

SUBMISSION BY THE ADMINISTRATIVE APPEALS TRIBUNAL TO THE JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT INQUIRY INTO THE EFFECT OF THE EFFICIENCY DIVIDEND ON SMALL AGENCIES

Introduction

The Administrative Appeals Tribunal is an independent tribunal established by the *Administrative Appeals Tribunal Act 1975*. Although it is part of the portfolios of the Attorney-General's Department it has a one line budget allocation so that it is entirely independent of government in administering its budget. The role of the Tribunal is to provide independent merits review of administrative decisions. The Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick¹.

Merits review of an administrative decision involves a reconsideration of the decision. On the facts before it, the Tribunal decides whether the correct, or, in a discretionary area, the preferable, decision, has been made in accordance with the applicable law. The Tribunal will affirm, vary or set aside the decision under review. If the decision is set aside the Tribunal substitutes its own decision.

The Tribunal does not have a general power to review decisions made under Commonwealth legislation. The Tribunal can only review a decision if an act or regulation or other legislative instrument specifically provides that a decision is subject to review by the Tribunal. The Tribunal has jurisdiction to review decisions made under approximately 400 separate acts and legislative instruments. Decisions in the areas of social security, veterans' affairs, workers' compensation and taxation provide the bulk of the Tribunal's workload. The Tribunal also reviews decisions in areas such as bankruptcy, civil aviation, corporations' law, customs, freedom of information, immigration and citizenship, industry assistance and security assessments undertaken by the Australian Security Intelligence Organisation.

The Tribunal consists of a President, other presidential members (comprising judges and deputy presidents), senior members and members. It exercises powers in divisions which include the general administrative division, security appeals division, taxation appeals division and veterans' appeals division. Staff members are employed under the Public Service Act to assist the Tribunal to carry out its functions.

In addition to the President, there are some 18 full-time members and 56 part-time members. Some 160 staff are employed, including persons in ongoing full-time, ongoing part-time and non-ongoing roles.

Pursuant to section 64 of the *Administrative Appeals Tribunal Act 1975*, the Tribunal is required to maintain a registry in each state of the Commonwealth. The Tribunal is subject to the requirements of the *Financial Management and Accountability Act 1997*. Members of the Tribunal are independent quasi-judicial officers whose pay and

¹ See section 2A, *Administrative Appeals Tribunal Act 1975*

conditions are set by the Remuneration Tribunal under the *Judicial and Related Officers' Determination*.

Current Budgetary Situation

In 2008/2009, as set out in the Attorney-General's portfolio budget statements (see table 3.2.3), the Tribunal's total income will amount to \$33,296,000 made up of appropriations by government of \$31,849,000, section 31 agency receipts of \$1,073,000 and \$374,000 of other revenue being Judges' pension and audit services received free of charge. The Tribunal has received permission to operate at a \$600,000 deficit in 2008/2009.

The Tribunal, in response to the need to find cost savings, will be undertaking a review of all current staffing levels and services, including case management practices and procedures to ensure applicants and respondents are dealt with as quickly and efficiently as possible within available funding. In order to achieve additional efficiencies, the Tribunal will review the costs of delivering circuit services and may increase the use of videoconferencing in lieu of travel. However, as will appear these cost cutting measures will not enable the Tribunal to operate without loss and are not sustainable.

For the year ended 30th June 2007, the Tribunal had 7,358 new matters lodged with it, finalised 7,297 matters and had 8,173 matters on hand. Current figures indicate that both lodgements and finalisations will be lower in 2007/08. Matters on hand will decrease with finalisations expected to exceed new lodgements

The Efficiency Dividend in Context

The efficiency dividend needs to be seen in context within a range of other current and previous government policies that adversely affect small agencies. These include:

- The requirement to fund staff wage increases over and above the provided inflator figure (less the efficiency dividend) through productivity savings.
- Failure to supplement depreciation funding notwithstanding the fact that on the changeover to accrual accounting, some assets were not completely funded for depreciation or not funded at all. This policy assumes that the cost of replacing assets remains constant when it is constantly rising.
- Failure to pay any interest on or add an inflator to agency reserves with the result that their real value is constantly decreasing. These reserves fund future asset purchases and employee liabilities that are growing in cost due to inflation and are not funded elsewhere.
- The fact that many small agencies have a very high proportion of costs that are not controllable within the short term (such as rent) as compared to controllable costs.

