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Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia

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Dear Secretary

Submission to the Inquiry into the Administrative Appeals Tribunal Amendment Bill 2004

Thank you for the opportunity to make a submission to this enquiry.

This submission focuses on the provisions of the Bill that relate to the position of President of the Administrative Appeals Tribunal.

We are particularly concerned about the proposal to eliminate the requirement that the President be a Judge of the Federal Court. The present requirement that the President of the AAT be a Judge of the Federal Court has ensured that the AAT has experienced independent and highly-skilled leadership over the past three decades. This does not mean that other people with different qualifications might not bring qualities and strengths to the Presidency or that widening the qualifications for appointment is necessarily a poor idea. But if the requirements for appointment as President are to be broadened, steps need to be taken to ensure that the leadership of the AAT maintains its reputation for independence and quality.

In his Second Reading speech, the Attorney-General observed that the Bill 'do[es] not involve a fundamental change to the purpose, structure or functions of the tribunal'. However, unless safeguards are introduced, the Bill's provisions relating to the President do threaten such a fundamental change to the AAT's independence.

The President and the AAT

The position of President cannot be divorced from consideration of the role and functions of the AAT.

The role of the AAT

The AAT was established in recognition that 'an inevitable development of modern government has been the vesting of extensive discretionary powers in Ministers and officials in a wide spectrum of business and personal life'.

This development required a 'comprehensive machinery to provide for an *independent* review of the way these discretions are exercised' (Attorney-General Enderby, second reading speech, House of Representatives, 6 March 1975, 1186) (emphasis added).

The independent review performed by the AAT ensures that government can be held accountable for how these discretionary powers are exercised. It does so in three distinct ways.

- It can provides redress to individuals and corporations who are affected by flawed administrative decision-making.
- It can improve overall administrative decision-making by the guidance it gives in those individual cases.
- It can contribute to a culture of accountability, in which administrative decision-makers understand that they exercise power on behalf of the public and that their actions must therefore be able to withstand public scrutiny.

In the nearly three decades since the AAT has been established, the discretionary powers vested in government have, if anything, become more extensive and the need for an independent and effective tribunal remains.

The functions of the AAT

The AAT exercises administrative power. It stands in the shoes of administrative decision-makers and makes a decision that is correct and preferable on the material before it.

The AAT, however, is independent of the decision-maker and his or her department. The AAT and its members are not responsible to the decision-maker or the decision-maker's Minister. The AAT does not depend not depend on the decision-making department for funding. The members of the AAT are not appointed by or subject to removal by or at the instance of the decision-making department. They are not subject to performance appraisal by those departments. In each of these instances, the Act carefully establishes lines of accountability that point away from the decision-making department. These mechanisms reinforce the intended independence of the AAT.

As Brennan J said in *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158, 'The Legislature clearly intends that the Tribunal, though exercising administrative power, should be constituted upon the judicial model, separate from, and

independent of, the Executive (see Part II of the Act). Its function is to decide appeals, not to advise the Executive.'

Independence and accountability

The independence of the AAT is essential to its function.

- For most individuals affected by administrative decisions, the AAT is their last option for seeking redress. Administrative justice – and the appearance of administrative justice – require that the final point of appeal be independent of the initial decision-maker and his or her department. An independent final point of appeal contributes to the legitimacy of the administrative process as a whole.

- Its instutional contribution, to improved decision-making and to a culture of accountability, also depends on its independence from departmental and ministerial decision-makers. It is its very independence and externality that means that it requires decision-makers to give an account of their exercise of government power.

The independence of the AAT does not compromise its own accountability.

- The AAT is subject to an extensive array of mechanisms by which it is accountable to the public directly and through the Parliament. It conducts its hearings in public (except in special circumstances): s 35. In most cases, it must give reasons for its decisions and those reasons must be provided in writing if requested: s 43. They are published on the Internet and available free of charge: http://www.austlii.edu.au/au/cases/cth/aat/. Its decisions are subject to review by the Federal Court: Part IVA. It is required to produce an annual report: s 24R. Its operations are kept under scrutiny by the Administrative Review Council as part of its overall review of the Commonwealth administrative law system: Part V.

The independence of the AAT does not compromise efficient administrative decision-making.

