

CHAPTER 1

INTRODUCTION

Referral of the Inquiry

1.1 The *Administrative Review Tribunal Bill 2000* (the principal Bill) was introduced into the House of Representatives on 28 June 2000.¹ On the same day, the Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (Selection of Bills Committee Report No. 10 of 2000) for inquiry and report by 7 September 2000.² Although preliminary steps were taken to commence the inquiry, it was ultimately decided that the provisions of a cognate Bill, yet to be introduced into the Parliament, should be dealt with at the same time. Accordingly, on 7 September 2000, the Senate agreed to extend the time for reporting to the first parliamentary sitting day in 2001.³ The *Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000* (the cognate Bill) was introduced into the House of Representatives on 12 October 2000.⁴ That Bill was also referred to the Legal and Constitutional Affairs Legislation Committee (Selection of Bills Committee Report No. 17 of 2000) for inquiry and report on the same day as the principal Bill.⁵

Background

Purpose

1.2 The purpose of the principal Bill is to establish the Administrative Review Tribunal (the ART), the function of which will be the review of administrative decisions on the merits. According to the Explanatory Memorandum, the ART will be ‘readily accessible and provide review that is fair, just, economical, informal and quick’.⁶ In a nutshell, the ART will replace various tribunals that have evolved to deal with the review of administrative decisions of departments and agencies. Specifically, these are the Administrative Appeals Tribunal (the AAT), the Social Security Appeals Tribunal (the SSAT), the Migration Review Tribunal (the MRT) and the Refugee Review Tribunal (the RRT). The Veterans Review Board (the VRB) will remain. The Bill details the ART’s membership, structure, review procedures and

1 House of Representatives, *Official Hansard*, 28 June 2000, p. 18404 per the Attorney-General, the Honourable Daryl Williams MP

2 Senate, *Official Hansard*, 28 June 2000, p. 15863

3 Senate, *Official Hansard*, 7 September 2000, p. 17526

4 House of Representatives, *Official Hansard*, 12 October 2000, p. 21407 per the Attorney-General, the Honourable Daryl Williams MP

5 Senate, *Official Hansard*, 12 October 2000, pp. 18471-18472

6 *Explanatory Memorandum*, Administrative Review Tribunal Bill 2000, p. 1

related matters. It also re-establishes the Administrative Review Council, the body established in 1976 to oversee the system of Commonwealth administrative law.⁷

1.3 The threefold purpose of the cognate Bill is to:

- amend Acts that confer jurisdiction on the existing tribunals to review administrative decisions, so that that jurisdiction is conferred on the ART;
- specify certain procedures to be followed by the ART in performing the review function; and
- provide transitional arrangements for: the review of decisions made prior to the commencement of the new ART; incomplete appeals from decisions of the existing tribunals; and the transfer to the ART of matters that are before any of the existing tribunals at the time of commencement of the ART.

Administrative review arrangements in historical context – at a glimpse

1.4 The last five decades have seen a rapid expansion of government activity and an increased tendency for the executive arm of government to make decisions that impact directly on the individual. In the late 1960s concern was raised that the opportunity for the individual to question the administrative decisions of government was inadequate.⁸ It was (and still is) the case that judicial review of administrative decisions is only available on certain established legal grounds - such as acting beyond power or failing to accord natural justice – courts cannot review administrative decisions on their merits. At that time, the only opportunity for merits review was to have the matter raised with the relevant Minister in Parliament.⁹

1.5 In the early 1970's, two significant Committees (the Kerr Committee and the Bland Committee)¹⁰ recommended, amongst other things, that there be established a general administrative review tribunal to review certain government decisions on their merits. The Commonwealth Government legislated to give effect to those recommendations and by virtue of the *Administrative Appeals Tribunal Act 1975* established the AAT with jurisdiction to review Commonwealth administrative decisions on their merits. The establishment of the AAT was the cornerstone for the development of merits review procedures: for the first time, individuals adversely affected by a government decision could challenge it before a tribunal empowered to substitute its own decision for that of the original decision maker. In addition, the AAT Act provided for the establishment of the Administrative Review Council which