Attached is a document that sets out some of the impact of government policies on the finances of the tribunal in the past few years

The Problem with the Efficiency Dividend

The position of a small agency, carrying on functions similar to the Administrative Appeals Tribunal, might be expected to be something like this.

Staff salaries and rent will represent about three-quarters of its budget. The budget will have been reducing by at least one per cent (and more recently one and one-quarter per cent) each year for more than a decade. Compounding makes the total considerably more than ten per cent over the decade. The annual inflator added to the budget is considerably less than annual cost increases. It is reduced by the efficiency dividend.

The cost of accommodation and wages has not been static but has been increasing annually by at least four per cent. Accommodation costs are fixed. Staff cannot be further reduced. Although constantly increasing these costs are not controllable.

It follows that not only have real budget reductions of more than 10 per cent been met in the past decade, but they have been met notwithstanding real increases in wages and rent. Moreover, the costs could not be met out of reduced expenditure on the three-quarters of the budget devoted to wages and rent. Annual increases of four per cent have to be met for this three-quarters of budget. The efficiency dividend and increases in the three-quarters of the budget have to be met out of the balance of the budget. Efficiency dividends of one per cent become practical cuts of four per cent out of one-quarter of a budget which must meet real increases in budget costs as well.

The efficiency dividend is not the only budgetary principle which creates problems for small agencies. Others are referred to in these submissions. They compound the problem.

This year the one and one quarter per cent efficiency dividend becomes three and one quarter per cent. In the Tribunal's case, the additional two per cent (or \$600,000) can be met this year from an approved budget deficit of that amount. However, the ordinary efficiency dividend, on top of a decade of efficiency dividends, has taken its toll. The budget for hearings in the Tribunal (the Tribunal's most essential activity) must be reduced. Important professional development activities have been cancelled. Other cuts have been necessary. This process is not sustainable into the future.

Specific Questions

In answer to the specific questions posed, the Tribunal provides the following information:

Whether the efficiency dividend has a disproportionate impact on smaller agencies, including whether or not smaller agencies are disadvantaged by poorer economies of scale or a relative inability to obtain funding for new policy proposals

Agencies such as the Administrative Appeals Tribunal, which has a legislatively mandated service requirement and is geographically disparate, have a greater difficulty, than larger agencies, in finding efficiencies due to a lack of economies of scale. First, agencies which have only one function (reviewing government decisions

in the case of the Tribunal) cannot give priority to some functions and delay others. Secondly, small agencies cost structures are generally dominated by fixed or long term costs such as property, depreciation and salaries. The relatively small amount of discretionary funding available for administrative costs and additional projects represents a small proportion of total funding. The impact of the efficiency dividend is much greater when most of the savings must be generated from this small funding pool. Furthermore, there is an apparent incapacity of smaller agencies such as the Tribunal to attract NPP funding. The failure to attract NPP funding appears to be due to a variety of reasons including:

- The large threshold for NPP funding.
- The inability of small agencies to be able to carry their NPPs in an environment where they may be competing with a much larger portfolio agency that may be reluctant to sacrifice the agencies' own NPP's in order to allow a smaller agency's NPP to succeed;
- An unwillingness of government to apparently fund infrastructure projects, such as new case management systems in the AAT's case, together with an expectation that these can be internally funded from existing resources.
- There is a general attitude that smaller value NPP's can be easily absorbed by existing funding but in a small agency a small NPP may represent a significant percentage of total funding available.

