CHAPTER TWO

ISSUES

2.1 Most submissions to the inquiry endorsed the initiative to update the AAT, and expressed support for those provisions of the Bill that aim to improve the review process. However, a number of concerns were raised, particularly in relation to the impact that the proposed changes may have on the standing and independence of the Tribunal. This chapter addresses concerns regarding:

- the removal of the requirement that the President of the AAT must be a Federal Court judge (item 15 of the Bill);
- the removal of provisions allowing tenured appointment of members (item 21 of the Bill);
- provisions allowing the President to remove a member from a tribunal, and to reconstitute a tribunal (item 66 of the Bill);
- provisions allowing the Tribunal to request a person applying for review to amend their statement of reasons (item 95 of the Bill);
- provisions allowing the Minister rather than the Governor-General to assign members to Divisions of the Tribunal (item 36 of the Bill); and
- other provisions.

Removal of the requirement that the President of the AAT must be a Federal Court judge (item 15)

2.2 The proposed removal of the requirement that the President of the Tribunal must be a judge of the Federal Court attracted the strongest criticism from submittors and witnesses. Not one of the 17 primary submissions received by the Committee expressed support for this change, and those expressing firm opposition included significant bodies such as the Administrative Review Council (ARC) and the Law Council of Australia (the Law Council).[1]

2.3 At present, only a Federal Court judge may be appointed as President.[2] The Bill expands the range of qualification requirements for appointment as President to include:

- a current or former judge of any federal court;
- a former judge of any state or territory supreme court; and
- a person who has been enrolled as a legal practitioner in Australia for at least five years.[3]

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1 *Submission*s *15* and *11* respectively.

2 Subsection 7(1) *Administrative Appeals Tribunal Act 1975*

2.4 The Attorney-General's second reading speech stated that:

> The purpose of the reform is to ensure that the most appropriately qualified person occupies the position of president, regardless of whether or not they happen to be a judge of the Federal Court.[4]

2.5 A representative from the Attorney-General's Department told the Committee it was the Government's view that the Federal Court judge requirement unnecessarily restricts the pool of qualified people.[5] She advised the Committee:

> ... the President has a range of functions and powers and needs to bring a range of qualities. Some of those qualities are administrative, some are to do with managing the organisation, some are to do with managing its workload and its membership, and others are to do with procedures and practices in particular matters or kinds of matters. And, yes, that mix of skills may well reside in a Federal Court judge, but it may also reside in a judge from another court—a Federal Court magistrate, for example—or somebody who has not been appointed to the bench.[6]

2.6 Many submissions, however, put forward a number of reasons why it was crucial to retain the requirement that the President be a Federal Court judge, and moreover, why it was not desirable that the President could potentially be a person with only five years of legal experience. The reasons are discussed below.

Independence

2.7 It was put very strongly to the Committee that it was crucial that the President of the Tribunal should be, and be seen to be, independent of government. The Law Society of Western Australia submitted that the independence of the Tribunal was of particular significance, in that it was a body whose work involved the review of acts of the executive, its agents, servants and instruments.[7]

2.8 The Committee took particular note of the views expressed by the ARC, a statutory body whose functions include keeping the Commonwealth administrative law system under review, monitoring developments in administrative law, and recommending to the Minister improvements that might be made to the system.[8] The pre-eminent membership of the ARC includes the President of the Australian Law Reform Commission, the Commonwealth Ombudsman, and the President of the AAT. ARC President Mr Wayne Martin QC emphasised the importance of the independence of the AAT President, advising the Committee that:

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3 *Explanatory Memorandum,* pp. 7-8.

4 Second Reading Speech, *House Hansard*, 11 August 2004, p. 32376.

5 *Committee Hansard,* 1 February 2005, p. 28.

6 ibid.

7 *Submission 1*, p. [1].

8 Section 51 of the *Administrative Appeals Tribunal Act 1975*.

> The President is the public face of the Tribunal and he has a vital role in organising and discharging its business. We think it is important that he or she be, and be seen to be, independent of government.[9]

2.9 Mr Martin pointed out that a judge of the Federal Court has security of employment by nature of his or her tenured appointment (until the age of 70).[10] As many submittors argued, it is the security provided by tenure that allows freedom to make decisions that may not be popular with government.[11]

2.10 Part-time AAT members Dr Maxwell Thorpe and Dr John Campbell submitted that a Tribunal President who is a Federal Court judge has no direct or personal stake in the outcome other than determining a correct and fair decision. They argued that this independence at the top of the organisation can influence the Tribunal as a whole towards impartial decisions:

> This [impartial] attitude toward decision-making may then be adopted by members. If this is the case, there can be no perception of bias and the Tribunal, under the stewardship of a Federal Court judge, may enjoy the respect of the community.[12]

2.11 Mr Graham McDonald, a Deputy President member of the Tribunal, submitted:

> It is the independence guaranteed by having a Federal Court judge appointed which gives citizens lodging appeals against decisions of government ministers, departmental officers and government instrumentalities the confidence that their matters will be dealt with in accordance with the highest possible quasi-judicial standards.
> ...
> This is of particular importance where the decision being reviewed <u>always</u> involves the Government as a party.[13] (emphasis added)

2.12 The importance of the perception of independence was highlighted in a submission from constitutional specialists at Melbourne University's Centre for Comparative Constitutional Studies. They argued that under the revised requirements, there would be nothing to stop the Minister appointing a relatively junior public service lawyer to the position of President. They also pointed out that there may be a perception that the appointee is subject to political pressure:

> Even if the government had no intention of putting any pressure on that appointee to act in a particular manner, the appointee must be aware that,

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9 *Committee Hansard,* 1 February 2005, p .17.

