



Australian Government
Department of Immigration and Citizenship

Administrative Appeals Tribunal seminar
The obligation to assist model litigants in AAT proceedings

‘Issues concerning legal advice and representation’

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Canberra
26 August 2009

Ladies and gentlemen.

It's a pleasure to have this opportunity to discuss issues concerning legal advice and representation in the context of our obligation to act as a model litigant in Administrative Appeals Tribunal hearings.

In 2008-09 the Department of Immigration and Citizenship received over four and half million visa applications.

The majority were for visitor visas with significant numbers of student, skilled, family and humanitarian stream visa applications.

In the same year, the department conferred citizenship on over 100 000 permanent residents.

These programs represent a significant investment by the Australian Government in nation building and reflect the government's commitment to immigration and citizenship as a cornerstone of this country's future.

To understand this contribution, we should reflect on the fact that sometime this year, we are expecting the seven millionth permanent migrant to arrive in Australia since my department was established in 1945.

Our work over this time has resulted in approximately one in four Australians having been born overseas and about one in two Australians having been born overseas or having at least one parent who was born overseas.

One of the highlights of our work and one of which I am especially proud is our contribution as the lead agency in the resettlement of a substantial number of refugee and humanitarian entrants each year.

Today I will discuss the department's activities in terms of our interaction with the Administrative Appeals Tribunal.

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Coming from a legal background myself and as a member of the Administrative Review Council, I consider administrative justice and good decision-making to be one of the touchstones of good public administration.

While there are a number of factors that can lead to merits review and a different outcome for the applicant, I am keenly aware that quality decision-making may limit unnecessary review by merits review tribunals such as the AAT.

In 2007 the department worked with the Administrative Review Council to produce a series of good decision-making guides.

Two sets of guides were created. The first set for decision-makers in my department and the second for decision-makers across all of government. These guides were made widely available to staff of my department. I commend them to you.

At many stages of the visa and citizenship application lifecycle there are appropriate merits review opportunities.

Most decisions made to refuse visa applications are reviewable by one of the two specialist tribunals—the Migration Review Tribunal and the Refugee Review Tribunal.

This case load of the MRT and RRT makes up the bulk of migration merits review.

In 2007-08, 6325 applications for review were made to the MRT and 2284 applications were made to the RRT. Some 500 989 potentially reviewable visa applications were lodged with the department in that year.

Decisions to cancel visas are also usually reviewable by the Migration Review Tribunal. However, in some special cases parliament has determined that the Administrative Appeals Tribunal is the best forum to review cancellations.

This is so in the case of cancellations of business skills visas, and cancellations under section 501 of the *Migration Act 1958* due to a failure to pass the character test.

In addition, this tribunal has jurisdiction to review:

- visa refusals on the basis of section 501
- refusals of protection visas on the ground of Article 1F (crimes against humanity, war crimes etc)
- refusals of applications for citizenship by conferral
- decisions to caution, suspend or cancel a migration agent's registration, and
- review of FOI decisions.

In 2008-09 the AAT reviewed 298 departmental decisions.

Of these, nearly 50 per cent were decisions to refuse applications for citizenship by conferral, 25 per cent were decisions to cancel business skills visas, and 17 per cent were character-related decisions.

To understand the department's practice in the conduct of AAT matters, it is instructive to understand the department structure.

Interaction with our clients takes place through a number of channels including face to face contact via our state and territory offices and overseas posts, through our various telephone enquiry lines, and through our electronic services such as e-visa and the new Visa and Citizenship Wizards.

These wizards help clients to self-determine their eligibility for various visas and you can go to our website to see how they work.

The policy-making hub of the department is our National Office here in Canberra.

National Office is structured along divisional and branch lines, which are collected under three broad groups—Migration, Refugee, Citizenship and Compliance Group, Borders, Detention and Technology Group and Client and Corporate Services Group.

In terms of our conduct of litigation both in the courts and in the AAT, this function is centralised in the Litigation and Opinions Branch, which is part of our Governance and Legal Division led by the Chief Lawyer Robyn Bicket, who joins me as a panellist today.

The Litigation and Opinions Branch is structured along client lines to ensure the relevant policy areas within the department are provided with high quality advice and reporting.

The branch has 25 legal officers and 19 administrative staff managing our litigation case load.

The benefits of centralisation of legal services in National Office are many.

Most importantly, it provides us with consistency across matters and allows us to minimise the risks of a large case load by developing strategies based on economies of scale.

It also ensures we carefully choose which matters we pursue and have clearly justified policy reasons for doing so.

As at 30 June 2009 the department had an overall litigation case load of 1305 cases on hand, including 127 AAT matters.

While these figures have reduced significantly over the years—from an historical high of 4477 cases overall and 258 AAT cases as at 31 July 2004—this number is still significant and demands a highly managed approach that is reflected in the centralisation of all matters.

The other clear benefit of centralisation is in the management of our Legal Services Panel.

The allocation of work to this panel is actively managed to ensure high quality legal services that represent value for money.

Panel performance is closely monitored both on a day-to-day basis by our legal officers and via four monthly formal reviews.

In managing our litigation case load, the department is guided by the Attorney-General's Legal Services Directions and the model litigant obligations imposed on the department. We take our obligations very seriously.

The Legal Services Directions provide that litigation is to be conducted in accordance with legal principle and practice, taking into account the legal rights of the parties and the financial risk to the Commonwealth (including the agency) of pursuing its rights.

The directions also provide that litigation is to be conducted in accordance with Model Litigant obligations. Pursuant to these obligations the department is required to act honestly and fairly in handling claims and litigation.