7 The Administrative Review Council was established under section 51 of the *Administrative Appeals Tribunal Act 1975* and commenced operation in 1976

8 The Kerr Committee was established in 1968 to examine the available methods of review of federal government decisions. That committee reported in 1971 that the methods were inadequate: Parliamentary Paper No 144 of 1971

9 Although merits review of veterans' pensions and benefits has been available since the 1920s: See paragraph 1.6

10 The Kerr Committee Report, Parliamentary Paper No 144 of 1971 and the Bland Committee Report, Parliamentary Paper No 316 of 1973

would oversee the system of the Commonwealth administrative law and report from time to time on the adequacy of that system.¹¹

1.6 In addition to the AAT, several specialist merits review tribunals have evolved to deal with appeals from administrative decisions:

- Merits review of decisions about Veterans' pensions and other entitlements has been available since 1920 through the Repatriation Commission. Appeals from the decisions of the Repatriation Commission have been available through a succession of tribunals the most recent of which is the VRB, established in 1985. The VRB's decisions are subject to second-tier merits review by the AAT;
- Merits review of decisions relating to financial assistance to students has been available through the Student Assistance Review Tribunal (SART) since 1974, although that tribunal has recently been abolished and its functions are now incorporated in the SSAT. The SSAT, initially established by executive action with a limited jurisdiction, was given legislative sanction in 1988 and deals with a very broad range of decisions relating to social security entitlements. Decisions of the SSAT are subject to second-tier merits review by the AAT;
- Merits review of immigration decisions has been available since 1982 through the Immigration Review Panel. That panel was created by executive action and was replaced by the legislatively established Immigration Review Tribunal (the IRT) in 1989, later renamed the Migration Review Tribunal (the MRT). The Refugee Review Tribunal (RRT) was established in 1993 and reviews decisions in relation to applications for refugee status and refugee protection visas. Limited appeals lie from both the MRT and the RRT to the Federal Court.¹²

1.7 In summary, the only decisions that are subject to two tiers of independent merits review are those related to social security and veterans affairs matters. All other administrative decisions, such as taxation and workers' compensation, have one tier of external review at the AAT as noted above, the MRT and the RRT are alternative specialist tribunals to the AAT. There is no avenue of appeal from the RRT or the MRT to the AAT.

Recent examinations of the multi-tribunal system of administrative review

1.8 In 1993 the Government considered it was timely for a review of the Commonwealth merits review tribunal system and requested the ARC to undertake an inquiry into the effectiveness and efficiency of the system. Concern had been raised that the growing number of tribunals afforded the opportunity for the development of disparate, if not conflicting, practices and processes in the review of administrative decisions. In addition, there was some indication that the differences in terms and conditions of appointment for tribunal members was a concern. In September 1995, the ARC tabled its report, *Better*

11 *Administrative Appeals Tribunal Act 1975*, section 51

12 Subsection 475(1) of the *Migration Act 1958* provides that, subject to subsection 475(2), decisions made by the MRT and the RRT are reviewable by the Federal Court. Subsection 475(2) provides a list of those decisions that are not reviewable by the Federal Court including any internally reviewable decision, MRT-reviewable and RRT-reviewable decisions

Decisions, recommending structural changes to the multi-tribunal system.¹³ In particular, the ARC recommended that the existing specialist tribunals should be united as a single review tribunal comprising a number of specialist divisions to hear first-tier review cases. In addition, the report recommended that there be a single Review Division to review all cases that raise a substantial question of law.¹⁴

1.9 Eighteen months later in March 1997, the Attorney-General announced the Government's intention to amalgamate the various specialist tribunals but amended this statement of intention in February 1998 to exclude the VRB from the amalgamation proposal.

