Social Security Appeals Tribunal

SUBMISSION TO THE PRODUCTIVITY COMMISSION

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Introduction

The Social Security Appeals Tribunal (**SSAT**) wishes to preface its response to the information requests and draft recommendations in Chapter 10 of the Productivity Commission's draft report *Access to Justice* with a request that the SSAT be included in Figure 10.5 which addresses the time taken by tribunals to finalise matters.

In 2011-12, the SSAT finalised 50% of applications for review of decisions made under the social security law, family assistance law and other statutes under which decisions are made by officers employed in the Department of Human Services (Centrelink) within 7.4 weeks. During that year, the SSAT finalised 50% of decisions made under the child support legislation (which affect two individuals so that there are two citizen parties to the review) within 11.7 weeks.

In respect of the Commission's observation that "it is difficult to analyse the efficiency of tribunals based on cost per case when there are no similar tribunals available for comparison", the costs of the SSAT's review of decisions which were made under the social security, family assistance law, and other statutes by officers employed in Centrelink can be compared with the costs of review by the Administrative Appeals Tribunal (**AAT**) of such decisions made by the SSAT. In 2012-13, applications for review of decisions of the SSAT by the AAT comprised >30% of all applications to the AAT.[1] Similarly, the costs of review by the Veterans' Review Board (**VRB**) can be compared with the costs of review by the AAT of the VRB's decisions.

Information request 10.1

Given the contextual differences of the specific matters that tribunals seek to resolve, the Commission seeks feedback on how and where alternative dispute resolution processes might be better employed in tribunal settings, including what types of disputes, to assist in timely and appropriate resolution.

The employment of alternative dispute resolution (**ADR**) in a merits review tribunal is open to debate.

[1] *Administrative Appeals Tribunal Annual Report 2012-13*, pages 26-27, Charts 3.1 and 3.2.

Firstly, if having a "normative effect" on agency decision-making remains a goal for merits review tribunals, that effect is likely to be diminished if cases are settled confidentially by ADR.[2]

To illustrate, in respect of the 322 decisions of the SSAT which were varied or set aside by the AAT by agreement in 2012-13,[3] the SSAT does not know which of its decisions were so changed let alone the reason for change (other than that it was unlikely to have been an error of law as there is a process whereby the SSAT is to be notified by the AAT if the reason its decision was changed was due to an error of law[4]). In some cases, the SSAT will have made a decision which is less favourable to an applicant than the agency's decision. In such cases, review by the AAT is likely to be sought. If applications for review in such cases are settled by an agreement to reinstate the agency's decision, the practical effect may be that SSAT is precluded (without a statutory basis) from making a decision which is less favourable to an applicant. From the following published information, this may be occurring.

In addition to the 322 Centrelink payment decisions made by the SSAT which were changed by the AAT by agreement (apparently reached through ADR), the AAT changed 81 decisions of the SSAT on review. Thus, a total of 403 decisions made by the SSAT were changed. However, the Department of Human Services (**DHS**) reported, in its "Centrelink payments merit review outcomes" for 2012-13, that the AAT changed 155 decisions.[5] Inferentially, the balance of the 248 decisions of the SSAT changed by agreement or by review did not effect a change to DHS' decision.

Secondly, in addition to the issue of loss of normative effect through confidential settlements, there is an issue of inequality if (due to cost) applicants for review are not legally represented in ADR but the agencies which made the decisions are represented by in-house lawyers or external solicitors. In the SSAT's experience, many applicants do not distinguish between, or understand, the different roles of tribunal members and tribunal staff. This lack of understanding (which persists in spite of efforts at correction) may mean that statements made in conferences by tribunal staff to a legally unrepresented applicant about his or her prospects of success are heard and acted on as if they were the opinion of a member.

Further, if a tribunal relies on ADR by its staff to reduce the tribunal's hearing workload and vaunts the success rate, an expectation is created that staff maintain or increase the number of applications for review which are finalised without a hearing. There is a risk that this expectation acts as a pressure on the staff to finalise an application by consent or by the withdrawal of the application. This pressure may aggravate the disadvantage inherent in the agency being legally represented and

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[2] Administrative Review Council, *Better Decisions: Review of the Commonwealth Merits Review Tribunals* (ARC 39, 1995) at paragraph 3.148; Gabriel Fleming, *Administrative Review and the "Normative" Goal – Is Anybody Out There?*, (2000) 28 Federal Law Review 61 at pages 68 and 82; Joan Dwyer, *The Impact of the AAT: A View from the Tribunal*, paper presented to the national AIAL Conference, *The AAT – Twenty Years Forward* (1-2 July 1996). The collected papers of this conference are reproduced in J McMillan (ed), *The AAT Twenty Years Forward: Passing a Milestone in Commonwealth Administrative Review* (1997).

