Australian National University Public Law Conference 2023: Integrity and Innovation (Public Law in the 2020s)

Introduction

1. Esteemed colleagues and advocates of public law, I extend my gratitude for your attendance at this session, titled ‘A new system of Federal Review: changes to the AAT’. It is an honour to engage with such a distinguished assembly of scholars, lawyers, and professionals.

2. I wish to specifically address the esteemed attendees on two pertinent matters.

Statutory Prerequisites for Submitting an Application

3. The initial matter I intend to address pertains to the jurisdictional prerequisites for submitting a valid application for review to the Administrative Appeals Tribunal (hereinafter referred to as "the **Tribunal**"). These prerequisites are enshrined in s 29 of the Administrative Appeals Tribunal Act 1975 (Cth) (henceforth "the **AAT Act**").

4. I shall not delve into a comprehensive discussion of all jurisdictional prerequisites at this juncture. Nevertheless, I aim to elucidate certain facets of s 29 that may present challenges, along with potential rectifications to be considered upon the inauguration of the forthcoming Administrative Review Tribunal (hereinafter referred to as "the **ART**").

5. Section 29(1)(c) of the AAT Act mandates that an application submitted to the Tribunal for a decision review must encapsulate a clear articulation of the rationale underlying the application. It is imperative to underline that any deviation from this stipulation results in the application being rendered invalid, as elucidated in the judgments of Miller v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 489 and Miller v Minister for Immigration, Citizenship and Multicultural Affairs [2022] FCAFC 183.

6. The stipulations delineated in s 29(1)(c) are stringent and leave little room for flexibility. Regrettably, the provision does not endow the Tribunal with any discretionary powers to either absolve applicants from adhering to the specified requirement or to proffer an extension for compliance. This rigidity potentially

exhibits an unintended discriminatory bias, particularly affecting applicants who grapple with the nuances of the English language or those constrained by limited access to legal representation due to circumstances such as incarceration or prolonged periods in immigration detention.

7. A salient inconsistency that warrants our attention is the divergence between s 29(1)(c) of the AAT Act and s 347 of the MA. Specifically, s 347 of the MA delineates the statutory criteria required to submit an application for a Part 5 reviewable decision to the Migration and Refugee Division (hereinafter referred to as "the **MRD**") of the Tribunal.

8. In contrast to s 29(1)(c) of the AAT Act, s 347 refrains from enforcing an unequivocal stipulation necessitating the inclusion of the underlying rationale for the application within its contents. It is noteworthy to mention that the MRD adjudicates Part 5 reviewable decisions, distinct from the scope of applications encapsulated under s 29(1) of the AAT. Yet, the disparity in the stipulations between s 29(1)(c) and s 347 raises questions about the coherence and uniformity of requirements across different facets of administrative review.

9. It is imperative to underscore that both the General Division (hereinafter referred to as "the **GD**") and the MRD adjudicate review applications pertinent to diverse dimensions of Australian migration law. Upon a meticulous examination, no cogent rationale emerges that justifies the apparent legislative incongruence between s 29(1)(c) of the AAT Act and s 347 of the MA. This disparity warrants a deeper exploration to ensure uniformity and coherence in the legislative framework governing administrative review processes.

10. There exists a substantial justification for reconsidering and potentially moderating the stipulations under s 29(1)(c) of the AAT Act in the forthcoming legislation aimed at instituting the ART.

11. The AAT's merits review capacity is best conceptualised as a re-evaluation, wherein the AAT assumes the position of the original decision-maker to independently ascertain, based on the evidence at its disposal, the optimal decision under the confines of the delegated authority. This sentiment is encapsulated in the ruling of Frugtniet v Australian Securities and Investments

Commission (2019) 266 CLR 250 at 271 [51]. In light of this, there isn't an inherent obligation to pinpoint discrepancies in the initial decision-maker's determinations.

12. To further elucidate, the AAT's role is fundamentally to re-examine and, if necessary, re-adjudicate matters initially determined by the primary decision-making authority, as illustrated in Shi v Migration Agents Registration Authority (2008) 235 CLR 286 at 315 [100]. In this context, the omission of a stated rationale for the application shouldn't serve as an insurmountable barrier to invoking the Tribunal's jurisdiction. Generally, there isn't a stringent need to highlight errors in the original decision.

13. Furthermore, within the continuum of administrative processes, the underlying motives for an application tend to crystallise as the case unfolds within the Tribunal's purview. Typically, litigants are mandated to present a comprehensive outline detailing facts, central issues, and assertions preceding a contested hearing, as evidenced in LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1039 [21].

14. Throughout the Tribunal's proceedings, documents are frequently presented pursuant to official directives, and evidence is solicited in both documentary and oral forms during adversarial hearings. The crux of the matter is straightforward: the substantive reasons underlying an application often become manifest post the exhaustive adjudication by the Tribunal. Even if one were to challenge this premise, it remains conceivable that the Tribunal, based on its evaluation of evidentiary weight and arguments, could arrive at a conclusion distinct from the initial decision-maker's judgment.

