The Administrative Decisions Tribunal of New South Wales

Paper presented by Naomi Sharp to the NSW Bar Readers Course on 28 October 2008

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INTRODUCTION

1. The Administrative Decisions Tribunal of New South Wales has been in operation in New South Wales since 6 October 1998, just over ten years. The sprawling jurisdiction of the ADT has continued to grow at a rapid rate.

2. The ADT is much more than simply a merits review tribunal. In fact, the ADT is a unique tribunal that was not modelled upon any one blueprint. While many assume that the ADT is simply a State-based equivalent of the Commonwealth Administrative Appeals Tribunal (AAT), in fact the two bodies are quite distinct. This is in no small measure due to the fact that many aspects of the constitutional requirement of separation of powers at the Commonwealth level have no application at the State level, thereby permitting the ADT to intrude into the judicial arena. For this reason, and in contrast to the AAT, it has been possible to vest the ADT with an original jurisdiction and appellate jurisdiction in addition to a merits review jurisdiction.

3. Nor can it be said that the ADT is the New South Wales “super-tribunal”. While the ADT brought together a range of disparate tribunals operating in New South Wales, the government has not elected to go down the path of having only one super-tribunal.

4. While the Administrative Decisions Tribunal Act 1997 (NSW) (ADT Act) constitutes the ADT and gives it certain generic features, the ADT Act leaves the ADT as very much an empty canvas. It is the particular enactment that confers jurisdiction upon the ADT in the

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1 In particular, there is no constitutional prohibition on an executive body exercising judicial power at the State level.
2 As to the executive character of the AAT, see Re Adams and Tax Agents Board (1976) 1 ALD 251 and Re Winthrop and Smith and Minister for Immigration and Ethnic Affairs (1980) 2 ALD 873.
3 For example, another integrated tribunal, the Consumer, Trader and Tenancy Tribunal (CTTT), has been established pursuant to s 5 of the Consumer, Trader and Tenancy Tribunal Act 2001 (NSW). The CTTT combines the jurisdictions of the Fair Trading Tribunal that dealt with consumer credit compliance, home building disputes, consumer claims, motor vehicle claims with the Residential Tribunal which dealt with residential tenancy, strata titles and residential park disputes. The CTTT is managed by the Department of Fair Trading. It commenced operation on 25 February 2002.
particular case that will give the ADT its character. As will become clear, when the ADT acts under certain legislation, it is no more than an executive decision-maker (and to this extent the parallels with the AAT are clear). However, depending on the particular enactment at issue, the ADT is also capable of acting as a quasi-judicial tribunal – either as a disciplinary tribunal or as a forum for what are essentially civil proceedings. Perhaps the closest analogy to the ADT is the Victorian Civil and Administrative Tribunal (VCAT). The VCAT, which commenced operation on 1 July 1998, amalgamated a number of existing Victorian Tribunals and the former Victorian Administrative Appeals Tribunal. It exercises original and review jurisdiction.  

5. This paper describes some of the central features of the ADT. The objectives underlying the establishment of the ADT are discussed. The composition and organisation of the ADT and the nature of the ADT’s original, review and appellate jurisdiction are considered in more detail.

6. On 22 October 2008, the Parliament passed the Administrative Decisions Tribunal Amendment Bill 2008. This Bill has not yet received the assent. It amends the ADT Act in a number of ways. This paper does not take account of those amendments.

OBJECTIVES OF THE ADT

7. The ADT has been a long time in coming. A general merits review tribunal was first recommended by the New South Wales Law Reform Commission in 1973. The ADT was finally constituted by subsection 11(1) of the ADT Act, which came into operation on 6 October 1998.

8. To read only the Act under which the ADT is constituted would give too narrow an appreciation of the true character of the ADT’s function. That said, the ADT Act does form the necessary starting point because it delineates between the ADT’s review
jurisdiction and its original jurisdiction and makes it clear that the original and review jurisdictions each have distinct objectives.

9. The primary objective of the review jurisdiction of the ADT is to provide a cheap and efficient means to conduct merits review of government decision-making. The primary objective of the original jurisdiction of the ADT was to correct the mischief described by the Hon Mr Whelan in the following terms:

The growth of tribunals has fragmented responsibility for determining legal rights, leading to a lack of consistency and in some cases arbitrary decision making. It may also lead to poor resource allocation in relation to decision making.

ESTABLISHMENT AND ORGANISATION OF THE ADT

10. The ADT exercises functions conferred under the ADT Act and other Acts. The Tribunal consists of a President, Deputy Presidents, non-presidential judicial members and non-judicial members. The President of the ADT must be a District Court judge, while Deputy Presidents and non-presidential judicial members must be judicial officers or legal practitioners of at least seven years standing. A non-judicial member must, in the opinion of the Minister, have special knowledge or skill in relation to any class of matters in respect of which the ADT has jurisdiction.

11. The Governor may appoint the President or a Deputy President as a Division Head or one or more of the ADT’s Divisions. The President directs the business of the ADT.

12. The ADT Act also makes provision for the appointment of assessors, who may, with the parties’ consent and following a direction by the ADT or the President, inquire into

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7 Ibid at 9605.
8 Section 11(2). Note that unless otherwise indicated, all remaining references to sections in the footnotes are references to the ADT Act.
9 Section 12. The President and Deputy Presidents are collectively referred to as “presidential judicial members”: s 12(2).
10 Section 17(1).
11 Section 17(2).
12 Section 17(4).
13 Section 17.
14 Section 25.
15 Section 29.
and report on issues or matters raised in or connected with the proceedings.\textsuperscript{16} In certain situations, an assessor may sit with a tribunal member in order to assist the member.\textsuperscript{17}

13. The ADT Act also creates the positions of Registrar and Deputy Registrars who assist the President in directing the business of the ADT and exercise such other functions as are conferred by the ADT Act or other Acts or laws.\textsuperscript{18}

14. The ADT has been organised into the following Divisions:\textsuperscript{19}

\textbf{The General Division:}

15. The General Division commenced operation on 6 October 1998 and the bulk of the ADT’s merits review function is conducted in this Division. It is specifically allocated decisions made under a wide variety of statutes including the \textit{Boxing and Wrestling Control Act 1986} (NSW), the \textit{Education Reform Act 1990} (NSW), the \textit{Freedom of Information Act 1989} (NSW) (FOI Act), the \textit{Guardianship Act 1987} (NSW), the \textit{Local Government Act 1993} (NSW), the \textit{Ombudsman Act 1974} (NSW), the \textit{Protected Estates Act 1983} (NSW), the \textit{Public Health Act 1991} (NSW) and the \textit{Veterinary Surgeons Act 1986} (NSW). In addition, where a function is not expressly assigned to a particular Division by Sch 2 to the ADT Act, that function is allocated to the General Division.\textsuperscript{20}

\textbf{The Equal Opportunity Division:}

16. The Equal Opportunity Division commenced operation on 6 October 1998. This Division is essentially the successor to the Anti-Discrimination Tribunal and hears complaints of unlawful discrimination referred to it under the \textit{Anti-Discrimination Act 1977} (NSW) (AD Act) by the President of the Anti-Discrimination Board or the Minister. The ADT can only deal with complaints which have been referred to it by the President of the NSW Anti-Discrimination Board.

