

CHAPTER 2

THE LEGISLATIVE PROPOSAL FOR THE NEW TRIBUNAL

Introduction: proposed structure of the new Tribunal

2.1 As noted above in chapter 1, the *Administrative Review Tribunal Bill 2000* (the principal Bill) and the *Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000* (the cognate Bill), if enacted, will constitute a fundamental restructuring of the Commonwealth system of merits review of administrative decisions. This section of the report provides an overview of the main provisions of the Bills that constitute the new fundamentals of the proposed system.

2.2 Seeking to counter the ever expanding number of specialist tribunals, the Bills seek to amalgamate the Administrative Appeals Tribunal (the AAT), and three specialist tribunals being the Social Security Appeals Tribunal (the SSAT), the Migration Review Tribunal (the MRT) and the Refugee Review Tribunal (the RRT). The ART will be constituted in Divisions, corresponding to the jurisdictions of the existing tribunals:

The creation of a number of Divisions is intended to ensure that the Tribunal, even though a single body, will enjoy the beneficial aspects of the specialist review tribunals, such as their ability to develop flexible, cost-effective and non-legalistic procedures and practices that are appropriate for, and tailored to, the types of decisions that they review.¹

2.3 The six proposed Divisions are:

- the Immigration and Refugee Division will comprise the current jurisdictions of the MRT and the RRT;
- the Income Support Division will have the current jurisdiction of the SSAT;
- the Veterans' Appeals Division will have the current AAT's jurisdiction to hear appeals from the VRB;
- the Taxation Division;
- the Workers' Compensation Division; and
- the Commercial and General Division;²

2.4 The principal Bill makes provision for further Divisions to be added to the ART by providing in clause 11 that the Tribunal has the above mentioned Divisions and 'any other Division specified in the regulations.'

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

2 Clause 10 of the principal Bill establishes the Administrative Review Tribunal and clause 11 sets out the divisions.

Appointment of members of the Tribunal

2.5 The ART will consist of a President appointed by the Governor-General,³ six executive members who will each head one division⁴ and an unspecified number of senior members and other members. The principal Bill limits the number of senior members by stipulating that senior members must not comprise more than 10% of the total number of members of the ART or, in any particular division, more than 15% of members who have that division as their primary division.⁵

2.6 There are no qualifications specified for the selection of the President of the ART who must, however, be full-time and not engage in other paid work except with the consent of the Attorney-General.⁶ Similarly, executive members must also be full-time, but other members may be part-time.⁷

2.7 All members, including the President, will hold office for a fixed, renewable term of 'up to 7 years'.⁸ Although there are no qualifications for the selection of the President, each other member will be appointed by the Governor-General after the portfolio Minister is satisfied, 'having regard to the person's qualifications and experience, that the person should be appointed'.⁹ There are no particular qualifications specified in relation to the appointment of members.

Terms and conditions of appointment

2.8 The principal Bill covers other matters related to the terms and conditions of employment such as: the fixing of remuneration; leave of absence; the requirement for consent to any prospective outside employment for full-time members; and the limitations on, and requirement to give written notice in respect of, any outside employment by part-time members.¹⁰ In general, the schematic structure of accountability is that the President will be accountable to the Attorney General and other members will be accountable to the President.

3 Clause 12 of the Administrative Review Tribunal Bill

4 Clauses 13 and 14 of the Administrative Review Tribunal Bill

5 Clause 13 of the Administrative Review Tribunal Bill. By comparison, the Administrative Appeals Tribunal is comprised of 21 senior members and 48 members, thereby making the percentage of senior members approximately 30%: Administrative Appeals Tribunal Annual Report 1999-2000, p. 8. But see the comment on this issue in paragraph 3.83 above that the percentage of senior members across all tribunals is less than 10%

6 Subclauses 17(1) and 21(1). This is a departure from the Administrative Appeals Tribunal where the President must be a Federal Court Judge: Section 7(1) of the *Administrative Appeals Tribunal Act 1975*

7 Subclause 17(2) of the Administrative Review Tribunal Bill

8 Clause 18 of the Administrative Review Tribunal Bill

9 Clause 15 of the Administrative Review Tribunal Bill. Note that the relevant portfolio Minister for the Commercial and General Division of the Administrative Review Tribunal is the Attorney-General (subclause 15(1))

10 Clauses 19, 20, 21(1) and 21(2) and (3) of the Administrative Review Tribunal Bill respectively

This is so, for example, in relation to approving outside employment, leave of absence, and, importantly, the disclosure of interests.¹¹

2.9 Generally, the requirement is that, within one month from his or her appointment, the President must make financial interests disclosure to the Attorney-General as required (including that of the President's immediate family). The information must be kept updated. Where the President has a conflict of interest in relation to an application for leave to apply for second-tier review, the President must delegate that function in accordance with the Act.¹² Similar disclosure is required of other members.¹³ The requirement for disclosure is strengthened by the fact that the disclosure is required to be in writing and ongoing.