10 ibid.

11 For example, Dr Maxwell Thorpe and Dr John Campbell, part-time AAT members, *Submission 4,* p. [4].

12 *Submission 4*, p. [4].

13 *Submission 10*, p. [1].

> after his or her term expires, he or she will be at the mercy of the government either for reappointment or appointment to a new governmental position. Even if the appointee him or herself still intended to act with independence and integrity it is hard to see such an arrangement maintaining high levels of public confidence.[14]

2.13 Several submittors argued that the independence of the President was of even greater importance if additional powers proposed for the President in other provisions of the Bill came into effect. This is particularly the case for proposed new powers relating to the composition and recomposition of tribunals, and to the removal of members. These powers are discussed in a later section of this report. ARC President Mr Martin told the Committee:

> [The ARC thinks] it is very important that those powers be exercised by somebody who is both actually and perceived to be independent.[15]

2.14 Other provisions of the Bill will, in effect, mean that tenured appointments to the AAT will no longer be possible, for any member of the Tribunal, or for the President. Concerns regarding this provision are discussed in detail below. The prospect of members no longer being appointed with tenure makes it all the more crucial that the President of the Tribunal be a tenured Federal Court judge, according to AAT presidential member Mr Graham McDonald:

> Should the Parliament decide on the abolition of tenure for all other appointees, it is even more imperative that the President should be independent and be seen publicly to have that independence, in order that the integrity of the Tribunal is better placed to be protected.[16]

Experience and status

2.15 Another reason put forward for maintaining the requirement that the President be a Federal Court judge was the experience, knowledge and status that such a judge brings to the position. It was argued that judicial appointment provided a guarantee that the required skills and qualities would be available. The Public Interest Advocacy Centre (PIAC), for example, pointed to the extensive powers the President has over the operation of the Tribunal, and argued that:

> The President's broad powers and responsibilities necessitate that the incumbent be a person of extensive legal and management experience. A Federal Court Judge is the ideal candidate as they have considerable experience as practitioners and adjudicators, and in managing proceedings.[17]

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14 Dr Simon Evans, Dr Carolyn Evans and Ms Anna Hood, Centre for Comparative Constitutional Studies, University of Melbourne, *Submission 2*, p. 9.

15 *Committee Hansard,* 1 February 2005, p. 17.

16 Mr Graham McDonald, *Submission 10*, p. 3.

17 *Submission 12*, p. 2.

2.16 Other submittors echoed this opinion, including ARC President Mr Martin who emphasised the importance of the quality of decision-making that was associated with a Federal Court judge:

> If the president is a judge of the Federal Court we think it more likely that he or she will be experienced in the process of weighing evidence and evaluating competing submissions in order to come to a decision. That is the essential role of the tribunal. It is also likely that he or she will be eminently legally qualified and that can be important in resolving some of the difficult questions of law that come before the tribunal.[18]

2.17 The high standing and authority of a Federal Court judge was also cited as important. PIAC submitted that the appointment of a Federal Court judge as President gives the Tribunal greater status and authority.[19] The Law Council argued that a judicial appointment to the AAT President position 'removes the [AAT] from the general body of executive decision makers and gives it status, recognition and respect'.[20] Mr Mark Robinson representing the Law Council told the Committee:

> That authority is respected and adhered to by all lawyers around the country and in the common law world. It is also respected, appreciated and acknowledged by all private citizens.[21]

2.18 It was put to the Committee that any appointment less than a Federal Court judge downgrades the Tribunal as a whole,[22] and risks a folding-back, or 'dumbing-down' of the Tribunal.[23]

Coordination with the Federal Court, and relationships within the Tribunal

2.19 The ARC argued that having a Federal Court judge preside over the Tribunal assists coordination of matters between the Court and the Tribunal, especially where there are proceedings at both levels relating to the same subject matter.[24] The ARC observed that:

> The capacity for the same judicial officer to preside over related cases in the Court and the Tribunal can save a lot of time and the resources of both the parties and Government and avoid the risk of inconsistent decisions. Questions of law may also be referred from the Tribunal to the Court in the midst of a Tribunal review, and it is currently possible for the President of

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18 *Committee Hansard* 1 February 2005, p. 25.

19 *Submission 12*, p. 2.

20 Mr Mark Robinson, *Committee Hansard,* 1 February 2005, p. 10.

21 ibid.

22 Law Council of Australia, *Submission 15*, p. [1]; Other submissions echoed this point, including PIAC, *Submission 12*, p. 3.

23 Mr Mark Robinson, *Committee Hansard,* 1 February 2005, p. 10.

24 *Submission 11*, p. 3

> the Tribunal to participate in the full Federal Court's determination of such questions.[25]

2.20 The ARC also pointed to other problems that may arise within the Tribunal if a person who was not a judge was appointed President. These problems will arise as judges (for example Family Court judges) will inevitably remain as members of the Tribunal. As ARC President Wayne Martin noted:

> It would seem odd ... that if there were members of the tribunal who were judges they were subject to direction by a president who was not a judge and if they were subordinate in the hierarchy of the tribunal to a president who was not a judge. That in turn might cause some concerns within the Federal Court and perhaps make it harder to get Federal Court judges to serve on the tribunal.[26]

Trends in comparable jurisdictions

2.21 Another argument put forward for retaining judicial leadership of the Tribunal was that appointment of persons who were not judges would go against the trend for tribunals in comparable jurisdictions. It was pointed out that the presiding officer of comparable administrative review tribunals in Victoria, New South Wales and Western Australia is a judge. The case of the United Kingdom was also cited, with submissions observing that the proposed unified tribunals service there would have extensive judicial leadership.[27] This, it is argued, is in recognition of the critical need to maintain community confidence in the independence and impartiality of such tribunals, it also being recognised that independence should be the most important guiding principal for tribunals.[28]

The Committee's view

2.22 The Committee notes the very strong concerns expressed in submissions and by witnesses that the Tribunal as a whole will be downgraded if the President is not a judge, and in particular if he or she does not have the standing, authority, and independence of a Federal Court judge. The fact that a Federal Court judge has security of tenure is an important part of his or her ability to be independent, and to be seen to be independent, of government. This independence is considered particularly vital, given that the Tribunal by its nature is one where the Government is always a party to proceedings. That fact alone makes an independent President a crucial element in maintaining the community's respect for the integrity of the Tribunal.