\textsuperscript{16} Section 33.  
\textsuperscript{17} Section 35. The role and function of assessors is not further considered in this article.  
\textsuperscript{18} Section 28.  
\textsuperscript{19} See s 19 and Sch 1.  
\textsuperscript{20} Clause 2(2) of Sch 2.
The Legal Services Division:

17. The Legal Services Division commenced operation on 6 October 1998 and is the successor to the Legal Services Tribunal. It hears complaints referred to it under the *Legal Profession Act 2004* (NSW) (LP Act); *the Conveyancers Licensing Act 1995* (NSW) and the *Public Notaries Act 1997* (NSW) against legal practitioners and licensed conveyancers who have been accused of professional misconduct or unsatisfactory professional conduct. Proceedings in the Division can only be commenced by the Legal Services Commissioner, the Law Council or the Bar Council. The Legal Service Division’s jurisdiction operates concurrently with the Supreme Court. Consequently, the informant may elect to proceed directly in the Supreme Court rather than in the ADT.

The Community Services Division:

18. The Community Services Division commenced operation on 1 January 1999 and hears applications for review of various administrative decisions made in the Community Services, Disability Services and Ageing portfolios. In this Division, the ADT reviews reviewable decisions under the *Adoption Act 2000* (NSW), the *Disability Services Act 1993* (NSW), the *Youth and Community Services Act 1973* (NSW) and *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW) and exercises original jurisdiction under the *Child Protection (Prohibited Employment) Act 1998* (NSW) (CP(PE) Act). Presently, the Division’s main business is the hearing of applications by persons for exemption from prohibition on being engaged in child-related employment because of a past serious sex offence.

The Retail Leases Division:

19. The Retail Leases Division commenced operation on 1 March 1999 and hears retail tenancy claims and unconscionable conduct claims made by parties to retail leases under the *Retail Leases Act 1994* (RL Act).

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21 The court, in the exercise of its inherent jurisdiction, may remove a practitioner from the roll of legal practitioners.
The Revenue Division:

20. The Revenue Division commenced operation on 2 July 2001. In this Division, the ADT reviews certain reviewable decisions made by the Chief Commissioner of State Revenue pursuant to the following enactments: the Accommodation Levy Act 1997, the Debits Tax Act 1990, the Duties Act 1997, the Health Insurance Levies Act 1982, the Land Tax Act 1956, the Land Tax Management Act 1956, the Parking Space Levy Act 1992, the Pay-roll Tax Act 1971, the Premium Property Tax Act 1998, the Revenue Laws (Reciprocal Powers) Act 1987, the Stamp Duties Act 1920, and a regulation under any of those Acts. An application for review of such a decision is made under the Taxation Administration Act 1996.

21. Members of the ADT are assigned to its Divisions in accordance with Sch 2 to the ADT Act, and each Division exercises such functions of the Tribunal (except the functions of the Appeal Panel) as are allocated by that Schedule. In the usual course, a matter in either the original or review jurisdiction of the ADT will be heard by one member. However, Sch 2 also sets out certain special requirements in terms of the constitution of the Tribunal for the purpose of hearing applications under particular statutes. The President or relevant Divisional Head may give directions as to the members who are to constitute the Tribunal for the purposes of any particular proceedings. In giving such a direction, s 22(3) relevantly requires that regard be had to:

(a) the degree of public importance or complexity of the subject-matter of the proceedings;

(b) if the proceedings concern the review of a reviewable decision – the nature and status of the office of the administrator who made the reviewable decision,

(b1) if the proceedings concern the hearing of an external appeal – the nature and status of the decision-maker who made the decision concerned,

(c) the need for any members to have special knowledge or experience in the subject-matter of the proceedings.

22 Section 20(1).
23 Section 20(2).
24 Section 22(1).
25 See Div 3 of Sch 2.
26 Section 22(2).
22. The ADT Act also creates an Appeal Panel of the ADT. The ADT was the first Australian tribunal to have both a first instance and appeal level. The Appeal Panel must be comprised of at least three members of the ADT. The Appeal Panel must include one presidential judicial member who is a member of the Division from which the decision under review is made; one other judicial member (whether or not that member is a Division member), and one non-judicial member who is such a Division member.

THE JURISDICTION OF THE ADT

23. The ADT is vested with three jurisdictions:
   (a) an original jurisdiction;
   (b) a merits review jurisdiction; and
   (c) an appellate jurisdiction.

23. Pursuant to s 36(1) of the ADT Act, the ADT is vested with an original jurisdiction (where it makes “original decisions”) and a merits review jurisdiction (where it reviews “reviewable decisions”). The ADT has original jurisdiction where an “enactment” provides that applications may be made to the ADT for a decision made in the exercise of functions conferred or imposed on the ADT by that enactment. The ADT has review jurisdiction where an “enactment” provides that applications may be made to the ADT for review of decisions made by an administrator. An “enactment” is defined by s 5 as:
   (a) in relation to a reviewable decision – an Act (other than this Act) or a statutory rule (other than a statutory rule made under this Act), or

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27 Section 24(1).
28 Anderson, op cit, at 100.
29 Section 24(1).
30 Section 24(2).
31 Section 36. “Original decisions” are defined in s 7 as those decisions where the ADT had jurisdiction under an enactment to act as the primary decision-maker. “Review decisions” are defined in s 8 as decisions of administrators that the Tribunal has jurisdiction under an enactment to review.
32 Section 37.
33 Section 38. In relation to a reviewable decision an “administrator” is defined in section 9(1) as “the person or body that makes (or is taken to have made) the decision under the enactment concerned”.

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(b) in any other case – an Act (other than this Act).

24. At the time of enacting the ADT Act, the Government also gave consideration to vesting the ADT with a judicial review jurisdiction (to operate concurrently with the Supreme Court’s jurisdiction).34 However, there have been no developments on this front.