Performance agreements and codes of conduct

2.10 The principal Bill introduces two new concepts: performance agreements and codes of conduct. All members except the President are required to enter into performance agreements. In the case of executive members, these are to be with the President and in the case of other members these are to be with either the relevant executive member or senior member appointed for that purpose.¹⁴ The principal Bill stipulates that a performance agreement is to deal with the performance by the member of the member's duties and in particular will require the member to: participate in a performance appraisal scheme; be accountable for his or her productivity; assist the president as required in managing administrative affairs of the Tribunal; and recognise the need for compliance with the code of conduct.¹⁵ Non-compliance with the performance agreement or code of conduct can result in a member being subject to a written direction from the President requiring the member to improve his or her performance under clause 26 or be removed from office under clause 28.

2.11 The code of conduct is to be drafted by a committee appointed by the President,¹⁶ and will be a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.¹⁷

Removal from office

2.12 The Governor-General must remove the President from office if both Houses of Parliament in the same session resolve that the President should be removed for misbehaviour or physical or mental incapacity.¹⁸ In addition, the Governor General must remove the

11 Disclosure of interests by the President is governed by clause 22 of the Bill and disclosure of interests by other members is governed by clause 23 of the Administrative Review Tribunal Bill.

12 Clause 22 of the Administrative Review Tribunal Bill

13 Clause 23 of the Administrative Review Tribunal Bill

14 Clause 24 of the Administrative Review Tribunal Bill

15 Subclause 24(2) of the Administrative Review Tribunal Bill

16 Clause 25 of the Administrative Review Tribunal Bill states that the committee to draft the code of conduct will consist of the President, 2 executive members and an external person whom the President considers to be suitably qualified to be a member of the committee.

17 Subclause 25(5) of the Administrative Review Tribunal Bill

18 Subclause 27(1) of the Administrative Review Tribunal Bill

President from office if the President becomes bankrupt or makes arrangements with creditors indicating insolvency.¹⁹ In the same way, the Governor-General must remove a member from office if the member becomes bankrupt, or if the President is satisfied that the member should be removed from office because the member:

- misbehaves or is physically or mentally incapacitated;
- is absent, except on approved leave, for 14 days in 3 months or 28 days in 12 months;
- fails to comply with outside employment or disclosure of interests obligations;
- breaches a performance agreement or fails to enter into one;
- breaches the code of conduct;
- fails to comply with directions by the President in relation to performance agreements, codes of conduct, constitution of the ART, or practice and procedure directions; or
- being an Immigration Review Division member, has a financial interest in the provision of services to non-Australian citizens seeking to enter or remain in Australia.²⁰

Administrative arrangements for the Tribunal

2.13 The President is to be responsible for managing the administrative affairs of the ART²¹ and each executive member is to assist the President in managing the administrative affairs of his or her division.²² Other members will assist the President and executive members as required.²³ There is to be a Chief Executive Officer (CEO) appointed by the Governor General who will assist the President in the management of the ART and hold office for a period not exceeding 5 years.²⁴ Other provisions deal with aspects of the CEOs appointment, conditions of service and removal from office.²⁵

2.14 The powers of delegation are contained in clause 50 of the principal Bill. The President may delegate certain powers to a member, the CEO, or staff²⁶ although certain powers, such as those relating to the code of conduct, practice and procedure directions and the referral of questions to the Federal Court, will be non-delegable. Subclause 50(3) of the principal Bill provides that particular powers of the President will only be delegable to

