Bills Digest
No. 80 2000–01

Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000

ISSN 1328-8091

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Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000

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Law and Bills Digest Group
7 February 2001

Contents

Glossary

AAT	Administrative Appeals Tribunal (existing)
AAT Act	*Administrative Appeals Tribunal Act 1975*
ART	Administrative Review Tribunal (proposed)
ART Bill	Administrative Review Tribunal Bill 2000
ASIO	Australian Security Intelligence Organisation
ASIO Schedule	**proposed Schedule 1** of the *Australian Security Intelligence Organisation Act 1979*, which is inserted by **item 1 of Schedule 5** of the Bill
Bill	Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000
Council	Administrative Review Council
Family Assistance Schedule	**proposed Schedule 1** of the *A New Tax System (Family Assistance) (Administration) Act 1999*, which is inserted by **item 1 of Schedule 13** of the Bill
IRD	Immigration and Refugee Division of the ART (proposed)
MRT	Migration Review Tribunal (existing)
RC	Repatriation Commission (existing and continuing)
RRT	Refugee Review Tribunal (existing)
Social Security Schedule	**proposed Schedule 3** of the *Social Security (Administration) Act 1999*, which is inserted by **item 1 of Schedule 11** of the Bill
SSAT	Social Security Appeals Tribunal (existing)
Taxation Schedule	**proposed Schedule 2** of the *Taxation Administration Act 1953*, which is inserted by **item 1 of Schedule 7** of the Bill
VRB	Veterans' Review Board (existing and continuing)
Veterans' Schedule	**proposed Schedule 7** of the *Veterans' Entitlements Act 1986*, which is inserted by **item 1 of Schedule 9** of the Bill

Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000

Date Introduced: 12 October 2000

House: House of Representatives

Portfolio: Attorney-General

Commencement: The provisions relating to the Administrative Review Council commence on Royal Assent to the *Administrative Review Tribunal Bill 2000* (the ART Bill).

With certain exceptions (which are separately noted in the Main Provisions section), the rest of the Bill commences when Parts 4 to 10 of the ART Bill commence. This will be 12 months after Royal Assent, unless an earlier date is fixed by Proclamation.

Purpose

The ART Bill, with which this Bill is cognate, establishes the Administrative Review Tribunal (ART), which will replace the Administrative Appeals Tribunal (AAT), Migration Review Tribunal (MRT), Refugee Review Tribunal (RRT) and the Social Security Appeals Tribunal (SSAT).

This Bill:

- abolishes the AAT, MRT, RRT and SSAT
- makes transitional arrangements for the transfer to the ART of matters which have not been completed by the AAT, MRT, RRT or SSAT by the time those tribunals are abolished
- provides for the transfer of members of the MRT and RRT (but not members of the AAT or SSAT) to the ART
- continues the terms of members of the Administrative Review Council
- contains specific provisions setting out the interrelationship between the ART Bill and unique procedures followed in major merits review jurisdictions, including social security, migration and veterans' affairs, and
- makes consequential amendments to over 200 Commonwealth Acts.

Background

This Bill is cognate with the ART Bill, which was introduced on 28 June 2000. The background to both Bills is explained in the Digest (Bills Digest No 40 of 2000-01) for the ART Bill.

The ART Bill and this Bill have been referred to the Senate Legal and Constitutional Legislation Committee for inquiry. The Committee, although originally due to report on 7 September 2000, is currently due to report on 6 February 2001.[1] The Government currently envisages that the ART will commence on 1 July 2001,[2] although the Bill would permit commencement to be as late as early to mid-2002.[3]

Main Provisions

The Bill repeals the AAT Act, and abolishes the AAT,[4] MRT, RRT[5] and SSAT[6] with effect from the date the ART commences review of decisions. This ensures that there is no gap between the existing tribunals and the ART.

Schedules 1, 2 and 3 make largely technical consequential amendments to over 200 Acts. **Schedule 1** replaces references to the AAT with references to the new ART. **Schedule 2** replaces references to the AAT Act with references to the ART Bill.

Schedule 3 makes a number of technical amendments, such as replacing references to particular sections of the AAT Act with references to the corresponding provisions in the ART Bill. It also makes some minor substantive changes. It is not the purpose of this Digest to detail all these amendments. With a few exceptions,[7] all of these amendments in Schedules 1, 2 and 3 will commence when Parts 4 to 10 of the ART Bill commence.

As a result of these amendments, the right to apply for merits review of the majority of decisions made under Commonwealth Acts is not materially altered. However, the composition of and procedure to be followed by the ART will differ from that of the current AAT, and this will affect the way review of these decisions is conducted.