25. The ADT’s original and review jurisdictions, as well as its appellate jurisdiction, are discussed below.

Original jurisdiction

26. Where the ADT exercises original jurisdiction it operates as the original decision-maker (i.e.: makes the decision for the first time). The Equal Opportunity Division, the Retail Leases Division, and the Legal Services Division all exercise the ADT’s original jurisdiction. Examples of enactments that confer original jurisdiction on the ADT are: Pt 9 of the AD Act; Div 7 of Pt 10 of the LP Act; and Div 3 of Pt 8 of the RL Act.

27. A person has standing to apply to the ADT for an original decision if that person is an “interested person” who applies in the manner and time prescribed by the rules of the ADT or the enactment under which the application is made.35 An “interested person” is relevantly defined as “a person who is entitled under an enactment to make an application to the Tribunal for an original decision.”36 Accordingly, to determine whether the ADT has original jurisdiction, it is necessary to consider the relationship between s 42 of the ADT Act and the relevant enactment. To take one example, s 71(1) of the RL Act provides:

A party or former party to a retail shop lease or former retail shop lease may lodge a retail tenancy claim in respect of the lease with the Tribunal for determination of the claim.

28. Further, s 71A(1) provides:

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34 Second Reading Speech, op cit., at 9605.
35 Section 42.
36 Section 4(1).
A lessor or lessee, or former lessor or lessee, under a retail shop lease or former retail shop lease may lodge an unconscionable conduct claim with the Tribunal for determination of the claim.

29. To take another example, the AD Act provides that a matter may find its way to the ADT as a result of being referred to the Tribunal by the President pursuant to s 91(2) or s 94(1) of the AD Act or by the Minister pursuant to s 95 of the AD Act.

30. The ADT Act does not itself confer powers on the ADT in order for it to exercise its original jurisdiction. Rather, s 45 of the ADT Act provides that the powers of the ADT are those conferred on the ADT by the enactment under which the application is brought. For example, when the ADT is hearing a matter under the AD Act, it has the powers available to it that are conferred by s 113 of the AD Act. Section 113 confers a range of coercive powers upon the ADT. It may, for example, make orders akin to injunctions; it may order a person who has contravened provisions of the AD Act to pay compensatory damages to the applicant/complainant of up to $40,000 (which is shortly to increase to $100,000); and it may order the respondent to publish an apology.

31. When the ADT hears a matter under Div 7 of Pt 10 of the LP Act, it has available to it the powers conferred by s 171C of the LP Act. This includes the power to direct that the legal practitioner’s name be removed from the legal practitioners’ roll, to order that the legal practitioner’s practising certificate be cancelled, to publicly reprimand the legal practitioner, or order the legal practitioner to pay a fine not exceeding $50,000 if the legal practitioner is guilty of professional misconduct or not exceeding $5,000 if the legal practitioner is guilty of unsatisfactory professional conduct. In addition, pursuant to s 171D of the LP Act, the ADT can, in certain circumstances order the legal practitioner to waive or repay fees, provide legal services to a complainant for free or pay compensation to a complainant (although the amount of compensation cannot exceed $10,000 unless the legal practitioner and complainant agree).

32. When the ADT hears a matter under the RL Act, s 72 of the RL Act confers the ADT with extremely broad powers. For example, the ADT can order a party to pay money by way of damages, debt or restitution, perform specified work or services, surrender possession of premises, relief against forfeiture, to rectification of a lease. Pursuant to s 72AA of the RL Act, the ADT can order a party to the proceedings pay money to a
person specified in the order, whether by way of debt, damages or restitution, or refund any money paid by a specified person; or order that a debt is not due and owing. By s 73 of the RL Act, the ADT’s jurisdiction to make a monetary award in an amount of up to $300,000.

33. In contrast, under the CP(PE) Act, the ADT’s only power is one of declaration. Pursuant to s 9(1) of that statute, a “prohibited person” within the meaning of that statute may apply to the ADT for an order declaring that the CP(PE) Act does not apply to that person in respect of a specified offence. The CP(PE) Act does not vest the ADT with any coercive powers.

34. In all the examples referred to above, the ADT has been conferred with judicial power. Thus, the ADT’s original decision-making jurisdiction is in many respects more akin to a jurisdiction to make judicial decisions than executive decisions.

35. When one considers the powers that can be brought to bear by the ADT in exercising its original jurisdiction, it becomes apparent that the ADT’s original jurisdiction is in fact quite disparate and can be further sub-divided into the following functions:

(a) a quasi-judicial function – in other words, a function to settle disputes between private parties (although sometimes the respondent will be a government entity acting in a “private” capacity, for example, as an employer or a lessor) in a manner which mirrors normal civil proceedings in the courts (for example, under the AD Act and RL Act); and

(b) a disciplinary function under the LP Act.  

37 The judicial power has been have been described in short-hand by Gaudron J in Sue v Hill (1999) 199 CLR 462 at 515 as follows:

The nature of the [judicial power] may be described as that brought to bear for the purpose of “making binding determinations as to rights, liabilities, powers, duties or status put in issue in justiciable controversies”.

More fully put, the ADT has power to make binding decisions as to rights, liabilities, duties, powers or status: Huddart Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330 at 357; Harris v Caladine (1991) 172 CLR 84 at 147; Re Nolan; Ex parte Young (1991) 172 CLR 460 at 497; Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245 at 258 and 268; and to adjust these rights and duties in accordance with legal standards: Queen Victoria Memorial Hospital v Thornton (1953) 87 CLR 144 at 151; R v Spicer; Ex parte Australian Builders’ Labourers’ Federation (1957) 100 CLR 277 at 290.

38 Note that the ADT does exercise a disciplinary function under the Veterinary Surgeons Act 1986 (NSW). However, in so doing, it exercises its review jurisdiction rather than original jurisdiction. In this regard, see 25D of the Veterinary Surgeons Act 1986 (NSW) provides that the ADT may review a decision of the Investigating Committee ordering the suspension of the veterinary surgeon or the attachment of conditions to their rights of practise.
Review jurisdiction

36. In the ADT’s review jurisdiction, the ADT operates as an external merits reviewer of administrative decisions. However, the ADT’s jurisdiction is not “at large” with respect to administrative decisions. Rather, the ADT may only review “reviewable decisions.”

37. A “reviewable decision” is defined in s 8 of the ADT Act as “a decision of an administrator that the Tribunal has jurisdiction under an enactment to review.” In turn, s 9 defines “administrator” as “the person or body that makes (or is taken to have made) the decision under the enactment concerned”. A “decision” is defined very broadly in s 6(1) as follows:

A “decision” includes any of the following:

(a) making, suspending, revoking or refusing to make an order or determination,

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission,

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument,

(d) imposing a condition or restriction,

(e) making a declaration, demand or requirement,

(f) retaining, or refusing to deliver up, an article,

(g) doing or refusing to do any other act or thing.

