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20 January 2005

Senate Legal and Constitutional Committee
Parliament House
CANBERRA ACT 2000

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Dear Sir/Madam,

Re: Inquiry into the Administrative Appeals Tribunal Amendment Bill 2004

I write on behalf of the National Welfare Rights Network Inc. (NWRN).

Thank you for the opportunity to provide a submission on the *Administrative Appeals Tribunal Amendment Bill 2004* (the Bill).

About the NWRN

The NWRN is a national peak body that brings together a network of services throughout Australia that provides free and independent information, advice and representation to individuals about Social Security law and its administration through Centrelink. The NWRN consists of specialist community legal centres and services as well as individual advocates who are based in generalist community legal centres. NWRN member organisations are located in each capital city in Australia and in four regional centres.

Our members have special expertise in administrative review through both direct assistance and representation of people seeking internal review and review by the Social Security Appeals Tribunal (SSAT) and Administrative Appeals Tribunal (AAT) as well as providing advice to self represented litigants and hearing the views of those who represented themselves through these processes. A list of member organisations is set out at attachment 1 to this submission.

Following, for your consideration, are our comments on the Bill.

Yours faithfully,

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General comments on the Bill

The central purpose of administrative review is "to provide a credible means of ensuring that individuals are fairly treated in their dealings with government."[1] The AAT has an important role in providing individuals in society adversely affected by government decisions, the right to appeal in a relatively informal and low cost jurisdiction. We are of the view that the SSAT/AAT as it currently exists is structurally sound and whilst improvements can always be made, the AAT has generally succeeded in providing large numbers of people, affected by a diverse range of decisions, with a fair and accessible mechanism for having the decisions that affect them reviewed.

The NWRN has serious concerns about a number of proposals contained in the Bill that seek to make substantial changes to the AAT operations that are not justified and furthermore represent a direct threat to the quality of the administrative review process. We are concerned that the Bill contains some provisions that will clearly erode the independence of the Tribunal.

The NWRN major concern with the Bill is the proposal to expand the qualification requirements to be appointed as President of the Tribunal. Currently the President of the Tribunal must be a Judge of the Federal Court. The Bill proposes to expand the qualification requirements to include a federal magistrate, a former judge, a legal practitioner enrolled for at least 5 years. The NWRN believe that the status and authority that judges bring to it gives the public confidence in the Tribunal's independence and respect for the authority of its decision.

This proposal to, in effect, lower the qualification requirements of President, is being introduced at the same time as a number of proposals that would increase the powers of the President.

The NWRN urges the Committee to recommend that the proposed changes to the qualification requirements of President be rejected (clause 15 of the Bill).

The NWRN also wishes to highlight its concern with the proposal to reduce the appointment of all members (including the President) to terms of up to 7 years. It is of the essence of the AAT that it be independent. The capacity if not the propensity of governments to influence the result in external review processes is high because Tribunals lack the constitutional, historical and traditional protections enjoyed by the Courts. The NWRN also urges the committee to reject this proposal (at clause 21).

The NWRN is also of the view that the proposed objects clause is ill conceived and is distinctly unsuited to the composite picture across the two-tiers of the social security external merits review process (the present SSAT/AAT process). The NWRN considers that such an emphasis on a 'quick and economical' review process will lead to decisions to which proper thought has not been given drastically reducing the quality of the review process.

[1] Castles, Margaret, Alternative Law Journal Vol 24 No4, August 2000 at 182.

The NWRN urges the Committee to recommend that the words 'quick and economical' are deleted from the Tribunal's proposed objects. We would also urge the Committee to give serious regard to our comments about the value of a binding objects clause and recommend accordingly.

Positive proposals contained in the Bill

The NWRN commends a number of proposals in the Bill which we believe will facilitate the process of review for consumer appeals and go some way to readdressing the power imbalance between consumers and governments departments/agencies. These proposals include:

- clause 90 that adds a note to clarify that the Tribunal is not limited by the applicant's statement of reasons;

- clause 105 which introduces a requirement that the person who made the decision which is subject to the review, must use his or her best endeavours to assist the Tribunal to make its decision;

- clause 124 which amends the provisions that impose an obligation on government departments/agencies to provide the Tribunal with copies of all documents that are relevant to the review of the decision to change the test of the relevance of documents from a subjective test to an objective one;

- clause 160 which imposes a time limit on decision-makers when reconsidering a decision that the Tribunal has remitted to them. The Bill proposes that the time period will be 28 days unless otherwise stated by the Tribunal. [The NWRN substantially agrees with this proposed amendment. NWRN notes that many consumer appeals in the social security jurisdiction relate to decisions which affect the consumer's capacity to have food on the table and where they have a few or no other financial resources. Consequently, they are often in need of expeditious decision-making. In the NWRN view, a statutory duty ought to be imposed on decision makers to reconsider and implement the Tribunal's decision as soon as is reasonably practical but no later than 14 days, unless exceptional circumstances apply].