[3] Administrative Appeals Tribunal above n 1 at pages 193-194, Table A4.5.

[4] *Social Security Appeals Tribunal Annual Report 2012-13* at page 16.

[5] *Department of Human Services Annual Report 2012-13* at page 199.

the applicant being unrepresented. For example, the AAT reported that 526 (32%) of all applications for review of decisions about Centrelink payments were withdrawn and 18 (1%) were dismissed by consent.

Thirdly, if a tribunal's mechanism of review is truly fair, just, informal, economical (to the public purse) and quick, there may be little (if any) cost savings through ADR due to the costs of ADR itself plus the costs of hearing those applications for review which were unable to be resolved by ADR.[6] For merits review tribunals like the SSAT, Migration Review Tribunal (**MRT**), Refugee Review Tribunal (**RRT**) and VRB, ADR would newly require participation by the agency. This additional cost to the public purse must be taken into account into a consideration of the cost effectiveness of ADR. As well as adding cost, unsuccessful attempts at ADR increase the time taken to finalise the application for review.

Further in this respect, it is sometimes a condition precedent to the exercise of the power of a merits review tribunal to make an order to give effect to the outcome of an agreement reached by the parties through ADR that the tribunal first consider the same issues which it would have been required to address in making a decision following a hearing.[7] To satisfy that condition precedent, the tribunal may need to convene a hearing. To show that the condition precedent had been met (particularly in the context of a statutory appeal or judicial review application in which one of the parties seeks to vitiate the agreement), the tribunal may decide to give reasons for its decision. The cost of finalisation of this kind of case by ADR, or without ADR, may be much the same.

To the extent that conferences serve a case management purpose, the SSAT has found in the complex matters in its child support jurisdiction that having the SSAT member who will preside at the hearing convene a directions hearing (at which orders are made about documents and information which the (citizen) parties are to give to the SSAT and hearing arrangements are fixed) better fulfils that purpose.

Fourthly, the more prescriptive the statutory provisions under which the reviewable decision was made, the less may be the scope for ADR. If that proposition is accepted (as it was by the Administrative Review Council (**ARC**)), [8] compulsory ADR for all reviews within a generalist merits review tribunal is likely to be inappropriate.

While internal review, specialist tribunals, mediation and preliminary conferences have been characterised as necessary filtering mechanisms in large volume areas of the AAT's jurisdiction to

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[6] The costs of the AAT's finalisation of a review without a hearing in 2012-13 ($3,538) was 60% more than the average cost of a finalised application for review by the SSAT ($2,215) even though 78% of applications for review by the SSAT were finalised with a hearing. Source: Administrative Appeals Tribunal above n 1 at page 32, Table 3.8; Social Security Appeals Tribunal above n 4 at page 11.

[7] See, for example, subsection 103W(4) of the *Child Support (Registration and Collection) Act 1988* which prohibits the SSAT from making a decision by consent in relation to a departure from administrative assessment of child support unless it is satisfied that it is just and equitable and otherwise proper to do so having regard to the matters set out in subsections 117(4) and (5) of the *Child Support (Assessment) Act 1989*.

[8] Administrative Review Council above n 2 at paragraph 3.151.

enable the AAT to make decisions which will have a normative effect on primary administration,[9] an examination of the AAT's decisions about social security entitlements indicates that those decisions turn on essentially factual issues rather than on issues of statutory interpretation or agency practice.[10] Hence, ADR appears to impact quantitatively, rather than qualitatively, on the applications which are heard by the AAT.

