Alternative Dispute Resolution in Administrative Matters

Australian National Report for the International Association of Supreme Administrative Jurisdictions

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Catherine Bergeal
Secretary General of the Council of State of France
Acting Secretary General of the International
Association of Supreme Administrative Jurisdictions

Attention: Laurent Athalin
By email: aihja@counsel-etat.fr

cc: President's Chambers: Duncan.Kerr@aat.gov.au
Justice Griffiths' Chambers: Justice.Griffiths@fecdcourt.gov.au

Dear Secretary General,

Re: Alternative Dispute Resolution in Administrative Matters

Thank you for your letter dated 9 October 2015 to the Honourable Justice Duncan Kerr, Chev LH, President of the Administrative Appeals Tribunal, Judge of the Federal Court of Australia.

The President has asked me to liaise with the Honourable Justice Griffiths, Judge of the Federal Court of Australia and prepare a response to the questionnaire regarding alternative dispute resolution in administrative matters. Please see the attached joint response from the Administrative Appeals Tribunal and the Federal Court of Australia.

As Australia is a Federal System, the President has also sought comment from the relevant Supreme Courts and Administrative Tribunals of the Australian States and Territories. While the majority have indicated that they do not have any additional comment, some of the State Administrative Tribunals may wish to provide further information in the near future.

I appreciate the opportunity to provide input into this important project and am available if any points of clarification are required.

Yours sincerely,

Justin Toohey
Director, Alternative Dispute Resolution
Alternative Dispute Resolution in Administrative Matters in Australia

Background

Australia has a comprehensive framework for the resolution of disputes arising from administrative decisions. Two main pathways exist for individuals seeking an independent review of administrative decisions by Commonwealth Government agencies:

1. Merits review by the Administrative Appeals Tribunal (AAT), and
2. Judicial review by the Federal Court or Federal Circuit Court.

There are also a range of other avenues for individuals who concerned with administrative decision making processes including internal complaints handling, Ombudsman investigation, or seeking compensation for detriment caused by defective administration (the CDDA Scheme). In addition, in Australia’s Federal System, the various States and Territories are also responsible for administrative decisions and allow for merits and judicial review through separately established courts and tribunals. This report will focus on alternative dispute resolution (ADR) in the AAT and the Federal Court of Australia of decisions made by the Australian Government. The AAT was established by the Administrative Appeals Tribunal Act 1975 (AAT Act) and commenced operations on 1 July 1976. On 1 July 2015 the Migration Review Tribunal, Refugee Review Tribunal and Social Security Appeals Tribunal were merged with the AAT. The jurisdiction of the AAT is conferred by legislation, regulation or other legislative instruments providing that an administrative decision can be reviewed by the AAT. The AAT can review decisions made under more than 400 Commonwealth Acts and legislative instruments. The most common types of decisions the AAT can review relate to:

- child support
- Commonwealth workers’ compensation
- family assistance, paid parental leave, social security and student assistance
- migration and refugee visas and visa-related decisions
- taxation
- veterans’ entitlements.

The AAT also reviews decision relating to:

- Australian citizenship
- bankruptcy
- civil aviation
- corporations and financial services regulation
- customs
- freedom of information
- the National Disability Insurance Scheme
- passports and
- security assessments by the Australian Security Intelligence Organisation (ASIO).

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2 http://www.ombudsman.gov.au/
The AAT is not always the first step in having a decision reviewed. In some cases, the AAT cannot review a decision until there has been an internal review of the primary decision or review by a specialist review body like the Veterans’ Review Board. The AAT can also conduct a second review of certain decisions that have been reviewed in our Social Services & Child Support Division. A second review is conducted in our General Division.

The AAT reviews a decision “on the merits” and can consider new factual information to arrive at the correct or preferable decision. This is to be contrasted with judicial review by the Federal Court of Australia which is focused on the lawfulness of a decision having regard to the findings of fact made by the primary administrative decision maker. The AAT has the power to:

- affirm a decision
- vary a decision
- set aside a decision and substitute a new decision, or
- remit a decision to the decision-maker for reconsideration.

