Tribunal Adjournments, Amendments and Admission of Evidence

Matt Black
Barrister-at-Law

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Introduction

1. Quick. Fair. Informal. These words appear amongst the objectives of the Administrative Appeals Tribunal (**AAT**),[1] the Queensland Civil and Administrative Tribunal (**QCAT**),[2] and numerous other tribunals around Australia. It is not uncommon, however, for a party – or a practitioner – to feel that one or more of these objectives can only be achieved by sacrificing one of the others.[3] In this paper, I will use those possible conflicts as a backdrop to discuss three related topics:

   (a) Adjournment decisions.

   (b) Allowing amendments (or a change in a party's "case").

   (c) Admitting or excluding evidence.

2. Below, I will outline some of the general principles relating to adjournments, amendments and admission (or exclusion) of evidence in tribunals. My suggestion is that, whilst the balancing of efficiency and fairness tends to favour allowing adjournments and amendments, there might be greater scope for those parties who are resisting such allowances to succeed.

Adjournment decisions

3. The granting of an adjournment can easily be seen to advance the objective of fairness in tribunals, but that is almost necessarily at expense of pursuing a quick proceeding. That is, an adjournment necessarily adds to the amount of time required to finalise a case. So, when is it appropriate to grant an adjournment?

4. Both the AAT and QCAT have express statutory powers to adjourn proceedings.[4] Statutory powers of that nature are not uncommon, and the courts presume that the legislature intends such a power to be exercised reasonably: *Minister for Immigration and Citizenship v Li* [2013] HCA 18, [63] (***Li's case***).

5. In *Li's case*, the Migration Review Tribunal (**MRT**) had a statutory power to "adjourn … from time to time" (at [44]). The proceeding before the MRT dealt with a visa application, and the applicant wanted to rely on a "skills assessment" that was relevant to the visa criteria. She had obtained one skills assessment, but was in the process of obtaining a further skills assessment. The applicant requested that the MRT adjourn or delay making its decision to give her time to obtain and rely on the second skills assessment.

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1 *Administrative Appeals Tribunal Act 1975* (**AAT Act**), s 2A.
2 *Queensland Civil and Administrative Tribunal Act* (**QCAT Act**), s 3.
3 Eg, *May and Military Rehabilitation and Compensation Commission* [2011] AATA 697, [15].
4 AAT Act, s 40(1)(c); QCAT Act, s 57(1)(c). The AAT also has a Listing and Adjournment Practice Direction: <http://aat.gov.au/LawAndPractice/PracticeDirectionsAndGuides/PracticeDirections/ListingAndAdjournmentPracticeDirection.htm>.

6. The MRT refused to adjourn, saying that it "considers that the applicant has been provided with enough opportunities to present her case and is not prepared to delay any further" (at [40]). It proceeded to make a decision affirming the refusal to grant the applicant a visa.

7. In the High Court, it was emphasised that there is a presumption of law that a statutory, discretionary power to adjourn must be exercised reasonably (at [63]). It was held that the MRT's exercise of the discretion was unreasonable, Hayne, Kiefel and Bell JJ saying (at [85]):

> The Tribunal's error might be identified as giving too much weight to the fact that Ms Li had had some opportunity to present evidence and argument and insufficient weight to her need to present further evidence. It would not appear that the Tribunal had regard to the purposes for which the statutory discretion in s 363(1)(b) is provided in arriving at its decision. It is not possible to say which of these errors was made, but the result itself bespeaks error. In the circumstances of this case, it could not have been decided that the review should be brought to an end if all relevant and no irrelevant considerations were taken into account and regard was had to the scope and purpose of the statute. Because error must be inferred, it follows that the Tribunal did not discharge its function (of deciding whether to adjourn the review) according to law …

8. Relevantly, the High Court said that when deciding whether to adjourn, the MRT was required to consider the basis for the adjournment request in the context of the statutory purpose of providing an applicant the opportunity to present evidence and arguments relating to the issues arising in the review (at [80], [83]). It was also said (at [82]):