19 Subclause 27(2) of the Administrative Review Tribunal Bill

20 Subclause 28(2) and (3) of the Administrative Review Tribunal Bill

21 Clause 32 of the Administrative Review Tribunal Bill

22 Clause 33 of the Administrative Review Tribunal Bill

23 Clause 34 of the Administrative Review Tribunal Bill

24 Clauses 35, 36 and 37 of the Administrative Review Tribunal

25 See for example, remuneration and allowances provisions, clause 38, leave of absence clause 39, disclosure of interests, clause 41 and removal from office, clause 42

26 Initially, clause 50 stated that the President may delegate certain powers and functions to a member, the Chief Executive Officer, staff or a consultant. The Scrutiny of Bills Committee expressed concern at ‘the apparent breadth of powers that might be delegated under subclause 50(1), and the apparent width of the class of potential delegates’: Scrutiny of Bills Committee, *Alert Digest*, 10/00, pp. 5-6. The Government has amended clause 50 to remove consultants from the class of potential delegates

executive members. For example, one such power or function of the President is the granting of leave for second-tier review under proposed paragraph 65(1)(c), where the Tribunal that made the first decision consisted of, or included, an executive member.

2.15 Subclause 50(4) enables an executive member to delegate his or her power to determine an application for leave for second-tier review to a member of the executive member's Division (but not to any member who was a member of the tribunal at any stage during the first-tier review).²⁷

Miscellaneous: Registries, staff, consultants and annual reports

2.16 As to the proposed geographic location of the ART, clause 49 provides that there will be a registry in every State and Territory and that the President may establish additional registries as he or she thinks fit. One of the registries will be designated as the Principal Registry.

2.17 The principal Bill makes certain provisions for the appointment of staff to the ART,²⁸ the engagement of consultants by the CEO²⁹ and the presentation of an annual report to the Parliament.³⁰

Initiating the review process

2.18 Part 4 of the principal Bill deals with initiating first and second tier review of administrative decisions. Although all decisions will be reviewable in the first instance, generally by a single member panel, access to second-tier review will be available only where certain conditions are met.

Initiating first-tier review

2.19 Clause 62 provides that if a person makes a valid application for review of a decision, the Tribunal, must review the decision. Other Acts and subordinate legislation are to provide which decisions are reviewable by the ART (subclauses 54(1) and (2)).³¹ There are over 350 Commonwealth Acts that currently provide for decisions to be reviewed by the AAT and the bill will amend each of those Acts so that the ART will assume the jurisdiction to review those decisions.

2.20 Original decision-makers are required to give notice of decisions to persons who are affected by them (clause 56) and a person affected can request a statement of reasons for the

27 The qualification on the executive member's power of delegation was inserted by the Government's amendments and would appear to meet the concern raised by the Scrutiny of Bills Committee, *Alert Digest*, 10/00, p. 7

28 Clause 46 of the Administrative Review Tribunal Bill

29 Clause 48 of the Administrative Review Tribunal Bill: Note that consultants may be engaged to perform a range of services including in respect of conferences or processes under Division 5 of Part 6 or inquiries under Division 6 of that Part

30 Clause 51 of the Administrative Review Tribunal Bill

31 Clause 54 of the Administrative Review Tribunal Bill. Subclause 54(1) identifies what are original decisions

decisions (clause 57). Reasons will be given unless the request comes within the categories of exceptions listed in subclause 57(3). Where reasons are being furnished to persons so requesting, the reasons must be furnished within 28 days after receipt of the request (subclause 57(5)). The decision whether or not to comply with a request to furnish a statement of reasons is itself reviewable by the ART (clause 58) as is the adequacy of the statement of reasons (clause 59).

2.21 However, the Attorney-General may certify that disclosure of certain matters in the statement of reasons would be contrary to the public interest as it would compromise political, security or public interest considerations (subclause 60(1)). If so, the decision-maker is not required to include those matters in the statement of reasons or, if the exclusion of the material would make the statement false or misleading, the decision-maker is not required to give the statement (subclause 60(2)).

2.22 Clause 61 provides that a person whose interests are affected by an original decision may apply to the ART to have the decision reviewed and this includes the Commonwealth, an authority, tribunal or other statutory body or person connected with the Commonwealth.

Initiating second-tier review

2.23 Second tier review is by leave of the Tribunal. Any participants in the first tier review and the original decision-maker may apply to the ART for leave to apply for review of the first-tier decision (clause 63). The application must state the grounds for the review (clause 64) which are that:

- The first-tier review was made by a single member panel of the Tribunal; and the executive member or President is satisfied that the application raises a principle or issue of general significance; or
- The applicant for the first-tier review and the original decision maker agree in writing that the decision involved a manifest error of law or fact that materially affects the first tier review decision, the President or executive member is satisfied that the first-tier review decision involved such an error and there has been no appeal to the Federal Court on a question of law from the first-tier review decision (clause 65).

