INQUIRY INTO THE ADMINISTRATIVE APPEALS TRIBUNAL AMENDMENT BILL 2004

Submission to the Senate Legal & Constitution Legislation Committee

20 January 2005

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This submission is a joint individual submission.

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Submission by Dr MEC Thorpe, Part Time Member AAT.
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Note: Whilst Dr Campbell and I accept responsibility for this submission, the subject matter has been discussed with other Members of the Tribunal and we aware of their general consensus.

1. The stated purpose of the *Administrative Appeals Tribunal Amendment Bill 2004* is:

> *"… to make the tribunal more efficient, more flexible and more responsive to the ever changing environment in which it operates*"[i].

This includes ensuring the Administrative Appeals Tribunal ("the Tribunal") has the capacity to manage its workload and to ensure that reviews are conducted efficiently.

2. The five key areas of reform are[ii]:
   - Tribunal procedures;
   - Removal of restrictive provisions;
   - Better use of ordinary members;
   - The role of the Federal Court; and
   - Qualification requirements for appointment as President

3. The Tribunal has assisted with the development of proposed changes to the procedures and provisions for reconstitution of the Tribunal. We have very little quarrel with the practice and procedure amendments, the removal of structure of a Tribunal provisions and provision for reconstitution of tribunals and the better use of ordinary members. We are not qualified to comment on the proposed reform changes of the role of the Federal Court, other to say that any measure negating the requirement for a matter to be referred back to the Tribunal, when it can be finalised by Federal Court, is to be applauded.

4. During our very extensive ongoing tenures, the Tribunal has performed its "quasi-judicial" duty[iii] with purposeful endeavour while maintaining its independence. The Tribunal has provided a successful review mechanism for government decision makers at many levels. At the request of government, it provides a level of continuity between the decision maker and high quality merits review. The Tribunal offers a unique opportunity for low cost, independent review. Mr R.K Todd, one time Deputy President, has credited this success to the Tribunal's commitment to its duty:

   - to offer each party a reasonable opportunity to be heard and to present its case;
   - to weigh the evidence or other information placed before it;
   - to construe and apply the relevant law;
   - to expose its reasoning processes to the parties; and

- to avoid bias or the appearance of bias

5. Where appropriate, the inquisitorial role of the Tribunal and the contributions of experts sitting on multimember Tribunals have engendered the applicants with a sense of fairness. A consequence being that the adversarial nature of inquiry, that can be replaced by the inquisitorial role when the situation so warrants, is removed. The pre-hearing processes such as mediation, conciliation have also provided fair and simpler options for resolution and as proposed in the Bill will have a greater role in the future.

6. We share the concerns of the Selection of Bills Committee[iv], namely:

a. the downgrading and potential loss of independence of the Tribunal
b. the potential downgrading of AAT as an accountability mechanism.

7. In the second reading speech[v] Senator Ian Campbell said: "

Taken individually, each of the measures contained in the Bill is relatively modest. However taken together they represent the most substantial reform of the tribunal undertaken since it opened its doors on 1 July 1976."

8. By way of background, Sir Anthony Mason[vi] argued that prior to 1976 administrative decisions made by officers lacking independence from Executive Government, and subject to political or bureaucratic influence, were not made in public; that the reasons for decision were usually unstated, that the requirements of natural justice were not always observed and that the individual claims of justice were often subordinated to public policy. Acknowledgment of these realities led the Commonwealth to introduce an integrated set of statutory provisions for the review of administrative decisions[vii]. The Administrative Appeals Tribunal and the office of Ombudsman were created, the procedures of judicial review were broadened and simplified and departmental records were opened up under the Freedom of Information legislation.

9. In the second reading speech the then Attorney General, Mr Enderby said that the independence of the Tribunal from the executive branch of Government was seen as an important feature of the system. He quoted from the UK Committee on Tribunals and Inquiries[viii]:

"*The Tribunal is not to be an ordinary court, but neither is it to be an appendage of Government Departments. The Tribunal is to be regarded as machinery provided by Government for adjudication rather than part of the machinery of departmental administration. In particular clause 14 of the Bill was intended to give members of the tribunal a proper independence from the executive Government".*

10. The *Administrative Appeals Tribunal Act 1975* provided for the establishment of the Administrative Review Council, (ARC) to monitor the operation of the system of review. The view of the ARC is that the integrity of the Tribunal system rests with the community's acceptance that the system is independent and therefore has value to them as citizens.