> It cannot be suggested that the Tribunal is under an obligation to afford every opportunity to an applicant for review to present his or her best possible case and to improve upon the evidence. Of course it may decide, in an appropriate case, that "enough is enough" …

9. It should be noted that, in *Li's case*, there was no opposing party participating in the MRT hearing and so no prospect of prejudice to another party. That will not ordinarily be the case in the AAT or QCAT, but it nevertheless seems that what is required is a balancing of the interests of the party seeking the adjournment on the one hand, and considerations of prejudice to other parties and general efficiency of proceedings on the other.[5]

10. A tribunal's obligation to accord procedural fairness can also require it to take the initiative to adjourn. That is, a failure to adjourn proceedings "may, conceivably, constitute a failure to allow a party the opportunity of properly presenting his case even though the party in question has not expressly sought an adjournment": *Sullivan v Department of Transport* (1978) 20 ALR 323, 343.

11. An example of that situation is *Civil Aviation Safety Authority v Ovens* [2011] FCAFC 75. There, CASA tendered an aviation policy document into evidence during re-examination of the final witness in the proceedings. Up until then, the other party (Mr Ovens) had been unaware of the existence of the policy (which had only recently been published). The Full Court held that there had been a denial of procedural fairness, even though Mr Ovens (who was represented by counsel) did not apply for an adjournment. The Full Court said (at [27]):

> … the references [in the transcript] to the Published Policy, coming as they did, necessarily in light of the late knowledge of it, after the close of Mr Ovens' evidence, were too late and too slight and in the main did not go further than the issue of the status and thus the relevance of the Published Policy. The possible impact of the Published Policy on the hearing before the Tribunal was a matter of some complexity and this made it necessary that Mr Ovens be given a fuller opportunity to deal with it.

12. The Full Court held that the AAT was obliged to give Mr Ovens an opportunity to consider

5 See *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27, [5].

whether the policy should be applied to his circumstances, whether any evidence should be adduced in that regard, and whether any submissions would be relevant (at [31]).

Amendment of a party's case

13. Amendments to a case, like adjournments, might promote fairness but as a result they may require some sacrifice of the quickness objective. Amendments might also raise questions about informality, because amendments tend to call to mind thoughts of pleadings and particulars which are often not welcome in tribunal practice.[6]

14. In the courts, of course, the purpose of pleadings is "to state with sufficient clarity the case that must be met ... [and] define the issues and make clear that which is in issue": *Ballesteros v Chidlow (No 2)* [2005] QSC 285, [35]. In tribunals without pleadings, there is nevertheless a "basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her": *Banque Commerciale S.A., En Liquidation v Akhil Holdings Limited* (1990) 169 CLR 279, 286.[7]

15. It seems to follow that procedural fairness dictates that the parties in tribunal proceedings are entitled to clearly know what issues are in contest. The need for such knowledge is patent: it guides the party in seeking out and obtaining evidence to put before the tribunal, and in formulating the contentions that are to be relied on. Although tribunals such as the AAT and QCAT are sometimes referred to as inquisitorial in nature,[8] the practical reality is that it is generally the parties who identify and define the issues. Indeed, in *Sullivan v Department of Transport* (1978) 20 ALR 323, Deane J said that ordinarily the AAT "will be best advised to be guided by the parties in identifying the issues" (at 342).

16. In the AAT, each party is generally required to file a "Statement of Facts, Issues and Contentions" for that purpose.[9] Other than documents of that nature, the "case" that must be met will often be identified by reference to documents such as:

    (a) The terms of the decision that is under review.

    (b) Affidavits or witness statements that are filed.

    (c) Outlines of submissions.

17. Once the issues in contest are identified and defined, there is a question as to the extent to which a tribunal may allow or deny a party the opportunity to amend or change its case. In fact, this is probably best stated as two questions:

    (a) First, can a tribunal refuse to allow a party to change its case, such as by raising a new issue or withdrawing an earlier concession?