2.24 Most importantly, subclause 65(6) provides that unless there are special circumstances, the application for leave must be made ‘on the papers’, that is, without the applicant or any other person being permitted or required to appear before the Tribunal.

2.25 Persons who are granted leave can apply for second-tier review (clause 66). The principal Bill provides that the Tribunal must conduct second-tier review where an application has been properly made (clause 67) by a person entitled to apply under clause 66.

Tribunal’s preparations for review

2.26 Reviews (first-tier or second-tier) will take place in whichever Division the President directs (clause 68). The constitution of each Tribunal for the purposes of conducting reviews will be directed by the President and will be between 1-3 members. The expectation is that panels will be single-member panels except where the president considers it is inappropriate because the review raises a principle or issue of general significance or one or more members have particular expertise. Second-tier review panels must not include any

members of the first tier review panel. The President's directions may cover timing, and place of the review, the manner in which it is conducted and any other matter. Practice and Procedure directions may make further provision about directions by the President (clause 69).

2.27 The principal Bill makes provision for the Tribunal to be reconstituted where a member becomes unavailable (clause 70), where the President believes it is necessary for the efficient conduct of the review (clause 71) or where a participant requests reconstitution (clause 72).

2.28 It should be noted that the principal Bill makes no provision for a hearing to be restarted due to new members being substituted on a panel.

Practices and procedures to govern review process

2.29 The following are some of main provisions governing procedure for the application for and hearing of review:

- the decision maker is to be notified of applications for review (clause 76);
- in the case of the review of an original decision, the decision-maker must provide the Tribunal with a statement of reasons for the decision within 28 days (although this time limit may be varied) and produce any relevant documents (clause 77);
- the production of documents to the Tribunal by decision-makers is subject to any decision by the Tribunal on the application of the decision maker, that they need not be disclosed on the ground of confidentiality (clause 82);
- the Head of an Agency may give written notification to the Tribunal that a specified person or persons is or are to replace the decision-makers as participants for all or any specified purposes of a review relating to all or a specified class of decisions (subclause 84(4));³²
- the principal Bill sets out who are participants in the review process: The applicant, the decision-maker, and other persons whose interests are affected will be entitled to participate in the review process. The Attorney-General of the Commonwealth, a State or Territory (if relevant to the review, for example, the review may take place under State or Territory law), may also intervene in the proceedings (clause 86). It should be noted, however, that a decision maker can elect not to be a participant in a review or be directed by the head of the agency not to participate in the ART review (clause 85). If the decision maker does choose to be a part of the review process, then his or her participation is subject to clause 94 which requires that a decision maker 'use his or her best endeavours in assisting the ART to make its decision on the review'.

Procedures governing the conduct of the hearing

2.30 The principal Bill sets standards significant to the proper conduct of hearings. These include:

32 This clause was inserted by virtue of the government amendments to the Administrative Review Tribunal Bill

- provision is made for the resolution of disagreements between panel members when determining a review (clause 89);
- the Tribunal must afford procedural fairness (clause 90);
- the Tribunal is not bound by the rules of evidence (clause 91);
- the Tribunal must use as little formality and technicality as possible (clause 92);
- the Tribunal may control the scope of the review by limiting the questions of fact and evidence it deals with (clause 93);
- the decision maker (if a participant) must use his or her best endeavours to assist the Tribunal (clause 94);
- the Tribunal may summon witnesses and require documents to be produced (clause 95);
- the Tribunal may impose conditions on appearance by participants before it (subclauses 96(1) and (2));
- the Tribunal must decide whether to conduct the review ‘on the papers’ (subclause 96(3));
- if the Tribunal decides to conduct the review on the papers, it must notify the participants and afford them the opportunity to make written submissions on whether the review should be conducted in that manner (subclause 96(4)). This means that participants do not have an automatic right to present their case orally to the ART – which is a significant departure from the current operation of the AAT. They can make oral statements only with the permission of the ART and subject to conditions or directions imposed by the ART;
- reviews are to be public except in special circumstances, for example, the Tribunal may give written directions appropriate to protect the confidential nature of any part of the review. The directions may require part or all of the review to take place in private or restrict the disclosure of personal details of participants and witnesses, statements, evidence etc. The underlying principle, however, must be that it is desirable for participants to be fully aware of all relevant matters (clause 100);
- there will be no right to be represented by a lawyer or other person before the ART. A person may only be represented if the practice and procedure directions so allow or the Tribunal agrees and the practice and procedure directions do not prohibit him or her from doing so (clause 105);³³
- if a person applies in writing for an interpreter, or to be assisted by some other person for the purpose of understanding the proceedings of the ART, and the Tribunal agrees, the person may be so assisted. In addition, the Tribunal may initiate assistance for a person appearing before it (clause 106).