In contrast, **Schedules 4 to 14** make substantial alterations to the procedures to be followed in the high volume jurisdictions of the present tribunals, such as social security, migration and veterans' affairs. These alterations are described below in separate sections. A number of the provisions ensure that existing procedures specific to those jurisdictions continue. In this Digest, while the continuation of existing arrangements may be noted in footnotes, the focus of the text is generally on the substantive amendments made to present arrangements.

Schedules 15 to 17 also contain detailed transitional arrangements for review of cases which are not completed at the time the existing tribunals are abolished and their jurisdiction is conferred on the ART.

Review of security assessment decisions

> References in this section to the 'ASIO Schedule' are references to **proposed Schedule 1** of the *Australian Security Intelligence Organisation Act 1979*, which is inserted by **item 1 of Schedule 5** of the Bill.

The ASIO Schedule modifies the procedures contained in the ART Bill, to replicate the special procedures for review of security assessment decisions conducted by the Australian Security Intelligence Organisation (ASIO) which are currently contained in the AAT Act.[8] The Bill also updates the *Australian Security Intelligence Organisation Act 1979* to refer to the ART Bill rather than the AAT Act.

Review of ASIO security assessments will take place in the Commercial and General Division of the ART, which is to be called the Security Appeals Division when hearing these applications.[9]

Loss of a right to reopen a decision

The Bill makes one substantive change to the present position in relation to security appeals. Currently, people who have already had review of their security assessment finalised by the AAT have a right to have the AAT's decision reopened at any time, if they obtain fresh evidence of material significance.[10] This right is removed by **item 7 of Schedule 4**. Instead, review of the ART's first-tier decision will be available only where the criteria for second-tier review are met, that is, if the case raises an issue of general significance or there was a manifest error in the ART's first-tier decision.[11] It is curious that this right has been abolished, whereas all the other unique procedures which apply to review of security appeals have been preserved.

Review of taxation decisions

> References in this section to the 'Taxation Schedule' are references to **proposed Schedule 2** of the *Taxation Administration Act 1953*, which is inserted by **item 1 of Schedule 7** of the Bill.

Some taxation objection decisions are currently reviewable by the AAT, others are appealable to the Federal Court, and in respect of a third class of decision the taxpayer may choose between a right of review by the AAT or an appeal to the Federal Court.[12]

The Bill does not add to or subtract from the classes of decisions which are reviewable.[13] The Bill modifies the procedures contained in the ART Bill for the review of decisions so that the existing modifications to the review procedure for taxation decisions can continue.[14]

Review of decisions currently reviewable by the AAT will take place in the Taxation Division of the ART.[15] The Small Taxation Claims Tribunal, which hears small claims, will continue to exist and will be located within the Taxation Division of the ART.[16]

Substantive alterations to taxation review procedures

The Bill proposes two changes of significance in the taxation review procedures, as well as making some minor amendments[17] to the present system.

The first alteration concerns decisions on taxation objections which are either reviewable on the merits by a tribunal or appellable to the Federal Court, at the election of the taxpayer. **Schedule 6** introduces a new option, not currently available. Under the proposed amendments, a taxpayer who elects to apply to the ART for review may terminate this review and instead institute an appeal in the Federal Court within 7 days of terminating the application for review in the ART. He or she must obtain the consent of all the participants in the review.[18]

The second alteration is to the jurisdictional limits of the Small Taxation Claims Tribunal. Currently, the Small Taxation Claims Tribunal within the AAT may hear all applications where the amount in dispute is less than $5000.[19] The Bill proposes that the Small Taxation Claims Tribunal will have jurisdiction where the amount in dispute is less than $15,000, a three-fold increase in the monetary limit.[20] However, the following conditions must also be met:

- the applicant has given the ART written notice that he or she wants the review to be in the Small Taxation Claims Tribunal, and
- the President of the ART is satisfied that the review is 'likely to be able to be conducted relatively quickly or easily', and
- the President of the ART is satisfied that the review 'does not raise an issue, or principle, of general significance'.

These three conditions are wholly new. It is currently not open for an applicant to choose to have review of a small taxation claim determined in the AAT proper rather than the Small Taxation Claims Tribunal. Neither is the President of the AAT permitted to decide that a matter involving a small amount of money is complex or involves a principle of general importance, and therefore should not be heard in the Small Taxation Claims Tribunal.