38. Section 6(3) provides that a decision made beyond power is nevertheless a “decision” for the purposes of the ADT Act. Section 6(5) provides that a failure to make a decision within the period specified under the relevant enactment also constitutes a “decision” for the purposes of the ADT Act.

39. Section 55(1).

40 Cf with Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd (1979) 41 FLR 338.
39. In order to determine the scope of the ADT’s review jurisdiction, it is again necessary to have recourse to the particular enactment in issue. Examples of enactments that confer review jurisdiction on the ADT are s 35 of the Apiaries Act 1985 (NSW), s 53 of FOI Act, s 52 of the Passenger Transport Act 1990 (NSW) and s 96 of the Taxation Administration Act 1996 (NSW). To take the FOI Act as one example, s 53(1) of the FOI Act provides that a person who is “aggrieved” by an agency or Minister’s decision may apply to the ADT for review of that decision. Section 53 of the FOI Act then goes on to set out who may be taken to be “aggrieved”, for the purposes of that section. For present purposes, it suffices to note that applicants for access to documents who have been denied access are persons “aggrieved” as are persons who have been consulted pursuant to ss 30-33 of the FOI Act and who disagree with the decision that an agency or Minister has taken to release documents to the access applicant.

40. In the usual case, it is the General Division, the Community Services Division and the Revenue Division which exercise the ADT’s review jurisdiction.

41. To fully appreciate the changes that the ADT Act has wrought to administrative law in New South Wales it is also necessary to briefly consider the following provisions of the ADT Act which facilitate external review of decision-making in the ADT. First, an administrator that makes a “reviewable decision” must give notice to any “interested person” of the decision and their rights to review. An “interested person” is relevantly defined in s 4(1) as “a person who is entitled under an enactment to make an application to the Tribunal for a review of a reviewable decision”.

42. Secondly, an administrator is required to provide reasons for his or her decision(s) if so requested. As such, the ADT Act is of fundamental importance in creating a right to obtain reasons. As is regularly noted, the provision of reasons is a crucial component of administrative review. As the Hon Mr Whelan observed in the Second Reading Speech to the Administrative Decisions Tribunal Bill 1997:

43. An essential element of good administration is the need to ensure that reasons are given for administrative decisions. The supply of reasons for decisions will give people dealing
with government departments and agencies an assurance that decisions are made rationally, taking into account only the relevant considerations.

44. The obligation to provide reasons for decisions reached in the exercise of public powers is essential to ensuring accountability. It is likely to cause a decision maker to consider carefully the grounds upon which a decision is made and ensure that proper process and policies are applied. However, the most important result of requiring reasons to be given for decisions is that it allows an individual affected by a decision to understand the reasons for that decision and therefore arms an individual with the information necessary to seek review and remedies to ensure administrative justice.

45. Thirdly, the **ADT Act** creates an internal review procedure whereby an “interested person” can request another officer from the agency (or where the administrator is not from an agency, an employee of the administrator), to review the administrator’s decision.44 A greater emphasis is placed on internal review than in the federal sphere,45 as in the usual course, the finalisation of an internal review is a pre-requisite to the right to apply to the ADT for review of a reviewable decision.46 The internal reviewer must consider any relevant material submitted by the internal review applicant, and then affirm, vary or set aside the decision and make a substitute decision.47 As Anderson recognises, “[t]he emphasis placed upon internal review by the ADT Act is a welcome recognition that decisions can be efficiently resolved close to the source of the decision”, although she rightly cautions that the value of the internal review mechanism will turn on the detail of the internal review process, and on that matter the ADT Act is largely silent.48

46. Section 58 of the ADT Act places a general obligation on an administrator, whose reviewable decision is subject to a review application in the ADT, to file a copy of reasons and all documents that the administrator considers to be relevant to the ADT’s determination of the application. In some cases, this obligation is displaced by the

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43 Second Reading Speech, op cit., at 9604.
44 In some cases, the internal review procedure created under the ADT Act is displaced by the relevant enactment’s special internal review procedure (For example, s 192 of the Adoption Act 2000 (NSW) excludes s 53 of the ADT Act and substitutes the internal review procedure set out in s 192 of the Adoption Act 2000 (NSW). Another example is s 53(5) of the FOI Act).
45 Ellis, op cit., at 106. See also Anderson, op cit., at 102-103.
46 Section 55(1)(b). In some circumstances, an internal review may be dispensed with: s 55(2).
47 Section 53.
48 Anderson, op cit., at 102.
relevant enactment.\(^{49}\) By s 59, an administrator is permitted to take certain objections to lodgement of these documents.

47. Section 63 of the ADT Act governs the exercise of the ADT’s review jurisdiction. That the ADT must consider the matter on the merits is made clear by s 63(1) which requires the ADT to make the “correct and preferable decision” having regard to all the material then before it including relevant factual material and applicable written and non-written law.\(^{50}\) The ADT effectively “steps into the shoes” of the administrator in exercising its review jurisdiction. In this regard, s 63(2) provides that that ADT may exercise all of the functions that were conferred on the administrator by the relevant enactment. As such, in the usual course it is more conceptually accurate to view the ADT as re-making the decision rather than reviewing it.

48. Section 63(3) confers power on the ADT for the purpose of disposing of review applications. The ADT may decide:

(a) to affirm the reviewable decision, or

(b) to vary the reviewable decision, or

(c) to set aside the reviewable decision and make a decision in substitution for the reviewable decision it set aside; or

(d) to set aside the reviewable decision and remit the matter for reconsideration by the administrator in accordance with any directions or recommendations of the Tribunal.

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\(^{49}\) For example, s 53(5) of the FOI Act expressly excludes the application of s 58 of the ADT Act in FOI review proceedings in the Tribunal. It is an interesting question as to whether the ADT has power to compel an agency or Minister to provide it with the documents to which access is sought as the FOI Act is silent on the matter (except where a “restricted document” is concerned – as to which see s 57(3) of the FOI Act). One possibility is that the ADT would derive power from s 73(5)(b) of the ADT Act. Section 73(5) relevantly provides:

The Tribunal:

... (b) is to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings.

\(^{50}\) This also means that the ADT is not limited to the material that was before the original decision-maker or the decision-maker on internal review.
49. Section 64 of the ADT Act expressly requires the ADT to take into account, and give effect to, Government policy when exercising its review jurisdiction.\(^{51}\) Section 64 empowers the Premier or any other Minister to certify in writing that a particular policy exists in relation to a particular matter, and the ADT must then take judicial notice of the contents of the certificate.

