Administrative Appeals Tribunal Amendment Bill 2004

I am seeking to make this submission in a personal capacity. While I hold office as a tenured presidential member of the Administrative Appeals Tribunal, and have done for now over 16 years, I am currently on leave (s.11 of the AAT Act) to chair the Superannuation Complaints Tribunal. I am the only AAT serving presidential member with entitlements under the *Judges' Pensions Act* 1968 (s.11 of the AAT Act). To qualify for entitlements under that latter Act, aside from any incapacitating illness (s.6(2) of the *Judges' Pensions Act*) or removal from office (s.13 of the AAT Act), I must complete 10 years service in the position and attain at least 60 years of age. However, the tenure extends, at the option of the office holder, until 70 years of age (s.8(2) of the AAT Act).

Doing away with tenured appointments (s.21 of the Bill which repeals ss.8(1) and 8(2) of the AAT Act)

The Bill seeks to repeal and not replace the provisions of the currently existing AAT Act which provide for the tenured appointment of presidential members, senior members and members.

Setting aside the position of President of the Tribunal, to which I shall return later in this submission. I believe that the combination of tenured and term appointed appointees to the AAT has both worked well and ensured and enhanced public confidence that the AAT acts independently of Government despite being an instrument of government. The issue concerns full time appointments. Part time term appointments are made in favour of members who bring a particular expertise to the AAT eg senior medical practitioners, engineers, those with military experience. Such appointees have, or have had, other careers and generally do not rely on income from the AAT appointment to meet their day-to-day expenses. Accordingly such appointees are by their circumstances independent. Full time appointees who rely on income from the AAT for their daily support are, however, in a different position.

The removal of the ability to make tenured appointments, as proposed under the Bill, will inevitably result in a drop in public confidence that the AAT is truly independent of Government. It is often claimed that once appointed, a member cannot be dismissed or removed (other than for stated cause see s.13 of the AAT Act) and is free of any constraints in the exercise of the powers conferred by the AAT Act. Taken in isolation, this is may be true as a proposition. When placed in context, however, the proposition becomes more clouded. Where a person is a full time appointee and hoping for reappointment, it will be open for it to be suggested decisions are being reached which do not harm the appointee's reappointment opportunity. Since reappointment is solely in the Government's power (s.6 of the AAT Act) even the perception that a decision has been reached which upholds the position advocated by Government can be detrimental to the credibility if the Tribunal as an independent arbitrator between the Government and the citizen.

It is of note that the independence of the judiciary (particularly from Government) is held to be crucial in our system of Government. Judges decide facts in accordance with legal principles. Not every case decided by a judge involves the Government as a party. Every

case decided by the Tribunal involves the Government as a party. The criteria for deciding cases is "is the decision appealed against the correct and/or preferred decision?". This involves not only a consideration of the application of legal principles but also as to whether or not any discretionary decision has been exercised in the best possible way. As such the independence of the decision making role of the AAT needs to be, and be seen to be, secure and beyond reproach. The fact that the Tribunal is itself an instrument of Government, without any constitutional definition, as is given for example to the exercise of judicial power, heightens the need for clearly defined parameters to ensure independence is maintained and perceived to be maintained.

In recent years, all full time appointments have been made for a term. Currently the AAT Act provides term appointments shall not exceed 7 years (s.8(3) of the AAT Act). In fact most appointments are made for a 3 or 5-year period. If a person accepts a full time appointment he/she clearly cannot maintain any previously existing on going commitment to whatever partnership/company or government engagement he/she previously had. Any such retention would be antithetical to the role as an AAT appointee. Accordingly, once appointed for a term, the appointee unless retiring, will seek renewal. In such circumstances an appointee, even unconsciously, may tend to favour upholding a Government decision - particularly where the exercise of a discretion is involved, i.e. in the determination of the preferred decision where there is a range of decisions which could be reached.

Appointments involving both tenured appointees in full time positions of senior members and deputy presidents and term appointments for part time members' positions has operated well. As well as avoiding suggestions of bias such appointments have ensured an even continuity of decision making a factor which stands to be weakened in a high turnover of term appointees.

The President – no longer required to be a serving Federal Court Judge (s.15 of the Bill)

Currently, the President of the Tribunal must be a serving judge of the Federal Court (s.7(1) of the AAT Act). The Government is seeking to broaden the scope of who may be appointed President of the AAT. Under s.15 of the Bill, the President may be a retired Federal Court or State Supreme Court judge or a practitioner who is not a judge but who has been enrolled for a period of not less than five years.

It has been suggested that, as well as giving it a choice from a broader pool, the proposed amendment is consistent with what has been done with the Native Title Tribunal. There is, however, one fundamental difference. The Native Title Tribunal performs purely a mediation function, whereas the AAT reaches determinative decisions between the Federal Government and the citizen. It is clear that if a Federal Court judge is not appointed to the Tribunal and a retired judge or a non-judicial practitioner is appointed as President of the Tribunal the status of the Tribunal will be reduced. The status is, however, a minor point. It is the independence guaranteed by having a Federal Court judge appointed which gives citizens lodging appeals against decisions of government ministers, departmental officers and government instrumentalities the confidence that their matters will be dealt with in accordance with the highest possible quasi-judicial standards. One only has to look at the problems that have been raised surrounding the Chairman's position at the Australian Broadcasting Tribunal to realise the importance of having a person who is a judicial officer

preside. This is of particular importance where the decision being reviewed always involves the Government as a party.

The position of President is not one which is so unimportant that a retired judge should fill it. The position is, or ought be, a dynamic leadership position and is not appropriately able to be fulfilled by somebody in retirement mode. There is, after all, a budget of $27 million per annum involved, as well as a wide range of senior legal and other professional members who participate in the work at the Tribunal, to say nothing of the fact that some cases are of such importance that senior silk appear. The repercussion arising from Tribunal decisions can have profound consequences for Government administration. Accordingly, a more active approach than can be generated by a retiree is to be preferred.

It is not open to argument that the position of President being held by a serving Federal Court Judge is one which may breach the separation of powers. It cannot do this on the basis that:

- the Bill seeks to retain the power to appoint a judge to the position and, if it was really believed that there was a breach of the separation of powers, then it would not retain that position.

- in any event, the High Court in the Hindmarsh Island case expressly approved the position of President of the AAT as not being inconsistent with the carrying out of judicial function and as not offending any of the provisions of the provisions or the separation of powers doctrine.

Should the Parliament decide on the abolition of tenure for all other appointees, it is even more imperative that the President should be independent and be seen publicly to have that independence, in order that the integrity of the Tribunal is better placed to be protected.

It is often said that Australia leads the world with its administrative review processes including the structure established by the AAT Act. While most of the balance of the provisions in the Act seek to make the processes of the AAT more flexible and are to be welcomed, it is the issues surrounding the question of independence of the decision-maker which will weaken the current highly regarded provisions. When viewed with other administrative steps taken, e.g. the previous Attorney-General successfully urging the Remuneration Tribunal to sever the previously existing connection between Federal Court Judges' remuneration and that of all classes of the AAT's membership which resulted in a down grading of remuneration and a loss of status, the removal of both tenure and the necessity of having the President a Federal Court Judge is, regrettably, further indicative of adoption of a policy which seeks to undermine the standing and the independence of the Tribunal to the detriment of Australian citizens seeking to challenge Government decisions.

For the above reasons, I would earnestly request the Senate Standing Committee to recommend the retention of the choice to make tenured appointments and confirm that the President must be a serving Federal Court Judge.