Finally, consideration must be given to whether ADR detracts from the function of a merits review tribunal to make the correct and preferable decision. The ARC said that:

> *If the agency and the applicant seeking review of an administrative decision are able to agree on a decision that is lawful, it is difficult to see what interests would be served by any further expenditure or resources. Provided the tribunal is satisfied that the applicant has not been pressured or coerced into accepting a less favourable outcome, there should be no obstacle placed in the way of such settlements.*[11]

However, in the context of merits review, if ADR gives an applicant an outcome which is not available to other citizens in like circumstances, it is difficult to see how the interests of equality under the law are served. For example, hundreds of AAT proceedings which relate to the recovery of a debt under the social security, family assistance or student assistance law are settled by a partial wavier of the debt and the proceedings are taken to have been dismissed.[12] The result is that some applications for review by the SSAT are made by persons, who do not dispute the existence or quantum of a debt, but who seek review by the SSAT in order to apply for review by the AAT where they obtain a discount of the debt.[13] Rather than being a filter, the SSAT is a step to an outcome which is not otherwise available. From a financial perspective, the merits review system rewards the person who has occasioned further cost.

Rather than importing ADR as a matter of course into other merits review tribunals, it may be timely to question assumptions[14] about the role played by merits review tribunals and/or to consider ways to hear reviews more quickly, informally and economically as well as fairly and justly.

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[9] The Hon Sir Gerard Brennan AC KBE, *The AAT – Twenty Years Forward*, Opening Address to the Administrative Appeals Tribunal Twentieth Anniversary Conference, 1 July 1996, www.hcourt.gov.au.

[10] The AAT made 398 decisions after a hearing in what it describes as its "social security jurisdiction" in 2012-13. Source: Administrative Appeals Tribunal above n 1 at page 193, Table A4.5. The AAT's decisions are published on AustLII.

[11] Administrative Review Council above n 2 at para 3.146.

[12] Section 182 of the *Social Security (Administration) Act 1999*; section 146 of the *A New Tax System (Family Assistance) (Administration) Act 1999*; section 326A of the *Student Assistance Act 1973*. More than 12% of applications for review by the AAT under those Acts were settled in this way. Source: *Administrative Appeals Tribunal Annual Report 2012-13*, pages 193-194, Table A4.5.

[13] Section 181 of the *Social Security (Administration) Act 1999*.

[14] The Hon Michael Kirby AC CMG, *AAT – Back to the Future* delivered at the Australian National University, *The AAT- Twenty Years Forward* (1-2 July 1996) and published on the website of the High Court: http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_aat.htm

Draft recommendation 10.1

Restrictions on the use of legal representation in tribunals should be more rigorously applied. Guidelines should be developed to ensure that their application is consistent. Tribunals should be required to report on the frequency with which parties are granted leave to have legal representation.

Draft recommendation 10.2

Legal and other professional representatives should be required to have an understanding about the nature of tribunal processes and assist tribunals in achieving objectives of being fair, just, economical, informal and quick. Legislation should establish powers that enable tribunals to enforce this, including but not limited to tribunals being able to make costs orders against parties and their representatives that do not advance tribunal objectives.

The SSAT concurs that "consistent with their original intent, tribunals should conduct themselves in a way that, in many cases, will make the involvement of lawyers unnecessary". The SSAT would add in respect of specialist merits review tribunals, that the involvement of the agency whose decision is under review should also be unnecessary in most cases. If the agency is not represented at the hearing, real or perceived disadvantage to applicants without legal representation should be reduced.

Within the Commonwealth civil justice system, the decision-maker is required to provide a written statement of reasons for the decision under review and to set out his or her material findings of fact and refer to the evidence on which those findings are based. Within the SSAT's jurisdiction, the decision-maker has a right to make written submissions which is not exercised. Members of a specialist merits review tribunal, or of a specialist merits review division within a generalist tribunal, should have the knowledge and skills to undertake the inquiry entrusted to them and to make the correct or preferable decision without further assistance from the decision-maker. In an exceptional case, the tribunal could order the decision-maker to make written and/or oral submissions.

If a tribunal is a second tier of external merits review, it might be the decision-maker who is the applicant for review. In that case, the decision-maker should have the same opportunity to present his or her case (including any right to be legally represented) as any other applicant.

A tribunal is in control of its own procedure. Undue caution in exercising that control is likely to be the nub of the problem rather than legal representation *per se*. For that reason, the SSAT does not favour prohibition on the use of legal representatives, reporting on the frequency of allowing legal representation, or amending statutes to require legal representatives to assist a tribunal to achieve its statutory objective and to allow cost orders to be made for failure to do so.

Information request 10.2

Due to the varying degrees to which tribunals have implemented information and communication technologies, the Commission seeks further information on the extent to which such technologies are used in tribunals, and on the experiences of tribunals that have implemented them.