These considerations may make a significant difference to applicants with small claims. Currently, the fee for an application on a taxation matter to the Small Taxation Claims Tribunal is $50, whereas in the AAT it is $500.[21] The ART's fees are yet to be determined, and will be contained in regulations made under the ART Bill.[22] The increase in the Small Taxation Claims Tribunal's jurisdiction to claims under $15,000 may give many more applicants an opportunity to have their cases reviewed more economically by the Small Taxation Claims Tribunal. Further, under the Bill, an applicant may choose to pay the additional fee in order to obtain the benefit of having his or her claim referred to the ART itself rather than considered by the Small Taxation Claims Tribunal. Conversely, an applicant may be forced to pay a more substantial application fee if the ART President

determines that the matter is complex or raises an issue of general significance, and hence ought not to be heard in the Small Taxation Claims Tribunal.

Review of veterans' entitlements decisions

> References in this section to the 'Veterans' Schedule' are references to **proposed Schedule 7** of the *Veterans' Entitlements Act 1986*, which is inserted by **item 1 of Schedule 9** of the Bill.

The Veterans' Schedule provides for the modified application of the review procedures contained in the ART Bill to the review of veterans' decisions.[23] These amendments preserve nearly all of the special features of the veterans' review jurisdiction currently contained in the *Veterans' Entitlements Act 1986*.[24] In addition, **Schedule 8** makes a number of purely terminological and procedural modifications to the *Veterans' Entitlements Act 1986*.

One or two tiers of ART review?

Currently, all decisions relating to veterans' entitlements under the *Veterans' Entitlements Act 1986* are made in the first instance by the Repatriation Commission (RC). Some of these decisions are then reviewable on application to the Veterans Review Board (VRB)[25] and then by the AAT.[26] Other decisions are reviewable internally by the RC itself,[27] and then by the AAT.[28]

Under the Bill, review by the VRB and the RC will continue. Both the decisions of the VRB and the internally reviewed decisions of the RC will be reviewable in the Veterans' Appeals Division of the ART as of right.[29] Both streams of decisions presently have a single right of review before the AAT. Under the proposed ART scheme, however, there is a difference in the way the two streams of veterans decisions will be treated. Decisions of the VRB will be second-tier review decisions in the ART, bypassing the first-tier ART review and the leave requirements which ordinarily apply to second-tier review.[30] In contrast, internally reviewed decisions of the RC will be reviewed by the ART's first tier, and will have an option for yet another layer of review, second-tier ART review, if the leave requirements are satisfied.[31]

It is difficult to identify a policy reason for treating the two streams differently. The Attorney-General in his second reading speech gave this simple explanation: '[t]his is because the [VRB] provides first-tier external review of veteran decisions.'[32] This is true. However, currently the VRB provides first-tier external review of some decisions and the RC provides first-tier internal review of other decisions. Both are then treated identically at the AAT. So the difference in the identity of the first review body does not currently provide a reason to differentiate between decisions made by the VRB and those made by the RC. If the lack of first-tier external review were a barrier, a solution may be to make all veterans' decisions reviewable by the VRB before proceeding to the ART. If first-tier internal review by the RC is currently seen as of similar status to review by the VRB, it is questionable why the two streams of review are not treated identically before the ART.

Another concern, which will be mentioned later,[33] is that the retention of two tiers of external review for veterans' decisions is inconsistent with the approach taken in relation to income support decisions.

Significant drafting anomalies

A number of anomalies result from the drafting strategy, adopted in Part 1 of the Veterans' Schedule, of preserving the terminology used in the *Veterans' Entitlements Act 1986*.

In the ART Bill itself, the 'decision-maker' is the person within a Department or agency who made the 'original decision'. Even when the ART is conducting second-tier review of a first-tier ART review, the 'decision-maker' is deemed to be the original decision-maker, not the ART itself.[34] A number of obligations, including giving notices, preparing a statement of reasons, providing documents, and reconsidering decisions at the request of the ART, are imposed by the ART Bill on the original 'decision-maker'.

For veterans' matters, in practical terms the primary decision-maker in all cases is the RC. However, Part 1 of the Veterans' Schedule defines 'decision-maker' and 'first-tier decision' by reference to subsection 175(1) of the *Veterans' Entitlements Act 1986*.[35] This has the effect of artificially defining the 'decision-maker' as the RC in some instances and the VRB in other circumstances.[36] Although this drafting strategy preserves the existing veterans' legislation, it does not match the way the ART Bill was drafted. A number of provisions of the ART Bill impose obligations on the 'decision-maker'. The intention is that these obligations are assumed by the person or body who made the initial decision, not by the tribunal which reviewed the decision. In the veterans' review context, these obligations should fall on the RC, rather than the VRB. However, in some provisions of the ART Bill as modified by Part 1 of the Veterans' Schedule, unintended consequences result from the use of that changing definition of 'decision-maker'. They are:

- the ART may (in some instances, but not others) review the statement of reasons provided by the VRB and require the VRB to provide additional reasons for its decision if the ART concludes the VRB's statement of reasons is inadequate.[37] This is a serious incursion on the autonomy of the VRB as an independent external review body, which should be considered of comparable status with the first tier of the ART, and