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6 There are exceptions, of course, such as QCAT's civil dispute jurisdiction. There is also a general requirement for parties in the AAT to file a "Statement of Facts and Contentions".

7 See also Jarvis, D. G. (2007) *Procedural Fairness as it Applies in the Administrative Appeals Tribunal*, <http://www.aat.gov.au/Publications/SpeechesAndPapers/AATMembers/docs/JarvisProceduralFairnessApril2007.rtf>.

8 Eg, *Kowalski and Repatriation Commission* [2008] AATA 903, [33]-[35].

9 See *General Practice Direction*, <http://www.aat.gov.au/LawAndPractice/PracticeDirectionsAndGuides/PracticeDirections/GeneralPracticeDirection30April2007.htm>.

(b) If so, how should that power of amendment be exercised?

18. It is probably the first question that is the more difficult one. I cannot offer a definitive answer, but my view is that tribunals can refuse to allow amendment of a case, and that in doing so they ought to be guided by the principles discussed in the High Court's judgment in *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 (***Aon***).

19. In *Aon*, the purpose of the relevant rules of court was "to facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense", with the objective of "the just resolution of the real issues" and "the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties". Against that background, the High Court held that applications for leave to amendment are not to be considered solely by reference to whether prejudice to the other side can be compensated by costs orders (at [5], [98]). Broader factors must be taken into account, including (at [5], [98]):

(a) The unfairness or prejudice involved in delaying proceedings.

(b) Costs and inefficiencies in the use of publicly funded hearings.

(c) The timing and explanation for the application to adjourn or amend.

20. The plurality in *Aon* said that the minimisation of delay and expense is "essential to a just resolution of proceedings" (at [98]). Further, where a party has "had a sufficient opportunity to plead his or her case, it may be necessary for the court to make a decision which may produce a sense of injustice in that party, for the sake of doing justice to the opponent and to other litigants" (at [94]). Thus, the fact that refusal of leave to amend would cause a level of injustice does not mean that leave must be granted. That injustice is simply to be weighed against the countervailing injustice to the other party, and the public interest.

21. In *Kalafatis and Commissioner of Taxation* [2012] AATA 150, the AAT suggested that the principle underlying *Aon* (at [46]):[10]

> .. is that objectives of the sort set out in s 2A of the AAT Act, and that are applicable in a case management system, must be understood and applied in a particular case in light of the particular circumstances of that case and in light of the Tribunal's functions and its duties i.e. its duties to act with procedural fairness and to reach the correct or preferable decision.

22. The principles in *Aon* do not, of course, tell us what powers a tribunal has in relation to amendments. Indeed, in *Aon* the court rules specifically dealt with the power to allow amendments and the real question was how that discretion should be exercised.

23. To explore this issue further, I will use the AAT as my example. The President of the AAT has an express power to give directions as to "the procedure of the Tribunal generally" and "the conduct of reviews by the Tribunal".[11] That power has been exercised to issue a "General Practice Direction". The Direction includes a requirement to file a "statement of issues":

> A brief statement setting out the issue(s) that the applicant and the respondent consider to be in dispute must be exchanged and lodged with the Tribunal at least one working day prior to the first conference. The statement of issues must address the specific issue(s) in question and must not be expressed in general terms.

10 In QCAT, see cases such as *Sloan v Scottsdale Installations Pty Ltd* [2013] QCAT 638, [17]; *Albion Projects Pty Ltd v Simpson* [2014] QCAT 73, [14].

11 AAT Act, s 20(2).

24. The Direction also requires each party to file a "statement of facts and contentions":

> At least 14 days prior to the second conference, the applicant is to lodge and serve a statement of facts and contentions. This statement must clearly and concisely set out the facts upon which the party relies and any contentions to be drawn from those facts, should include references to relevant legislation and case law and should not be just a repetition of the statement of issues. …
>
> At least 7 days prior to the second conference, the respondent is to lodge and serve a statement in reply …

25. The Direction does not specifically deal with amending the Statement of Facts and Contentions, and nor does it deal with the extent to which a party might be limited at the hearing to the content of the Statement of Facts and Contentions. However, it seems reasonably clear that any substantial or important deviation by a party from its Statement of Facts and Contentions could amount to a breach of the rules of procedural fairness. That is, a party who appears at a hearing ready to answer the case that arises from the Statement of Facts and Contentions is likely to be denied a reasonable opportunity to present its case if the other party suddenly moves the goal-posts.