- The AAT is required to conduct its proceedings 'with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit': s 33. Proposed s 2A[1] records the existing approach of the AAT.

- The AAT has long recognised the the importance of efficiency in government administration. The precedents that guide it require that it does not lightly depart from government policy. It attaches particularly great weight to policy determined at the political level. It recognises the expertise of departmental decision-makers. Where there is concern that the tension between the approach of decision-makers and that of the AAT, the Parliament can (and has) directed the AAT to have regard to administrative directions or guidelines.

The role of the President

[1] 'In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.'

General

The requirements for appointment as President should reflect the role of the President of the AAT as a body that performs an independent review of administrative decisions to ensure that they are correct as a matter of law and preferable given all the facts.

- First, the President is a decision-making member of the AAT.
- Secondly, the President has particular responsibilities in the administration of the AAT.
- Thirdly, the President by virtue of his or her office affects the ethos of the AAT and reflects that ethos to the public.

The President must must possess the skills and personal attributes necessary to fulfill each of these aspects of his or her role.

Decision-making skills

As the senior decision-making member of the AAT, the the President 'would need to have high legal skills, high level experience in decision-making and dispute resolution, and an ability to determine authoritatively any decision from the diverse range of matters that would come before the tribunal' (ARC, *Better Decisions*). While many cases that the AAT hears do not require significant legal analysis, there are others – particularly cases on which the President is likely to sit – in which complex legal issues arise. The statutory regimes reviewed by the AAT include the Commonwealth's most complex legislation (for example, parts of the migration, taxation and social security legislation) and difficult legal issues of application and interpretation. The President requires the legal skills to hear these cases and a reputation that indicates to persons affected by administrative decisions, and to the public, that the AAT as an institution has the skills to provide redress in these cases.

As the Leggatt Report observed of the proposed new tribunal system for the UK, the Presidents will have 'the task to promote by leadership and co-ordination, both consistency of decision-making and uniformity of practice and procedure throughout their respective areas of responsibility' (Sir Andrew Leggatt, *Tribunals for Users - One System, One Service*, 16 August 2001, [132], http://www.tribunals-review.org.uk). They will hear 'the most difficult, novel and complex issues, and those which raise general issues of practice and procedure for the System or any of its Divisions' and require the technical and leadership skills to contribue to the development of the principles of administrative justice that will guide government and other members of the tribunal.

Independence

There are several reasons that it is important that the President of the AAT is both independent in fact and perceived to be independent by the Australian people.

The first is that the President sits on important cases, including the more controversial and political cases. These are precisely the types of cases where it is important that applicants exercising their rights under the Act believe (rightly) that their application will be determined on the merits rather than as a result of explicit or indirect political pressure.

Similarly the Leggatt Report described the required qualities of presidential members as being: 'a robust sense of independence from government in all its forms but the ability to conduct a constructive and appropriate dialogue with it, a keen sense of the distinctiveness of tribunals and their functions, and determination to make real improvements in service to the users whilst doing justice to all.'.

In addition, the President helps to create an ethos of independence that permeates the whole operation of the AAT. One way in which this may manifest itself is through the decisions made by the President with respect to the allocation of matters to various members. An independent President ensures that such allocations are made on a rational basis rather than for political reasons. The increased administrative role of the President contemplated by the Bill accentuates the importance of the President's independence. The President is also an independent voice to put the case for necessary changes to the funding, operation or personnel of the AAT.

Finally, the AAT can only perform its role if it is *perceived* by the public to be independent. Even the relatively quick and cheap procedures of the AAT still place burdens of time and cost on applicants. Applicants are unlikely to bear these costs unless they perceive the AAT to genuinely determine issues on the merits. Having a President who is perceived to be independent as the public face of the AAT is an important step in making sure that this perception of independence is maintained. The ARC observed in its *Better Decisions* report that '[i]t is crucial that members of the community feel confident that tribunal members are of the highest standard of competence and integrity, and that they perform their duties free from undue government or other influence' (at 70, quoted in O'Connor J, 'Lessons from the Past/Challenges for the Future: Merits Review in the New Millennium', June 2000, http://www.aat.gov.au/CorporatePublications/speeches/oconnor/lessons.htm).