The SSAT has an electronic case management system which contains all documents received from the agency and other parties, as well as records of action taken by the SSAT's registry staff or an SSAT member, in relation to an application for review.

Statutes which confer jurisdiction on the SSAT permit an application for review to be made orally. Registry staff record applications for review in the case management system thereby triggering an electronic notification to the agency to provide the statement about the decision and a copy of the documents which are relevant to that decision. The SSAT will soon launch its electronic lodgement facility for the making of applications for review and is working with the Department of Human Services (in which the decisions reviewable by the SSAT are made) to enable documents to be uploaded to the SSAT's case management system.

Many hearings by the SSAT are done electronically (by telephone or by video-conference). In such cases, the SSAT's electronic case management system enables the SSAT to be constituted by a member located interstate without the need to send a paper file. The case management system and all documents in relation to a review can be accessed from each of the SSAT's hearing rooms.

The SSAT's electronic case management system (combined with diversion of phone calls) has enabled the SSAT to operate seamlessly where a registry has been affected by a natural disaster, building evacuations or power outages. By diversion of phone numbers to other registries, interstate staff answer enquiries from parties and update the case management record.

Where the SSAT is the only level of external merits review, the SSAT records its hearings and does so digitally. The recording is made available electronically to a transcription service for preparation of a transcript at the request of a party to a statutory appeal against, or application for judicial review of, the decision of the SSAT.

The SSAT has an electronic document management system for its corporate documents, and uses the electronic systems of its portfolio department for its financial and HR functions.

Information request 10.3

The Commission seeks views on the cost-effectiveness of consolidating all Commonwealth merits review bodies in one Administrative Review Tribunal along the lines recommended by the Administrative Review Council.

The extent (if any) to which consolidation will be cost effective depends on the culture and mode of operation of the new tribunal. The current specialist Commonwealth merits review tribunals have far greater workloads, but much lower costs, than the Commonwealth's generalist merits review tribunal. The combined number of applications for review received by the MRT, RRT, SSAT and VRB in 2012-13 was 35,981 compared to 6,176 by the AAT.

The average cost of finalising applications for review by these tribunals in 2012-13 is set out in the table below.

Name of tribunal	Finalised applications	Average cost of review	Average cost without a hearing	Average cost with a hearing
AAT	6,042	$6,303[15]	$3,538	$16,641
SSAT	12,412	$2,215[16]	N/A	N/A
MRT/RRT	19,347	$3,747[17]	N/A	N/A
VRB	3,403	$1,615[18]	N/A	N/A

If the reviews currently done by the MRT, RRT, SSAT and VRB were to be done in accordance with the model and cost structures of the AAT (including the much higher level of members' remuneration), the cost to Government would significantly increase notwithstanding any reduction in accommodation footprint or efficiencies in delivery of corporate services for the new tribunal.

The Commission has raised the possibility of savings in the cost of "outreach efforts". If such efforts refer to activities to inform the community (or sections of the community) about the availability of merits review and how the particular Commonwealth merits review tribunal undertakes a review, cost savings would be negligible because the tribunals spend little on this activity and already give out information about each other where there is a common user demographic (such as social security applicants and recipients in the case of the SSAT and AAT).

However, if "outreach efforts" refer to registry staff contacting self-represented parties (as outlined on page 304 of the Commission's draft report), the SSAT provides such information in its written acknowledgment of receipt of an application for review, and on its website which includes information in many languages as well as audio-visual material. Being able to view the tribunal's premises and to see a segment of a public hearing (or a mock hearing if the tribunal conducts private hearings) is less costly and likely to be of most assistance to any person who will be newly appearing at the particular tribunal.

[15] Calculated from the average costs of reviews respectively finalised without a hearing and with a hearing. Source: Administrative Appeals Tribunal above n 1 at page 32, Table 3.8.

[16] Social Security Appeals Tribunal above n 4 at page 11.

[17] The average cost of a review by the MRT/RRT was derived by dividing the total cost of those tribunals inclusive of depreciation by the number of cases decided, as published in the *Migration Review Tribunal – Refugee Review Tribunal, Annual Report 2012-13*, at page VII.

[18] *Veterans' Review Board Annual Report 2012-13* at page 59. However, the cost may be somewhat understated as it appears not to include the cost of accommodation of the VRB and of the corporate services which are provided to the VRB by the Department.