26. A common response in such cases is for the AAT to adjourn the hearing so as to ensure both parties are given that "reasonable opportunity" to present their case. My contention is that another solution would be to refuse to allow the relevant party to deviate from its Statement of Facts and Contentions, and that in at least some circumstances that is most appropriate way of ensuring that both parties have a "reasonable opportunity" to present their cases.

27. At this point, let me identify why I think the AAT has the power to hold a party to its Statement of Facts and Contentions. First, I think there might be some statutory basis. The AAT has an express power to "determine the scope of the review of a decision by limiting the questions of fact, the evidence and the issues that it considers".[12] That power has not been the subject of extensive judicial consideration, but on its face it empowers the AAT to refuse to consider issues that might otherwise be within the scope of its review.

28. Secondly, I think that the recent Full Court judgment in *Heffernan v Comcare* [2014] FCAFC 2 supports the proposition that the AAT can refuse to allow a party to change its case or raise new issues. In *Heffernan*, the applicant was a public servant who had been injured at work. The Commonwealth accepted liability for that injury, and the applicant sought compensation for the cost of a modified vehicle to accommodate his injury. There were two possible statutory provisions under which he might have been entitled to that compensation.

29. At the hearing in the AAT, the applicant (through his counsel) expressly relied on one provision of the statute but disclaimed reliance on the other provision (referred to as section 39). After the hearing had concluded the applicant was invited to provide written submissions in relation to a different issue. In those submissions, he raised an argument that section 39 applied to his case. In its decision, the AAT did not refer to or consider section 39.

30. In the Full Court, the applicant argued that the AAT had erred by failing to address the submission that he had made in relation to section 39. The Court rejected that ground of appeal. Allsop CJ said (at [39]):

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12 AAT Act, s 25(4A).

> The prompt and fair despatch of business in the Tribunal requires order and regularity in the provision of evidence and submissions for the Tribunal's consideration. Nothing obliges the Tribunal to consider arguments sent to it after a hearing, without leave, and of which the other side has had no notice.

31. The Chief Justice then concluded (at [40]):

> In circumstances where the point had been raised without leave, in the context of an earlier specific disavowal, it cannot be concluded that the Tribunal was bound in law to deal with the issue. It was not properly before the Tribunal. There was no error of law in the Tribunal in failing to deal with the matter.

32. Katzmann J said (at [118]):[13]

> The case was conducted on the basis of a concession that s 39 (not just s 39(1)(d)) had no application. Leave to withdraw the concession had not been sought, let alone given. The submission was therefore irrelevant. It did not address an issue in the proceeding. It was entirely gratuitous. No error of law arises from the Tribunal's failure to consider it. There can be no denial of procedural fairness in these circumstances.

33. The decision in *Heffernan* is not directly on point, because it dealt with a party attempting to raise a new issue after the hearing had concluded. However, I would argue that the language used by the Court in that case strongly supports the proposition that the AAT can refuse to allow a party to raise issues beyond those in its Statement of Facts and Contentions. For example, Katzmann J's statement that the applicant had not sought leave to withdraw his concession clearly implies that such leave is necessary. In principle, if leave is required to withdraw a concession made at the hearing then leave should also be required to withdraw a concession made prior to hearing in the Statement of Facts and Contentions.