- some matters may only be referred by the ART to the VRB for reconsideration rather than to the RC.[38]

These anomalies are more than mere technical or drafting errors; they substantially alter the operation of the ART Bill as it applies to veterans' matters. The status of the VRB is diminished by requiring it in some instances to perform functions which are appropriate to a primary decision-maker but not to an external review body. More fundamentally, they affect the procedural rights of veterans who are applying for review of decisions made by the RC. The distinction drawn in the definition of 'decision-maker' generates inconsistencies in the

treatment of categories of case which should, logically and as a matter of fairness, be treated identically.

It would be possible to avoid these outcomes by adopting the approach taken by the drafters for social security decisions in **Schedule 11** of the Bill, and redraft Part 1 of the Veterans' Schedule to define the 'decision-maker' as the RC and 'first-tier decision' as the decision of the VRB. As the Veterans' Schedule only applies to veterans' review matters, there is no need to use the generally applicable terminology used in the ART Bill.

The amendments proposed by the Attorney-General on Thursday 7 December 2000 only partially address this problem, hence generating further inconsistencies. They redraft certain individual clauses to refer to the 'Commission' rather than the 'decision-maker.[39] However, they do not alter the definitions of 'decision-maker' and 'first-tier decision' in proposed section 6 of the ART Bill, and these flawed definitions will continue to apply in many clauses, producing the results outlined above.[40]

Minor drafting flaw

The RC currently has express power to review and alter a decision at any time after it has been made, including while the decision is under review by the VRB[41] or during review by AAT, with the consent of the applicant.[42] While this power to reconsider a decision is preserved, the drafting of the amendments is unnecessarily complex,[43] and a much simpler approach has been taken in the drafting of the income support provisions.[44]

Review of social security decisions

> References in this section to the 'Social Security Schedule' are references to **proposed Schedule 3** of the *Social Security (Administration) Act 1999*, which is inserted by **item 1 of Schedule 11** of the Bill.
>
> References in this section to the 'Family Assistance Schedule' are references to **proposed Schedule 1** of the *A New Tax System (Family Assistance) (Administration) Act 1999*, which is inserted by **item 1 of Schedule 13** of the Bill.

Social security and family assistance decisions are currently reviewable by the SSAT, and a second tier of review is available as of right in the AAT. Under the Bill, review of social security decisions and family assistance decisions will be conducted in the Income Support Division of the ART.[45] There will be no automatic right to two tiers of review. Instead, second tier review will be available only with leave of the President or executive member of the Income Support Division if the case raises an issue or principle of general significance, or if the parties agree there has been a manifest error of law or fact.[46] Social security is the only jurisdiction to lose an entire tier of review as of right (the automatic right of review of the SSAT's decision by the AAT). In 1998-1999 nearly 20% of SSAT decisions (1995 out of 10138) were appealed to the AAT. The majority of these (1745 out of 1995) were appeals by applicants rather than the Department, and 42.6% of these AAT reviews, resulted in the decision of the SSAT being set aside or altered.[47] The loss of an

automatic right of second-tier review is thus a serious disadvantage for social security applicants.

Schedules 10 and 12 make a number of consequential amendments, chiefly replacing references to the AAT and SSAT with references to the new ART.[48] The Social Security Schedule and the Family Assistance Schedule make a number of substantive changes, including disapplying[49] the definition of 'decision-maker' in the ART Bill and substituting 'Secretary'.[50]

Item 4 of Schedule 10 removes a note which explained that the subsection had been inserted in response to a ruling made by the AAT. The *Explanatory Memorandum* stated that the note is 'obsolete' with the repeal of the AAT.[51] However, as decisions of the AAT and the SSAT are expressly preserved as relevant matters to be taken into account by the Secretary in making decisions administering the social security law,[52] it is curious that the helpful note referring to the AAT's decision will be removed.

Preservation of some specific social security procedures

The Social Security Schedule and the Family Assistance Schedule modify the ART Bill to ensure that certain specific procedural requirements which currently apply to the SSAT will continued to apply when the ART is reviewing social security and family assistance decisions. These include:

- the obligation to have regard to, although not to automatically apply, Ministerial policy statements which have been tabled in Parliament[53]
- the ART's ability to request the Secretary to use his or her powers to require a person to provide information or documents[54]
- the Secretary's power to conduct a reconsideration on his or her own motion, even during review by ART[55]
- restrictions on the ART's power to exercise all the powers and discretions of the Secretary for certain specified classes of social security, but not family assistance, decisions,[56] and
- the ART's ability to require the Commonwealth to pay a participant's reasonable travel and accommodation costs, as well as the costs of the provision of medical services.[57]

