ATTACHMENT A

Question 1 (proof Hansard p. 32)
[In relation to Item 36 of the Bill, which provides that the Minister, not the Governor-General, will assign non-presidential members to Divisions of the Tribunal.]

Senator LUDWIG—How long does it take now for the Governor-General to act? Can you give me a start date and a finish date?

Ms Davies—It does not take long, but there is a process of lodgement of papers et cetera for Executive Council.

Senator LUDWIG—We are talking about time; we are not talking about process. How long does it currently take? Perhaps you can have a look at that if you do not know. How is the minister going to be any speedier in that sense? I am sure he has an in-tray that is quite large.

Ms Davies—Yes. Going to Executive Council is an additional step once the minister has—

Senator LUDWIG—That is accepted. There is no argument about that. What is the mischief that it is trying to resolve? Why put the minister in wherever it seems to mention the Governor-General? I am trying to establish why that is. I do not see the utility. If you can explain to me the utility I might be able to grasp the nub of it and understand it. Perhaps you can have a look at the reason.

Ms Davies—Sure.

Response

The proposed changes enable the Minister administering the Act (currently the Attorney-General) to make an assignment (in addition to varying the assignment). Currently, non-presidential members are assigned to a Division when they are appointed. The proposal removes this additional requirement from the Executive Council and enables the Minister to make the initial assignment. There is no particular reason why the Governor-General should be concerned with assignments as they 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.

The proposed provisions will facilitate faster assignments and variations of assignments because it will remove a layer of formality. Presidential members are not assigned to any division.

Question 2 (proof Hansard p. 32)
[In relation to Item 36 of the Bill, which provides that the Minister, not the Governor-General, will assign non-presidential members to Divisions of the Tribunal.]

CHAIR—Is there any other tribunal at Commonwealth level where the minister makes direct assignments in that way?
Ms Davies—I am not sure that other tribunals have divisions in quite the same way.

Senator LUDWIG—The AIRC has panels and the president assigns those panellists.
CHAIR—Could you check on that please?
Ms Davies—Certainly.

Response

Other federal merits review tribunals such as (the Migration Review Tribunal, the Refugee Review Tribunal, the Social Security Appeals Tribunal and the Veterans Review Board) do not have divisions. The Social Security Appeals Tribunal designates members as administrative, legal or medical members but this is done administratively by the Tribunal and not under legislation.

As the Committee notes, the Australian Industrial Relations Commission has a number of panels which are referable to an industry or group of industries. Subsection 37(1) of the *Workplace Relations Act 1996* enables the President to assign an industry or a group of industries to a panel of members of the Commission.

Question 3 (proof Hansard p. 32)
Senator BRANDIS—But what seems to be being slipped in here by the new clause 23(2)(b)(iii) is the right of the president to remove a member. That is not part of the existing act.
Ms Davies—That is certainly the difference, yes.
CHAIR—Where does that come from?
Ms Davies—As I said, I am not aware of a specific precedent in any other legislation that gave rise to that clause. I am not aware of one. I am not saying that there is not one, but I am not aware of one.
CHAIR—Could you check, please?

Response

There are several provisions which, while not exact precedents, provide similar powers to the heads of other tribunals. The Chairperson of the Superannuation Complaints Tribunal can reconstitute the Tribunal to remove any perception of bias: section 9 of the *Superannuation (Resolution of Complaints) Act 1993*.

Similar provisions to the proposed clause 23(2)(b)(iii) are contained in the *Migration Act 1958*. Section 355A provides the Principal Member with the power to reconstitute the Migration Review Tribunal by removing a member, if the Principal Member thinks that the reconstitution is in the interests of achieving the efficient conduct of the review in accordance with the objects of the Migration Act. Section 422A of the Migration Act contains a similar provision in relation to the Refugee Review Tribunal.

The Western Australian *State Administrative Tribunal Act 2004* (SAT Act) provides the Tribunal President with broad powers to reconstitute a Tribunal where necessary. Section 12 allows the President to alter who is to constitute the Tribunal for the purpose of dealing with a matter and the Tribunal as constituted can have regard to any record of the proceeding taken before the alteration.

The term "interests of justice" is used in a range of Commonwealth Acts, in the context of powers exercisable by courts and encapsulates a discretionary decision which requires any competing interests to be properly balanced so that justice is

served. For example, it is a matter the Federal Court must consider when deciding whether to transfer proceedings under section 86A of the *Trade Practices Act 1974.*

Question 4 (proof Hansard p. 33)

CHAIR—So what is the definition of the interests of justice?

Ms Davies—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.

CHAIR—Ms Davies, could I ask you to look at the *Hansard* transcript of what you just said and then come back to the committee with your view of the definition of the interests of justice? I am sorry, but I do not understand what you just said.

Response

The term "interests of justice" is not explicitly defined in the Bill or the Explanatory Memorandum. The Explanatory Memorandum gives two examples of the types of mischief the provision is intended to overcome. 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.

The examples given can be categorised as elements of the rule against bias.

