Mediation in the ACT Administrative Appeals Tribunal

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I had proposed this afternoon to provide a perspective of the manner in which mediation operates within the legislative framework of the ACT Administrative Appeals Tribunal Act 1989 so as to provide an illustration of the manner in which the mediation process may need to be conducted to satisfy the requirements for legislated mediation programs.

The ACT AAT Act is, of course, the legislation which governs the ACT AAT and its procedures.

For those who are unfamiliar with the ACT AAT, I should explain that its legislation was modelled on the Commonwealth AAT Act.

Its function is to review decisions made under enactments that are made reviewable by those enactments.

Some differences have emerged over the years between the two Tribunals, however, including in some respects, the approach to mediation. In practice the difference between the Commonwealth of Australia and ACT Tribunals is in the volume of work and the nature of the cases that are dealt with by each of them.

The areas that create the greatest volume of work for the Tribunal are planning, land management, tree protection, revenue, housing assistance, licensing, professional and occupational registration and discipline and freedom of information requests.

The Tribunal comprises two divisions: a general division and a land and planning division.

It is in relation to the land and planning division that my comments will be focussed today because the AAT Act was amended in 2003 to change the manner in which cases in that division were required to be dealt with. The changes included provisions dealing with mediation.

Provision for mediation for both divisions of the Tribunal was first included in the AAT Act in 1994 (section 33A). It applied to both divisions and it enabled the Tribunal to refer a matter to a registered mediator for mediation 'if the President considered it desirable to do so and the parties consent'.

I am not aware of any case in which a matter was referred to mediation pursuant to that section. The most likely explanation for that, I think, is that the mediation process was unfunded whereas preliminary conferences which had the capacity to perform a similar function were funded. Another reason is that in planning cases the development application process includes requirements for pre-application consultation with persons affected by the development application and, in practice, the planning authority usually sought to broker agreement between parties prior to any appeal. There was a basis, therefore, for a view that attempts at resolution had been exhausted and, at least on the side of the developer, there was a concern not to waste further time with attempts at settlement. In light of

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those kinds of considerations there was some scepticism about the utility of any attempt to encourage mediation.

In introducing the AAT Amendment Bill the Attorney-General said that the mediation provisions contained in it were part of a package of legislation to improve land management processes in the ACT. The package was said to be designed to strengthen the land and planning division in order to assist it speedily and effectively to resolve disputes about land and planning decisions. More specifically, mediation was seen as a means of reducing the number of land, planning and environment matters that the Tribunal had to hear.

Section 49D of the AAT Act now provides for mediation in the land and planning division in the following way:

- there is a mandatory requirement for the Tribunal to consider whether a case is suitable for mediation;
- if it is considered suitable and it is reasonably likely that the application may be resolved by mediation the Tribunal, on its own initiative, may refer the matter to a registered mediator;
- a matter may be referred to a registered mediator on the application of a party;
- if the matter is referred to a registered mediator, either on the Tribunal's initiative or on the application of a party, the Tribunal has the power to direct the parties to attend the mediation.

There are a number of observations to be made about that provision.

1. In determining whether a case is suitable for mediation, the Tribunal takes a fairly robust approach. The attention of the parties is directed to the issue of mediation and they are asked to express a view about whether they are agreeable to participating in it in documents which are required to be lodged with the Tribunal at the outset. When the parties first come before the Tribunal at a directions hearing the issue is ventilated unless they have all previously signified their agreement to participate. Even in cases where the agreement of a party is not forthcoming, the Tribunal explains what it sees as the advantages of that process. The result in practice has been that only a handful of cases have not been referred to mediation.
2. The Tribunal has the power to direct the parties to attend the mediation. There are consequences for failing to attend mediation in accordance with a direction. The Tribunal has power to make an order for costs against a party who does not comply with a direction and, in some cases, to order that the defaulting party cease to be a party or even to dismiss the appeal. This raises potentially an interesting question, which time does not permit me to endeavour to resolve now, as to the point at which the direction has been complied with if a party after arriving at the venue designated by the direction decides to withdraw.
3. The requirement is for mediation to be undertaken by a mediator who is registered under the Mediation Act.