Whether the efficiency dividend is now affecting the capacity of smaller agencies to perform core functions or to innovate

Small agencies generally exist to perform a single core function and, as a result, have few, if any, discretionary sub-programs that can be sacrificed to the increased demands of the efficiency dividend.

Agencies such as the AAT have now reached the stage where their critical mass is such that they cannot effectively fulfil both their statutory requirements and undertake other requirements of government in relation to governance, risk management, compliance with the procurement guidelines to the required level and innovate.

In many cases, there is simply no funding available for special projects and systems are in a maintenance mode only. This stifles the capacity of agencies to drive change, extract efficiencies or limit cost increases through the adoption of new systems. Various governance and procurement requirements adversely affect smaller agencies as they absorb a far greater proportion of the available resources than for larger agencies, which are able to devote expert full-time resources to these requirements. In smaller agencies these are an additional task which must be undertaken by officers who are already struggling to find time to complete the multitude of other pressing tasks.

What measures small agencies are taking to implement the efficiency dividend, and the effect on their functions, performance and staffing arrangements.

As set out in the portfolio budget statements, the Tribunal is undertaking a review of its management, corporate services and other arrangements with a view to finding further efficiencies without negatively affecting performance or the provision of

services to users of the Tribunal. To this end, the Tribunal has engaged PriceWaterhouseCoopers to conduct a review of the corporate services functions of the Tribunal and Acumen Consulting to conduct a review of current IT services. Preliminary indications are that, in the consultants' views, there is simply not the level of efficiencies available, to enable the Tribunal to find \$600,000 in savings, being the extent of the additional 2% efficiency dividend. The Acumen Consulting report indicates that the Tribunal is currently underspending significantly in relation to IT services as compared to other agencies and industry benchmarks. A significant injection of funding is required in order for the Tribunal to bring its IT services up to comparable government standards and maintain them at that level.

In the absence of additional funding, the only way the Tribunal can make the necessary savings in order to achieve the required budget outcome is to slow down the processing and hearing of appeals by cutting part-time member expenditure and associated support services. This will directly impact not only on individual applicants, but will also have follow on effects to respondent departments whose decisions are the subject of review. Such a slow down in the processing of appeals would appear to be at odds with the Tribunal's statutory obligation of providing a mechanism of review that is quick.

Any impact of the efficiency dividend on the use by smaller agencies of "section 31" agreements to secure non-appropriation receipts (eg through user charges and cost recovery) – noting that these receipts are not subject to the efficiency dividend.

First, it must be noted that all fees received by the Tribunal are paid into consolidated revenue. Fee increases would have no effect on the Tribunal's budget. Other sources of section 31 receipts have been fully utilised by the Tribunal to increase its income. This has involved the letting or use of AAT facilities by other bodies or tribunals (consistent with the role of the Administrative Appeals Tribunal) to generate income. In this regard the Tribunal has:

- Provided tribunal hearing rooms for Royal Commissions or inquiries such as the Australian Wheat Board Inquiry, Centenary House Inquiry and most recently the Equine Influenza Inquiry,
- Allowed use by other government bodies and private individuals of the tribunal's videoconferencing facilities to generate significant additional income,
- Provided accommodation and registry services to other tribunals
 - Perth: the Tribunal provides facilities for the Migration Review Tribunal and Refugee Review Tribunal;
 - Adelaide: the Tribunal provides accommodation services for the Refugee Review Tribunal and the Migration Review Tribunal, accommodation for the National Native Title Tribunal and most recently hearing room accommodation for the Veterans' Review Board;
 - Canberra: the Tribunal provides hearing room accommodation for the Veterans' Review Board;

- Brisbane: the Tribunal provides hearing rooms and office accommodation for the Migration Review Tribunal and Refugee Review Tribunal;

These arrangements have provided whole of government savings for which the Tribunal, as an independent agency, does not necessarily receive full benefit.