The Leggatt Report considered independence to be the most important guiding principle for tribunals: 'Tribunals were established because it was clear that the citizen needed an independent means of challenging possible mistakes and illegalities which was faster, simpler and cheaper than recourse to the courts. Tribunals are an alternative to court, not administrative, processes. They will keep the confidence of users only in so far as they are seen to demonstrate similar qualities of independence and impartiality to the courts.' [2.18]

The current requirement that the President be a Federal Court judge

None of this entails that the President *must* be a judge and that the current section 7 be retained unamended. As the ARC commented, the decision-making qualities required 'would ordinarily (but not necessarily) be found in a person who is a judge, or who has legal skills broadly equivalent to that of a judge' (*Better Decisions*). And it is possible to identify persons and institutions with a reputation for independence that are not judges (eg the Auditor-General).

However, there are clear advantages to retaining the present requirement in section 7 that the President be a judge.

Advantages of the current requirement that the President be a Federal Court judge

The perception and reality of independence

The first of these is the *perception and reality of independence* of Australian judges. Most judges take a significant reduction in pay when they become judges. The prestige of Australian judges is not linked to salary but rather to public and professional respect for the role and this in turn is linked to judicial independence. A judge who fails to act independently would quickly lose the respect of the legal profession and would threaten public confidence in the judiciary. The constitutional protections outlined in chapter III of the Constitution are one method of protecting that independence. In particular, section 72 does not allow Federal Court judges to be removed except by 'the Governor-General, on an address from both Houses of Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity' and whose remuneration cannot be diminished during their term in office. The protection of the office and remuneration of federal judges makes it difficult for political pressure to be brought to bear on them in the form of threatened non-appointment or reduction in salary.

In the second reading speech for the original AAT Act, then Attorney-General Enderby described the judicial status of presidential members as 'essential to the successful operation of the Tribunal.' As he noted, the AAT has a role in reviewing the decisions of ministers and the most senior public servants and that nothing less than a 'tribunal of full judicial status would be satisfactory' for the purposes of ensuring appropriate review of high officials in a manner that created confidence in the Australian people (House of Representatives, Hansard, 6 March 1975, 1187).

Legal skills

Further, the *legal skills* of federal judges are generally of the highest quality. The Commonwealth government has the capacity to appoint judges from among the most experienced and talented legal practitioners across Australia. This means that the judges appointed have the capacity to make high-quality determinations of law and to act independently of legal advice. These qualities also allow for quicker hearings as the President is able to follow the legal arguments of counsel and ask relevant, probing questions without the need for consultation. A recent study in the United Kingdom compared the working of lay magistrates (who are not legally trained) with that of stipendiary magistrates (who are legally qualified). The report found that, despite more complex cases being reserved for stipendiary magistrates, those with legal training on average heard 22% more cases than lay magistrates. This was achieved even though stipendiaries tended to ask more questions and make more challenges to counsel. The public and professional perception was also that stipendiary magistrates were more likely to make the correct decision and to handle court business effectively. (Rod Morgan and Neil Russell, *The Judiciary in the Magistrates' Courts*, Home Office Occasional Paper 66, no date, http://www.homeoffice.gov.uk/rds/pdfs/occ-judiciary.pdf). There are thus considerable advantages to having well-trained lawyers making complex legal decisions.

Judges are generally experienced in making sound decisions in complex cases over a range of topics. Given their experience in making legal and factual decisions the quality of the decisions is likely to be better and less open to successful appeal than those of people with less experience in this area.

The combination of independence and legal skills

Ultimately, it is requirement that the President *combine* high level legal skills and the perception and reality of independence that suggests that current requirement is appropriate. These attributes may perhaps be found *separately* not infrequently, but judicial appointment, or eligibility for such appointment, is a strong and reliable indicator of the that the proposed President possesses *all* those attributes.

It is worth noting that the Lord Chancellor has foreshadowed that the UK government's legislative response to the Leggatt Report will include a requirement that the most important leadership positions in the new tribunal system be filled by judges (Lord Falconer of Thoroton, Secretary of State for Constitutional Affairs and Lord Chancellor, Council on Tribunals Conference, London, 25 November 2004, http://www.dca.gov.uk/speeches/2004/lc251104.htm).