The NWRN also supports a number of proposals that will improve the review process including:

- clauses 173 and 174 which expands the power of the Federal Court and the Federal Magistrates Court hearing appeals made from the Tribunal to make findings of fact where an error of law has been made by the AAT. Such findings will only be able to be made if it is appropriate to do so and if they are consistent with the findings of the AAT in the matter. This amendment implements a recommendation made in the Administrative Review Council's report number 41, *Appeals from the Administrative Appeals Tribunal to the Federal Court*;

- clause 187 which extends the offences of failing to comply with a summons, refusing to be sworn or to answer questions, or giving false or misleading evidence to apply to alternative dispute resolution processes (this is currently extended to conferences and mediations);

- clause 110 which gives the President power to authorise conference registrars to issue directions as to the procedure to be followed at or in connection with the hearing of a proceeding. We note that this amendment implements recommendation 125 of the Australian Law Reform Commission (ALRC) Report 89, *Managing Justice*.

Amendments to the Administrative Appeals Tribunal Act 1975

The NWRN has confined its detailed comments to those proposals that it believes are a cause for concern.

Schedule 1, clause 2A – proposal to inset the following objects clause into the legislation: "In carrying out its function, the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick."

The NWRN is of the opinion that 'economical and quick' are not appropriate objectives for the AAT. The proposed clause mirrors the objects of the SSAT, which offers a substantially different type of review. The current SSAT/AAT process strikes an appropriate balance between the need for early decisions and the need for thorough examination of complex matters. It does this by enabling the bulk of consumers to undertake a relatively quick, informal review procedure conducted by the SSAT, whilst providing through the AAT a slower and more studied review process necessary to deal with matters which have complex evidence or require examination of technical provisions which are unsuited to the speedy resolution procedures of the SSAT.

The current SSAT/AAT process takes into account the needs and unique characteristics of social security consumers, the considerable lengthy technical legal and factual work in matters that are likely to require resolution by the AAT and the inadequate resources of legal services to assist people with social security problems. Given the AAT's place as the final tier of external merits review for social security matters the paramount goal of the AAT must be to reach the correct and preferable decision. In the NWRN view, the objectives of 'fair and just' are consistent with this goal whereas the objectives of 'quick and economical' will detract from the quality of AAT review.

The NWRN opposes that amendment proposed in **Schedule 1, Clause 39** on the same grounds.

The NWRN notes that the amendment bill does not bind the Tribunal to interpret the Act in light of the clause. The NWRN considers that it is appropriate for the objects clause to be as stated (and binding) in this case because:

- It helps to reinforce the fundamental importance of the AAT within the Australian democracy;
- It helps to entrench and enforce the rights of individuals who seek to challenge decisions through the AAT;
- It combats formalism and adversarialism;
- It ensures that the common law objectives of administrative review are honoured within a revamped Tribunal;
- It reminds all parties about the accepted role of the AAT as set out in cases such as *Drake v Minister for Immigration* (1979) 24 ALR 577 to carefully assess the correct and/or preferable decision; and
- It recognises that the AAT often deals with matters of public interest as between parties of unequal means and power.

Recommendations: (i) objects clause to list "fair, just and informal" and to omit "quick" and "economical"; (ii) objects clause to bind the Tribunal.

Schedule 1, clause 15 – proposal to expand the qualification requirements for appointment as President from a requirement that the person be a Judge of the Federal Court to include a federal magistrate, a former judge, a former federal magistrate, or a legal practitioner enrolled for at least five years in an Australian jurisdiction, in addition to a Judge of the Federal Court.

The proposed clause causes the most concern for the NWRN.

The NWRN is strongly of the view that the President of the Tribunal should continue to be a member of the judiciary for the following reasons:

- It helps to reinforce the fundamental importance of the AAT within the Australian democracy;
- It makes the AAT less vulnerable to political interference;
- It helps to ensure that decision makers at the lower levels of the review process and government departments give Tribunal decisions appropriate regard;
- It enhances the standing of the Tribunal in the public's eyes and contributes to the public's confidence in the review process;
- It enhances the expertise of the Tribunal and greatly assists it in dealing with the most legally complex or significant cases; and
- A Federal Court judge has the appropriate range and level of experience for the position of President.

Recommendation: reject the proposed amendment at clause 15 that repeals subsection 7(1).