While the tribunals continue to have custom designed case management systems, savings on information technology are likely to be relatively small. In relation to the possibility of savings in records management raised by the Commission, the SSAT has less than one full-time equivalent devoted to records management so that there is no saving to be reaped there. Thus, the savings of co-location in the short to medium term would arise from any reduction in accommodation footprint, common reception service, and any economy of scale in finance, HR and general IT functions.

Information request 10.4

Where consolidation is not feasible, the Commission seeks views on options for greater use of co-location, shared administration and shared outreach.

The SSAT continues to favour co-location of the major Commonwealth merits review tribunals. In default of, or pending the creation of, one Commonwealth merits review tribunal, opportunities for co-location and shared corporate services could be maximised and best managed by one body which is not amenable to control by one of those merits review tribunals.

A body to provide corporate services to these merits review tribunals could be created by Ministerial direction and could be given agency status by its listing as an entity for the purposes of the *Public Governance, Performance and Accountability Act 2013.*

Information request 10.5

The Commission seeks views on whether current appeal and review mechanisms within and between tribunals, and between tribunals and courts, are operating fairly, efficiently and effectively, and what opportunities exist for rationalisation or improvement.

The Commission points out that "if too broad, internal appeal rights and second tier merits review have the potential to result in unmeritorious appeals and unnecessary and costly duplication".

There is currently no right of second tier merits review in respect of the decisions of the AAT, MRT, RRT, but also of the SSAT in relation to the most child support decisions. The low success rate of appeals (to the various courts to which an appeal lies) on a question of law against those tribunals' decisions is the best indicator of the extent to which the tribunals make legally correct decisions.

In relation to those decisions of the SSAT which are reviewed by the AAT, an analysis of the outcomes indicates that:

- The AAT very rarely disagrees with the SSAT as to the law. In 2012-13, only 4% of applications for review by the AAT of decisions of the SSAT resulted in the SSAT's decisions being changed after a hearing by the AAT. The reason for the change was fresh evidence or a different view of the evidence.

- Decisions of the SSAT are also changed by the AAT without a hearing to give effect to an agreement reached between the parties: see the response to Information request 10.1 above.

Abolition or restriction of second tier merits review from the SSAT and the VRB would significantly reduce the review workload of the AAT (by around 37% of lodgements[19] but 40% of hearings[20] based on published data for 2012-13).

In 1995, the ARC recommended a second tier of review within the proposed Administrative Review Tribunal (**ART**) because a case may raise "an important issue or principle of general significance", or a decision of the ART may "involve a manifest error and should, for reasons of efficiency and practicality" be able to be determined by a Review Panel. The resultant ART Bill provided for further review only in the first of these two circumstances.

It is now some 18 years since the ARC enquiry and report. The volume of decisions in respect of which there is currently no second tier of external merits review has grown substantially. In 2012-13, the MRT received 16,164 applications for review; the RRT received 4,229 applications for review and the SSAT received 1,582 applications for review of child support decisions (in respect of which the SSAT is the only tier of external merits review). Those tribunals have necessarily dealt with important issues or principles of general significance arising in those reviews.

Further, the SSAT had only been an adjudicative tribunal for six years when the ARC undertook its enquiry and made its recommendations. The quality of the SSAT's decision-making had developed in the ensuing 18 years such that Parliament conferred the child support jurisdiction (without any further right of merits review) on the SSAT in 2007.

If the Commonwealth merits review tribunals were consolidated into an ART and a further review were favoured on the ground that there had been a manifest error of law or of fact which is likely to have materially affected the ART's decision (ARC recommendation 97[21]), the error of fact should be manifest on the evidence before the ART when it made the decision. Such a limitation is an incentive for parties to make full disclosure in the first instance (as the case law requires of a person making an application for a determination to depart from administrative assessment of child support at all decision-making levels and of a person seeking review of such a decision by the SSAT[22]).

[19] Administrative Appeals Tribunal above n 1 at pages 26-27, Charts 3.1 and 3.2.

[20] Administrative Appeals Tribunal above n 1 at pages 193-194, Table A4.5.

[21] Administrative Review Council above n 2, at page 150.

[22] *Humphries v Berry (SSAT appeal)* [2008] FMCAfam 409; *Agrippa & Horton (SSAT Appeal)* [2010] FMCAfam; *Morse v Potts (SSAT appeal)* [2010] FMCAfam 985.