Possible disadvantages of the current requirement that the President be a Federal Court judge

Skills

In the second reading speech introducing the current amendments, Attorney-General Ruddock emphasised the need for efficiency, flexibility and responsiveness in the AAT and greater reliance on alternative dispute resolution methods such as conciliation. The background of judges does not necessarily include management skills and some judges may be tempted to use inflexible or legalistic procedures that are not suitable for a body such as the AAT. Judges may also be less familiar with the structures, processes and pressures that operate in administrative decision-making than those who have directly experienced administrative decision-making as members of the executive or public service. But these are equally arguments for increasing the diversity of appointments to the courts. Judges should – and increasingly *do* – have expertise in alternative dispute resolution. The development of administrative law by the courts would benefit from having judges with experience in adminstrative decision-making.

Constitutional issues

The question whether it is constitutionally permissible to appoint a federal judge as President has also been raised on occasion. While it is certainly arguable that such appointments are unconstitutional, we believe that it would be unduly risk-averse to eliminate the current requirement.

Brennan J was undoubtedly correct to assume the constitutionality of his appointment as President. As he said in *Re Becker*, '[t]he legislature clearly intends that the [Administrative Appeals] Tribunal, though exercising administrative power, should be constituted upon the judicial model, separate from, and independent of, the Executive (see Pt II of the Act).' As he observed, the AAT does not advise the Executive but merely determines appeals. The AAT can 'consider the views of the decision-maker' but is not bound to follow them. (*Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158, 161)

In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1997) 189 CLR 1 at 17, the majority of the High Court held that there is unlikely to be any constitutional incompatibility when a federal judge performs an administrative function on non-political

grounds (in other words, on grounds that are not confined by factors expressly or impliedly prescribed by law) and 'independently of any instruction, advice or wish of the Legislature or the Executive Government, other than a law or an instrument made under a law'.

In obiter dicta, the majority specifically observed that there was no constitutional incompatibility in the appointment of a federal judge as President of the AAT. The majority reasoned that '[w]here a judge is appointed as a presidential member of the Administrative Appeals Tribunal, the function of deciding applications must be performed independently of any instruction, advice or wish of the Executive Government' and the judge must determine what he or she 'considers to be the correct or preferable decision' (*Wilson* at 18).

These remarks may well be reconsidered were the question to arise directly in the High Court. While it would be unduly risk-averse to eliminate the current possibility that a Federal Court judge be appointed as President, it would be prudent to avoid any amendments that would reduce the President's independence from the executive government. The present Bill does not give rise to the same level of concern as the Administrative Review Tribunal Bill. However, items 21 and 22 of Schedule 1 should be noted. They repeal subsections 8(1) and (2) in order to ensure that Presidential appointments are for fixed terms. They therefore open the possibility of a President being reappointed on the expiry of their original term as President (see also proposed s 8(3) and Explanatory Memorandum on item 23). If the President is to be denied tenure, it would be prudent to ensure that the terms of judges as Presidents are not renewable.

The Bill's proposal to eliminate the current requirement that the President be a Federal Court judge

Item 15 of Schedule 1 of the present Bill amends section 7 of the Act. It would repeal the current requirement that the President be a federal court judge. Instead, it would substitute a requirement that the President a federal court judge; a former federal or Supreme Court judge; or a legal practitioner of at least five years standing. In the second reading speech, the Attorney-General stated that the purpose of the reform is 'to ensure that the most appropriately qualified person occupies the position of president, regardless of whether or not they happen to be a judge of the Federal Court.'

Advantages of widening the requirements

There are often advantages in widening the pool of potential applicants for important public roles. While the Australian judiciary is outstanding in many respects, it is still predominantly male, white, privately educated and drawn from the Bar. Widening the qualifications could allow for applicants with a wider range of relevant experiences from a more diverse group.

A particular advantage of widening the qualifications, given the other changes being made to the Act, is that the President will gain increased managerial and leadership powers designed to ensure Tribunal flexibility. The President will also take a leading role in ensuring the success of alternative dispute resolution. These managerial and dispute resolution skills are not necessarily ones in which judges have particular training or experience. There may be other backgrounds that would better prepare the President for this aspect of the role.

