

Administrative Appeals Tribunal submission in response to NADRAC Issues Paper – Alternative Dispute Resolution in the Civil Justice System

The Tribunal is an independent body that reviews a wide range of administrative decisions made under more than 400 enactments, mostly by Australian Government ministers, departments, agencies, authorities and other Tribunals.

The *Administrative Appeals Tribunal Act 1975* states that "...the Tribunal must pursue the objective of providing a mechanism of review that is fair, just economical, informal and quick."

The Tribunal has available to it a range of alternative dispute resolution processes. These are dealt with in Part IV Division 3 of the Act, which is provided as Annexure A to this submission. In addition, the Tribunal has adopted a number of process models that provide guidance about our ADR processes. These were the work of the Tribunal's ADR Committee and are closely modelled on those made available by NADRAC.

ADR processes at the Tribunal are almost always conducted by either a conference registrar or a member of the Tribunal.

The Tribunal finalises approximately 80% of its applications without recourse to a hearing. The Tribunal makes good use of ADR, in particular conferencing, to achieve this result.

When considering this submission, it is important that a number of distinguishing features of the Tribunal's work are taken into consideration.

1. The Tribunal reviews the merits of an existing decision. The issues in dispute have already been considered by the original decision maker. Merits review is not the same as litigation. Whilst the Tribunal can be court like in its procedures, the process is extremely flexible, can be inquisitorial and less adversarial in nature.
2. The Tribunal, through its Conferencing system has built in a significant ADR process to every matter that comes before the Tribunal. There are opportunities for additional ADR processes where warranted.
3. Disputes that come before the Tribunal are mostly in the nature of a citizen challenging a decision of the Commonwealth. The ADR process at the Tribunal is constrained by this fact and appropriately tailored to this type of dispute. Often there will only be one result such as entitlement to a pension or not. Compromise decisions can be difficult to achieve. For example, it is not open to the parties to agree by way of compromise to the award of a half pension.

4. The Tribunal has no power to award costs, with the exception of Compensation applications. Even then costs can only be awarded against the employer. Parties before the Tribunal do not have the disincentive of increasing the other party's costs should they be unsuccessful. Nor do they have the incentive to settle a dispute if there is a risk that the other party may be successful and obtain a costs order. This adds its own dynamic to the ADR process at the Tribunal.
5. Merits review and final administrative decision-making by the Tribunal are intended to have a normative effect on government decision making. When decisions are not made by the Tribunal this normative effect is lost.

This submission was prepared in consultation with, and with the assistance of, the Tribunal's ADR Committee.

Background to this submission

In late February the Tribunal was invited to a consultation session with NADRAC. Two letters from the President of the Tribunal to Justice Kellam regarding the consultation appear at Annexure B should be read with this submission. The Tribunal welcomes this opportunity to state the role and function of the Tribunal where ADR is concerned.

Copies of this submission have been provided to the Attorney General's Taskforce on Access to Justice and the Attorney-General himself.

Introduction

It is the Tribunal's view that use of ADR at the application stage of the review process for government decision-making is one of the ways that the cost of litigation may be minimised. There are, however, at least two other approaches which help to reduce recourse to litigation:

1. Increased availability of legal advice to those impacted by government decisions.

The Tribunal has arranged for the provision of legal advice clinics, provided mostly by the respective legal aid commissions in each of the states. These clinics are invaluable for providing applicants with advice about their chances of success before the Tribunal. If applicants are able to receive good advice at an early stage that their chances of success are minimal or non-existent, this will often result in the applicant withdrawing, and minimises costs. More readily available legal aid services to applicants, particularly in the early stages of a matter reduce the cost of matters in the Tribunal for all parties.

2. Increased use of dispute resolution at the initial decision-making stage of reviewable decision making process.

The first conference at the Tribunal is often the first time that an applicant has come face to face with someone from the respondent agency to discuss the issues in dispute. Sometimes an applicant will have appeared at an intermediate Tribunal, such as the Veterans Review Board where generally the respondent Department does not appear. The opportunity to discuss the issues with somebody representing the department or agency may offer a sufficient explanation for the basis of the decision being challenged for the applicant to withdraw their application immediately. Occasionally an opportunity to talk to a representative of the department or agency is what the applicant wants from the process. The Tribunal believes that if people impacted by government decisions had this opportunity earlier, there may be fewer applications made to the Tribunal..