Appeals from the AAT on a question of law are available to the Federal Court. In a number of legislative frameworks appeal can be made directly to the Federal Court in the first instance. For example under section 14ZZ of the Taxation Administration Act 1953 (TAA) a taxpayer must make an irrevocable election as to whether review will be sought in the AAT or the Federal Court. The Federal Court and the Federal Circuit Court may also conduct judicial review of administrative decisions under the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act). Section 5 of the ADJR Act sets out the grounds on which judicial review may be sought.
**Response to ISAJ Questionnaire**

**Introductory questions**

1. How do you define alternative procedures? How do you distinguish them from jurisdictional procedures and arbitration procedures?

Subsection 3(1) of the AAT Act sets out that:

> "alternative dispute resolution processes means procedures and services for the resolution of disputes, and includes:
> (a) conferencing; and
> (b) mediation; and
> (c) neutral evaluation; and
> (d) case appraisal; and
> (e) conciliation; and
> (f) procedures or services specified in the regulations;
> but does not include:
> (g) arbitration; or
> (h) court procedures or services.
>
> Paragraphs (b) to (f) of this definition do not limit paragraph (a) of this definition."

Division 3 of Part IV of the AAT Act establishes when matters may be referred to an ADR process and who may conduct ADR processes. The AAT’s [General Practice Direction](http://www.aat.gov.au/AAT/media/AAT/Files/Directions and guides/General-Practice-Direction.pdf) refers matters in the General and Other Divisions to an initial conference process. Conferences are conducted by Conference Registrars who are authorised officers for conducting ADR processes and issuing procedural directions to the parties. Conference registrars are not Members of the AAT and cannot determine or dismiss an application for review. Evidence of anything said and done during an ADR process is inadmissible as evidence unless the parties agree. If an AAT Member conducts an ADR process, the Member is not eligible to hear the matter if a party objects to the member participating in the hearing.


> alternative dispute resolution process means a procedure or service for the resolution of disputes (other than arbitration or mediation) not involving the exercise of the judicial power of the Commonwealth.

Part 28 of the Federal Court Rules deals with ADR processes in detail. Rule 28.01 requires:

> Parties must, and the Court will, consider options for alternative dispute resolution, including mediation, as early as is reasonably practicable. If appropriate, the Court will help implement those options.

Rule 28.02 outlines that a party may apply to the Court for an order that:

(a) the proceeding or part of the proceeding be referred to an arbitrator, mediator, or some suitable person for resolution by an ADR process; and

(b) the proceeding be adjourned or stayed; and

(c) the arbitrator, mediator, or person appointed to conduct an ADR process report to the Court on progress in the arbitration, mediation or ADR process.

2. Do alternative procedures such as those defined above exist in your country? If no alternative procedures exist in your country, do you plan to create such procedures? Can you articulate your current thinking in this domain?

Beyond the statutory processes of the AAT Act, the use of ADR in administrative matters is supported by Australian Government policies. The Office of Legal Services Coordination in the Attorney-General’s Department (AGD) Guidance Note No 12 advises government litigators to always consider alternative processes and to seek early independent advice of possible settlement terms. AGD encourages and supports dispute management within Australian Government agencies through the development of dispute management plans.

The Australian Taxation Office (ATO) has developed its own dispute management plan, which can be found on the Australian Taxation Office website. The Australian Competition and Consumer Commission (ACCC) has also developed a dispute management plan and policy, which can be found on the Australian Competition and Consumer Commission website. Australia has a well-developed system for the accreditation of mediators. More information on the National Mediator Accreditation System (NMAS) is available here. The AAT and the Federal Court are both recognised mediator accreditation bodies (RMABs) under the NMAS and all officers at the AAT and Federal Court who are authorised to conduct ADR processes are accredited mediators.

I. The goals and the scope of alternative procedures

1. With what objectives are these procedures deployed? What advantages and benefits are expected to result from them?

The statutory objectives of the AAT are to provide a review process that:

- is accessible,
- is fair, just, economical, informal and quick,
- is proportionate to the importance and complexity of the matter, and
- promotes public trust and confidence in the decision-making of the Tribunal.

These objectives have been well supported by the early adoption of alternative dispute resolution processes at the AAT. The AAT has a long history of exploring mechanisms for resolving matters without the need for a determinative hearing process. Alternative dispute resolution processes at the AAT include:

- mediation
- conciliation
- arbitration
- referral to an independent expert

These processes are designed to provide a more efficient and cost-effective means of dispute resolution for parties involved in administrative matters. Further information on the National Mediator Accreditation System (NMAS) is available here.