34. In contrast to *Heffernan*, there are authorities to the effect that the AAT should not limit itself to the case raised by an applicant. Thus, in *Benjamin v Repatriation Commission* [2001] FCA 1879 the Full Court said (at [47]):[14]

> [The AAT] is under a duty to arrive at the correct or preferable decision in the case before it, according to the material before it. An inquisitorial review conducted by the Tribunal is one in which the Tribunal is required to determine the substantive issues raised by the material and evidence advanced before it. In doing so, it is obliged not to limit its determination to the "*case*" articulated by an applicant if the evidence and material that it accepts, or does not reject, raises a case on a basis not articulated by the applicant …

35. My view is that the two cases are not inconsistent with one another. *Heffernan* deals with the limits that may be placed on the issues (and, thereby, the evidence) that may be put to the AAT. *Benjamin*, on the other hand, deals with the AAT's obligation to deal with issues raised by the evidence and material that has in fact been put to the tribunal.

36. In summary, it seems to me that a tribunal will generally have two options when a party wishes to depart from the issues that it has previously identified and defined:

    (a) The tribunal can allow that change in case, subject to ensuring procedural fairness to the other party (such as by way of an adjournment); or

    (b) The tribunal can refuse to allow the change in case, and hold the party to the issues (or concessions) previously identified.

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13 Jacobson J agreed with both Allsop CJ and Katzmann J.

14 See also *Bushell v Repatriation Commission* (1992) 175 CLR 408: "the AAT is an administrative decision-maker, under a duty to arrive at the correct or preferable decision in the case before it according to the material before it".

37. When determining the proper approach, the tribunal will likely find guidance in the principles discussed by the High Court in *Aon*.

Admitting or excluding evidence

38. Dealing with evidence in tribunals can cause consternation in respect of the objectives of being quick, fair and informal. Large amounts of detailed or marginally relevant evidence can slow things down – and few practitioners enjoy listening to hearsay upon hearsay. However, the exclusion of too much evidence might produce unfairness, and the application of strict rules of evidence might lead to excessive formality. What is a tribunal to do?

39. As a starting point, I note that tribunals are generally not bound by the rules of evidence,[15] and that they may, generally, inform themselves in any way they consider appropriate.[16] Despite the width of those propositions, there must be some boundaries as to what material a tribunal may have regard to.

40. It has been said that the AAT must proceed by reference to rationally probative evidence: *Rawson Finances Pty Ltd v Commissioner of Taxation* [2013] FCAFC 26, [62], [84]. So, whilst not bound by the rules of evidence, it would seem that at a minimum a tribunal must exclude from evidence any material that is not probative of some fact relevant in the proceedings. It does not necessarily follow, of course, that a tribunal ***must*** admit into evidence any material that is probative of some fact relevant in the proceedings.

41. The current President of the AAT, Justice Kerr, has published an important extra-judicial discussion of evidence in the AAT in which he eschews any regular application of the rules of evidence in the AAT.[17] His Honour, after noting that the AAT is not bound by the rules of evidence, said what that requires is:

> … that the admissibility of 'evidence' in merits review tribunals should be determined exclusively by the 'limits of relevance' rather than 'the interstices of the rules of evidence' … The task of a merits review tribunal is to give such weight to whatever relevant evidential material is before it as it determines it ought to bear. …
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> I conceive of this as conferring on merits review tribunals the freedom to take into account all of the relevant testimony, materials and circumstances known to it removed from the strictures of the rules of evidence.

42. Justice Kerr went on to say that if the AAT, in any particular matter, intends to require "compliance with formalities limiting the presentation of otherwise relevant materials, procedural fairness requires that that it makes those circumstances known … well in advance of any hearing". Thus, his Honour appears to accept that the tribunal may exclude otherwise relevant evidence so long as the parties are accorded procedural fairness (albeit that his Honour would seem to see such circumstances as being rare).