33 This takes into account subclause 8(1) of the Government’s amendment to the Administrative Review Tribunal Bill

Practice and Procedure Directions

2.31 Practice and procedure directions will govern the conduct of ART members and staff. The President will be empowered to make practice and procedures directions that will apply to the whole ART or to one or more Divisions. The relevant portfolio Minister and the executive member responsible for a Division will also be able to issue directions in relation to the procedures within their own Division (clause 161). The Minister's directions will prevail over those of the President and executive members, while presidential directions will prevail over those issued by executive members (subclause 161(6)).

2.32 Members and staff, including the CEO, must comply with these directions (subclause 161(7)). Although under clause 108, the ART may determine its own practice and procedure, ART members must not make any determinations about practice and procedure that are inconsistent with the practice and procedure directions (subclause 108(4)).

Other mechanisms: Conferences and Inquiry officers

2.33 The principal Bill makes provision for other mechanisms to be used throughout the review process. Important mechanisms include:

- the right currently enjoyed at the AAT to use conferences and other processes to resolve issues relevant to the review is preserved for the ART. Practice and procedure directions may govern the conduct of the conference and other processes (clause 110);
- the Tribunal may engage a consultant or appoint a member, the CEO or staff to conduct an inquiry into any issue raised and report to the Tribunal (clauses 111-117). The inquiry officer may control the scope of the inquiry by:
 1. limiting questions of fact, evidence and issues that he or she will consider (clause 112); and
 2. summon witnesses and require the production of documents (clause 113);
 3. permit a participant to appear before the inquiry officer and give evidence, make statements, present arguments, answer questions of the inquiry officer and others. The inquiry officer may impose conditions on the things the person is allowed to do (clause 114); and
 4. determine inquiry practice and procedure directions that are not inconsistent with other provisions in the Bill or the practice and procedure directions (clause 117);

2.34 The inquiry officer makes a report to the Tribunal and the Tribunal must give a copy to the participants in the review. The Tribunal may adopt anything in the report but before doing so, it must give the participants an opportunity to make submissions, either orally or in writing about the content of the report and take those submissions into account (clause 118).

2.35 Part 7 of the principal Bill makes provision for the implementation or alteration of decisions while a review is being conducted. In this context, for example, the principal Bill restricts the powers of the original decision-maker to implement a decision during a review or Federal Court appeal. While the basic rule is that a review will not affect the operation of the decision, in certain cases the Tribunal can direct that the operation or implementation of a decision, whether original or first-tier, be stayed. The Tribunal may direct a stay if a

participant has requested such a direction and the Tribunal considers it may be desirable in order to ensure that the review of the decision will be effective (clause 121). In addition, there are restrictions on the power of a decision-maker to change a decision that is being reviewed – a decision must not be changed unless the enactment that permitted the making of the application expressly permits the original decision to be altered or the participants in the review consent to the change being made (clause 123).

2.36 A significant departure from the present practice of the AAT is that, if new evidence becomes available during a first-tier or second-tier review, the Tribunal must decide whether to refer the new information back to the decision-maker for reconsideration of the decision (clause 124). However, the Tribunal can decide to deal with the matter itself (proposed paragraph 124(2)(b)).