12 http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx
resolution was formally recognised in the AAT Act through amendments in 1995 and further expanded in 2005. The current provisions provide for referral to a range of ADR processes and protection for ADR practitioners and the parties in their exchange of information and offers. The AAT’s [Alternative dispute resolution guidelines](http://www.aat.gov.au/steps-in-a-review/alternative-dispute-resolution) state that ADR processes should:

- resolve or limit the issues in dispute
- be accessible
- use resources efficiently
- resolve disputes as early as possible
- produce outcomes that are lawful, effective and acceptable to the parties and the Tribunal
- enhance the satisfaction of the parties.

The AGD [Guidance Note No 12](http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/Use-of-Alternative-Dispute-Resolution-ADR.pdf) outlines that using ADR to resolve disputes may assist Commonwealth agencies to:

- tailor the process to suit the needs of the agency and the other disputants, including addressing concerns about privacy and confidentiality and accommodating special needs.
- provide the opportunity for direct communication between the agency and the other disputants.
- create an environment that may be less formal and more relaxed.
- foster better relationships between the agency and the other disputants (particularly where the emphasis is on joint problem solving and communication rather than a more narrow focus on investigation and advice).
- narrow the issues in dispute.
- enhance the reputation of government generally and the agency, including the Commonwealth Government’s reputation as a model litigant.
- allow the consideration of a wider range of remedies, including both legal and non-legal remedies.
- resolve the dispute at a comparatively lower cost than legal proceedings.

2. Are alternative procedures used in your country in administrative matters? Since when? What factors contributed to their development and what is the proportion of administrative disputes that are resolved each year by such procedures?

The AAT has a long history of using ADR processes in administrative review. The AAT Act established the Administrative Review Council (ARC) to monitor the administrative merits review system and regularly review the operation of the AAT Act. The ARCs 1995 report [Better Decisions: review of Commonwealth Merits Review Tribunals](http://www.arc.ag.gov.au/Documents/ARC+REPORT+39.pdf) recognised the contribution of ADR at the AAT [at paragraph 3.141]:

> In the review tribunal setting, the AAT has pioneered the use of mediation and is evolving principles governing the circumstances in which it can be of use. The AAT’s experience to date suggests that mediation can assist in having review participants move away from previously entrenched views at an earlier stage in the review process.

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The ARC went on to recommend that:

**Recommendation 20**

*All review tribunals should explore the potential use of alternative dispute resolution techniques to resolve the issues arising in cases coming before them.*

The National Alternative Dispute Resolution Advisory Council (NADRAC) was established in 1995 as an independent non-statutory body to provide expert policy advice to the Attorney-General on the development of ADR and promotion of the use of alternative dispute resolution. NADRAC concluded in late 2013 following the whole-of-government decision to simplify and streamline the business of government. Previous NADRAC publications can be found on the AGD [NADRAC publications](http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx) page.

The legislative basis for the AATs use of ADR was expanded by legislative amendments in the *Administrative Appeals Tribunal Amendment Act 2005*. In the past five years the AAT has routinely finalised approximately 80% of matters without a hearing. As outlined in Table 1, in 2014-15, some jurisdictions had higher or lower than average rates of finalisation without a hearing.

**Table 1: Percentage of matters finalised without a hearing 2014-15**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>2014-15</th>
</tr>
</thead>
<tbody>
<tr>
<td>All</td>
<td>81%</td>
</tr>
<tr>
<td>Social security</td>
<td>78%</td>
</tr>
<tr>
<td>Veterans’ affairs</td>
<td>68%</td>
</tr>
<tr>
<td>Workers’ compensation</td>
<td>86%</td>
</tr>
<tr>
<td>Taxation</td>
<td>88%</td>
</tr>
</tbody>
</table>

3. Do rules restricting recourse to alternative procedures in administrative matters exist in your country? In your opinion, what are the types of litigation for which these procedures would not be appropriate?

As the jurisdiction of the AAT is conferred by parliamentary enactment, the application of ADR processes to certain types of administrative decisions is also a matter for parliament. Through the *Tribunals Amalgamation Act 2015*, Division 3 of Part IV of the AAT Act which deals with ADR, does not apply to the Migration and Refugee, Social Services and Child Support, or Security Divisions of the AAT.