The ACT Mediation Act contains provisions for registration of persons who meet competency standards and cancellation of registration in certain circumstances. It also contains provisions restricting the admissibility in evidence of communications in and relating to the mediation and the obligation for secrecy of the mediator. It also contains provisions protecting the mediator.

While the AAT Act does not specifically endeavour to regulate or affect the mediation process otherwise than by s 49D and the Mediation Act, there are a number of provisions that have practical implications for the manner in which it is conducted. I shall not attempt to be exhaustive but merely give a few examples.

Section 49C of the AAT Act, introduced at the same time as section 49D, requires the Tribunal to decide an application within 120 days after the appeal is filed.

This provision places greater emphasis upon the need for the speedy resolution of cases generally than provisions which already exist such as:

- section 3A(c) which includes as one of the objectives of the AAT that it operate efficiently; and
- section 32(1)(b) which requires proceedings to be conducted with as little formality and technicality, and with as much expedition as the requirement of the Act and other relevant enactments and a proper consideration of matters permits.

The 120 day time limit can be extended but it requires the President to be satisfied that it is in the interests of justice to do so and to provide details of the extension and reasons for it in the Tribunal's annual report.

Clearly, however, the objective is to meet the time standard and, in the first year of operation of the provisions, the time limit was extended in only one case.

In the life of a planning case, 120 days is a very tight time frame in which to dispose of a matter if it proceeds to a hearing.

In order to achieve compliance with the 120 day limit a carefully controlled program of steps in sequence is put in place.

A directions hearing is ordinarily held within four weeks of the filing of the appeal. Prior to the directions hearing:

- notice of the appeal has to be given to the decision-maker;
- a statement of reasons for the decision prepared and the evidence on which it was based collated;
- persons entitled to be joined as parties notified of their rights;
- orders made joining parties who have applied to be joined and who have demonstrated a sufficient interest in the decision under review and furnishing them with the statement of reasons and other material;
- a directions hearing is listed and notice of it given to the parties;
- and other matters attended to.

Mediation, if directed, is ordinarily held within 10 days from the date of the directions hearing and a default program put in place in the event that mediation is unsuccessful. This involves allowing the applicant and supporting parties a period of three weeks after the day fixed for mediation to file witness statements, other evidence and submissions, the same period for the respondent and supporting parties to do likewise, a period of one week for material to be submitted in reply and about one week for the material to be collated and distributed to Tribunal members who are to hear the case before the hearing.

The program allows the Tribunal about the same period of time that is given to each party to prepare its case, that is, three weeks, to make a decision and prepare written reasons. This usually results in disposition of the case with no time to spare.

The significance of all of this to mediation is that it cannot progress at a leisurely pace. A mediator ordinarily has about 1-2 weeks in which to examine the papers, contact the parties and to do whatever else is required before the mediation process takes place. This can be especially challenging in planning cases because it is not uncommon for them to involve multiple parties.

It is not impossible but practically very difficult to extend the time allowed for mediation.

There are tensions, therefore, between the need for expedition, on the one hand, and the quality of decision-making and the mediation process on the other hand but, given the oft-made criticism of delays in the justice system, s 49C could be part of an increasing trend to impose time limits for the determination of cases.

If mediation is not successful in resolving the matter it proceeds thereafter in accordance with the default program.

Of perhaps greater significance to the mediation of these cases is the manner in which they are disposed of if mediation is successful in arriving at an agreed outcome. Once a matter comes before the Tribunal it replaces the government agency or official as the decision-maker. It is said that the Tribunal stands in the shoes of the decision-maker. Its role is not necessarily to determine whether the original decision-maker was wrong but what is the correct or preferable decision for the Tribunal to make.

Any decision made by the Tribunal can only be in accordance with the powers conferred on it by the AAT Act.