50. Where the ADT varies or substitutes its own decision for the administrator’s decision, s 66(2) deems that the ADT’s decision is the administrator’s decision and takes effect from the date of the administrator’s actual decision unless the Tribunal otherwise orders.

51. The ADT is also empowered, at any stage of the proceedings, to remit a matter to the administrator for reconsideration, whereupon the administrator can affirm, vary or set aside the decision, substituting it for a new decision.\(^{52}\) This can be an efficient and effective means for achieving the applicant’s objectives on review and is one of the key mechanisms by which the ADT can facilitate fast and effective administrative justice.

52. The particular enactment under which the application for review has been made may also supplement the ADT’s powers in the particular case. For example, s 101 of the *Taxation Administration Act 1996* (NSW) confers additional powers on the ADT. The PPIP Act is particularly interesting in terms of the extra power it confers upon the ADT. In this regard, s 55(2) of the PPIP Act provides:

> On reviewing the conduct of the public sector agency concerned, the Tribunal may decide not to take any action on the matter, or it may make any one or more of the following orders:

(a) subject to subsections (4) and (4A), an order requiring the public sector agency to pay to the applicant damages not exceeding $40,000 by way of compensation for any loss or damage suffered because of the conduct,

(b) an order requiring the public sector agency to restrain from any conduct or action in contravention of an information protection principle or a privacy code of practice,

(c) an order requiring the performance of an information protection principle or a privacy code of practice,

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\(^{51}\) Cf with *Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 645.

\(^{52}\) Section 65.
(d) an order requiring personal information that has been disclosed to be corrected by the public sector agency,

(e) an order requiring the public sector agency to take specified steps to remedy any loss or damage suffered by the applicant,

(f) an order requiring the public sector agency not to disclose personal information contained in a public register,

(g) such ancillary orders as the Tribunal thinks appropriate.

53. It is clear from s 55 of the PPIP Act that the ADT does more than merely “step into the shoes” of the original decision-maker when acting under the PPIP Act. The ADT in fact brings judicial power to bear in making the orders authorised by s 55. The ADT’s jurisdiction under the PPIP Act is also interesting in that it does truly review the conduct of an agency (or “decision” as broadly defined in s 6(1)(g) of the ADT Act), rather than re-making a decision of the agency.

The “contrary provision” – s 40 of the ADT Act

54. At this point it is useful to comment on the crucial role played by s 40 of the ADT Act. It will have been seen that the powers, functions and procedures of the ADT Act depend in any case on the interplay between the ADT Act and the enactment under which the ADT is exercising its jurisdiction (the principal Act). As has already been noted, the terms of the ADT Act and the principal Act do not always sit seamlessly together. Further, in many cases, the principal Act will make provision for matters that are contrary to the ADT Act. For example, s 73 of the ADT Act displaces the rules of evidence. However, when the ADT is exercising jurisdiction under Div 7 of Pt 10 of the LP Act, s 168 of the LP Act expressly applies the rules of evidence.

55. Section 40 of the ADT Act addresses the question of statutory inconsistencies, providing that in every case the principal Act shall prevail over the ADT Act. Section 40 provides:

(1) The provisions of this Act have effect subject to any contrary provision being made in a relevant enactment (whether expressly or impliedly).
However, a provision of a relevant enactment is not to be interpreted as amending or repealing, or otherwise altering or affecting the effect or operation of, any of the provisions of this Chapter unless the provision of the relevant enactment provides expressly for it to have effect despite a specified provision, or despite any provision, of this Chapter.

This section applies to a provision of a relevant enactment whether enacted before or after the commencement of this section.

In this section:

“relevant enactment” means an enactment under which the Tribunal has jurisdiction:

(a) to make an original decision, or
(b) to review a reviewable decision,

or that otherwise deals with the jurisdiction of the Tribunal.

Section 40 of the ADT Act can also be applied to “iron out” what one may call certain infelicities in the drafting of various enactments which confer jurisdiction on the ADT, so that the ADT Act and the principal Act can be read harmoniously together.

Appellate jurisdiction

The ADT’s appellant jurisdiction is governed by Ch 7 of the ADT Act. Section 113(1) provides that parties to proceedings on the ADT’s original or review jurisdiction may appeal to the Appeal Panel in respect of an “appealable decision”.

An “appealable decision” is defined as:

a decision of the Tribunal (or a decision that is taken to be a decision of the Tribunal) made in proceedings for:

(a) an original decision where the enactment under which the Tribunal has jurisdiction to make the decision expressly provides that the decision may be appealed to an Appeal Panel under this Part, or

(b) a review of a reviewable decision.\(^{53}\)

\(^{53}\) Section 112(1). Section 112(2) makes provision for other specific decisions to be “appealable decisions”.\)
59. A party is entitled to appeal on any question of law without leave, but requires the
Appeal Panel’s leave before the Appeal Panel can consider the merits of an appealable
decision. Leave is usually sought concurrently with the hearing of the substantive
appeal.

60. Where the Appeal Panel determines a question of law, it may make any such order that
it considers appropriate, including an order affirming, varying, setting aside and
substituting a decision or setting aside and remitting a decision to the ADT at first
instance. When hearing the matter on the merits, the Appeal Panel must determine the
“correct and preferable decision”, having regard to the material before it. In determining
an appeal on the merits, the ADT is empowered to affirm, vary or set aside the decision
and substitute its own decision in lieu thereof.

61. The Appeal Panel is important both because it establishes norms of decision-making
and because of its role in assisting consistency in the ADT’s decision-making function.
While it is true that no principle of stare decisis requires members of the Tribunal at first
instance to follow the Appeal Panel’s decisions, in practice this is what has occurred.

62. Lastly, it should be noted that in the recent case of NSW Breeding and Racing Stables
Pty Ltd v Administrative Decisions Tribunal (NSW) (2001) 53 NSWLR 559, Barrett J held
that where a party to proceedings in the ADT seeks judicial review of an “appealable
decision” in the Supreme Court’s original jurisdiction rather than seeking to appeal to the
Appeal Panel, the Supreme Court should decline to exercise its jurisdiction unless the
criteria in s 123(2) of the ADT Act as to the availability and adequacy of the Appeal
Panel process are satisfied. In the course of judgment Barrett J commented (at 572 [49])
on the role of the Appeal Panel thus:

Appeal to an Appeal Panel in the present case represents a remedy for the
plaintiff at least as effective and convenient as judicial review by this Court and
arguably more so, given the limitations upon the judicial review jurisdiction and

54 Section 113(2).
55 Section 114.
56 Section 115.
57 As to why the Tribunal at first instance should generally follow Appeal Panel decisions see: Rittau v Commissioner of Police, New
South Wales Police Service [2002] NSWADT 186 at [61]-[62], cited with approval in NSW Breeding and Racing Stables Pty Ltd v
the capacity of the Appeal Panel to make orders in substitution for those of the Tribunal, and if it is so minded (and requested), to review merits.