The Security Division of the AAT deals with security assessments by the Australian Security Intelligence Organisation (ASIO) and has, since its introduction in 1995, had a number of procedural protections relating to the protection of sensitive security information.

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In relation to the Migration and Refugee Division, Paragraph 356 of the Explanatory Memorandum to the *Tribunals Amalgamation Act 2015* outlines that:

> The procedures that apply to review of decisions in the Migration and Refugee Division would continue to be set out in the Migration Act: specifically, in Part 5 in relation to decisions reviewed by the MRT and in Part 7 in relation to decisions reviewed by the RRT. While there are elements in common between the procedure set out in Parts 5 and 7 of the Migration Act and the procedure set out Part IV of the AAT Act, there are certain different or additional rules that reflect the particular characteristics of the migration and refugee jurisdiction.

Paragraph 414 of the Explanatory Memorandum to the *Tribunals Amalgamation Act 2015* notes the maintenance of the pre-amalgamation procedures of the Social Security Appeal Tribunal where alternative dispute resolution was not used. The Explanatory Memorandum adds:

> The informal and non-adversarial nature of social services and child support reviews, as well as the expedition with which reviews are conducted, means alternative dispute resolution is not suitable in these situations. Having a member deal directly with the review is an equally effective means of reaching the correct or preferable decision in any proceeding.

Such restrictions on the types of administrative decisions that can be referred to an ADR process do not exist at the Federal Court.

| 4. | Do instruments organising the use of administrative procedures in administrative matters exist in your country? If so, are these instruments legally binding (hard law/soft law)? |

The legislative, regulatory and policy basis for ADR in administrative review are set out above. These are a combination of legally binding statute and court rules, policy, and self-regulatory frameworks.

| 5. | If your State is a member of the European Union, how was the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters transposed into national law? Caution! This question is only asked insofar as the said directive can weigh on “administrative” matters in accordance with your domestic law. |

Not applicable to Australia.

| II. | The stakeholders in alternative procedures |

| 1. | What categories of natural or legal persons have recourse to alternative procedures? Can all legal persons governed by public law use them? |

Section 27 of the AAT Act allows any person whose interests are affected by a reviewable decision to apply for a review. This is not restricted to natural or legal persons. An unincorporated organization or association can apply for review if the decision relates to a matter included in the objects of purposes of the organization. Section 5 of ADJR Act limits who may apply for judicial review to a person who is aggrieved by a decision.
As set out above, authorised officers of the AAT can conduct ADR processes. All ADR processes at the AAT are non-determinative. While a third party may offer an opinion this is not-binding on the parties. Any agreement reached during an ADR processes is subject to a seven day ‘cooling-off’ period in which the parties may rescind the proposed terms. Parties to a dispute are not restricted to the use of AAT ADR practitioners and could engage private ADR practitioners separately from the AAT’s procedures. This is not a common practice given that AAT does not charge for ADR services and the skills and experience of AAT officers is well regarded. The AAT is aware that some agencies such as the ATO will engage external mediators or internal facilitators during audit dispute or reconsideration stages (prior to appeal to the AAT). For more information on the ATO’s dispute resolution procedures please refer to the ATO website.¹⁷

At the Federal Court, Registrars commonly conduct mediation. The parties are also able to go to third party mediator or arbitrators. If a proceeding is referred to arbitration, the arbitration the arbitrator can make a determinative award which can be registered under Federal Court Rule 28.13. If registered, the arbitral award has the force of a court order.

Australia’s National Mediator Accreditation System (NMAS) is discussed above. The National Mediator Accreditation Standards are maintained by the Mediator Standards Board.¹⁸ The AAT is a corporate member of the Mediator Standards Board. The Law Council of Australia has prepared guidelines¹⁹ for parties and lawyers using mediation. The AAT has published a guide to the duty to act in good faith²⁰ in ADR processes.