The Tribunal notes that the Attorney General's reference to NADRAC requested that it:

“enquire into and identify strategies to remove barriers and provide incentives for greater use of ADR as an alternative to civil proceedings and during the court or Tribunal process.”

In the Tribunal ADR is not an “alternative”. ADR is inherent in our process through the conferencing system and other ADR opportunities. 80% of applications lodged with the Tribunal are finalised prior to a full hearing. The remaining 20% that are heard and determined by the Tribunal have all been subject to ADR.

Dependant upon the type of matter before the Tribunal, the hearing process can be quite informal. A dispute involving an entitlement to a small social security payment with an unrepresented applicant is conducted in an entirely different and more informal manner from one involving many millions of dollars in a taxation dispute with senior legal representation on both sides. The hallmarks of adversarial process, being cost, delay and tactical litigation are generally not present within the Tribunal.

There are also significant legislative obligations that distinguish Tribunal proceedings from litigation. Respondent agencies have an obligation to assist the Tribunal reach the correct or preferable decision.(S331AA). As with litigation, respondents are also bound by the Legal Services Directions and by Model Litigant responsibilities.

It is the Tribunal's submission that few barriers exist to the use of ADR at the Tribunal and parties before the Tribunal are given adequate opportunities to use ADR (including mandatory referral of most applications for some form of ADR). Through the conferencing process, respondents before the Tribunal engage in well over 10,000 ADR processes each year. Further, the use of additional ADR processes may well add to the ultimate cost of resolution of

the matter. A failed ADR process may cost the parties the same as the cost of a full hearing before the Tribunal and delay final resolution

The *Issues Paper* raises the possibility of ADR being referred outside court or Tribunal processes to private or community ADR practitioners. The Tribunal already has this capability under its Act (S34H) To date this has not been utilised as the Tribunal has excellent in-house ADR resources as well as expert members many of whom are also ADR practitioners that it can use to conduct in-house ADR processes.

The Tribunal supports the use of consistent ADR terminology to promote certainty about processes, provided the actual underlying practice is consistent also.

The Tribunal makes the comment that before attempts to raise public awareness of ADR are made, there would be benefit in NADRAC and the Department taking steps to achieve some consistency in practice for referral to, and conduct of ADR processes.

We now turn to a more detailed explanation of our current ADR processes.

The Tribunal submits that current Tribunal ADR processes are highly effective. With rare exceptions, every application made to the Tribunal is scheduled for a conference within 6 weeks of lodgement.

The conference is the primary ADR process used by the Tribunal. It is much more than a case management tool. Conference registrars are all trained and highly experienced ADR practitioners. By 30 June 2009, every conference conducted at the Tribunal will be conducted by a Conference Registrar who is eligible for accreditation under the National Mediator Accreditation Standards.

Conference Registrars use dispute resolution techniques at every point in the conference process. This occurs even if it appears that the application is likely to proceed to a hearing. Conference registrars use their special legal knowledge and experience of matters in the jurisdiction of the tribunal to identify which matters will proceed to hearing and which might be resolved. They employ multiple ADR techniques in a blended fashion during the conference process to narrow the issues in dispute and explore settlement opportunities.

Conferencing is the engine room of the Tribunal's processes. It is responsible for the Tribunal's high rate of resolution of applications and for the high level of satisfaction among the Tribunal's users. In the Tribunal's 2008 user survey, on a scale of 1-5, 5 being the most satisfied, applicants, respondents, applicants' solicitors and respondents' solicitors rated the conference process as depicted in the following table.

	APP	RESP	APPL SOL	RESP SOL
a) Conferences are held within a reasonable time	3.7	4.2	3.9	4.1
b) Conferences are conducted fairly	3.5	4.2	4.2	4.1
c) The main points of the case are explored	3.6	3.9	3.9	3.9
d) The Registrar puts the parties at ease	3.5	4.4	4.3	4.3
e) The Registrar assists parties work out an agreement	3.3	4.0	3.7	4.0
f) The Registrar does not pressure parties to reach agreement	3.8	4.1	4.3	4.0
g) The Registrar assists the parties prepare for hearing	3.3	3.8	3.5	3.8

The Tribunal submits that in the context of its own jurisdiction, referral of matters to a body outside the Tribunal would add nothing to what is already a highly successful process. Further, an ADR process which is referred outside the Tribunal has significant cost implications for the parties. The Tribunal has no funding to engage external ADR practitioners and would rely upon the parties to privately fund any external ADR process.