Section 44(1) of the Act requires the Tribunal to make a written decision:

- affirming the decision under review; or
- varying the decision under review; or
- setting aside the decision under review.

If it sets aside the decision it is required to:

- make a decision in substitution; or
- remit the matter for reconsideration in accordance with its directions or recommendations.

To be capable of being endorsed by the Tribunal the agreed outcome needs to be formulated in a manner that reflects which of those particular powers the Tribunal is asked to exercise and care needs to be taken about the drafting of the decision. There have been occasions in which much time has been spent and delay occasioned by the Tribunal having to unravel ambiguous drafting in the parties' written agreement and re-drafting agreements that plainly failed to reflect their intentions.

In practice there are two ways in which an agreed outcome can be given effect to by the Tribunal. The first is by dismissal. Section 43 of the AAT Act provides for the dismissal of an appeal if the parties consent to that course or if the applicant advises the Tribunal that he/she wishes to discontinue the appeal or to have it dismissed.

If an applicant should come to the realisation as the result of the mediation that he/she is fighting a lost cause, he/she can initiate action to bring it to an end by filing the appropriate notice or, together with the respondent, advising the Tribunal that they agree to dismissal of the application for review of decision.

The power to dismiss an application is discretionary. It would be unusual but not inconceivable that the Tribunal may decide not to exercise its discretion to dismiss a matter. If there were other parties to the appeal apart from the applicant and the respondent, their position may have to be considered.

The second and more usual method is in cases where a compromise has been reached and the Tribunal is requested to exercise the power given to it by s 43B of the AAT Act. That section enables the parties to present to the Tribunal the written terms of the agreement which they have reached. If the Tribunal is satisfied that a decision in those terms or consistent with them would be within its powers

and it appears to the Tribunal that it would be appropriate to do so, the Tribunal is able to make a decision in the terms proposed without holding or completing a hearing.

There are, therefore, two important considerations to be addressed by the Tribunal if presented with written terms of agreement following mediation and it is necessary for the mediator to be aware of these considerations in guiding the parties to settlement.

The first is the question as to the power of the Tribunal to make the decision. This may require careful consideration not only of the statutory power that is being exercised in making the decision under review but also a substantial body of law that affects the manner in which the power is to be exercised.

In the area of planning appeals, for example, a key provision of the *Land (Planning and Environment) Act 1991*, pursuant to which planning approval to development applications is given or refused, is section 8. It provides, in effect, that no approval can be given under the Act if to do so would be inconsistent with the Territory Plan. The Territory Plan is a voluminous document which contains the planning policies and guidelines in varying degrees of generality and specificity for development in the Australian Capital Territory. Any agreement proposed by the parties that was not consistent with the Territory Plan would be beyond the power of the Tribunal to approve.

The issue of the power of the Tribunal to make a decision can arise in other ways. There have been cases where the Tribunal has declined to make a decision agreed by the parties because of a failure of process which the Tribunal considered it mandatory to satisfy. The Tribunal also has recently been requested to determine as invalid a consent decision made by it about two years previously on the basis that the decision lacked the necessary specificity for a valid order.

Irrespective as to the wishes of the parties, therefore, the Tribunal is required to bear in mind its obligation to ensure that no approval proposed by them is inconsistent with the Territory Plan and that there are no other legal impediments to its power to make the decision.

It is highly desirable, therefore, that any mediator also take into consideration whether there are legal impediments to the power of the Tribunal to make a decision in the terms to which the parties are prepared to agree. Otherwise the time spent in mediation may have been to no avail.

The second important consideration arises from the statutory requirement that it appear to the Tribunal that it is appropriate to make the decision. Again, it is not sufficient that the parties agree on what is an outcome acceptable to them both. Let me give a simple illustration of the manner in which the Tribunal might see an outcome agreed by the parties as inappropriate to endorse.