Schedule 1, clause 21 – proposal to restrict terms of appointment for all members to up to 7 years, with eligibility for re-appointment.

This proposal also causes NWRN serious concern.

The NWRN is strongly of the view that Deputy Presidents and Senior Members of the AAT ought to be given tenure because:

- The Tribunal lacks the constitutional, historical and traditional protections enjoyed by Courts and is therefore more prone to political influence;
- It helps to reinforce the independence of the members when performing their Tribunal functions;
- It reduces the risk of governments influencing the result in external review processes;
- They are more likely to be called upon than members to decide cases that involve potentially far reaching consequences for government; and
- It assists in securing the best qualified and able people.

***Recommendation*:** reject the proposed amendment at clause 21.

Schedule 1, clause 47 – proposal to remove the current requirement that a multi-member tribunal be constituted by at least one presidential or senior member. This would allow a multi-member tribunal to be constituted by ordinary members only.

In the NWRN's experience, the practice of the Tribunal is to constitute multi-member Tribunals in cases involving significant questions of law, complex issues of fact and detailed consideration of scientific or medical evidence.

Unlike the SSAT, the AAT does not constitute multi-member tribunals as a matter of routine. This is likely to be attributable to perceived resource considerations, although the evidence of the SSAT shows that such panels are more effective for unrepresented persons as they are better equipped to reach a quality outcome in the matter due to their skill mix and such panels can operate in a cost-effective manner.

The NWRN is concerned that this amendment has been motivated by perceived financial considerations, and that the amendment will not result in an increase in multi-member tribunals, but rather that the current advantages arising from Deputy Presidents and Senior Members sitting on Tribunals with other members may be lost.

***Recommendation*:** reject the proposed amendment at clause 47

Schedule 1, clause 66 – includes proposals to expand the powers of the President to direct that a member not continue to take part in proceedings if it is "in the interests of justice", reconstitute a multi-member Tribunal with new members and to reconstitute the Tribunal if it is "in the interests of achieving the expeditious and efficient conduct of the proceeding".

Relevantly, clause 66 proposes to give the President a power to direct that a member cease to take part in proceedings if he or she is satisfied the direction is "in the interests of justice".

The NWRN is of the view that a Tribunal should only be reconstituted in rare and exceptional cases.

The NWRN believes that the proposed power is too broad and leaves room for misuse. We note that the proposal does not define the phrase, "in the interests of justice" however the Explanatory Memorandum details the following examples of directions that would be in the interests of justice:

- Where the member has a conflict of interest in the proceeding; or
- Where the member has made a public statement that could prejudice the impartiality of the proceeding.

In the NWRN opinion, the grounds should be explicitly set out in the Act.

Clause 66 also proposes to insert a new subsection (s23A) that gives the President power to reconstitute the Tribunal if he or she is of the opinion that it would be in the interests of achieving the "expeditious and efficient conduct" of the review.

The NWRN sees no justification for this power and is concerned that this provision will see the Tribunal emphasising the portion of the objects clause that relates to "economical and quick" review and will detrimentally effect the other, in our opinion, far more important objects of "fair, and just" review.

***Recommendations*:** (i) amend the proposed s23(9) to list the specific grounds for the exercise of the power and (ii) reject the proposed s23A.

Schedule 1, clause 73 – proposal to allow the Tribunal to limit the scope of a review

On its face, this proposal appears to give the Tribunal an unfettered discretion to determine the scope of the review by placing limits on questions of fact and the evidence and issues that it will consider. If that was the intent of the proposal, it could prejudice a consumer's case where other issues may well affect the outcome.

However, the NWRN notes from the Explanatory Memorandum that the proposal is not intended to allow the Tribunal to limit its own jurisdiction conferred by the Act or other legislation.

***Recommendation*:** the proposed clause 73 be amended to make it clear that the power is limited to evidence or issues of law and fact that are not within the Tribunal's jurisdiction

Schedule 1, clause 95 – proposal to allow the Tribunal to ask a person applying for review by the Tribunal to amend their statement setting out their reasons for lodging a review.

In the NWRN opinion, initial information required from consumers should be kept to the minimum necessary so that the information required does not deter applicants from seeking review. It must be acknowledged, that in the social security jurisdiction, few will be able to access legal advice or assistance, and therefore are unlikely to be able to identify some or all the issues relevant to the appeal.

We would also point out that the current conferencing, pre hearing and case management processes are designed to ensure that the relevant issues are identified early in the process. In the NWRN experience the current processes have the advantage of assisting rather than deterring unrepresented litigants.