PROCEDURE OF THE ADT

63. Despite the fact that the ADT has three different jurisdictions in which it performs vastly different functions, it has a single set of procedural rules that are set out in Ch 6 of the ADT Act. The uniformity of procedure is made all the more peculiar by the fact that the ADT generally operates as an executive decision-maker in its review jurisdiction, but like a quasi-judicial tribunal in the exercise of its original jurisdiction, and a judicial tribunal when exercising its appellate jurisdiction.

64. Sections 67 to 69 of the ADT Act deal with parties to ADT proceedings. Section 67 departs to some extent from the common law conception of standing in respect of parties to proceedings in the ADT’s original and review jurisdictions, and reflects the fact that decision-making in the ADT is more polycentric and that the ADT is regularly called upon to assess and apply the public interest in making its decisions. A person will be obviously be a party to proceedings where they are entitled to, and have, made an application to the Tribunal. This turns on whether the potential applicant is an “interested person” and that will in turn depend on what the relevant enactment provides.

65. Persons whose interests are likely to be affected by the ADT’s decision (in either its original or review jurisdiction) may also apply, pursuant to s 67(4), to be made parties, and the ADT may also add that person as a party on its own motion. The ADT may join a person as a party if satisfied that their interests are likely to be affected. Further, when the ADT is exercising original jurisdiction and orders are sought in respect of a person other than the applicant, that other person is a party.

66. Section 69 empowers the Attorney General to intervene in proceedings before the ADT, thereby becoming a party. Other enactments also confer rights to party status or rights to intervene.

58 Where the ADT has determined that the interests of a person are or are likely to be affected by a decision, that decision is not appealable. However, if the ADT determines that the interests of the person are not or are not likely to be affected, then the person may appeal that determination to the Appeal Panel.
59 Section 67(1)(a1).
60 Sections 67(1)(b) and 67(2)(c).
to be heard. For example, s 57(6) of the FOI Act joins the Premier (as the Minister administering the FOI Act) as a party to proceedings concerning access to “restricted documents”. In contrast, s 55(7) of the PPIP Act merely gives the Privacy Commissioner a right to appear and be heard.

67. Section 73 is perhaps the most important provision of Ch 6 as it sets out the general procedures and rules according to which the ADT must conduct itself. Section 73 aims to achieve flexibility and efficiency in decision-making, while at the same time ensuring that the ADT at all times affords procedural fairness to the parties who come before it.

68. Section 73(1) provides that subject to the Act and any rules of the ADT, the ADT may determine its own procedure. Section 73(2) dispenses with the rules of evidence and permits the ADT to “inform itself on any matter and in such manner as it thinks fit”, subject to the rules of natural justice.

69. By s 73(3), the Tribunal must act with “as little formality as the circumstances of the case permit” and “according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms”.

70. In recognition of the fact that many parties in the ADT are not legally represented, s 73(4) imposes obligations on the ADT to take steps to ensure that parties understand what is going on. This will go a long way towards ensuring that parties are afforded procedural fairness. However, one may be more circumspect about the effect of s 76 which permits the ADT to determine the matter “on the papers” if it appears to the ADT that the “issues for determination can be adequately determined in the absence of the parties”. While such a provision may have efficiency attractions, some commentators have been critical of s 76 for it means that an applicant has no right to a hearing. As Anderson notes:

There are real risks in the tribunal being able to dispense with a hearing. The tribunal may think it has the full story when it has not. There is a major risk that the papers do not reflect what may or may not come out at an occasion where a person is present and possibly represented.

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61 See ss 67(1)(d) and 67(2)(e).
62 Anderson, op cit., at 104.
71. One way to ensure that s 76 does not erode procedural fairness is to ensure that the parties have consented to dispensing with the hearing.\(^{63}\) As such, it is of some concern that the ADT and the Appeal Panel have held that a party's consent is not a pre-requisite to determining the matter “on the papers”.\(^{64}\) That said, the ADT regularly considers questions of costs “on the papers”. That is generally reasonable since the question is ordinarily a narrow and discrete one and the matters arising will be generally clear in advance.

72. Section 73(5) sets down various requirements to ensure that proceedings are conducted as efficiently as possible, including by permitting the ADT to require parties to reduce their arguments to writing, to place time limits on the length of oral argument; and by permitting the ADT to dismiss at any stage proceedings that are frivolous, vexatious, or otherwise misconceived or lacking in substance.

73. Part 3 (ss 90-98) of Ch 6 of the ADT Act empowers the Rule Committee of the ADT to make rules of the ADT. However, to date little use has been made of this power. Indeed, ten years after the commencement of the ADT, the ADT only has a small number of rudimentary “interim” rules of practice as set out in the *Administrative Decisions Tribunal Rules (Transitional) Regulation 1998* (these rules are shortly to be repealed). While the lack of rules may assist the ADT in maintaining flexible procedures, the effect in practice has been that unrepresented parties (and practitioners) often have little idea of what to expect when appearing before the ADT.

74. The ADT also has some potential to operate in a more inquisitorial manner. This is largely a result of s 73(5)(b) which provides that the Tribunal “is to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings”.\(^{65}\) The ADT's inquisitorial powers are furthered by s 83(1)(c) which permits the ADT to examine or cross-examine any witness to such extent as the Tribunal thinks proper in order to elicit information relevant to the exercise of the ADT's functions. However, there are many practical constraints on the ADT's inquisitorial function. For example, it does not have access to field officers or an

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\(^{64}\) *Lloyd v Veterinary Surgeons Investigating Committee* [2001] NSWADTAP 26 at [16] and *Neary v Treasurer of New South Wales* [2002] NSWADTAP 4 at [20].
investigatory bureaucracy and is dependent on the material that the parties bring before it.\textsuperscript{66}

75. Lastly, it should be noted that as an inferior tribunal, the ADT has no inherent jurisdiction. However, the ADT does have implied power to take steps to protect its processes. One example is the implied power to set aside summonses that are an abuse of process.\textsuperscript{67}

**CHARACTERISING THE ADT**

76. It is clear from the preceding discussion that the ADT is much more than a merits review tribunal. Put another way, the ADT is much more than an executive decision-maker and to no small extent its very name is a misnomer. In reality, the ADT’s original jurisdiction can be further segmented into:

(a) an quasi-judicial function approaching that brought to bear in ordinary civil proceedings; and

(b) a disciplinary function.