The capacity of the Tribunal to continue to make such arrangements and generate additional income is limited. Further savings to the required extent cannot be found from this type of activity. This type of arrangement, whilst beneficial in respect of income, is not a core function of the Tribunal and takes up a significant amount of management time which could otherwise be devoted to the finalisation of additional matters within the Tribunal

How application of the efficiency dividend is affected by factors such as the nature of an agency's work (for example, cultural, scrutiny or regulatory functions) or the degree of discretion in the functions performed by smaller agencies:

The Tribunal's method of operation is dictated by the provisions of the *Administrative Appeals Tribunal Act 1975*, together with jurisprudence developed since the commencement of the Tribunal in 1975. The Tribunal is required to conduct hearings. Members, hearing rooms and registries are required in every state.

The recent government focus on alternative dispute resolution procedures, whilst hopefully providing some benefit to the parties in terms of the cost of the resolution of matters, does not necessarily involve cost savings to the Tribunal. In fact, from the Tribunal's point of view, ADR procedures can involve the addition of a further layer of activity and cost between the commencement of a matter and its finalisation through a hearing and decision. Failed ADR procedures can add significantly to the cost to the Tribunal.

The Tribunal is a non-cost jurisdiction. Apart from an application fee payable by an applicant, no further charges are levied on an applicant notwithstanding that the matter may go through to an expensive hearing. Furthermore, the Tribunal does not receive the benefit of any application fees as these are paid into consolidated revenue. The Tribunal therefore has very limited capacity to alter its method of operation and work practices as these are dictated by both statute and common law.

Government policies can have a huge impact upon the workload of the Tribunal. The Tribunal is a demand driven agency in that it cannot control the amount of work that it receives as this is generated by appeals lodged from decisions by departments and agencies. For example, the Tribunal recently experienced a surge in the number of appeals from the Australian Taxation Office as a result of decisions made in relation to mass marketed tax schemes. Whilst the Tribunal has been able to work effectively with the Taxation Office to manage these matters and deal with them as efficiently as possible, the generation of appeals against ATO decisions is an area that is completely outside the control of the AAT. It is the actions of the ATO that determine the number of appeals that come to the Tribunal.

In a similar way, in the compensation area, licences have been granted to a number of private employers, including the Commonwealth Bank, the National Bank and some transport companies to come under the Comcare workers compensation regime. The Tribunal has been assured that the number of appeals that will make their way through to the Tribunal will be small. The Tribunal is expected to merely absorb this additional workload, as it is not sufficient to trigger an NPP process. It is only when there is a very significant number of appeals (such as the ATO mass marketed tax scheme objections) that the Tribunal is able to successfully seek additional funding. The inability to control inputs seriously affects the capacity of the Tribunal to make long term budget decisions.

If appropriate, alternatives to an across-the-board efficiency dividend to encourage efficiency in the Commonwealth public sector, including consideration of whether certain agencies should be exempted from the efficiency dividend, or whether the rate of the dividend should vary according to agency size or function

Given the role of the Tribunal to review government decisions, it is not considered generally appropriate for the Tribunal to comment on matters of policy. The Tribunal can indicate that the current system of efficiency dividends, combined with other government policies and practices, is simply not working to ensure that smaller agencies like it receive adequate funding to continue to operate in a manner where their core functions can be properly maintained.

It could well be that there needs to be a much lower threshold for small agencies in terms of NPP money or that there should be exemptions to the efficiency dividend for small agencies. An alternative is that there could be a regular review (say every five years) of an agency's funding to ensure that it is able to adequately undertake its functions and that it is receiving enough funding to ensure that it is financially viable on an ongoing basis. The current system of "financial health checks" seems to predicate itself on the fact that in order to ask for a financial health check, managers of agencies must have failed. It is suggested that in most cases, managers have done very well in continuing to keep agencies functioning given the steadily eroding body of funds available to them.

The current system is designed such that a small agency with no new policy additions, no matter how efficient, will eventually be unable to meet normal increases in running costs and require assistance from government to continue to operate.