The express requirement that the ART have regard to Ministerial policy probably changes little, if at all, the existing legal position that administrative tribunals must have regard to government policy as a 'relevant consideration; that is not binding on them'.[58] It will still be a matter for the ART to decide what weight to give to the policy, and the policy may be departed from if it would produce injustice in the circumstances of an individual case.[59]

Loss of some specific social security procedures

A number of provisions of the social security legislation setting out unique review procedures for the SSAT have not been included in the legislation which transfers the SSAT's functions to the ART. Distinctive features of review by the SSAT which appear to be lost include:

- the ability to apply for review orally or over the telephone[60]
- private hearings[61]
- review by a three member multi-disciplinary panel in most cases,[62] and
- the absence of the Department from the review process.

Unlike the decision-maker under other enactments, the Secretary of the Department of Family and Community Services must be a participant in review before the ART. Although a senior official from the Department of Family and Community Services testified that the Department would not want to be represented at every hearing, but only those raising significant issues, such as the interpretation of new measures,[63] the Secretary is a compulsory participant at ART hearings.[64] This is a significant change in the procedure and one that may cause great disquiet to applicants. Anecdotal evidence suggests it is of considerable relief to social security applicants that currently the Department may not be present at reviews before the SSAT.[65] Under the amendments contained in the Bill, not only will the Secretary have to participate in reviews, but the Secretary will be able to be represented by a delegate,[66] who may be legally qualified and who will almost certainly have considerable experience in the area. By contrast, applicants for review will not be permitted to be represented before the ART unless the ART agrees. This puts the Secretary at a considerable advantage compared to the applicant appearing before the ART.[67]

Although the Secretary is a compulsory participant in the review, he or she cannot be required to attend or take part in a preliminary conference or 'other process'.[68] It is not clear whether 'other process' includes a hearing before the ART. Even if this exemption is restricted to processes other than the hearing, it seems unusual to require the Secretary to be a participant in all reviews, but not to be able also to compel him or her, whether personally or by a delegate, to take part in the review processes. It would appear simpler, and consistent with the general scheme established in the ART Bill,[69] to permit the Secretary to decline to participate either in the review of a particular matter or of a class of decisions.

Review of migration decisions

All migration decisions currently reviewable by the MRT, RRT and AAT will be reviewable by the ART. There will no longer be any provision for the MRT and RRT to refer decisions involving an important principle or issue of general application to the AAT,[70] because, obviously, the ART cannot refer matters to itself. In any event, it does not appear that this facility has been much used.

A self-contained migration review code

Review of migration decisions is treated differently from review of all other decisions. In other areas of review, the procedures set out in the ART Bill will apply, with some modifications to deal with matters peculiar to that jurisdiction, such as the secrecy requirements attendant on ASIO assessments, and the need to continue social security payments pending the outcome of review. However, because there are so many unique provisions governing migration review, the procedures set out in the ART Bill will not apply.[71] Instead, the specific migration procedures will continue,[72] with some amendments to include certain provisions of the ART Bill. Part 5 of the *Migration Act 1958* will constitute a self-contained code for the procedures to be followed by the ART when reviewing migration decisions.[73]

A large number of the amendments made by the Bill do not substantively change any of the current review rights. A number of these simply reflect the replacement of the MRT, RRT and AAT with a single tribunal, the ART.[74] Other provisions have been repealed but substantially reenacted elsewhere, in an attempt to make the *Migration Act 1958* more readable and internally consistent.[75] It is neither possible nor necessary to chart in detail what is effectively the reorganisation of various statutory provisions. Accordingly, this Digest will focus only on those amendments which make substantive changes to the current migration review regime.

This section of the Digest first describes the categories of migration decisions that are reviewable by the ART. It then details amendments to the migration review scheme that incorporate provisions of the ART Bill, as well as a number of amendments that do not seem explicable on the basis of integration of some of the ART Bill procedures, and for which no explanation is proffered in either the *Explanatory Memorandum* or second reading speech.

Reviewable decisions

Migration code decisions

The Bill provides a new conceptual framework for review of migration decisions. It distinguishes between five classes of decision which will be reviewable by the ART:

- reviewable general visa decisions (currently reviewed by the MRT and business visa decisions by the AAT)

- reviewable protection visa decisions (currently reviewed by the RRT)
- reviewable deportation decisions (currently reviewed by the AAT)
- reviewable general character decisions (currently reviewed by the AAT), and
- reviewable protection visa character decisions (currently reviewed by the AAT).