2.37 The principal Bill provides that a review can end or be terminated if a decision-maker reconsiders the original decision under clauses 123 (above), 124 (above) or 125³⁴ and the reconsidered decision ends the matter (clause 126). In addition, Part 8 of the principal Bill provides that a review may be completed or end where:

- an applicant ends a review in accordance with the practice and procedure directions;³⁵
- a participant (not the Attorney-General or decision maker) fails to attend the review³⁶ or to comply with practice and procedure directions;³⁷
- the application is frivolous or vexatious;³⁸ and
- in a second-tier review, the parties agree to forego the further review of the first-tier decision.³⁹

2.38 If the Tribunal ends its review of a decision, a participant may apply to the Tribunal for reinstatement of the review and the Tribunal may do so.⁴⁰

2.39 Like the AAT, the ART will have all the powers of the decision-maker in reviewing a decision, and may affirm, vary or set aside a decision and substitute a new decision (clause 133). The Tribunal's decision will come into operation either immediately or on such later day as may be specified by the Tribunal (clauses 134(1) and (2)). Also like the AAT, in certain cases the ART's decision will be deemed to be that of the decision-maker (clause 134). In those cases, unless the Tribunal orders otherwise, the date of operation of the decision is taken to be the date of the original decision (clause 135(3)).

34 Clause 125 covers the situation where a Tribunal may, at any time, request a decision-maker to reconsider an original or first-tier decision. The decision-maker must either affirm, vary or set aside the decision and substitute a new decision. The applicant can then decide whether to proceed with the review of the varied decision by the Tribunal (clause 126)

35 Clause 127

36 Clause 128

37 Clause 129

38 Clause 130

39 Clause 131

40 Clause 132

2.40 Of importance is the new provision that governs the giving of reasons by the ART. Like the AAT, the ART will be required to give a written decision to each participant but will not be required to give written reasons for the decision unless a participant who has been given the written decision requests the reasons in writing. The request must be made within 28 days of receiving the decision and the reasons must be furnished to the participant within 28 days of the Tribunal receiving that request.⁴¹

2.41 Significant remaining provisions in the principal Bill include:

- offences – the principal Bill duplicates the offences created in the AAT Act relating to the giving of evidence and contempt of the ART and also creates a new offence of disclosing confidential information (clause 148). The penalties are, however, increased;
- legal protection and liability of members and others. Members and, when performing specified duties, the CEO, inquiry officers, staff and consultants have the same protection and immunity as a Justice of the High Court. Participants have the same protection as a witness in a proceeding before the High Court.⁴²
- confidentiality of information – members, staff, the CEO and consultants are not competent to give certain evidence or produce documents to a court;⁴³
- legal assistance and costs – Participants may apply to the Attorney-General for assistance and in certain cases, that assistance may be granted. Otherwise, participants are required to bear their own costs.⁴⁴
- appeals and references to the Federal Court.⁴⁵ In particular, a time limit of 28 days attaches to the making of most appeals - for example, in the case of an appeal from a first-tier decision where leave is refused for second-tier review, the appeal must be made within 28 days of the notification of the refusal of leave for second-tier review,⁴⁶ and
- re-establishment of the Administrative Review Council.⁴⁷

2.42 In addition, it should be noted that the principal Bill contains provisions designated as ‘core’ provisions. Although other Acts may change some of the provisions relating to the ART’s procedures, clause 7 provides that core provisions will not be affected by other Acts. Subclause 7(3) list the core provisions in the principal Bill and these include the provisions that relate to: the establishment, structure, membership and staffing of the ART (Parts 2 and 3); the initiation of second-tier review (Division 2 of Part 4); the Tribunal’s preparations for review (Part 5); practice and procedure directions and determinations (clauses 107, 108, 116

41 Clause 136

42 Clause 144

43 Clause 151

44 Clause 154 and 155

45 Part 10 of the Administrative Review Tribunal Bill

46 Clause 168(1)

47 Part 11 of the Administrative Review Tribunal Bill

and Divisions 10 of Part 9); and other provisions relating to procedural fairness, the rules of evidence, and the use of interpreters.

Provisions in relation to specific jurisdictions

2.43 As is usual with consequential legislation, the cognate Bill operates by way of schedules. Several schedules merely update references in Acts: for example, references to the Administrative Appeals Tribunal or the Administrative Appeals Tribunal Act are replaced with references to the ART or the principal Bill. Other schedules relate to specific jurisdictions: schedules 6 and 7 relate to the taxation jurisdiction, schedules 8 and 9 relate to the veterans' entitlements jurisdiction, schedules 10 and 11 relate to the social security jurisdiction, schedules 12 and 13 relate to the new tax system (family assistance) (administration) jurisdiction, and schedule 14 relates to the migration and refugee jurisdiction. Other schedules relate generally to the transition from the AAT, the MRT and the RRT, and the SSAT to the ART.