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25 ibid.

26 Mr Wayne Martin QC, *Committee Hansard,* 1 February 2005, p. 18.

27 Dr Simon Evans, Dr Carolyn Evans and Ms Anna Hood, Centre for Comparative Constitutional Studies, University of Melbourne, *Submission 2*, p. 7; Administrative Review Council, *Submission 11*, p. 4.

28 Dr Simon Evans, Dr Carolyn Evans and Ms Anna Hood, Centre for Comparative Constitutional Studies, University of Melbourne, *Submission 2*, p. 5.

2.23 Evidence presented to the Committee makes it clear that the experience, knowledge and authority brought to the position by a Federal Court judge is highly respected by all stakeholders. The Committee further notes concerns raised that the additional powers given to the President of the AAT under the Bill[29] make it all the more important that such powers have the safeguard of being placed in the hands of a Federal Court judge.

2.24 Of particular note to the Committee is the fact that not one stakeholder has expressed support for the removal of the requirement that the President be a Federal Court judge. In particular, the ARC, the body representing the peak professional and governmental expertise in this area, is opposed to this measure, despite supporting the majority of the provisions of the Bill.

2.25 The origins of this proposal remain unclear to the Committee. In contrast to other changes proposed in the Bill, this change does not arise out of the recommendations of the major reviews which have inquired into the review tribunal system. That is, the ARC's *Better Decisions: review of Commonwealth Merits Review Tribunals* (1995), and the Australian Law Reform Commission's *Managing Justice: a review of the federal civil justice system* (2000).[30]

2.26 Although the Committee recognises the argument that there may be advantages to be gained from widening the pool of those qualified for the position of President, the submissions of well-respected bodies in the legal field in Australia demonstrate that current arrangements requiring a Federal Court judge operate well, and that the current pool of qualified people is sufficient. The Committee also is not convinced that retaining the requirement that the President be a Federal Court judge would detract from the objectives of the Bill in seeking to make the Tribunal more efficient. Indeed, there is widespread agreement that to lessen the qualifications for President would be a backward step, and would undermine the independence, reputation, and efficacy of the AAT.

2.27 Accordingly, the Committee is of the opinion that the position of President of the AAT should remain reserved for a judge of the Federal Court.

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29 That is, powers to reconstitute a tribunal and to remove members from a tribunal, as per Item 66 of the Bill, as discussed in a later section of this report.

30 ARC Report no. 39, *Better Decisions: review of Commonwealth Merits Review Tribunals*, 1995, p. 83, Australian Law Reform Commission, *Managing Justice: a review of the federal civil justice system*, 2000.

Recommendation 1

2.28 The Committee recommends that the Bill be amended to retain the requirement that the President of the Administrative Appeals Tribunal must be a judge of the Federal Court of Australia. That is, subsection 7(1) should not be repealed.

Removal of provisions allowing tenured appointment of members (item 21)

2.29 A further area of concern raised in submissions is the proposed replacement of tenure for presidential and senior members with fixed-term appointments. The Bill proposes to restrict the term of appointment for all members to up to a maximum of seven years, with eligibility for re-appointment.

2.30 The AAT is structured to have four classes of member, as shown in the following table. The table also shows the number of members in each class, with the number having tenure shown in brackets.

Table 2.1: AAT classes of membership

Class of member	**Current provisions for tenure***	**No. of members (No. with tenure)****
Presidential Members (judges)	To 70 years of age, or at ceasing to be a judge	9 (9)
Deputy Presidents	To 70 years of age (if full-time)	10 (2)
Senior Members	To 65 years of age (if full-time)	15 (4)
Members	No provision for tenure	39
Total		**73 (15)**

* Source: *Administrative Appeals Tribunal Act 1975*, section 8.
** Source: Attorney-General's Department, *Submission 18,* p. 6.

2.31 In his second reading speech the Attorney-General explained the rationale for removing provisions for tenured appointments:

> 'tenured appointments reduce the flexibility of the tribunal to respond to the changing case load'
>
> and

> 'tenured appointments undermine the ability of government to ensure that the pool of available members corresponds with the needs of the AAT and its users.'[31]

2.32 A number of submissions argued that the removal of the ability to make tenured appointments would affect the independence, and perceived independence, of the Tribunal. Mr Graham McDonald asserted that it would 'inevitably result in a drop in public confidence that the AAT is truly independent of Government'.[32] Other submittors were of the same view, including the South Brisbane Immigration and Community Legal Services (SBICLS) which expressed concern that:

> With power to appoint and re-appoint applicants for fixed terms it is possible there will be a real or perceived risk that appointees may be susceptible to governmental pressures. This has the potential to undermine the integrity of the AAT and its perceived independence.[33]

2.33 The Law Society of NSW, arguing against the removal of tenured appointments, emphasised the link between the security of tenure, and the independence of the Tribunal:

> The security of tenure is one of the cornerstones of independence, whether for a court or tribunal, and that independence should not be compromised.[34]

2.34 The Law Society of NSW also argued against any move towards equating AAT appointments with practices in the Public Service:

> The term of the President, Deputy President and permanent members should not be based on practices within the public service. ...The [Tribunal resolution] process requires particular skills and abilities which are not dissimilar to those of the judiciary. Confidence, discernment and tact are developed over time from dealing with the Tribunal's business. The Tribunal should not lose this expertise by limiting tenure.[35]

2.35 The Law Council contended that if all future appointments to the AAT were for fixed terms only, the Tribunal as a whole would be downgraded, with the potential that its independence would be seriously undermined.[36] The Law Council argued in favour of maintaining the ability to make tenured appointments:

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31 Second Reading Speech, *House Hansard*, 11 August 2004, p. 32376.