***Recommendation*:** reject the proposed amendment at clause 95.

Schedule 1, clause 99 – proposal to limit the Tribunal from extending the time period to lodge an application unless "the Tribunal is satisfied it is reasonable in all the circumstances".

The NWRN does not see any justification for amending the existing 'out of time' statutory provision.

We are not convinced that this proposed amendment does not narrow the discretion of the Tribunal to accept applications out of time.

In the NWRN opinion, the current provision strikes an appropriate balance in protecting the rights of consumers to challenge government decisions and the need for finality in government decision-making.

Recommendation: reject the proposed amendment at clause 99.

Schedule 1, clause 112 – proposal to allow the President to direct that a proceeding be referred to a particular alternative dispute resolution (ADR) process (eg. conferencing, mediation, neutral evaluation, conciliation).

The NWRN considers that ADR will only be relevant and appropriate in a number of given situations:

- Where it is optional and voluntary to the consumer;
- Where there is a statutory or policy discretion to make a decision that equates to a settlement of the matter between the parties;
- Where the parties are able and delegated to actually conduct negotiations and settlements;
- Where there are no factors such as domestic violence that make ADR inappropriate; and
- Where sufficient processes can be put in place to counter the adverse consequences that would otherwise flow from the inbuilt power imbalance between government and consumers.

***Recommendation*:** reject the proposed clause 112 in its current form. That the proposed clause 112 be redrafted to take into account the above concerns.

Schedule 1, clauses 192 to 196 – proposal to allow persons summonsed to be paid fees for compliance with the summons, as opposed to simply for fees for attendance. This proposal will also allow persons who are summonsed to produce documents to be paid fees associated with the costs of producing the documents. The fees will be payable by the parties, not the Tribunal.

The NWRN is concerned this proposal could compromise a consumer's ability to properly present their case in the social security jurisdiction, as few persons affected by social security decisions will be able to afford such costs.

The NWRN notes that the current subsection 67(3) of the AAT Act grants to the Tribunal a discretionary power to order that the Commonwealth shall pay fees and allowances of a witness in whole or in part. The NWRN is of the view that this provision ought to be strengthened to compel the Tribunal to order that the Commonwealth pay the costs where it is demonstrated that the payment of such costs would cause the other party financial hardship.

Recommendation: the current subsection 67(3) of the AAT Act be amended to make it clear that the Commonwealth is liable for such costs where it would cause the other party financial hardship

Amendment to the Freedom of Information Act 1982

As well as amendments to the AAT Act, the Bill also proposes to make a few amendments to other Commonwealth legislation. Two important proposed amendments relate to the *Freedom of Information Act 1982* (FOI Act) – clauses 214 and 213.

Schedule 1, clause 214 - proposal to amend section 64 of the FOI Act which, at present, provides that the Tribunal can only require the production of a document that is claimed to be exempt (in order to ascertain whether it is an exempt document) during the course of the hearing.

It is proposed that section 64 be amended to make it clear that the Tribunal can, at any time after the date by which an agency must have complied with section 37 of the AAT Act (this section requires the respondent to produce to the Tribunal all documents within its possession or control that are relevant to the review), require production to the AAT of documents claimed by the agency to be exempt. This means that the Tribunal will be able to require production of the exempt document in order to ascertain that it is exempt prior to the hearing. This would implement recommendations 85 of the Open Government Report of the Australian Law Reform Commission (ALRC 77). The NWRN supports the implementation of this recommendation.

***Recommendation*:** accept the proposed amendment

Schedule 1, clause 213 – proposal to further amend section 64 of the FOI Act to clarify that if an agency voluntarily produces an exempt document to the Tribunal then the Tribunal is prohibited from disclosing the documents to any person other than a member or staff member of the Tribunal.

The NWRN notes that this was recommendation 86 of the ALRC 77. The recommendation arose from a decision of the Federal Court which held that if an exempt document is voluntarily produced to the AAT then the AAT is not prohibited from showing it to the applicant's legal representatives (*Day v Collector of Customs* (1995) 130 ALR 106).

The NWRN does not agree that recommendation 86 of ALRC ought to be implemented, on the basis that it would defeat the rules of procedural fairness, the participant having no opportunity to dispute the veracity of the document.

The NWRN recommends that the law be amended in so far as it applies to the social security jurisdiction, to impose a statutory right to receive copies of all relevant documents and materials, except where to do so would not be in the public interest. Where a document is not provided to a participant the Tribunal should not rely upon the document in the determination of the proceedings before it.

Recommendation: reject the proposed amendment at clause 213.

Attachment 1

List of National Welfare Rights Network members

NEW SOUTH WALES

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