Note for the purposes of this question the AAT will be treated as an ‘administrative court’. Under section 34A of the AAT Act, the President of the AAT may direct referral to an ADR process. Referral can be to an individual either internal or external to the AAT who is engaged by the Registrar under section 34H. The Registrar must not engage an individual for this purpose unless satisfied of their suitable experience and qualifications. In current practice, AAT ADR processes are conducted by internal AAT authorised officers or members. In relation to the Federal Court, Section 53A of the FCA Act provides the Court may, by order, refer proceedings in the Court, or any part of them or any matter arising out of them:

(a) to an arbitrator for arbitration; or
(b) to a mediator for mediation; or
(c) to a suitable person for resolution by an alternative dispute resolution process.

ADR processes at the AAT are conducted by the AAT itself. Table 2 above list the types of processes used. AAT members more commonly conduct the case appraisal and neutral evaluation processes which are low in volume. Authorised officers of the AAT are salaried employees and are more cost effective for the AAT to utilise in conducting ADR processes compared with members. These officers are also ADR specialists. Members with specific subject matter expertise, such as medical members, are able to assist in providing a non-binding opinion in some instances. The cost and time of producing a non-binding opinion via a case appraisal or neutral evaluation can be similar to a determinative process. This reduces the attractiveness of this option especially when the specialist member may then be excluded from presiding at a hearing. Registrars at the Federal Court also conduct mediations and facilitate conferences of experts. Table A5.11 of the 2014-15 Annual Report\(^\text{21}\) of the Federal Court indicates that 1 of the 9 administrative appeals referred to mediation was referred to an external mediator.

### III. The procedures of alternative procedures

1. Can you detail the different alternative procedures applicable in administrative matters in your country? How do the parties choose between the various alternative procedures available?

The range of ADR processes available to the AAT are outlined above. This is not an exhaustive list and new of combined processes can be explored with parties. The AAT publishes descriptions of the process models\(^\text{22}\) used on the AAT website. The AAT also provides an ADR Referral Guideline\(^\text{23}\) which details the factors that the AAT considers when selecting a suitable process. Table 2 outlines the volume of the different types of ADR processes used at the AAT compared with hearings. The most common process used is conferencing and the average number of conferences required per matter at the AAT is 1.8.

**Table 2: Number and types of processes used in 2014-15**

<table>
<thead>
<tr>
<th>Event type</th>
<th>2014–15</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conferences</td>
<td>8,757</td>
</tr>
<tr>
<td>Case appraisals</td>
<td>1</td>
</tr>
<tr>
<td>Conciliations</td>
<td>523</td>
</tr>
<tr>
<td>Mediations</td>
<td>13</td>
</tr>
<tr>
<td>Neutral evaluations</td>
<td>9</td>
</tr>
<tr>
<td><strong>Hearings</strong></td>
<td><strong>1,105</strong></td>
</tr>
</tbody>
</table>

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ADR processes in administrative matters are used less frequently at the Federal Court. Table 3.6 of the 2014-15 Annual Report\textsuperscript{24} of the Federal Court indicates that there were 9 referrals to mediation in administrative appeal matters in the reporting year.

More broadly, the AGD publication Your Guide to Dispute Resolution\textsuperscript{25} is designed as an easy-to-understand overview of common ADR processes for a non-legal audience.

2. Do administrative appeals, mandatory prior to referral to the administrative court, exist in your country? Do optional such appeals exist? How are they organised? Does the lodging of an administrative appeal modify the conditions governing the filing and review of subsequent recourse to the court? For example, can the parties present arguments, not produced during a prior administrative appeal, before the administrative court?

As outlined above, a broad range of administrative decisions can be reviewed by the AAT and equivalent tribunals in the States and Territories. Jurisdiction is conferred on the AAT and some administrative decisions will only be subject to judicial review. AAT decisions can be appealed on a question of law to the Federal Court of Australia. Part IVA of the AAT Act deals with appeals to the Federal Court. Application for judicial review can also be made directly to the Federal Court under the ADJR Act. Before commencing action in the Federal Court an applicant must confirm that genuine steps have been taken to resolve the matter in accordance with the Civil Dispute Resolution Act 2011.

3. What are the general principles regulating alternative procedures (adversarial principle, impartiality, rules of confidentiality, time limits, etc...)? How much autonomy do parties have with regard to the organisation of the deployment of an alternative procedure?