32 *Submission 10*, p. 1.

33 *Submission 17*, p. 2. Similar comments were made by National Welfare Rights Network, *Submission* 6, p. 12; Dr Maxwell Thorpe and Dr John Campbell, *Submission 4*, p. [5].

34 *Submission 13*, p. 1.

35 ibid.

36 *Submission 15*, p. 2.

> ... the Law Council ... believes that the alternative of tenured appointments to the age of 70 years should be available where appropriate in order to secure good appointments.[37]

2.36 Other submissions also favoured a mix of tenured and fixed term appointments. In expressing its opposition to removal of tenure, the Lawyers Alliance argued in particular that tenure be retained for Presidential members.[38]

2.37 Some submissions pointed out that the proposal for fixed-term appointments did not specify a minimum term, which left open the option to government of making very short term appointments. It was argued that short-term appointments may further undermine public confidence in the integrity of the Tribunal.[39] In addition, it was also pointed out that short-term appointments were not conducive to a build-up of knowledge and experience by members. Mr Simon Moran of PIAC told the Committee:

> A minimum amount of time ... is essential for garnering the knowledge of the various pieces of legislation and the process for people to have expertise, which will be built up over time. The AAT covers a very broad variety of pieces of legislation. To get on top not only of the Administrative Appeals Tribunal's procedures but also of that legislation, you need a minimum amount of time.[40]

2.38 The suggestion that a minimum term should be specified was supported by other submittors. The Legal Services Commission of South Australia, though opposed to the abolition of tenure, argued that in the event that fixed-term appointments become law, deputy presidents and other members should have minimum terms specified (of seven and five years respectively).[41] This suggestion was qualified by the statement that the President should remain a judge of the Federal Court.[42]

2.39 Some submissions pointed out that a consequence of lack of tenure, combined with the potential for only a short-term appointment, may be that well-qualified people would not be attracted to leave successful positions to take up office with the Tribunal.[43] Ms Genevieve Bolton of the National Welfare Rights Network (NWRN) told the Committee:

> Another by-product of shorter term appointments is that they are less likely to attract the high-calibre and best-qualified people to these positions, and

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37 ibid.

38 *Submission 8*, p. 2.

39 See Legal Services Commission of South Australia, *Submission 14*, p. 1.

40 *Committee Hansard,* 1 February 2005, p. 3.

41 *Submission 14*, pp. 1-2.

42 ibid.

43 For example, South Brisbane Immigration and Community Legal Services (SBICLS), *Submission 17*, p. 2

> that will then have the effect of diminishing both the work and the value of the tribunal.
>
> In our submission, it would be very unlikely for, say, someone who has built up a practice at the bar over a 10- or 15-year period to be attracted to a position on the tribunal where there is only the security of a two- or three-year term.[44]

2.40 The submission from the ARC did not oppose limited-term appointments to the AAT.[45] ARC President Mr Martin commented that there is a need to strike a balance between the competing considerations of independence on the one hand, and of accountability and efficiency on the other.[46] However, Mr Martin did express the ARC's view that there should be a minimum term set, and told the Committee:

> We are of the view that the balance between independence and accountability and efficiency supports the notion of limited-term appointments, but appointments have to be long enough not to jeopardise independence.[47]

2.41 Mr Martin referred to the ARC's previously published position in its 1995 *Better Decisions* report, that terms of between three and five years were appropriate for review tribunal members.[48] The ARC stated that terms of less than three years do not provide a sufficient sense of security to members.[49] The *Better Decisions* report pointed out that terms of longer than three years may be appropriate for some senior members, to assist with continuity and to attract the best qualified and able members.[50]

2.42 In further support of setting a minimum term, the ARC argued that a minimum term of at least three years does not unduly hamper the ability of the Tribunal to be flexible in response to changing demands.[51]

2.43 A representative of the Attorney-General's Department told the Committee that in recent times, no tenured appointments of deputy presidents or senior members have been made, and that since 1989, appointments have been for fixed terms. It was

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44 *Committee Hansard,* 1 February 2005, p. 25.

45 *Submission 11*, p. 4.

46 *Committee Hansard,* 1 February 2005, p. 17.

47 *Committee Hansard,* 1 February 2005, p. 23.

48 *Submission 11*, p. 4, quoting ARC Report no. 39, *Better Decisions: review of Commonwealth Merits Review Tribunals*, 1995, p. 83.

49 *Submission 11*, p. 4.