77. In its review jurisdiction, the ADT generally operates as a merits reviewer of executive decisions. However, in certain circumstances the ADT is asked to go beyond simply “stepping into the shoes” of the original decision-maker and to exercise judicial powers – for example by ordering that damages payments be made by an agency guilty of conduct contravening the principal Act.\textsuperscript{68}

78. The ADT also functions as an appellate body and in this regard is called upon to determine questions of law. It follows that in performing its functions, the ADT exercises executive and judicial powers.


\textsuperscript{68} See, for example, C (No 2) v Secretary, NSW Treasury [2002] NSWADT 235 at [68], citing Grassby v R (1989) 168 CLR 1 at 16.

\textsuperscript{68} As the President of the ADT noted in his report in the 2001-2002 Annual Report:
The conceptual classification used by the ADT Act to define the work of the Tribunal – “review of reviewable decisions” and “original decisions” – does not precisely capture the difference between the business of the Tribunal that is of an “administrative” or public law character and that which is of a “civil” or private law character (the latter being a dispute between parties).
79. In addition to the decision-making powers conferred by the ADT Act and the various enactments under which it exercises its functions in the particular case, the ADT is also vested with a number of subsidiary powers which give the Tribunal a court-like flavour. For example, the ADT has the power to issue summonses, to require witnesses to give evidence on oath, and in certain instances to order costs. Many members of the Tribunal have a legal background. Further, the President is a District Court judge and the Deputy Presidents are all from legal backgrounds. This likely has an impact on the culture of the ADT. In this regard, Creyke postulates that where a tribunal has a judicial membership among its senior ranks, it is more likely that a judicial culture will permeate that tribunal. Further, the ADT Act does contain provisions which some say promote adversarial culture, including the right to legal representation, the holding of public hearings, and the giving of evidence on oath or affirmation.

80. In practice, the ADT has been more legalistic in exercising functions under certain enactments than others (for example, in disciplinary proceedings under the LP Act where the ADT is required to apply the rules of evidence). Moreover, there is more call for legal expertise in certain types of proceedings than in others. This observation is not confined to its different jurisdictions, but to the different enactments involved. For example, applications under the RL Act tend to be quite legalistic, applying principles of contract law and equity. Similarly, proceedings under the FOI Act regularly involve complex questions of statutory construction in construing the true scope of the exempt document provisions in Sch 1 to the FOI Act. However, applications under other enactments tend to be much more “facts driven”, for example, in determining whether a taxi-driver is of “good repute and in all other respects a fit and proper person” for the purposes of holding a taxi-cab authority. This obviously has implications for where it is appropriate that a party should be legally represented.

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69 Section 84.
70 Section 83(1)(b).
71 Section 88.
74 See s 33 of the Passenger Transport Act 1990 (NSW).
COSTS

81. Turning first to the question of costs, s 88 of the ADT Act relevantly provides:

(1) Subject to the rules of the Tribunal and any other Act or law, the Tribunal may award costs in relation to proceedings before it, but only if it is satisfied that there are special circumstances warranting an award of costs.

...  

(3) However, the Tribunal may not award costs in relation to proceedings for an original decision unless the enactment under which the Tribunal has jurisdiction to make the decision provides for the awarding of costs.

82. The first matter to be noted is that the ADT Act draws a distinction between the ADT’s review and appeal jurisdictions on the one hand, and its original jurisdiction on the other. In order to increase flexibility, it would probably have been preferable for the ADT Act to provide the ADT with a residual discretion as to costs in its original jurisdiction, particularly where those proceedings closely approximate ordinary civil litigation. However, this is not the course that the Legislature chose to adopt.

83. In any case, many enactments do make some provision for costs orders where the ADT is exercising its original jurisdiction. For example, s 114 of the AD Act confers a limited power upon the ADT to make orders for costs.75 Another example is s 77A of the RL Act, which simply applies s 88 of the ADT Act.76

84. The second point to note is that a fairly inflexible approach to the costs discretion has emerged across the board in ADT jurisprudence, both in construing s 88 of the ADT Act and in construing the various provisions of other enactments which deal expressly with

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75 Section 114 of the AD Act provides:
(1) Except as provided by section 111(2) and subsection (2) each party to an inquiry shall pay his or her own costs.
(2) Where the Tribunal is of the opinion in a particular case that there are circumstances that justify it doing so, it may make such order as to costs and security for costs, whether by way of interim order or otherwise, as it thinks fit.

In turn, s 111 provides:
(1) Where, at any stage of an inquiry, the Tribunal is satisfied that a complaint is frivolous, vexatious, misconceived or lacking in substance, or that for any other reason the complaint should not be entertained, it may dismiss the complaint.

(2) Where the Tribunal dismisses a complaint under this section, it may order the complainant to pay the costs of the inquiry.

See the discussion of this provision in Harding v Vice Chancellor, University of New South Wales [2002] NSWADTAP 36 at [22]-[26] and Citadin Pty Ltd (No 2) v Eddie Azzi Aust Pty Ltd and General Pants Co Pty Ltd [2001] NSWADTAP 31.

76 Section 77A of the RL Act provides: “The Tribunal may award costs under section 88 of the Administrative Decisions Tribunal Act 1997 in respect of proceedings commenced by an application made under this Part”.

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the question of costs. It may fairly be said that costs have, in practice, only been awarded in exceptional circumstances. Indeed, it is not uncommon for practitioners to take the view that the ADT is effectively a “no costs” jurisdiction. In this regard, the ADT has held that the term “special circumstances” in s 88 of the ADT Act means that costs will only be awarded where there are circumstances that take the matter out of the ordinary course of events,\(^77\) or to put it another way, where there are factors which extend beyond those reasonably connected with the usual or ordinary pursuit of a claim.\(^78\)

85. Some circumstances which the ADT has recognised as “special” to date include:

- the withdrawal by an applicant of an application after a date for hearing has been set, and in circumstances where the respondent has incurred expense in briefing counsel;\(^79\)
- a successful party’s rejection of an offer of compromise that was better than the result obtained at hearing;\(^80\) and
- clearly vexatious proceedings.\(^81\)

86. Significantly, it has also been held that no sufficiently arguable questions of law disclosed on appeal is a special circumstance entitling a costs award, at least where the subject of the dispute is more “commercial” in nature.\(^82\) In this regard, the threat of an adverse costs order can operate as a power disincentive to parties mounting what are clearly hopeless appeals. However, it is not clear why, on appeal, it is necessary to distinguish between appeals that are more as opposed to less “commercial” in nature. In either case, the parties have been given the opportunity to be heard at first instance by an independent body.