'***Reviewable general visa decisions***' are the same as the present MRT-reviewable decisions.[76] In addition, decisions to cancel a business visa or an investment-linked visa under subsections 134(1), (3A) or (4) of the *Migration Act 1958*, which are presently reviewed by the AAT, will be classified as 'reviewable general visa decisions'.[77]

'***Reviewable protection visa decisions***' are the same as the present RRT-reviewable decisions, that is, a decision to refuse or to cancel a protection visa to a person who seeks to qualify as a refugee.[78] However, if the decision to refuse or cancel the visa is made on character grounds, the decision is classified as a 'reviewable protection visa character decision'.

'***Reviewable deportation decisions***' are decisions to order the deportation of non-Australian citizens who have been convicted of a crime or crimes and sentenced to at least one year's gaol.[79] '***Reviewable protection visa character decisions***' are decisions to refuse or to cancel a protection visa on the ground of the person's character,[80] whereas '***reviewable general character decisions***' are decisions to refuse or to cancel any other type of visa on the ground of the person's character.[81] All three types of decision are currently reviewable by the AAT.

All five classes of decision will be reviewable by the ART in the Immigration and Refugee Division (IRD).[82] The IRD will be required to follow the procedures set out in the proposed self-contained code located in the *Migration Act 1958*.

There will be a number of changes in procedure and substantive rights as a consequence of these last three categories of decision becoming subject to the migration review code. Although they are currently largely governed by the AAT's normal review procedures, under the changes proposed in the Bill they will become subject to many procedures which currently only apply to MRT- and RRT- reviewable decisions. An example of central importance is that these applicants, who are presently entitled to representation before the AAT as of right,[83] will not be permitted to be legally represented before the IRD unless the directions[84] so provide.[85] Although an 'assistant' may be present during the IRD hearing to assist the applicant, he or she may not present arguments before the IRD on the applicant's behalf.[86] The assistant may present arguments only if the IRD decides to permit it because of exceptional circumstances, or if directions provide for assistance.[87] The lack of representation will not materially change the present position of applicants to the MRT or RRT. Indeed, there may be slightly greater access to representation or assistance if directions are made permitting assistance or representation in certain

categories of case. Further, applicants for protection visas currently have no right to an 'assistant' being present before the RRT, so this may be an advantage for them.

Reviewable migration decisions exempt from the migration code

The following decisions will also be reviewable by the ART, but in the Commercial and General Division rather than the IRD:

- decisions relating to migration agent registration under Part 3 of the *Migration Act 1958*[88]
- citizenship decisions under the *Australian Citizenship Act 1948*,[89] and
- decisions relating to the guardianship of children under the *Immigration (Guardianship of Children) Act 1946*.[90]

These decisions are currently reviewable by the AAT. They will not be covered by the self-contained migration code. Instead, the standard procedures set out in the ART Bill will apply.

Non-reviewable decisions

Decisions to refuse or cancel a protection visa on the ground of the person's character will not be reviewable at all by the ART if they are made by the Minister personally.[91] Additionally, decisions by the Minister to refuse or cancel a temporary safe haven visa on the ground of criminal conduct or the person's general character will not be reviewable by the ART.[92] These decisions are currently not reviewable by either the MRT or RRT, so this makes no substantive change.

Introduction of ART procedures into migration code

The Bill makes a significant number of changes which will substantially affect an applicant's rights of review. Some of the changes made are a logical extension of existing provisions,[93] or create new and more coherent procedures for the ART to comply with.[94]

A number of these changes involve the insertion into the migration code of largely procedural provisions which are part of the general scheme set out in the ART Bill, but which were not previously part of migration review procedure, such as:

- the ART's discretion to waive application fees[95]
- the ART's ability to determine its own practice and procedure, subject to directions[96]
- the applicant's ability to withdraw his or her application and end the review at any time[97]
- the ART's power to correct an 'obvious error' in its statement of reasons for decision[98]

- the ART's power to remit all matters to the Department for reconsideration[99]
- the ART's power to direct that a witness's fees be paid by the Commonwealth, even if the applicant called the witness,[100] and
- the broad power of the ART President and IRD executive member to delegate any or all of their powers to other members, the Chief Executive Officer of the ART, any member of the ART's staff or even to a consultant.[101] The proposed amendments would remove the power to delegate to a consultant, but retain the ability to delegate to any staff member.[102]

Many of these changes represent improvements to the current migration review process, introducing discretionary powers for IRD members which will assist them to reach fair and just review outcomes. The breadth of the power to delegate the functions of the ART President and executive members is discussed in the Bills Digest on the ART Bill.[103] Other changes, on the other hand, will have a significant impact on the rights of applicants, particularly the move towards conducting review on the papers without an oral hearing, and the introduction of power to terminate the review without making a decision if the applicant fails to comply with a direction from the IRD. These alterations are described in detail in the following sections.