Division 3 of Part IV of the AAT Act deals with ADR processes. This part provides a statutory framework for:

- referral to an ADR process
- indemnity of ADR practitioners
- without prejudice discussions being inadmissible as evidence
- a cooling-off period for agreements reached
- participation in good faith, and
- a party to object to a member involved in ADR going on to hear the matter.

The parties’ views on the conduct of an ADR process will be considered by the relevant authorised officer conducting the ADR process. The AAT adjusts processes to the needs of the parties and this flexibility is one of the identified benefits of ADR processes. However, the authorised officer retains control of the process used and steps taken. The AAT monitors the timeliness and efficiency of ADR processes.

Under Federal Court Rule 28.05, if the parties have referred a matter to a mediator or arbitrator, the parties must within 14 days of the referral, apply to the Court for directions as to the future management and conduct of the proceeding.

\textsuperscript{24} http://www.fedcourt.gov.au/about/corporate-information/annual-reports/2014-15/part-3

\textsuperscript{25} http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx
4. Does the initiation of an alternative procedure allow the suspension or interruption of periods of limitation? And of time limits for judicial appeals?

ADR processes at the AAT are expected to be conducted in a timely manner. Any potential impact on statutory time limits by referral to an ADR process will be considered when making the referral. For matters that are with the AAT’s control, such as extensions of time for lodging relevant material, these matters can be adjusted flexibly to suit the appropriate use of ADR processes. Both the AAT Act and the ADJR Act allow for a party to apply for a stay of an administrative decision if required.

5. Can the court intervene, even partially, during the course of an alternative procedure? If so, in what way?

The President of the AAT has the power to remove a proceeding from an ADR process and progress the matter to a hearing or directions hearing. In practice, such interventions do not occur and the authorised officers conducting an ADR process have considerable autonomy to manage the ADR process to a conclusion in a timely manner. If a matter has been constituted before a member there are limitations to what an authorised officer can do without the direction of the presiding member. Federal Court Rule 28.04 allows the Court to terminate mediation or an ADR process or terminate the appointment of a mediator or suitable person.

IV. The efficacy of alternative procedures

1. Do you consider that alternative procedures are faster and/or less costly than court procedures? Can you provide a quantitative comparison?

Yes, ADR processes at the AAT are generally faster and less costly than a hearing. The comparative benefit is not however easily quantified. For example, a matter may be resolved through a conciliation which is two hours in duration, however it will not be known with any certainty at that stage how many days would have been required for a hearing if the matter had not resolved. As Table 3 shows, the average number of minutes spent in ADR processes convened at the AAT is very low.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>2014-15</th>
</tr>
</thead>
<tbody>
<tr>
<td>All</td>
<td>80</td>
</tr>
<tr>
<td>Social security</td>
<td>63</td>
</tr>
<tr>
<td>Veterans’ affairs</td>
<td>65</td>
</tr>
<tr>
<td>Workers’ compensation</td>
<td>109</td>
</tr>
<tr>
<td>Taxation</td>
<td>115</td>
</tr>
</tbody>
</table>

The 2012-13 Annual Report of the AAT was the last report that attempted to estimate the relative costs of matters finalised with or without a hearing. The estimate at that time was that cost per matter finalised without a hearing was $3,538 (AUD) compared with $16,641 per finalisation with a hearing. This does not include the costs to the parties. Some matters
are less complex to finalise by way of a hearing. Prior to amalgamation with the AAT, the Annual Report\textsuperscript{26} of the Social Security Appeals Tribunal estimated that the cost per finalisation in the 2014-15 reporting year was $2,035 per application for review. In terms of timeliness, the average number of days from receipt of an application to the last ADR event in the AAT in 2014-15 was 130 days or approximately 4-5 months.

2. What is the proportion of administrative disputes that are definitively resolved by alternative procedures? What are the factors in success, or failure?

As outlined above, the AAT has for several years maintained a rate of finalisation without a hearing of around 80%. The ability to reach a negotiated agreement is largely governed by the willingness of the parties to resolve and the flexibility of the underlying decision-making framework. The AAT and the government party only have the discretions permitted by the originating legislative framework. Legislative frameworks that have very limited discretion for decision makers and which only permit an ‘all-or-nothing’ outcome are less amenable to negotiated outcomes though ADR processes. Similarly disputes which are primarily related to opposing views of statutory construction are less suited to resolution through ADR processes. Costs are also a factor. Many jurisdictions at the AAT do not require the applicant to pay an application fee or the fee is waived are reduced to a nominal amount. Costs cannot be awarded against an applicant and there are no additional filing fees. This means that applicants can elect to proceed to a hearing with minimal expenditure or risk which reduces the incentive to resolve without a hearing. However, many matters which may seem intractable may still benefit from an ADR process if the process is focussed on clarifying and narrowing the issues as opposed to achieving a negotiated outcome.