The reason for proposed paragraph 23(2)(b)(iii) is to ensure, as would be stated in proposed new section 2A, 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.

Question 5 (proof Hansard p. 37)

[Re Item 95 of the Bill, in relation to the provision that the Tribunal may request amendment of an insufficient statement.]

Senator LUDWIG—And the mischief it was designed to overcome?

Ms Davies—The practice of bald statements that the decision was wrong.

Senator LUDWIG—So who does not like that? Have the members or the registrar or the minister indicated that they particularly do not like that statement? How widespread is the practice? What is the downside? Do they not get to the correct and preferable decision as a consequence? Perhaps you could have a look at that for me.

Response

During the consultation process the Administrative Appeals Tribunal informed the Department that it is a common practice for applicants to state in their application form wording similar to the "decision was wrong in fact and law" without further substantiation.

The practice means that it is often difficult to elicit from applicants the reason they believe the decision was wrong prior to the first conference. One of the purposes of the Bill is to improve the capacity of the Tribunal to manage its workload and ensure that reviews are conducted as efficiently as possible. Proposed new subsection 29(1C) is consistent with this purpose. Applications that have a sufficient statement allow the Tribunal to manage its workload more effectively because:

- the Tribunal can determine whether the matter is suitable for an alternative dispute resolution process (including conferencing) or if it should go straight to hearing,

- the Tribunal can determine at an earlier stage the expertise of the member (or members) who should constitute the Tribunal, and

- the Tribunal will be able reach the correct and preferable decision more efficiently.

The Department notes that unrepresented applicants may not be able to state the reasons they disagree with the decision in the application form. The Department also notes that the Tribunal's procedures such as conferencing assist the Tribunal to elicit from unrepresented applicants the reason they believe the decision was not the correct or preferable one. For this reason, the power to request a further statement of reasons is discretionary and there is no sanction for a failure to comply with such a request.

Question 6

Senator MASON—Ms Davies, how many members—by that I do not mean presidential, deputy presidential or senior members—of the AAT are there?
Senator BRANDIS—And part-time members.
Senator MASON—Senator Brandis just reminded me about part-time members—members, senior members. What are the numbers, Ms Davies? Do you know?
Senator LUDWIG—They were designed to provide flexibility, Senator Brandis.
Ms Davies—I am a bit loath to add up on the spot.
Senator MASON—Even roughly would probably do for the moment.
Senator LUDWIG—You can correct that later if you like.
Mr Meredith—There are approximately 80 members of the tribunal.
Senator BRANDIS—Is that full-time and part-time, or just full-time?
Mr Meredith—That is full-time and part-time.
Senator MASON—The secretary has just given me the annual report for the AAT, and I am looking at it. Mr Meredith, do those 80 members include presidential members and senior members?
Mr Meredith—I cannot clarify that. I am talking about presidential members and senior members, but I am not talking about presidential members who are judges, as opposed to tenured deputy presidents.
Senator LUDWIG—Of the full number of those, can you provide a breakdown of how many are currently tenured and how many are judges or part-time? I think that covers the gamut.
Mr Meredith—We can do that.

Senator LUDWIG—Thank you. I guess the deputy too.

Response

The following table (based on one provided to the Department by the Tribunal) sets out the Tribunal's membership. Figures in brackets represent members with tenure.

Break-up by State and Appointment (DP, SM, M)

(Tenured Members are in parentheses)

	ACT	NSW	QLD	SA	TAS	VIC	WA	TOTAL
Total Members	**3**	**23 (4)**	**14 (2)**	**5 (1)**	**5**	**14 (5)**	**9 (2)**	**73 (14)**
Presidential Members	–	4 (3)	2 (2)	–	–	2 (2)	2 (2)	9 (9)
Deputy Presidents[1]	–	3	1	1	2	2 (2)	1	10 (2)
Senior Members	1	6 (1)	2 (1)	2	1	3 (2)	–	15 (4)
Members	2	10	9	2	2	8	6	39
Total Full-time	**1**	**7 (1)**	**3**	**2 (1)**	**–**	**6 (4)**	**–**	**19 (6)**
Presidential Members	–	1	–	–	–	1	–	2
Deputy Presidents	–	1	1	1	–	2 (2)	–	4 (2)
Senior Members	1	4 (1)	1	1 (1)	–	2 (2)	–	9 (4)
Members	–	1	1	–	–	2	–	4
Total Part-time	**2**	**16 (3)**	**11 (2)**	**3**	**5**	**8 (1)**	**9 (2)**	**54 (8)**
Presidential Members[2]	–	3 (3)	2 (2)	–	–	1 (1)	2 (2)	8 (8)
Deputy Presidents	–	2	–	–	2	–	1	5
Senior Members	–	2	1	1	1	1	–	6
Members	2	9	8	2	2	6	6	35

[1] Includes full-time Deputy President, Mr Graham McDonald, Vic, tenured, on leave of absence

[2] All part-time Presidential Members are Judges of the Federal Court