Preference for review on the papers

One of the most significant changes in the migration area is the move away from oral hearings. Currently, the MRT or RRT may conduct a review on the papers only where the outcome of the review will be a decision in the applicant's favour or the applicant consents to a review being conducted without a hearing.[104] The AAT, which currently reviews applications relating to business visas, criminal deportation and character decisions, has no power to proceed without a hearing.

Under the Bill, the IRD has a positive obligation to consider conducting a review on the papers not only in cases where the outcome will be favourable to the applicant,[105] but in every case, even if the decision would be adverse to the applicant.[106] There are requirements that the IRD give the applicant an opportunity to provide written documents and submissions,[107] and there are new and expanded provisions permitting the Secretary to provide written statements of fact, written arguments or documents[108] but once these have been considered, the IRD may in its discretion make a decision based solely on the papers.[109] Indeed, the *Explanatory Memorandum* states that '[t]he review procedure in the new Part 5 is based on review on the papers and discretionary hearings.'[110] These provisions broadly reflect **proposed section 96** of the ART Bill. However, Dr Nygh, the current Principal Member of the RRT, speculates that 'members are unlikely, except in the very clearest of cases, to proceed to make an adverse decision on the papers.'[111]

No right to appear or call witnesses

Consonant with the preference for reviews to be conducted on the papers, hearings will be discretionary under the migration review code,[112] as they are under the ART Bill.[113] The IRD may permit a person, including the applicant or the Department, to appear and give evidence or make statements or present arguments.[114] This is a significant derogation from the current right of applicants to appear and give evidence or make arguments.[115] Even if the IRD decides to permit a person to appear, it may withdraw that permission at any time, and may impose conditions on the right of appearance or direct the person as to the manner in which he or she may appear.[116] For example, the IRD may permit the applicant to appear and give evidence, but may direct the applicant only to speak about one issue of the several raised in the application.

The applicant's ability to call witnesses remains in the complete discretion of the IRD,[117] which is currently the case before the MRT and RRT but not the AAT.[118] However, the existing power of MRT applicants to adduce evidence through written witness statements or other written material will, under the Bill, be extended to all applicants for review by the IRD.[119]

The emphasis on the applicant providing written submissions and witness statements, and responding to the IRD's requests for information in writing rather than orally at a hearing, may have advantages in terms of efficiency of dealing with applications for review. However, it may also disadvantage applicants who are not represented, whose written expression is not good, or who are unable to clearly identify the issues. The extent of this disadvantage is exacerbated in the migration jurisdiction by the fact that many applicants will not have English as their first language. Although these applicants will be entitled to the assistance of an interpreter, this is only of assistance when giving oral evidence at a hearing.[120] Additionally, the requirements of the *Migration Act 1958* are complex, and it may be difficult to identify the issues to be addressed and to distil from the applicant's circumstances what facts are relevant to the issues at hand and what are not. If the matter does proceed to a hearing, the applicant may be legally represented only with the consent of the IRD, whereas DIMA is likely to have officers who are experienced in the interpretation of the *Migration Act 1958* and in the procedures at hearings and who may be legally qualified.

Power to end the review without ART making a decision

The MRT and RRT already have power to determine an application without making further inquiries or taking any further action if:

- the applicant was invited to appear but failed to attend[121]
- the applicant was invited to provide information but failed to provide it,[122] or
- the applicant was invited to comment on adverse information which would be reason for the tribunal to affirm the Department's decision, but failed to comment.[123]

These provisions will continue under the migration review code, and will now also apply to the current AAT-reviewable decisions.[124] They effectively negate any duty to inquire on the part of the new IRD.[125]

In addition, the IRD will have a broad new power to end the review without making a decision in any of the above circumstances,[126] and also if the applicant fails to comply with any directions made by the Minister or the IRD.[127] This replicates proposed section 129 of the ART Bill. Directions may include conditions or restrictions on the applicant's appearance and the giving of evidence. So, for example, if the applicant is permitted to give oral evidence only in relation to a certain issue, but fails to and speaks instead about other issues, this breach is sufficient to allow the IRD in its discretion to end the review.

The applicant will have 14 days to make an application to have the review reinstated.[128] The IRD will have a discretion to reinstate the review, subject to any directions in force. However, the IRD must not reinstate the review if the application was not made within the 14 day time limit.