Table A5.12 of the 2014-15 Annual Report\textsuperscript{27} of the Federal Court indicates that 50% of the administrative appeals referred to mediation were resolved or partly resolved.

3. What is the legal standing of an agreement reached by means of an alternative procedure? Can such an agreement be referred to the administrative court for approval?

Parties at the AAT can directly enter into a binding agreement on matters which are outside the scope of the AAT jurisdiction. However, most matters which resolve during an AAT ADR process are reduced to terms which are made binding by a consent order of the AAT. Likewise, agreements reached via ADR at the Federal Court can be made into orders of the Court.

4. What instruments and procedures are available to the parties in the case of a violation of the agreement reached by means of an alternative procedure, potentially approved by the administrative court?

The AAT Act includes penalties for contempt and a range of consequences are available to enforce directions and orders of the AAT. In practice, consent orders made by the AAT have the force of the legislative framework in which the administrative decision under review was made, and there is seldom a need for the parties to take further action to ensure the terms are complied with. Mechanisms for enforcement will primarily derive from the originating legislation. In most cases, any subsequent administrative decisions which affect the interests of a party will also be subject to merits review at the AAT. Orders of the Federal Court are enforceable under the powers of the Court.

\textsuperscript{27} http://www.fedcourt.gov.au/about/corporate-information/annual-reports/2014-15/part-3
5. Do you consider it necessary to further develop alternative procedures in your country? Why? In what form?

The AAT looks to continuously improve and refine the ADR processes that are offered to the parties. During the strategic planning period 2015-20 the AAT will review processes to explore ways to achieve greater integration and harmonisation of procedure in the amalgamated Tribunal. This will include consideration of whether there are aspects of the ADR processes that could be adopted with benefit in the divisions that do not currently employ ADR processes. The AAT has also looked to innovations at the Federal Court, such as the use of a conference of experts, to examine new models of ADR.
18 December 2015

Catherine Bergeal
Secretary General of the Council of State of France
Acting Secretary General of the International
Association of Supreme Administrative Jurisdictions

Attention: Laurent Atthalin
By email: aihja@conseil-etat.fr

cc: President’s Chambers: Duncan.Kerr@aat.gov.au
Justice Griffiths’ Chambers: Justice.Griffiths@fedcourt.gov.au

Dear Secretary General,

Re: Alternative Dispute Resolution in Administrative Matters

Further to my letter of 30 November 2015, I can now confirm that the administrative tribunals of the States and Territories of Australia have had an opportunity to provide additional input into Australia’s report to the International Association of Supreme Administrative Jurisdictions.

Most of these jurisdictions have indicated that ADR processes play an important role in the review of administrative decisions. Broadly speaking, there are not any significant differences between the approaches taken at the State and Territory levels of government in Australia as compared with the details reported for the Commonwealth Government.

I have attached a response from the New South Wales Civil and Administrative Tribunal (NCAT) which provides additional information in relation to the piloting of an Online Dispute Resolution (ODR) tool. The use of ODR to assist parties to reach a negotiated agreement is an area that will be explored further by a number of administrative tribunals in Australia.

Yours sincerely,

Justin Toochey
Director, Alternative Dispute Resolution
1 December 2015

The Honourable Justice Duncan Kerr Chev LH  
President  
Administrative Appeals Tribunal  
DX 10200  
Sydney Stock Exchange  

By email: duncan.kerr@aat.gov.au

Dear President,

Thank you for your letter of 24 November 2015 and the opportunity to comment on your responses to the International Association of Supreme Administrative Jurisdictions Questionnaire concerning alternative dispute resolution.