15. The stipulation for an obligatory inclusion of a statement elucidating the reasons for the application to the Tribunal ought to be re-evaluated. Upon the Tribunal acquiring jurisdiction, in instances where a party neglects to adhere to a directive issued by the Tribunal pertaining to the submission of a statement delineating facts, pivotal issues, and arguments, the Tribunal should be vested with the discretionary power to terminate the proceedings at that juncture. This approach ensures a more equitable procedural framework.

Statutory Objectives of the Tribunal

16. Section 2A of the AAT Act outlines the objectives the AAT should follow in executing its functions. The AAT's primary function is to offer a review mechanism that is easily accessible, ensures fairness, efficiency, and promptness, aligns its procedures with the significance and intricacy of the case, and fosters public trust in its decision-making process.

17. While the existing objectives, laid down by the Tribunals Amalgamation Act 2015 (Cth), have provided a comprehensive framework, there's scope for them to be fine-tuned to better serve the diversity of matters and maintain public confidence. Let us consider the following.

18. *Accessibility*. It is imperative that the Tribunal maintains its accessibility for all individuals, regardless of their socio-economic status or educational achievements. The forthcoming ART should epitomise a legal framework that underscores effortless access, both in physical proximity and in comprehensibility, drawing parallels with the provisions in the South Australian Civil and Administrative Tribunal Act 2013 (SA). Such an approach should encompass the refinement of procedures, the adoption of lucid language, and the implementation of uniform and standardised forms.

19. *Promotion of Public Trust*. The objectives of the AAT should be expanded to mirror the emphasis other state and territory tribunals place on promoting public trust in broader governmental decision-making, as seen in the Queensland Civil and Administrative Tribunal Act 2009 (Qld) and the ACT Civil and Administrative Tribunal Act 2008 (ACT).

20. Over the course of their tenure, Tribunal members amass substantial expertise in the intricate task of evaluating and critically reviewing various facets of Commonwealth legislation and associated policies. This extensive immersion provides them with a nuanced perspective on the implementation and interpretation of Australian legal provisions.

21. Given their vantage position, they are exceptionally equipped to discern and subsequently relay to the Commonwealth Attorney-General any recurrent or systemic challenges associated with the execution of authorising laws. This

proactive oversight role is not unprecedented; it resonates with the provisions encapsulated in s 6(h) of the ACT Civil and Administrative Tribunal Act 2008 (ACT).

22. The ART objectives should include objectives that emphasise transparency, independence in decision-making, and holding the broader government mechanisms accountable.

23. *Dispute Resolution*. In recent years, there has been a discernible trend towards the adoption and prioritisation of dispute resolution mechanisms. Given this evolving landscape, it would be judicious for the forthcoming legislation that oversees the ART to duly acknowledge this trend and strategically embed provisions that emphasise and prioritise such mechanisms.

24. The new legislation should integrate objectives emphasising mediation and alternative dispute resolution procedures as primary means before resorting to more formal processes, reflecting the emphasis in the South Australian Civil and Administrative Tribunal Act 2013 (SA), s 8(1)(c).

25. *Flexibility*. The forthcoming ART should be designed with adaptability and versatility at its core, ensuring its capability to address the multifaceted and diverse array of cases it will inevitably encounter. The governing legislation must encapsulate objectives that champion procedural adaptability, ensuring that each approach is bespoke and aligned with the distinct intricacies and requirements of individual cases.

26. *Cost-effectiveness*. A fundamental tenet of a just legal system is its affordability, ensuring that access to justice is not a privilege of the few but a right of all. In crafting the new legislation for the ART, it is imperative that the framework underscores the importance of cost-efficiency for all parties involved. This ensures that the legal process remains equitable, preventing financial barriers from impeding individuals' pursuit of justice.

27. By prioritising affordability, the legislation would send a clear message that justice should be universally accessible, irrespective of one's financial standing.

28. *Promotion of Best Principles of Public Administration*. The ART should stand as

a paragon of exemplary public administration, setting a benchmark for others to follow. In formulating the framework for the new ART, it is paramount that the governing objectives underscore a commitment to upholding the highest standards of administrative practice. This includes a dedication to delivering decisions of superior quality and unwavering consistency.

29. Furthermore, an unwavering adherence to procedural fairness is essential, ensuring that every stakeholder is granted an equal and just opportunity within the system. Beyond this, transparency should be woven into the very fabric of the ART's operations, guaranteeing that its processes are clear, comprehensible, and open to scrutiny. Such objectives would not only enhance the efficacy of the tribunal but also bolster public trust and confidence in its decision-making.

30. *General*. While the current objectives of the AAT Act have served its purpose, they could be enhanced to reflect the evolving legal landscape and the increasing emphasis on accessibility, transparency, and alternative dispute resolution. The proposed reforms seek to make the ART more in line with its counterparts in various states and territories, ensuring it remains a paragon of fairness, justice, and public trust.

Conclusion

31. The introduction of the ART signifies the Australian Government's commitment to modernising and streamlining the federal administrative review process, ensuring it is aligned with current needs and future challenges.

32. The establishment of the ART is a monumental step forward in our journey towards administrative excellence. Its core principles of user-focus, efficiency, accessibility, independence, and fairness are not just words, but a commitment to every individual and entity seeking review. As we transition to this new era, we are not just embracing change; we are shaping the future of federal administrative review in Australia.

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