT SMITH FREEHILLS LLP 2021