50 ARC Report no. 39, *Better Decisions*, *review of Commonwealth Merits Review Tribunals*, 1995, pp. 82-83.

51 *Submission 11*, p. 4.

also advised that the majority of appointments made in 2004 were for a period of three years or more, with a small number of appointments being for less than three years.[52]

2.44 The Departmental representative also argued that short term appointments were sometimes useful in that they allowed the Tribunal the flexibility to carry on its business and to deal with the exigencies of the appointments process. The example was given of a situation where a short term appointment would bridge the gap when delays in making an appointment are experienced.[53]

The Committee's view

2.45 The Committee acknowledges the view expressed that the security of tenure for AAT members is one of the cornerstones of independence, and recognises concerns that the removal of provisions for tenured appointments as presidential and senior members may compromise the independence and perceived independence of the Tribunal. The Committee also notes arguments favouring the retention of a mix of tenured and non-tenured appointments.

2.46 The Committee notes the view that non-tenured appointments, and particularly short-term appointments, may result in fewer well-qualified people being attracted to leave successful positions in order to take up office with the Tribunal.

2.47 The Committee notes that for over 15 years now, only fixed term appointments have been made. As such, it could be considered that the provisions of the Bill have the effect of formalising long-term practice. However, the Committee remains concerned that there is no minimum term specified. The Committee notes that the ARC has for some time supported three to five year terms for review tribunal members, and also notes the ARC view that a minimum term of at least three years does not unduly hamper the ability of the Tribunal to be flexible in response to changing demands. Accordingly, the Committee sees merit in incorporating the specification of a minimum term into the Act.

Recommendation 2

2.48 The Committee recommends that the Bill be amended to specify a minimum term of appointment of three years. Subsection 8(3) of the Act should be amended to read: 'subject to this Part, a member holds office <u>for a term of at least 3 years and not more than 7 years</u> as is specified in the instrument of appointment, but is eligible for re-appointment.'

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52 *Committee Hansard,* 1 February 2005, p. 38.

53 ibid, p. 30.

Provisions allowing the President to remove a member from a tribunal, and to reconstitute a tribunal (item 66)

2.49 Item 66 of the Bill inserts new sections 23 and 23A (amongst others) detailing the powers of the President of the AAT regarding reconstitution of a tribunal. A number of concerns were raised in relation to these sections.

2.50 Proposed subsection 23(2)(b)(iii) authorises the President to direct that a member not continue to take part in proceedings if the President is satisfied that it is 'in the interests of justice' to do so (subsection 23(9)(a)). The President must also consult the member concerned before exercising this power. Concerns were raised that this power is too broad and subject to misuse.[54] Whilst submissions acknowledged there may be circumstances where it was necessary to remove a member from a tribunal, the view was expressed that the term 'in the interests of justice' was 'remarkably vague',[55] and that these circumstances needed to be explicitly set out in the Act.[56]

2.51 PIAC submitted that the reconstitution of a tribunal in the middle of proceedings may involve considerable expense and lead to delays, because the interests of justice would require a rehearing:

> ... if the Tribunal had to be reconstituted, the interests of justice could only be served if the new Tribunal reheard the entire proceedings...
>
> ... the Tribunal can only make a fully informed decision if it [has] heard all of the evidence and come to its conclusion at the veracity of evidence and the credibility of witnesses.[57]

2.52 Similar concerns were raised in respect of new subsection 23A(2). It confers a power on the President to reconstitute a multi-member tribunal if he or she is satisfied that it is 'in the interests of achieving the expeditious and efficient conduct of the proceeding'. The Explanatory Memorandum gives examples of when this provision might apply, including where it is necessary to add a member because of his or her expertise, or to remove a member where expertise is not required.[58] The NWRN argued that this power is not justified, and that its inclusion risked a focus on 'economical and quick' review, rather than more important objects of 'fair and just' review.[59]

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54 National Welfare Rights Network, *Submission* 6, p. 7.

55 Mr Simon Moran, *Committee Hansard,* 1 February 2005, p. 5.

56 National Welfare Rights Network, *Submission 6,* p. 7.

57 *Submission 12*, p. 4.

58 *Explanatory Memorandum*, p. 19.

59 *Submission 6*, p. 7.

2.53 The Committee heard concerns that the broad reconstitution powers conferred on the Tribunal President under new sections 23 and 23A are unprecedented. After examining legislation for comparable administrative review bodies in Australia, the ARC has determined that there are several examples of provisions giving the presiding officer power to reconstitute if there is a conflict of interest,[60] and one example of a provision relating to perception of bias.[61] There are also examples of provisions where a presiding officer is given powers to reconstitute in the interests of efficiency, though these powers are qualified.[62] Importantly, though, the ARC has been unable to identify any existing provision in comparable legislation that empowers a president of a tribunal to direct reconstitution 'in the interests of justice', however defined.

2.54 The ARC commented that there was a need for provisions allowing the AAT President to reconstitute a tribunal, for example in unusual cases where an AAT member had not reached a decision after a lengthy period, or where a member was guilty of misconduct.[63] The ARC expressed support for the new provisions, but made the point strongly that reconstitution powers were only acceptable where the powers were exercised by a President who was a judge of the Federal Court. ARC President Mr Wayne Martin explained to the Committee the importance of having this safeguard:

> [If the President were not a Federal Court judge] ... one has the increased spectre of the power possibly being used for political purposes.
>
> ... it is these sorts of powers that we think reinforce the need for the president to continue to be a judge of the Federal Court. In that circumstance, one could have greater confidence that the power would only be exercised for the purposes for which we think it is being conferred and not for any improper purpose.[64]

2.55 Other submittors supported this view.[65] The Australian Lawyers Alliance, for example, pointed out the implications for the credibility of the AAT if a tribunal member was removed by a President whose independence was perceived to be in question:

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60 See ARC *Submission* 11A for full details. Examples given are NSW Administrative Decisions Tribunal, Veterans' Review Board, Social Security Appeals Tribunal, Australian Competition Tribunal, Copyright Tribunal, existing AAT legislation, Migration Review Tribunal (MRT).