2.44 Clause 6 enables regulations to be made consequentially on the enactment of the principal Bill or on the repeals and amendments made by the schedules to the cognate Bill or to otherwise provide for matters of a transitional or saving nature arising from either Bill. For the purposes of the Acts Incorporation Act, they are to be treated as if made by an Act.

2.45 Clause 69 of schedule 11 of the cognate Bill requires the ART to have regard to any Government Policy Statement made under subsection 9(1) of the *Social Security (Administration) Act 1999*. A similar provision relates to student assistance matters.

2.46 Schedule 14 codifies and consolidates in the new Part 5 of the Migration Act all relevant provisions relating to review of decisions under migration legislation, effectively establishing a self-contained review code.

2.47 Proposed subsection 344(1) of the Migration Act will provide for a more restricted test of standing to challenge migration legislation decisions, eg, 'the non-citizen the subject of a decision to cancel a business visa' instead of a person whose interests are affected by the decision.

2.48 The cognate Bill provides for methods of exchange of documents and the deemed receipt of documents when one of these methods is used. Time periods for seeking review often commence on the receipt (or deemed receipt) of documents.

2.49 The ART will be entitled to end a review without making a decision if the applicant fails to comply with conditions set or directions given by it. The ART will be obliged to notify the applicant of its decision and the applicant can seek reinstatement of the review within 14 days of receipt (or deemed receipt) of that notification. It appears that the ART's power to reinstate may be circumscribed by practice and procedure directions.

2.50 Proposed paragraphs 475(2)(c) and (d) of the Migration Act would expressly provide that the jurisdiction of the Federal Court to grant judicial review excludes a decision of the ART to end a review without making a decision because an applicant has failed to comply with directions. Although a decision of the ART to refuse re-instatement of the ART review is judicially reviewable, the application for review must be lodged within a set time.

2.51 Currently, the MRT and the RRT can determine a review on the papers if they propose to make a decision favourable to the applicant or the applicant consents. Under clause 360 of the cognate Bill, the ART, in exercising its migration jurisdiction must consider whether the review should be conducted on the papers, regardless of the nature of the proposed decision and the applicant will only have the right to make written submissions.

2.52 Currently, section 499 of the Migration Act allows the Minister to issue directions but requires the directions to be laid before both Houses of the Parliament within 15 sitting days. Section 353A empowers the Principal Member of the MRT to give directions as to the operation of the Tribunal and its conduct of reviews although the MRT is only required to comply with those directions so far as it is practicable to do so. Proposed section 353A would enable directions to be issued by the Minister, the President and the executive member of the IRD, would arguably authorise much wider subject matter, would not limit the obligation of compliance to such as is practicable, would provide for the priority for inconsistent directions to be (in descending order) Minister, President, executive member and would not require tabling before Parliament.

2.53 Proposed subsections 355A (1) and (2) of the Migration Act would enable the President or the IRD executive member to reconstitute the Tribunal in the course of a review where he or she is satisfied that the Tribunal has not complied with a direction under section 353A in relation to the review.

2.54 Proposed section 368B of the Migration Act would vest the power to correct an obvious error in a written statement setting out the Tribunal's decision and reasons for decision in the President and IRD executive member as well as in the member who presided at the relevant review.

2.55 Proposed section 346A of the Migration Act would provide that if an applicant for review of migration legislation decisions does not pay a fee or obtain a waiver from the ART, the ART may not proceed with the review. The criteria for waiver are to be prescribed in regulations. There is no provision for either merits or judicial review of refusal of the waiver. There is also no provision for the Attorney-General to consider and determine applications for legal and financial assistance.

2.56 Applications for review of migration legislation decisions must be made within prescribed periods, but proposed section 347 sets out maximum prescribed periods in respect of particular classes of such decisions. It appears that these periods could be further reduced by regulations (or possibly, even by Ministerial direction).

2.57 Proposed amendments to section 362A of the Migration Act will entitle the authorised review assistant of an applicant for review of a migration (as opposed to a refugee) decision to early access to written material produced to the ART.

2.58 Although proposed new section 367 would empower the IRD to give its decisions orally in the presence of the applicant or his or her representative or by telephone or other electronic means, it does not provide for the applicant to have access to an interpreter.