In the context of residential development objection is often taken by adjoining or nearby residents to the overshadowing/loss of sunlight access, overlooking/loss of privacy aspects and other adverse impacts on the amenity that would be caused by the development proposal. One means of reducing the impact of such a proposal would be to increase the setback between the proposed development and the affected neighbour. However, unless the size of the building was reduced the result may simply be to transfer the problem to the neighbour on the other side. In such a case the Tribunal would not approve such a proposed settlement without at least affording the neighbour on the other side opportunity to be heard.

In cases in the general division, the Tribunal has declined to endorse agreement as to conditions that should be attached to a licence to drive heavy transport because it considered the conditions proposed to be attached to the licence provided inadequate protection of the public. Where issues of

public safety are involved, the Tribunal needs to pay particular attention to what has been agreed because of its responsibility as the decision-maker.

The Tribunal also needs to be conscious of the fact that part of the object of administrative review is to improve the quality of decision-making. This may not be achieved by mere endorsement of the agreement of the parties. There needs to be inherent merit in what is proposed and capable of being sustained by sound reasons.

A further consideration is the need to satisfy another objective of the process of merits review to achieve consistency of decision-making so as to ensure that citizens are treated in an even-handed manner. It is possible that agreement in some cases might be readily capable of being arrived at but only at the expense of making a concession or conferring a benefit not generally made available.

I should also mention that the whole process of review by the land and planning division of the Tribunal, and of which mediation directed to be held is a part, is influenced by the objects of the AAT Act. They are set out in sections 3A and 3B which provide:

> *3A Main objects of Act*
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> *The main objects of this Act are —*
>
> *(a) to establish an independent administrative appeals tribunal; and*
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> *(b) to review decisions made by decision-makers under enactments if authorised by enactments; and*
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> *(c) to ensure that the AAT is accessible; and*
>
> *(d) to ensure that proceedings in the AAT are efficient, effective and as informal as possible; and*
>
> *(e) to ensure decisions of the AAT are fair; and*
>
> *(f) to foster an atmosphere in which administrative review is viewed positively as a way of enhancing the delivery of services and programs; and*
>
> *(g) to encourage, and bring about, compliance by administrators with Territory laws.*
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> *3B Role and main object of land and planning division*
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> *(1) The land and planning division of the tribunal forms part of the planning and land system within the ACT.*
>
> *(2) The main object of the land and planning division of the tribunal is to contribute to the orderly and sustainable development of the ACT by making decisions that are consistent with the land and planning system and with the social, environmental and economic background of the ACT.*

There are, therefore, a number of concepts enshrined in the AAT Act. It can be seen that arriving at the correct or preferable decision, whether in consequence of a hearing or mediation, involves more than adjudicating on or assisting the settlement of a dispute between parties. The fact that s 3B(2) of the AAT Act identifies the main object of the division in the way that it does makes it clear that broader planning objectives need to be satisfied.

The comments made by the Attorney-General in the explanatory statement to which I earlier made reference suggests that the new provision dealing with mediation in the land and planning division was intended as a case management strategy to save the resources of the Tribunal, to save the time, cost and inconvenience to the parties of a hearing and to further speed up the process overall. Doubtless these are all important objectives but the considerations which I have outlined suggest that the Act does not permit a settlement at any cost approach. It may be that parties participating in the mediation process need to be assisted to understand that the appeal mechanism is not simply a vehicle for ventilating and resolving grievances and that an outcome consistent with planning policies and principles is the ultimate objective.

There are other provisions of the AAT Act which may have the potential to impact on the manner in which mediation is undertaken in the AAT but time does not permit me to refer to them.

Different considerations will, of course, apply in other legislative contexts and a different approach to mediation will have to be taken than that taken by the land and planning division of the ACT AAT where this is dictated by the terms of any applicable legislation. The message which I think emerges from the comments which I have made about mediation not only in the context of the AAT but in other legislative contexts is somewhat trite. It is important to ensure that mediation is conducted with an understanding of the legislation which provides for it and the legislative context and legal framework in which it operates.

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