61 See ARC *Submission* 11A for full details. The Chairperson of the Superannuation Complaints Tribunal may reconstitute the Tribunal if he or she thinks it is desirable 'to remove any perception of bias'.

62 See ARC *Submission* 11A for full details. The power concerns the Migration Review Tribunal, and the Refugee Review Tribunal.

63 *Committee Hansard,* 1 February 2005, p. 19.

64 ibid, p. 20.

65 For example, Ms Genevieve Bolton, National Welfare Rights Network, *Committee Hansard,* 1 February 2005, p. 24; Law Council of Australia, *Submission 15*, pp. 1-2.

> The removal of a Tribunal member by a President whose appointment was publicly perceived to be political could create a scandal impugning the prestige and credibility of the AAT.[66]

The Committee's view

2.56 The Committee is satisfied there are circumstances where there is a need for the President of the Tribunal to have the flexibility to reconstitute tribunals and to remove members. The Committee notes concerns raised that the potential exists for these powers to be misused, and is particularly mindful of the fact that (in the case of section 23) the only guidance given to the President in the exercise of the power to remove a member is that the removal is 'in the interests of justice', a term which is not defined.

2.57 The Committee notes that the Explanatory Memorandum lists two examples of situations that may warrant a direction by the President to remove a member from a tribunal. These are:

- where the member has a conflict of interest in the proceeding; or
- where the member has made a public statement that could prejudice the impartiality of the proceeding.[67]

2.58 When asked for a definition of 'the interests of justice', a representative of the Attorney-General's Department told the Committee:

> I think it is that, if the situation arose where a president were considering acting under that provision, the interests of justice would need to be determined by considering the objects of the act and the range of factors that come into play in ensuring that the tribunal is able to make correct and preferable decisions and that the parties are able to obtain a proper decision from a tribunal proceeding.[68]

2.59 In responses provided to the Committee following the public hearing, the Attorney-General's Department confirmed that the term 'interests of justice' is used in a range of Commonwealth legislation in the context of powers exercised by the courts and certain statutory authorities. It is understood that, in these circumstances, the term is rarely defined by the legislation. As such, what constitutes the interests of justice in a given case is invariably left to the decision-maker concerned to determine. The intention is to confer a discretion requiring the decision-maker to balance properly any competing interests so that justice is served.[69] The Department cited the examples listed in the Explanatory Memorandum of a tribunal member having a conflict of

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66 *Submission 8*, p. [2].

67 *Explanatory Memorandum*, p. 18.

68 *Committee Hansard,* 1 February 2005, p. 33.

69 *Submission 18*, pp. 3-4.

interest or perceived bias, as instances when such a balancing exercise would be required. The Department stated:

> The reason for proposed paragraph 23(2)(b)(iii) is to ensure ... that the Tribunal provides fair and just review. The provision allows the President to intervene to prevent reviews by the Tribunal that may not be fair and just or may not be seen to be fair and just. This ensures that the parties can have confidence in the Tribunal as a decision maker and removes the need for further proceedings challenging the decision in such circumstances.[70]

2.60 The Committee remains concerned as to the lack of guidance in the Bill itself as to when the 'interests of justice' may warrant the removal of a member from a hearing. The examples listed in the Explanatory Memorandum of situations that may warrant a decision by the President to remove a member is not an exhaustive list. Further, regardless of whether the examples given in the Explanatory Memorandum are comprehensive, interpretive problems can arise when supporting information is included in an explanatory memorandum, but statutory guidance is not set out in the legislation itself. This has been a matter of note for the Committee on previous occasions when examining proposed legislation. It remains an ongoing concern for the Committee.

2.61 The Committee's view is that the Bill should be amended to prescribe the reasons why the President may direct a member to no longer take part in proceedings, with the added requirement that the President may only issue such a direction if he or she is satisfied that it is in the interests of justice to do so, for one or more of those reasons. Precedents exist in other Commonwealth legislation for this approach.[71]

2.62 The Committee notes the support of the ARC for the proposed reconstitution powers, but shares the ARC's concerns that the powers should only be exercised by a President who is a Federal Court judge. The Committee agrees that having a Federal Court judge as President of the AAT provides a safeguard, and sends a signal to the community that Tribunal decisions are being made with independence and integrity.

Recommendation 3

2.63 The Committee recommends that proposed subsection 23(9)(a) be amended, in order to provide guidance as to the circumstances under which the President should exercise the power to remove a member, and reconstitute a tribunal, 'in the interests of justice'.

Recommendation 4

2.64 The Committee recommends that new sections 23 and 23A should proceed, subject to the retention in the Act of the mandatory requirement that the President be a Federal Court judge (Recommendation 1).

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70 Attorney-General's Department, *Submission* 18, p. [4].

71 For example, subsection 38A(2) of the *Privacy Act 1988*.

Provisions allowing the Tribunal to request a person applying for review to amend their statement of reasons (item 95)

2.65 This amendment allows the Tribunal to request a person applying for review to provide a further statement of reasons if the Tribunal considers the initial statement to be insufficient. According to the Explanatory Memorandum, the reason for this provision is:

> ...to overcome the practise of applicants submitting in their statement of reasons that there was 'error in fact and law' without further substantiation, particularly where the applicant has legal representation.[72]

2.66 The Attorney-General's Department submitted that the amendment would assist the Tribunal to better manage its workload. A sufficient statement of reasons would allow decisions to be made at an earlier stage as to what type of expertise may be required on a tribunal, and whether the matter was suitable for an alternative dispute resolution process.[73] The Department advised that the power to request a further statement of reasons is discretionary, and that there would be no sanction for a failure to comply with such a request.[74]