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\(^78\) Kondos v Citadin Pty Limited [2003] NSWADTAP 7 at [25].
\(^79\) Graham v Director General, Department of Community Services [2001] NSWADTAP 4.
\(^80\) Calleja v Mali [2001] NSWADT 20 (a decision in the Retail Leases Division). See also Citadin Pty Ltd (No 2) v Eddie Azzi Australia Pty Ltd and General Pants Co Pty Ltd [2001] NSWADTAP 31 at [22].
\(^81\) Alessa Pty Limited v Total & Universal Pty Limited [2001] NSWADT 150 at [5]-[7]; PC v University of New South Wales (No.2) [2005] NSWADT 264; PC v University of New South Wales (GD) (No 2) [2006] NSWADTAP 54.
\(^82\) Citadin Pty Ltd (No 2) v Eddie Azzi Australia Pty Ltd and General Pants Co Pty Ltd [2001] NSWADTAP 31 at [23]-[24]. See also DO v University of New South Wales [2003] NSWADTAP 9 at [27].
87. It is also significant to note that the ADT has rejected the submission that adverse costs orders should be made as a sanction to reprove allegedly unreasonable conduct by a government agency which is said to have led to a citizen having no option but to apply to the ADT for relief, and in so doing, incurred professional costs.  

88. There are perhaps some signs that a more flexible approach is emerging on the question of costs. In DO v University of New South Wales [2003] NSWADTAP 9 at [27], the Appeal Panel observed that the determination of what amounts to “special circumstances” within the meaning of s 88 of the ADT Act will vary according to the enactment at issue:

In considering the exercise of the discretion in the retail leases litigation the Appeal Panel has given considerable weight to the commercial character of this category of dispute. A successful party should not, we consider, be exposed to an appeal where the errors of law are not reasonably arguable. The Appeal Panel has taken the view that a failure to succeed on appeal should be treated as a special circumstance. The Appeal Panel has been more circumspect in the approach that should be taken on this issue in respect of failed appeals in the public law and equal opportunity areas.

89. In making or defending an application for costs, it is important to have regard to the ADT’s Practice Note 12 “Costs”. The Administrative Decisions Tribunal Amendment Bill 2008 will, when it commences, amend s.88 of the ADT Act to adopt a number of the considerations referred to by Practice Note 12.

90. There is a good argument closer the proceedings to ordinary civil proceedings, the more likely that parties should be able to obtain their costs. For example, in Retail Lease applications, which are essentially commercial in nature and which closely approximate ordinary civil disputes, there seems no reason in principle why a costs order should not normally be made. Both parties will be put to considerable trouble and cost. There seems no reason in principle why costs should not usually follow the event in this context. (However, the ADT has rejected the argument that because of the commercial character of retail lease disputes, costs should follow the event at Divisional level as

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83 Raethel v Director-General, Department of Education and Training [2000] NSWADT 56. See also Citadin Pty Ltd (No 2) v Eddie Azzi Australia Pty Ltd and General Pants Co Pty Ltd [2001] NSWADTAP 31 at [7].
84 See also PC v University of New South Wales (No.2) [2005] NSWADT 264; PC v University of New South Wales (GD) (No 2) [2006] NSWADTAP 54.
occurs in ordinary commercial litigation in the courts.\textsuperscript{85} Similarly, litigation under the AD Act can be both lengthy and expensive – particularly if allegations of systemic discrimination arise. An applicant who succeeds on the merits will find their victory substantially eroded by the fact that he or she generally has to bear his or her own costs. In this regard, anecdotal evidence suggests that where a discrimination complaint is equally capable of being ventilated under federal anti-discrimination legislation, practitioners are now advising applicants to commence in the Federal Magistrates Court rather than the ADT because costs generally follow the event in that jurisdiction. If this is correct, one can only assume that the ADT’s jurisdiction under the AD Act will shrink substantially in the coming years.

91. The comments made above may be compared with the situation where an application under legislation such as the FOI Act, which seeks to give an individual rights against government. One of the FOI Act’s principal objectives is the promotion of access to information and here there is a very clear public interest in the right to know. Such considerations militate against costs orders, even where an access applicant has lost their application before the ADT.

CONCLUSION

92. Over the last ten years, the ADT has effected significant changes to the system of administrative law in New South Wales. The ADT operates, at least in part, as an external merits reviewer of government decisions. Moreover, the ADT Act introduces a right to obtain reasons for “reviewable decisions” and also establishes a system for the internal review of “reviewable decisions” which hopefully has the effect of resolving many disputes without the need for recourse to external review. Further, the ADT’s merits review function is enhanced by the establishment of the Appeal Panel which operates both to correct errors of law (and on occasion, errors on the merits) and to set important norms of decision-making.

\textsuperscript{85} Townsend v Chief Executive, State Rail Authority [1999] NSWADT 104 and Citadin Pty Ltd (No 2) v Eddie Azzi Australia Pty Ltd and General Pants Co Pty Ltd [2001] NSWADTAP 31, where the Appeal Panel noted that the VCAT had been more receptive to this argument, and then observed at [13] that:

\textit{It may be that more use of costs orders should be made where there is an appeal and it is dismissed. At the appeal level, there would seem to be a stronger case for recognising the complexity of retail leases disputes and their commercial character as relevant factors amounting to “special circumstances”.

But see Alessa Pty Limited v Total & Universal Pty Limited [2001] NSWADT 150 at [4].}
93. But the ADT has effected other significant changes to the legal system in New South Wales, which go beyond the strictly administrative law arena. These changes are found in the ADT’s original jurisdiction where the ADT operates as a quasi-judicial tribunal, either resolving what are essentially civil disputes or exercising a disciplinary function.

94. The significant point for present purposes is that the ADT has the capacity to operate as many different things for many different people. In this sense the ADT is a chameleon since the way it functions depends fundamentally upon the enactment under which it is vested with jurisdiction in any particular case. The key advantage is of course flexibility. However, there is also a need for caution. What may augur well under one enactment may not be appropriate when the ADT is acting under another enactment. Practitioners should always act cautiously in considering whether it is appropriate to invoke particular rules of practice used in dealing with certain enactments vesting jurisdiction in the ADT to other enactments vesting such jurisdiction.