11. During my tenure and the tenure of five Presidents (all Federal Court judges) the Tribunal has maintained independent decision making without interference by the Executive or Departments. It comes as no surprise that Executive government, and in particular their bureaucracies, sometimes regard the Tribunal as an irksome trespasser on their territory – a cuckoo in the administrative nest[ix].

12. Under the proposed Bill the President may be a Federal Court Judge, former Judge or other Judge but also simply a lawyer of five years standing. The new Bill thus proposes that the role of President, with very substantial powers in the conduct and direction of the Tribunal and its members, may be held by one who does not hold judicial office or indeed has had minimal judicial or decision making experience.

13. The establishment of the Tribunal was based on the recommendations of the Kerr Committee and the Bland Committee. Neither Committee addressed comprehensively the issues relating to the relationship between administrative Tribunals and the executive branch of Government. Also under the Kerr Committee proposal, the Chairman of the Tribunal would be a Federal Court Judge but not so the Bland Committee who suggested Federal judges sit on the Tribunal on an ad hoc basis. The Government of that day decided the Chairman of the Tribunal be a Federal Court Judge, but not so for other tribunals. This, we believe was a way of distinguishing the Tribunal as an "important" Tribunal with the intent of providing independence. The appointment of judicial members to head the Tribunal also recognised for tenure.

14. This inquiry must consider the effect of altering the legislation to allow for a non-judicial President.

INDEPENDENCE AND IMPARTIALITY: THE CHARTER JURISPRUDENCE

15. All tribunals, whatever their function, are established to be independent forums making objective determinations. The reality and perception of their independence is important given the role they play in the various Australian administrative and adjudicatory systems. In this submission we have canvassed several opinions from an excellent discussion paper relating to Tribunal Independence and Impartiality[x].

16. Justice Le Dain, in the Canadian Court, developed a dual approach to judicial independence. He noted that the impartiality of individual judges is reflected in issues such as security of tenure and financial security and independence of the court manifests in the institutional or administrative relationship between the Court and Government.

17. The preservation of the tripartite constitutional structure requires a constitutional guarantee of an independent judiciary. The classical division between the executive and judiciary does not however compel the same conclusion in relation to the independence of administrative tribunals. While they may possess adjudicative functions, they ultimately operate as part of the executive branch of Government, under the mandate of legislation. Tribunals span the constitutional divide between the judiciary and the executive.

18. Administrative Tribunals are in fact, created precisely for the purpose of ensuring the executive/political decision making process is carried out in accord with the law and the facts of a particular case. This may require them to make quasi-judicial decisions. It is recognised that it is properly the role of Parliament and the legislature to determine composition and structure of the Tribunal to discharge the responsibilities bestowed upon it.

19. The degree of independence required for a particular Tribunal is determined by discerning the intention of Parliament; absent constitutional restraints, this intention must be respected.

20. The decision of the Supreme Court of Canada in *Canadian Pacific LTD v Matsqui Band* (1995) 177 NR 325 shows how delicate and ultimately frustrating a task it is to unravel the two strands of impartiality and independence in the jurisprudence. At issue in *Matsqui*[xi] was whether the governing of the appeal tribunals established under the statutory appeal procedures gave rise to a reasonable apprehension of bias. The reasonable apprehension of bias was on two accounts.

a. Members of the tribunal as constituted could have a direct and personal interest in the outcome
b. Some members of the appeal tribunal did not enjoy security of tenure and rendering an adverse decision may not be in their personal interests.

As already pointed out by Todd[xii], it is mandatory that the Tribunal avoid bias or the appearance of bias.

21. The presence of a Federal Court judge as President with the opportunity for appeal to the Federal Court goes a very long way to inculcating a strong first step to impartiality and removal of bias. As a Federal Court Judge, he/she is tenured and also has no direct or personal stake in the outcome other than an interest in determining a correct and fair decision. This attitude toward decision-making may then be adopted by members. If this is the case there can be no perception of bias and the Tribunal, under the stewardship of a Federal Court judge, may enjoy the respect of the community.

22. If the Tribunal is not perceived as being capable of exercising its powers of review in an independent manner, free from coercion by or subservience to the most powerful party before it, namely the Government itself, the Tribunal will quickly lose its credibility as a worthwhile forum for independent external review of administrative decisions. The danger of not having a senior judicial member as President is that this independence and community respect may be lost. A senior bureaucrat or former head of a Government department as President may be an excellent chairman but there is the inherent risk that he/she may not (fairly or unfairly) be seen as impartial. Similarly, it may be difficult for a lawyer of five years to supervise legal challenges to Government decisions, notwithstanding other experiences that individual may have accumulated.