2.67 The Law Council expressed concern about this amendment. It submitted that the AAT was set up as an accessible forum to which anybody could apply for review of an administrative decision, and receive a fair go.[75] The Law Council argued that the amendment could disadvantage applicants who do not have legal representation, and who had trouble dealing with complex legislation. It was further argued that there is ample opportunity later in the process for refinement of an applicant's case.[76] Mr Mark Robinson representing the Law Council told the Committee:

> It is a little tough to force the applicant at the start to present an analysis that is critical or is a critique of what was wrong with the original decision, particularly identifying legal errors and errors of rationality and logic. It presumes that all applicants are able to do that equally. For disadvantaged applicants, for self-represented applicants, it is a very big ask. If it needs to be done, it can be done later at the preliminary conference or after the preliminary conference.[77]

2.68 PIAC representative Mr Simon Moran echoed these concerns, arguing that:

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72 *Explanatory Memorandum*, p. 27.

73 *Submission 18*, p. [5].

74 ibid.

75 *Submission 15*, p. [2].

76 ibid.

77 *Committee Hansard,* 1 February 2005, p. 8.

> One of the key attributes of the tribunal is its accessibility to unrepresented applicants. This will be diminished if unrepresented applicants face legalistic hurdles which they are unable to meet.[78]

2.69 Both PIAC and the Law Council observed that the current approach whereby preliminary hearings are used to distil the real nature of a review works well.[79] Mr Chris Cunningham representing the Law Council argued that, although efficiency was important, it was also important that the process was fair. He told the Committee:

> In practice, it is only when [the parties] actually sit around a table and discuss the issues that both parties work out exactly where they are at odds in relation to that decision. If an applicant, especially if they are an unrepresented applicant, is put to the task of reformulating something that they know is wrong but they are not sure why because they do not have the benefit of reading all the documents, getting medical evidence if necessary and all the other preliminary things that they require before they can make a value judgment, even as an applicant in person, then the system will become harsh and unfair, particularly to unrepresented applicants before the tribunal.[80]

2.70 Concerns were again raised regarding information included in the Explanatory Memorandum, but not in the Bill. PIAC suggested that if the amendment is aimed at applicants with legal representation (as is suggested in the Explanatory Memorandum), then the amendment should apply only to these applicants, and not unrepresented applicants.[81] The Law Council argued that it should be made clear in the legislation itself (and not just stated in the Explanatory Memorandum) that a request for a further statement by the Tribunal would not mean that the original application was not a valid application.[82]

The Committee's view

2.71 The Committee notes the concerns raised suggesting that the amendment will place hurdles in the path of unrepresented applicants. The Committee notes the reassurance provided by the Department that there would be no sanction for a failure to provide a further statement, but remains concerned that the fact of the Tribunal making a request for further details may deter an applicant not familiar with procedures from proceeding with an application.

2.72 The Committee also notes the benefits to the operation of the Tribunal if more informative statements of reasons are provided earlier in the process. On balance, the

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78 ibid, p. 2.

79 Mr Simon Moran, *Committee Hansard,* 1 February 2005, p. 5.

80 *Committee Hansard,* 1 February 2005, p. 11.

81 *Submission 12*, p. 4.

82 *Submission 15*, p. 3.

Committee considers that the concerns raised are not sufficient to prevent the passage of the Bill.

Provisions allowing the Minister rather than the Governor-General to assign members to Divisions of the Tribunal (item 36)

2.73 Under subsection 19(3) of the Act the Governor-General assigns non-presidential members to a particular Division or Divisions of the Tribunal, such as the Taxation Appeals Division or the Security Appeals Division. The Bill amends this arrangement so that the Minister will now make these assignments.

2.74 PIAC submitted that the independence, both actual and perceived, of the Tribunal is diminished by this amendment, and that there is no compelling reason to make such a change.[83] The Australian Lawyers Alliance also questioned this amendment, stating that:

> The amendment of section 19 to allow the Attorney General, rather than the Governor General, the right to move members from one division to another also represents increased political control of the work of the Tribunal.[84]

2.75 The Attorney-General's Department advised that the proposed provision will facilitate faster assignments and variations of assignments because it removes a layer of formality. The Department stated that there is no particular reason why the Governor-General should be concerned with assignments, and that:

> ... [assignments] represent a level of detail more appropriately left for the Minister, in consultation with the President and other appropriate Ministers to determine. If the Minister is able to vary the assignments, it is more appropriate that the Minister make the assignments as well. Otherwise, the Minister is given a power to vary a decision of the Governor-General.[85]

The Committee's view

2.76 The Committee recognises the view of the Attorney-General's Department that the amendment removes a layer of formality in relation to assignments of members to Divisions of the Tribunal. However, the Committee also acknowledges concerns that this amendment undermines the perceived independence of the AAT.

2.77 In recognition of these concerns the Committee considers that it would be desirable to ensure, though legislation, that the Minister is obliged to consult with the President of the AAT, prior to making or altering assignments. The Committee considers that the inclusion of a tenured AAT President in the process of making assignments to Divisions will give the public confidence that the independence of the Tribunal is being maintained. Accordingly, the Committee recommends that

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83 *Submission 12*, p. 3.

84 *Submission 8*, p. [2].

85 *Submission 18*, p. [2].

assignments to Divisions of the AAT should be made in consultation with the President of the Tribunal.

Recommendation 5

2.78 The Committee recommends that item 36 of the Bill be amended to include the requirement that the Minister must first consult with the President before making or altering assignments of members to a Division of Divisions of the Tribunal.