The proposition put forward on page 25 of the *Issues Paper* at paragraph 5.2. does not apply to the Tribunal. All of the Tribunal's conference registrars, many of the members and a number of other senior staff are capable of assessing disputes as suitable for referral to ADR processes. The Tribunal has an ADR Referral Policy (Annexure C) and a number of process models (Annexure D) for the various ADR processes that the Tribunal may convene. The Tribunal's conference registrar's and members are capable already of assessing if a matter would benefit from a further, more formal ADR process.

Increased understanding of ADR by the legal profession would assist the Tribunal for those instances where parties are represented before the Tribunal. How this increased understanding is achieved is a matter for government policy makers. The Tribunal already conducts public information sessions, liaison meetings and makes information available on its website about the use of ADR at the Tribunal. Awareness of ADR, particularly conferencing, among the Tribunal's regular users is already high.

The Tribunal considers that there are few if any barriers to the use of ADR in the Tribunal. The Tribunal is a no cost jurisdiction for applicants in all jurisdictions and for respondents in all but the Compensation jurisdiction. The Tribunal filing fee is small, subject to hardship and other exemptions and refundable upon an applicant being successful.

The Tribunal provides adequate incentives to parties to use ADR at the Tribunal by routine use of conferences, routine conciliations in the Compensation jurisdiction, and the provision of recommendations to the parties about ADR processes by Conference Registrars.

The primary barrier to the *effective* use of ADR in the Tribunal is the availability of respondent representatives with authority to negotiate and settle

during the ADR processes we run. It is a common complaint from members and conference registrars that representatives come to conferences without adequate instructions to effectively negotiate and settle disputes. The process may be delayed or postponed while instructions are sought and on occasion these instructions cannot be obtained. This involves cost to the Tribunal and to the applicant. In the Tribunal's experience the most effective participation at an ADR processes will involve someone in authority from the relevant respondent department or agency coming to the process with an open mind and flexible approach to settling the dispute.

The Tribunal sees no need for the introduction of mandatory ADR in the Tribunal setting (whether as a "pre-action protocol" or as part of the Tribunal's internal processes) in circumstances where:

- The Tribunal already uses what approaches mandatory ADR in its conference process and with workers' compensation conciliations.
- Some applications may be cheaply and easily finally determined in a hearing.
- The Tribunal's function is, at the end of the day, to conduct merits review of government decision making. Matters of public importance, that impact on the lives of Australians, or that involve matters of principal whether in law or in government decision making *should* be heard and determined where the parties so wish.

The Tribunal is a small agency with limited funding. Any mandatory requirements would need to have demonstrated benefits and be properly funded by government.

The Tribunal submits that the Commonwealth Government accesses ADR processes regularly when dealing with the Tribunal. In 2007-2008 the Tribunal conducted 9,668 conferences, 504 conciliations, and 90 other ADR processes. In the Tribunal context, there does not appear to be a particular need for Government to extend its use of ADR.

The Tribunal would support training and the production of targeted material to help provide government employees with the skills to effectively resolve disputes at the decision making stage.

The suggested processes outlined chapter 8 of the NADRAC issues paper are all employed by the Tribunal in one form or another, although they may have different names. The Tribunal uses concurrent evidence as and when appropriate. The conference registrars will often function in a similar way to a family consultant when providing assistance to applicants. Tribunal hearings are generally less adversarial than formal court hearings. Case appraisal and neutral evaluation are conducted by members with relevant expertise when appropriate also.

The Tribunal does not have a dispute management judge. ADR is managed at the Tribunal by the ADR Committee with the assistance of the Assistant Registrar. All of the members of the ADR Committee are experienced ADR practitioners who are well qualified to review our processes and procedures. The Committee meets twice yearly and on an ad-hoc basis as required.

In addition the President of the Tribunal, Justice Downes, is responsible for the administration of the Tribunal. Justice Downes takes an active role in developing and overseeing the Tribunal's processes and procedures where ADR is concerned.