23. Any change seen or perceived by the community as encouraging the Tribunal to rule in favour of Government must be viewed with caution. Changes that assist with cheaper and quicker justice, specialised decision making, and a check on executive power and improved standards of government decision making are to be welcomed.

TENURE

24. The question of removal of the provisions under the AAT Act which confer tenure on presidential members who are judges and allow for the appointment of Deputy Presidents or Senior Members with tenure enlivens again the issue of independence. In the second reading speech Senator Campbell[xiii] said, "*Tenured appointments reduce the flexibility of the tribunal to respond to its changing case load*"

25. The Law Council of Australia has warned that tenure is critical to securing good appointments[xiv]. As already referred to in *Masqi*[xv], there is the risk that untenured members will be influenced by the threat of non-reappointment. In our experience at the Tribunal, members have acted fearlessly in the interest of justice, but this may not continue into the future.

26. Appointments and renewal of appointments over the past five or six years to the Tribunal have been less than satisfactory; there have been lengthy delays in appointments and non-renewal of appointment of members who appeared to be performing their tasks in a most satisfactory fashion. As a spokesman for Mr Ruddock said in defending these changes[xvi]:

> "*Judges have life tenure- that's a fundamental part of the separation of powers – but in terms of administrative bodies we see this as a streamlining of the process to put it on a par with other tribunals. The vast majority of existing AAT members are on fixed terms already and there's no suggestion this has had an adverse effect on their decision making*".

This statement is mostly accurate because, during the period the spokesperson is referring to, the Tribunal was fortunate enough to have a an experienced and committed membership, working under the stewardship of a Federal Court judge. Removing the Federal Court Judge as President, introducing new, inexperienced members, and ridding the Tribunal of the "*old brigade*" has the real risk of "*destroying*" not only the perception, but also the reality of the Tribunal's independence.

27. In fairness, tenure of senior members has been of concern for some time. Under the proposed new legislation, members and senior members will "merge" and it would not be unreasonable to provide fixed term appointments of reasonable duration, with the opportunity for reappointment. Deputy Presidents have a more judicial-like role and responsibility and it would not be unreasonable to grant them tenure, or at least a substantial fixed term appointments. This along with the retention of the President as a Federal Court Judge, together with the improved procedures, will maintain the independence of the Tribunal with its high standing and respect by the community, and bring credit to the Government.

[i] News release by the Attorney-General The Hon Philip Ruddock MP 11 August 2004.

[ii] The AAT Bill 2004. The Second Reading Speech: Senator Ian Campbell on 17 November 2004.
[iii] Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals Submission by R.K. Todd.
[iv] Resolution of the Selection of Bills Committee on 30 November 2004 to recommend that the Administrative Appeals tribunal Amendment Bill be referred immediately to the Legal and Constitution Committee for inquiry and report by March 2005
[v] "*Administrative Review: The Experience of the First Twelve Years"* (1989) 18 Federal Law review 122 at 130
[vi] "*Administrative Review: The Experience of the First Twelve Years"* (1989) 18 Federal Law review 122 at 130
[vii] The *Administrative Appeals Tribunal* Act 1975 (Cth), the *Ombudsman* Act 1976 (Cth), The *Administrative Decisions (Judicial Review) Act* 1977 (Cth), the *Freedom of Information Act* 1982 (Cth)
[viii] Taken from *Key Note Speech* by Justice Deidre O'Connor, Second Annual AIJA Tribunal's Conference 10 September 1999.
[ix] The Parliament, The Executive and the Courts: Roles and Immunities. Address by The Hon Sir Gerard Brennan, School of Law, Bond University 21 February 1998
[x] Tribunal Independence and Impartiality. Discussion Paper prepared by Ms. Laverne A, Jacobs and Prof. Thomas S. Kuttner for CIAJ's national Roundtable series Dialogue Between Courts and Tribunals, May 31, 2002, Ottawa, ON
[xi] *Canadian Pacific LTD v Matsqui Band* (1995) 177 NR 325
[xii] The AAT Bill 2004. The Second Reading Speech: Senator Ian Campbell on 17 November 2004
[xiii] The AAT Bill 2004. The Second Reading Speech: Senator Ian Campbell on 17 November 2004
[xiv] Tribunal being nobbled, say lawyers. Article by Misha Schubert, AGE, 10 January 2004, p.4
[xv] *Canadian Pacific LTD v Matsqui Band* (1995) 177 NR 325
[xvi] Tribunal being nobbled, say lawyers. Article by Misha Schubert, AGE, 10 January 2004, p.4.