As you are aware, the Civil and Administrative Tribunal of New South Wales, or NCAT, is the tribunal which conducts merits review of administrative decisions made by the New South Wales Government or its agencies. Under the Civil and Administrative Tribunal Act 2013 (NSW), s 37(1), NCAT may, where appropriate, use or require parties to use any one or more "resolution processes". That phrase is defined in s 37(2) as meaning "any process (including, for example, alternative dispute resolution) in which parties to proceedings are assisted to resolve or narrow the issues between them in the proceedings". Mediation as a potentially applicable resolution process is further developed in Sch 1 to the Civil and Administrative Tribunal Regulation 2013 (NSW) which sets out more detailed provisions in relation to who may act as a mediator, costs, privilege, confidentiality and similar matters. NCAT is specifically empowered to give effect to any agreed settlement reached by the parties to proceedings under s 59 of the Civil and Administrative Tribunal Act.

The answers which the AAT has given to the IASAJ Questionnaire are largely reflective of the general position applicable in NCAT concerning alternative dispute resolution in administrative review proceedings, subject to specific, relative minor differences in terminology and similar matters resulting from the differences between the State legislation that governs NCAT and its practice and procedure and the Commonwealth legislation applicable to the AAT.

As to the last question concerning further development of alternative procedures, I should draw your attention to NCAT's trial of the use of digital technology to allow parties to participate in a structured negotiation with a view to reaching an agreed resolution in an inexpensive and convenient way. NCAT has called this resolution process Online Dispute Resolution or ODR.
In early 2015, NCAT conducted an ODR pilot over a three month period where parties to certain proceedings in the Consumer and Commercial Division could opt in to attempting to resolve their disputes online. Participants accessed the ODR pilot via a secure, 24 hour per day/ 7 days per week online portal that allowed the parties in dispute to exchange information about their dispute in a structured way without the need to meet or attend NCAT in person. The ODR process was structured so as to assist parties to focus on the issues they wished to have resolved and to lead them to outcomes which would be acceptable to both sides so that, where possible, a negotiated agreement could be reached. Where agreement was reached, the parties could seek an enforceable order from the Tribunal to give effect to their agreement. Where agreement was not reached, or if either party chose to withdraw from the ODR process, the dispute was listed for hearing before the Tribunal and was determined in the usual way.

Although the pilot was not in relation to merits review matters, the results suggested that it is worthwhile developing ODR further as one of the resolution process available generally in the Tribunal. It has potential to assist parties to reach a resolution promptly and inexpensively. In this way it can enhance the efficiency of the Tribunal’s operations and make it more accessible. ODR in the context of merits review of administrative decisions will be further explored in 2016.

Yours sincerely

[Signature]

The Hon Justice Robertson WRIGHT
President
Civil and Administrative Tribunal of New South Wales

cc The Honourable T F Bathurst AC, Chief Justice of New South Wales
Supreme Court of NSW
Victoria_Bradshaw@courts.nsw.gov.au
18 December 2015

Catherine Bergeal
Secretary General of the Council of State of France
Acting Secretary General of the International
Association of Supreme Administrative Jurisdictions

Attention: Laurent Athalin
By email: aihja@conseil-etat.fr

cc: President's Chambers: Duncan.Kerr@aat.gov.au
Justice Griffiths' Chambers: Justice.Griffiths@fedcourt.gov.au

Dear Secretary General,

Re: Alternative Dispute Resolution in Administrative Matters

Further to my letter of 30 November 2015, I can now confirm that the administrative tribunals of the States and Territories of Australia have had an opportunity to provide additional input into Australia's report to the International Association of Supreme Administrative Jurisdictions.

Most of these jurisdictions have indicated that ADR processes play an important role in the review of administrative decisions. Broadly speaking, there are not any significant differences between the approaches taken at the State and Territory levels of government in Australia as compared with the details reported for the Commonwealth Government.

I have attached a response from the New South Wales Civil and Administrative Tribunal (NCAT) which provides additional information in relation to the piloting of an Online Dispute Resolution (ODR) tool. The use of ODR to assist parties to reach a negotiated agreement is an area that will be explored further by a number of administrative tribunals in Australia.

Yours sincerely,

Justin Toohey
Director, Alternative Dispute Resolution
1 December 2015

The Honourable Justice Duncan Kerr Chev LH
President
Administrative Appeals Tribunal
DX 10200
Sydney Stock Exchange

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Yours sincerely

The Hon Justice Robertson WRIGHT
President
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