The directions specifically require, among other things:

- that the agency deal with claims promptly and not cause unnecessary delay in the handling of claims and litigation
- that it make an early assessment of the Commonwealth's prospects of success
- that it act consistently in handling of claims and litigation (I have already outlined how our structure supports this)
- that the agency endeavour to avoid, prevent and limit the scope of legal proceedings by giving consideration to alternative dispute resolution processes, and
- that it not rely on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement.

An example of how some of these obligations are complied with is reflected in the department's contractual arrangements with the Legal Services Panel.

That is, panel firms are required to give written advice on prospects within 21 days of receiving the claim.

Further, one of the key goals in the management of our case load is to withdraw as early as possible where there are no reasonable prospects of success.

Over the past five years the department's withdrawal rate in AAT matters has averaged 24 per cent.

This is often due to further evidence being submitted at the merits review stage than was available to the primary decision-maker.

The Model Litigant obligations also deal specifically with merits review proceedings.

In particular, the obligation to act as a model litigant extends to agencies involved in merits review proceedings.

There is also a specific reference, reflecting the nature of merits review and section 33(1AA) of the AAT Act, that the agency should use its best endeavours to assist the merits review tribunal to make its decisions.

For the department this means that our role is to reveal or elicit the facts or the truth for the minister so that the tribunal can make the correct and preferable decision.

It is not our aim to win at all costs.
Justice and fairness are the goal.

To achieve this, my department takes a number of steps to assist the tribunal in reaching its decision.

Where the applicant is unrepresented, our panel firms will, to the extent reasonably and practicably possible without overstepping their role as the Commonwealth's solicitors, guide the applicant through the AAT process and assist them to understand the legal issues involved.

This helping hand can often save the tribunal a significant amount of time and expense and may assist in narrowing the issues for consideration.

As many of you would be aware, the Migration Act contains a regime for the deemed notification of decisions, whereby a person is taken to be notified of a decision if the content and manner of the notification meets certain statutory requirements.

While these provisions are intended to give certainty to our decision-makers and to review bodies such as the tribunal, the risk of error is real and there are now many court decisions about what constitutes lawful notification.

In the context of AAT proceedings, where the department or our panel firm discover a notification error, we withdraw from the proceedings and renotify the applicant, thereby allowing the time limits to commence again.

This approach is adopted regardless of whether the issue is raised by the applicant. In this way the department behaves as a model litigant.

Another example of assisting the tribunal to reach the correct and preferable decision is our approach to extension of time applications.

As you would be aware where an application for review is made out of time, the tribunal has, in most cases other than onshore cancellations under section 501 of the Migration Act, jurisdiction to extend time pursuant to section 29 of the AAT Act.

Generally, unless the application is significantly out of time, the department's position is to neither consent to nor oppose the extension of time.

This is consistent with the department's model litigant obligations and our objective in managing the migration and citizenship review case load to provide real access to justice.

In terms of representation before the tribunal, in all matters the department encourages the use of solicitor-advocates from our panel firms.

We have found that our solicitor advocates provide able representation and assistance to the tribunal.

Occasionally counsel will be briefed to appear. Counsel may only be briefed where the matter is particularly complex.

Of the 1913 AAT matters resolved since 1 July 2004, in only 29 matters has counsel been briefed by the department.

Having noted these actions and initiatives taken by the department and its panel firms in assisting the tribunal, there are occasionally circumstances where our ability to assist the tribunal is impeded by statutory constraints.

For example, the secrecy provision in section 503A of the Migration Act prevents the disclosure of information received from a gazetted enforcement agency.

The purpose of section 503A is obvious.

It ensures the continued provision of information of this kind which is crucial to the integrity of Australia's borders.

Without it there would be a very real risk that important sources of information would dry up.

Unfortunately, a by-product of this is that on most occasions, information of this kind cannot be provided to the applicant or to the AAT.

Of course, the migration and citizenship portfolio is not unique in this regard with secrecy provisions being littered throughout Commonwealth legislation affected decision-makers across many agencies.

From the department's perspective the engaging of section 503A means that our legal officers and panel firms must find other ways to assist the tribunal.

Before concluding I will make one other remark related to the department's model litigant obligations.

That is, it sometimes appears that applicants do not often understand what it means for the department to be a model litigant.

In particular our objective is to withdraw where there are no reasonable prospects of success.

I say this because, our experience has shown that critical submissions or evidence is sometimes not submitted by the applicant until the hearing of the matter.

This approach of 'playing your ace' at the hearing is counterproductive.

If the critical submission or piece of evidence is provided to the department earlier it is possible that the department would have withdrawn, saving the tribunal and the parties the expense and trouble of a hearing.

So I encourage applicants to present new material at an early opportunity.

In this regard, the tribunal and its members may have a role to play in educating applicants and their legal representatives.

Conclusion

I hope this brief survey of our approach to issues of representation and advice demonstrates our intention not only to be a model litigant, but also to live up to our aim of having fair and reasonable dealings with our clients.

As a department which makes significant and often life-changing decisions for our clients, we are mindful of the importance of not only getting the decision right the first time, but then being subject to a range of accountability and review processes.

These are not limited to the Administrative Appeals Tribunal, and we are also cognisant of our responsibilities to the Auditor-General, the Commonwealth and Immigration Ombudsman and of course the Migration Review Tribunal and the Refugee Review Tribunal, among others.

The Administrative Appeals Tribunal in particular plays a unique and valuable role in these accountability mechanisms, and I have no doubt that the positive and properly independent relationship we have developed over the years will continue.

With all these groups we strive to be open and accountable so that our administrative decision-making and review is effective and delivers positive outcomes.

In these ways, we can maximise the contribution of sound administrative decision-making and review to the conduct of our future nation building activities.