The Tribunal would like to conduct more detailed research into its own use of ADR, in particular the cost effectiveness and satisfaction levels with the process. Such research is time consuming and expensive. The Tribunal would welcome any assistance in research aimed at improving the understanding and use of ADR in the Tribunal.

Tribunal members do conduct formal mediations in matters before the tribunal. In some cases ADR has been ordered by the Tribunal to take place as a condition of an adjournment being granted or prior to the matter being set down for hearing.

In conclusion, the Tribunal regularly examines and reviews the conduct of its own ADR processes, and is constantly seeking ways to improve.

The ADR Committee considers ways in which the use of ADR can be increased and improved. Use of the con-arb model, mediation for unrepresented parties and possible changes to the conferencing structure are issues that the Committee continues to consider.

Issues to do with ADR are discussed at a monthly conference registrar's meeting. Referral protocols, the conduct of conferences, roadblocks to resolving disputes and a host of other ADR related topics are discussed.

The conference registrars engage in a regular "connect" session where option generation in ADR has recently featured as a discussion topic. The conference registrars attended a conference in November last year to review the conference process and explore options for its improvement and for improvement to the ADR referral process.

The Tribunal's submission is that its processes with respect to ADR represent a good model for the use of ADR. The Tribunal is always open to improvement and refinement of these processes within the current overarching legislative and procedural framework. The cost of any significant changes to the use of ADR (some of which would require legislative change) in the Tribunal context should be weighed carefully against the benefits of the existing system.

Annexure A Division 3 – Alternative dispute resolution processes

34 Scope of Division

This Division does not apply to a proceeding in the Security Appeals Division to which section 39A applies.

34A Referral of proceeding for alternative dispute resolution process

- (1) If an application is made to the Tribunal for review of a decision, the President may:
 - (a) direct the holding of a conference of the parties or their representatives in relation to the proceeding, or any part of the proceeding or any matter arising out of the proceeding; or
 - (b) direct that the proceeding, or any part of the proceeding or any matter arising out of the proceeding, be referred for a particular alternative dispute resolution process (other than conferencing).
- (2) The President may also direct the holding of conferences of the parties or their representatives in the case of applications made to the Tribunal for review of decisions of a kind specified in the direction.
- (3) The President may also direct that proceedings be referred for a particular alternative dispute resolution process (other than conferencing) in the case of applications made to the Tribunal for review of decisions of a kind specified in the direction.
- (4) A direction may be given under a particular paragraph of subsection (1):
 - (a) whether or not a direction has previously been given under the same or the other paragraph of that subsection in relation to the proceeding; and
 - (b) whether or not a direction under subsection (2) or (3) has applied.
- (5) If a direction under this section is applicable to:
 - (a) a proceeding; or
 - (b) a part of a proceeding; or
 - (c) a matter arising out of a proceeding;each party must act in good faith in relation to the conduct of the alternative dispute resolution process concerned.

34B Alternative dispute resolution processes – proceeding before the Small Taxation Claims Tribunal

Scope

- (1) This section applies to a proceeding before the Small Taxation Claims Tribunal.

Statement about alternative dispute resolution processes to be given to applicant

- (2) The Registrar, a District Registrar or a Deputy Registrar must give to the applicant:

- (a) if the proceeding relates to an application to which subparagraph 24AC(1)(a)(i) or paragraph 24AC(1)(aa) or (b) applies – when the application is made; or
- (b) if the proceeding relates to an application to which subparagraph 24AC(1)(a)(ii) applies – when the notification referred to in that subparagraph is given;

a statement setting out the procedures to be followed by the Tribunal and the alternative dispute resolution processes that are available under this Act.

Referral of matter for alternative dispute resolution process

(3) If the Tribunal considers at any time that it may assist in the resolution of the dispute between the parties if:

- (a) the proceeding; or
- (b) any part of the proceeding; or
- (c) any matter arising out of the proceeding;

were dealt with by an alternative dispute resolution process, the Tribunal must:

- (d) direct the holding of a conference of the parties or their representatives in relation to the proceeding, part of the proceeding, or matter, as the case may be; or
- (e) direct that the proceeding, part of the proceeding, or matter, as the case may be, be referred for a particular alternative dispute resolution process (other than conferencing).