Concerns with the broader qualifications

The President will, however, still require the key qualities of independence, legal ability, and the capacity to make good decisions. None of these qualities is unique to the judiciary. The Auditor-General and the Ombudsman are examples of offices held by a succession of independent officers without judicial qualification. If, however, the requirement that the President be a Federal Court judge is removed and the Presidency is made a limited term office, concerns about independence will inevitably arise. Under the current proposals a person need only have been enrolled as a legal practitioner for at least five years in order to qualify as President. There would be nothing in the Act itself to prevent the minister from appointing a relatively junior public service lawyer to the position of President. Even if the government had no intention of putting any pressure on that appointee to act in a particular manner, the appointee must be aware that, after his or her term expires, he or she will be at the mercy of the government either for reappointment or appointment to a new governmental position. Even if the appointee him or herself still intended to act with independence and integrity it is hard to see such an arrangement maintaining high levels of public confidence. The protected tenure of judges makes both the likelihood and reality of lack of independence less likely.

Additionally, the low level of qualification provides little guarantee of legal skills. While the requirement that the President must be qualified as a lawyer is maintained, the high standard that usually accompanies appointment to judicial roles is not maintained. This is not to argue that there are not many exceptionally qualified lawyers who are not judges. There clearly are such people. But the proposed amendment does nothing to ensure such people are the ones appointed. Again, it is simply to the discretion of the Attorney to ensure that the appointment is made at an appropriate level.

The widened qualifications pose less of a problem for ensuring the qualities of decision-making skills. People from many backgrounds have to make decisions that involve time and financial constraint and the assessment of large quantity of factual material. Perhaps the most significant value that judges add is their familiarity with running hearings that are similar, although not identical, to court cases.

Conclusion

The present requirement that the President of the AAT be a Judge of the Federal Court has ensured that the AAT has experienced independent and highly-skilled leadership over the past three decades. The present requirement serves as a proxy for these qualities of indendence and ability. There is much to be said for retaining the requirement given the difficulty in identifying those qualities directly. This does not mean that other people with different qualifications might not bring qualities and strengths to the Presidency or that widening the qualifications for appointment is necessarily a poor idea.

Nonetheless, retaining the present requirement is consistent with increasing the diversity of those who are appointed as President of the AAT. Diversity could be increased by virtue of more diverse appointments to the federal judiciary. Making such people judges may also increase the attractiveness of the Presidency for highly qualified potential appointees.

If the requirements for appointment as President are to be broadened, steps need to be taken to ensure that the leadership of the AAT maintains its reputation for independence and quality.

One option might be to have an independent body make the appointments to the AAT rather than leaving the issue to ministerial discretion. An independent body consisting of judges, tribunal members, former senior public servants and community representatives could help to ensure that appointments of the highest quality are made and that re-appointments are based on merit in office rather than political perceptions of performance. This would be similar to a 1996 Victorian proposal and the proposed changes in the United Kingdom where tribunal heads will be selected by the Judicial Appointments Commission made up of judges (Lord Falconer of Thoroton, Secretary of State for Constitutional Affairs and Lord Chancellor, Council on Tribunals Conference, London, 25 November 2004, http://www.dca.gov.uk/speeches/2004/lc251104.htm). Such independence in selection should also help to reassure the Australian people that the office is independent of the government of the day. As a former President of the AAT has said:

> '[A]n appointment process of this kind which institutionalises a consistent merit-based selection process would do much to reassure the community that members have been appointed on the basis of their skills and abilities. It would minimise the potential for allegations to be made that appointments were on the basis of political affiliations or bias. A transparent merit-based appointment process would be a significant part of any comprehensive system to support the independence of tribunal members.' (O'Connor J, 'Lessons from the Past/Challenges for the Future : Merits Review in the New Millennium', June 2000, http://www.aat.gov.au/CorporatePublications/speeches/oconnor/lessons.htm)

There may well be other ways of helping to protect the independence, integrity and quality of the office of President that do not require the President to be a federal judge. (cf *North Australian Aboriginal Legal Aid Service Inc v Bradley* [2004] HCA 31 (17 June 2004) [3] (Gleeson CJ): '[T]here is no single ideal model of judicial independence, personal or institutional. There is room for legislative choice in this area; and there are differences in constitutional requirements.')

The present Bill, however, takes away the guarantees of a minimum of quality and independence represented by federal court judges and has not replaced them with any other mechanism for ensuring these qualities. We believe that, without such mechanisms, the amendments could threaten the reputation and performance of AAT.

Yours sincerely

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