43. Assuming that the admissibility of evidence in the AAT is to be determined exclusively by the "limits of relevance", but that relevant evidence might sometimes be excluded, what is the extent of the tribunal's exclusionary powers? As a starting point, it seems likely that the AAT may exclude evidence if it is unfairly prejudicial, even though it is otherwise relevant. It has been held that, at least in respect of some types of tribunal proceedings, a tribunal that is not bound by the rules of evidence may nonetheless apply the "spirit of those rules" unfairly

15 AAT Act, s 33(1)(c); QCAT Act, s 28(3)(b).
16 AAT Act, s 33(1)(c); QCAT Act, s 28(3)(c).
17 Hon. Justice Duncan Kerr, *Keeping the AAT from Becoming a Court*, <http://www.aat.gov.au/Publications/SpeechesAndPapers/Kerr/AIALNSWSeminar27August2013.htm>.

prejudicial evidence or evidence of character, reputation or tendency that lacks significant probative value: *De Domenico v Marshall* [1999] FCA 1305, [51] per Madgwick J, Spender and Dowsett JJ agreeing.

44. Earlier in this paper, I outlined my view of "amendments" to a party's case in tribunal proceedings. My view is that, once the parties have identified the issues in contest, a tribunal such as the AAT has the power to exclude evidence that is not relevant to those issues. Thus, if a party fails to convince the AAT to allow it to "amend" its case to raise a new issue, it would follow that evidence in relation to that new issue would be irrelevant and so properly excluded from consideration. I think that proposition finds support in the *Heffernan* case.

45. I have also discussed above my view of adjournment decisions in tribunals. Following from that, I would suggest that a tribunal such as the AAT has the power to exclude evidence that is otherwise relevant so as to avoid procedural unfairness or undue delay by way of adjournment. For example, an application of the rules of evidence would permit a court to exclude otherwise admissible evidence if allowing it would cause undue waste of time.[18]

46. In *Samsung Electronics Co Limited v Apple Inc* [2013] FCA 1142, the Court had fixed a timetable for filing evidence in the form of witness statements. Samsung sought leave to file further witness statements outside of that timetable. Bennett J refused to allow the evidence to be admitted, saying (at [155]):

> They have provided no satisfactory explanation of the delay. The inclusion of the Proposed Statements would likely significantly extend and disrupt a carefully set hearing timetable. This would increase the parties' costs and impact on the utilisation of the resources of the Court. For the reasons set out above, I am satisfied that, at the least, on the basis of the case management principles set out in *Aon*, the Court's discretion should not be exercised in favour of admission into evidence of the Proposed Statements.

47. *Samsung v Apple* was an unusual case, in that the new evidence was sought to be filed more than one year after the timetable for filing statements closed and in the context of a pending trial that was expected to run for four months.[19] However, it seems to me that applying the same principles a tribunal would be entitled to exclude evidence that is presented late in the proceedings (particularly on the eve of the hearing) rather than subjecting the 'innocent' party to the delay of an adjournment to meet the new evidence.

48. Another example of the exclusion of evidence to avoid delay appears in *Dyldam Developments Pty Limited v Jones* [2008] NSWCA 56. There, the defendant (on the third day of hearing) tendered a journal detailing the identity and location of the employees of a company in order to show that no employee was at a particular place on a particular date. The plaintiff objected, pointing out that there had not been any previous disclosure of the evidence. The defendant argued that the evidence should be admitted, and that there could be an adjournment (with costs) to allow the plaintiff to deal with it.

49. The trial judge said that whilst in the "general run of cases" an adjournment might be appropriate, in the particular circumstances it would cause an undue waste of time which would be unfairly prejudicial to the plaintiff. Part of those circumstances were that the plaintiff was suffering a "dire" medical condition. Accordingly, her Honour rejected the tender of the journal and that decision was upheld on appeal.

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18 See *Evidence Act 1995* (Cth), s 135.

19 And which is still running as at the date of this paper.

Summary

50. Above, I have discussed some of the principles relating to adjournments, amendments and exclusion of evidence in tribunal proceedings. It is clear that a tribunal such as the AAT has the power to allow an adjournment or to allow amendment to a party's case. It is perhaps less clear when a tribunal might refuse to allow such adjournment or amendment, but my suggestion is that a tribunal does have that power. If a tribunal refuses to adjourn or to allow an amendment, my further suggestion is that it must also have the power to exclude any evidence (such as late filed evidence) so as to avoid unfairness or undue delay.

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Matt Black
Barrister-at-Law