Other issues

2.79 A number of other issues were raised in submissions to the inquiry, and are discussed below. These include:

- insertion in the Act of an objects statement referring to 'quick' and 'economical' (Item 1);
- removal of the requirement that a presidential member should be part of a tribunal considering certain migration matters (Item 226);
- alternative dispute resolution provisions (Item 112);
- ordinary members to constitute multi-member tribunals (Item 47); and
- proposal to allow the Tribunal to limit the scope of a review (Item 73).

Insertion in the Act of an objects statement referring to 'quick' and 'economical' (Item 1)

2.80 Item 1 inserts an objects statement into the Act, stating that:

> In carrying out its function, the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.[86]

2.81 It was put forward in certain submissions that the focus should be on 'fair and just', and that 'economical' and 'quick' are not appropriate objectives for the AAT.[87]

2.82 The Explanatory Memorandum comments that the proposed objects statement is similar in terms to statements included in legislation for the Migration Review Tribunal, the National Native Title Tribunal, the Refugee Review Tribunal, and the Social Security Appeals Tribunal.[88] Some submissions argued, however, that reviews conducted at the level of the AAT should not be constrained by terms that apply to lower tiers of review.[89] The NWRN submitted that:

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86 Item 1 of the Bill, inserting section 2A.

87 National Welfare Rights Network, *Submission 6*, p. 4.

88 *Explanatory Memorandum*, p. 4.

89 SBICLS, *Submission 17*, p. 1.

> Given the AAT's place as the final tier of external merits review for social security matters, the paramount goal of the AAT must be to reach the correct and preferable decision. In the NWRN view, the objectives of 'fair and just' are consistent with this goal whereas the objectives of 'quick and economical' will detract from the quality of AAT review.[90]

Removal of the requirement that a presidential member should be part of a tribunal considering certain migration matters (Item 226)

2.83 Item 226 of the Bill amends the *Migration Act 1958* to repeal the provisions that the Tribunal must be constituted by a presidential member alone when conducting a review of certain decisions made by the Minister. The Explanatory Memorandum states that the removal of this requirement provides the President of the AAT with greater flexibility in constituting the Tribunal.[91] PIAC submitted that the relevant migration matters (which can include significant issues such as review of certain ministerial deportation orders and the refusal of a visa) require consideration from a highly-skilled adjudicator, and that these matters should be heard by a presidential member.[92] In addition, PIAC expressed concern that the amendment may lead to delay in Tribunal proceedings, due to legal challenges to the President's decision on the make-up of the tribunal. PIAC argued that:

> ... the amendment gives the President a discretion that must be applied by considering criteria set out in the section. If an applicant believes that the appointed Tribunal lacks the expertise required by the section, they may seek to challenge the President's decision on the grounds that it did not lawfully comply with the section. This would lead to further proceedings and delay of the Tribunal proceedings.[93]

Alternative dispute resolution provisions (item 112)

2.84 The range of alternative dispute resolution (ADR) mechanisms available to the Tribunal will be expanded under the Bill. The President will have the power to direct that a proceeding be referred to an ADR process. The NWRN submitted that ADR processes are only relevant and appropriate in certain situations (for example, where ADR is optional and voluntary).[94]

Ordinary members to constitute multi-member tribunals (item 47)

2.85 This amendment will remove the requirement that a multi-member tribunal be constituted by at least one presidential or senior member. This would allow multi-member tribunals to be constituted by ordinary members only. Some submittors

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90 *Submission 6*, p. 4.

91 *Explanatory Memorandum*, p. 57.

92 *Submission 12*, p. 5.

93 *Submission 12*, p. 5.

94 *Submission* 6, p. 8.

have argued that multi-member tribunals are constituted in cases involving some complexity or significant questions of law and that the ability to resolve such issues may be lost if legally qualified presidential and senior members are not required to sit on multi-member tribunals.[95] In contrast, others argue that an increased ability to use ordinary members, where a senior or presidential member would otherwise be required, may lead to an earlier resolution of matters and may assist in a more timely and efficient resolution of cases.[96]

2.86 A representative of the Attorney-General's Department provided clarification on this matter, advising that it is not currently a requirement under the Act that there be a legally qualified person on a multi-member panel. Senior members are normally legally qualified, but this is not a requirement.[97]

Proposal to allow the Tribunal to limit the scope of a review (item 73)

2.87 Item 73 of the Bill clarifies that the Tribunal will have the power to determine the scope of the review of a decision. The NWRN expressed concern regarding this amendment, stating that:

> On its face, this proposal appears to give the Tribunal an unfettered discretion to determine the scope of the review by placing limits on questions of fact and the evidence and issues that it will consider. If that was the intent of the proposal, it could prejudice a consumer’s case where other issues may well affect the outcome.[98]

2.88 However, the NWRN goes on to note from the Explanatory Memorandum that the proposal is not intended to allow the Tribunal to limit its own jurisdiction conferred by the Act or other legislation. The NWRN suggests that it be made clear in the legislation itself that the power is limited to evidence or issues of law and fact that are not within the Tribunal’s jurisdiction.[99]

The Committee's view

2.89 The Committee acknowledges the concerns raised in relation to these, and some other issues that are not discussed in this report. After careful consideration, the Committee considers that the concerns raised are not sufficient to prevent the passage of the Bill.

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95 National Welfare Rights Network, *Submission* 6, p. 6; Law Council of Australia*, Submission 15*, p.2 of Attachment 1.

96 Centrelink, *Submission 16*, p.4

97 *Committee Hansard,* 1 February 2005, p. 28.

98 *Submission 6*, p. 7.

99 ibid.

Recommendation 6

2.90 Subject to the preceding recommendations, the Committee recommends that the Bill proceed.

Senator Marise Payne

Chair