1.10 In November 1995, the Australian Law Reform Commission had received a reference to undertake a review of the adversarial system of litigation. Those terms of reference were amended by the Attorney-General, the Hon. Daryl Williams in September 1997 to, amongst other things, specifically focus the inquiry on the structure and management of federal merits review tribunals and other matters related to the review of administrative decisions. The ALRC presented its final report, *Managing Justice: A review of the federal civil justice system*, in January 2000¹⁵ and made recommendations which, the ALRC stated, would be of particular significance to the way in which the proposed ART would operate.¹⁶

1.11 In addition, Dame Margaret Guilfoyle reported to the Minister for Social Security in 1997 on certain aspects of the administrative review and appeals system in relation to that portfolio.¹⁷

1.12 The proposed structure of the ART is similar to that recommended in the ARC's *Better Decisions* Report¹⁸ while at the same time incorporating some of the recommendations of the ALRC'S *Managing Justice* report in relation to practice, procedure and case management in federal merits review tribunals.¹⁹ In addition, the Committee was told that some of the recommendations in the Guilfoyle Report are also addressed by the general approach taken in the ART Bills.²⁰ The structure and proposed procedural arrangements as set out in the principal and the cognate Bill are discussed in Chapter 2 and issues that have been raised in relation to the proposed ART are discussed in Chapter 3.

13 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (1995)

14 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (1995), p. 142

15 See the Attorney-General, the Honourable Daryl Williams, AM QC MP, "Reform of merits review tribunals", *News Release*, 20 March 1997 and "Reform of merits review tribunals", *News Release*, 3 February 1998

16 Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, Report No 89 (February 2000), p. 20

17 Guilfoyle, Dame Margaret, *Review of the Social Security Review and Appeals System, A Report to the Minister for Social Security*, August 1997

18 House of Representatives, *Official Hansard*, 28 June 2000, p. 18404 per the Attorney-General, the Honourable Daryl Williams MP

19 Senate, Legal and Constitutional Affairs, *Seminar: Administrative Law in Transition – The Proposed Administrative Review Tribunal*, 25 October 2000, pp.2-5

20 *Submission 46*, Department of Family and Community Services, p. 2

Conduct of the Inquiry

1.13 Following the referral of the principal Bill to the Committee on 28 June 2000, the Committee took immediate steps to commence the inquiry. The Committee wrote to a range of interested and relevant individuals and organisations and placed advertisements on the Committee's web site and in major newspapers around the country on 1 July 2000. It came to the Committee's attention, however, that the provisions of a cognate Bill, not yet introduced into the Parliament, would complete the package of legislation in relation to the establishment of the proposed Administrative Review Tribunal. Accordingly, an extension of time to report was sought on 7 September 2000. As noted above in paragraph 1.1, the cognate Bill was introduced into the House of Representatives on 12 October 2000 and was referred to the Committee for inquiry and report on the same day. The Committee sent copies of that Bill, the explanatory memorandum and the second reading speech to various interested persons and organisations. In response to the Committee's efforts, a total of 89 submissions (one of which was confidential) have been received and those that are not confidential are listed at Appendix A.

1.14 On 25 October 2000, the Committee sponsored a public seminar on the proposed legislation jointly with the Australian Institute of Administrative Law.²¹ The seminar was hosted at Parliament House and included key speakers such as the Attorney General, the Honourable Daryl Williams MP, Justice Deidre O'Connor, the President of the Administrative Appeals Tribunal and Dr Kathryn Cronin, the Deputy President of the Australian Law Reform Commission. Other guest speakers included: the shadow Attorney-General Mr Robert McClelland, Senator Andrew Bartlett and Senator Brian Greig and representatives from the Administrative Review Council, the Law Council of Australia, the Attorney-General's Department and various Tribunals involved in administrative review including the Social Security Appeals Tribunal, the Migration Review Tribunal and the Refugee Review Tribunal.

1.15 In addition, the Committee held public hearings in Melbourne, Canberra and Sydney on 15 November and 4 and 12 December 2000 respectively. A list of witnesses is at Appendix B.

Notes on References

1.16 References in this Report to submissions are to individual submissions as received by the Committee, and not to a bound volume. References to the Hansard transcript are to the official Hansard. Page numbers vary between the proof and the official Hansard transcript.

21 A copy of the transcript of proceedings of that seminar is available on the Committee's Internet web site.