(4) If a direction under this section is applicable to:

- (a) a proceeding; or
- (b) a part of a proceeding; or
- (c) a matter arising out of a proceeding;

each party must act in good faith in relation to the conduct of the alternative dispute resolution process concerned.

34C Directions by President

(1) The President may give directions about alternative dispute resolution processes.

(2) Directions under subsection (1) may relate to:

- (a) the procedure to be followed in the conduct of an alternative dispute resolution processes; and
- (b) the person who is to conduct an alternative dispute resolution process; and
- (c) the procedure to be followed when an alternative dispute resolution process ends.

(3) Subsection (2) does not limit subsection (1).

(4) The President may at any time vary or revoke a direction under subsection (1).

(5) A person is not entitled to conduct an alternative dispute resolution process unless the person is:

- (a) a member; or
- (b) an officer of the Tribunal; or

- (c) a person engaged under section 34H.

34D Agreement about the terms of a decision etc.

- (1) If:
 - (a) in the course of an alternative dispute resolution process under this Division, agreement is reached between the parties or their representatives as to the terms of a decision of the Tribunal:
 - (i) in the proceeding; or
 - (ii) in relation to the part of the proceeding; or
 - (iii) in relation to the matter arising out of the proceeding;that would be acceptable to the parties; and
 - (b) the terms of the agreement are reduced to writing, signed by or on behalf of the parties and lodged with the Tribunal; and
 - (c) 7 days pass after lodgement, and none of the parties has notified the Tribunal in writing that he or she wishes to withdraw from the agreement; and
 - (d) the Tribunal is satisfied that a decision in the terms of the agreement or consistent with those terms would be within the powers of the Tribunal;the Tribunal may, if it appears to it to be appropriate to do so, act in accordance with whichever of subsection (2) or (3) is relevant in the particular case.
- (2) If the agreement reached is an agreement as to the terms of a decision of the Tribunal in the proceeding, the Tribunal may, without holding a hearing of the proceeding, make a decision in accordance with those terms.
- (3) If the agreement relates to:
 - (a) a part of the proceeding; or
 - (b) a matter arising out of the proceeding;the Tribunal may, in its decision in the proceeding, give effect to the terms of the agreement without dealing at the hearing of the proceeding with the part of the proceeding or the matter arising out of the proceeding, as the case may be, to which the agreement relates.

34E Evidence not admissible

- (1) Evidence of anything said, or any act done, at an alternative dispute resolution process under this Division is not admissible:
 - (a) in any court; or
 - (b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory to hear evidence; or
 - (c) in any proceedings before a person authorised by the consent of the parties to hear evidence.

Exceptions

- (2) Subsection (1) does not apply so as to prevent the admission, at the hearing of a proceeding before the Tribunal, of particular evidence if the parties agree to the evidence being admissible at the hearing.

- (3) Subsection (1) does not apply so as to prevent the admission, at the hearing of a proceeding before the Tribunal, of:
- (a) a case appraisal report prepared by a person conducting an alternative dispute resolution process under this Division; or
 - (b) a neutral evaluation report prepared by a person conducting an alternative dispute resolution process under this Division;
- unless a party to the proceeding notifies the Tribunal before the hearing that he or she objects to the report being admissible at the hearing.

34F Eligibility of person conducting alternative dispute resolution process to sit as a member of the Tribunal

If:

- (a) an alternative dispute resolution process under this Division in relation to a proceeding is conducted by a member of the Tribunal; and
- (b) a party to the proceeding notifies the Tribunal before the hearing that he or she objects to that member participating in the hearing;

that member is not entitled to be a member of the Tribunal as constituted for the purposes of the proceeding.

34G Participation by telephone etc.

The person conducting an alternative dispute resolution process under this Division may allow a person to participate by:

- (a) telephone; or
- (b) closed-circuit television; or
- (c) any other means of communication.

34H Engagement of persons to conduct alternative dispute resolution processes

- (1) The Registrar may, on behalf of the Commonwealth, engage persons to conduct one or more kinds of alternative dispute resolution processes under this Division.
- (2) The Registrar must not engage a person under subsection (1) unless the Registrar is satisfied, having regard to the person's qualifications and experience, that the person is a suitable person to conduct the relevant kind or kinds of alternative dispute resolution processes under this Division.