The decision to end the review will not be judicially reviewable.[129] However, the decision of the IRD not to reinstate the review will be judicially reviewable.[130] So, if an applicant's review has been ended by the IRD, he or she must first seek reinstatement before applying to the Federal Court for judicial review. If the applicant is out of time in seeking reinstatement, and the IRD has complied with all the notice and other procedural requirements before taking the decision to end the review, there will be no discretion in the Federal Court to reinstate the application for review. Effectively, the application will be terminated without a decision on the merits being made, because of the applicant's non-compliance with procedural requirements.

The Attorney-General in his second reading speech explained that:

> 'These provisions will allow the ART to dispose more readily of cases where the applicant does not actively pursue his or her case … [and are] designed to improve the efficiency and effectiveness of decision-making in the Immigration Review Division'.[131]

The Attorney-General also noted that these provisions are 'consistent with the provisions in the ART Bill applying to the other Divisions'.[132] It is true that the ART in other divisions has power to end the review if the applicant fails to attend or fails to comply with directions.[133] However, the IRD is more limited in its power to reinstate review than the other five divisions of the ART. The power to reinstate in other divisions is entirely in the discretion of the ART,[134] and no time limits are set for the application for reinstatement. By contrast, in the IRD, non-compliance with the 14 day time limit means the ART has no discretion to reinstate the review. There is no ability to take into account cases of genuine hardship, for example where non-compliance may be due to illness, cultural reasons or simply lack of understanding of the notices given by the IRD.

Constitution of IRD

Currently, the MRT and the AAT may be constituted by one, two or three members,[135] whereas the RRT is always constituted by a single member.[136] Although the Bill will preserve the discretion to constitute the IRD with one, two or three members,[137] the IRD will only be able to sit with more than one member if one of three criteria is satisfied:

- the review raises an issue of general significance
- one or more members of the IRD have particular expertise which is relevant to the case under review, or
- to provide 'developmental experience' for IRD members.[138]

Whereas the first two criteria duplicate restrictions contained in proposed section 69 of the ART Bill, the third criterion has no such precedent. No explanation is proferred, either in the *Explanatory Memorandum* or the second reading speech, as to why IRD members may benefit from 'developmental experience' in the form of multi-member panels, whereas members of other Divisions of the ART are not provided with similar opportunities. It is difficult to ascertain why this is necessary particularly at the commencement of the ART, given that all existing members of the MRT and RRT will be transferred to the IRD for at least 12 months, whereas other divisions of the ART may comprise a significant number of new members. The amendments proposed by the Attorney-General would remove this unique third criterion from the migration review jurisdiction.[139]

The application of these criteria is likely to provide for some, albeit limited, opportunities for multi-member panels to sit on refugee protection visa cases, where currently there is no discretion to constitute multi-member panels, but may restrict the availability of multi-member panels in other cases.

Directions

The Principal Members of the MRT and of the RRT already have the power to give directions relating to the operation of and conduct of review by their respective tribunals.[140] Under the migration code, directions may be made by the Minister for Immigration and Multicultural Affairs, as well as by the President of the ART and the executive member of the IRD.[141] A similar power in relation to the other five Divisions is contained in proposed section 161 of the ART Bill. The directions given by the Minister will prevail over those of the ART President or IRD executive member.[142] Directions are not disallowable instruments and are not subject to the scrutiny of the Parliament.

The directions will have a lot of work to do under the new migration review code. They will contain requirements relating to the conduct of reviews and the operation of the IRD, including the allocation of work, the number of members who are to constitute the IRD, and priorities for reviewing decisions.[143] Some of these matters are currently regulated by guidelines,[144] and other matters are currently prescribed in the *Migration Act 1958*[145] or regulations.[146] A number of the directions will have the purpose of exempting certain

categories of decision from the compulsory requirements of the migration code.[147] This may afford a means of tailoring procedures for some of the disparate categories of matters which have been subsumed under the migration code.

Given that the Ministerial directions are pre-eminent, and given the significant range of topics covered by directions, there is potential for significant Ministerial or agency interference with the procedures adopted by the ART in the IRD. This is not of mere academic concern, as directions can specify matters such as time limits, which in the migration jurisdiction are critical to whether an applicant's claim is able to be reviewed or not.

There seems to be a disparity of treatment as between the IRD and its members, on the one hand, and applicants on the other. From the IRD's perspective, the directions are treated as non-binding procedures. Failure to comply with directions by the IRD will not result in the IRD's decision being invalid,[148] nor will it be judicially reviewable, except for certain decisions.[149] Only a 'serious or continuing breach' of the directions could lead to the removal of an IRD member.[150] By contrast, a single failure by an applicant to comply with any direction, however procedural, gives the IRD power to end the review without making a decision on the merits.[151] So the breadth of the matters to be covered by directions is of some considerable concern.

Substantive alterations for which no explanation is given

A number of substantive changes have been made to the existing migration merits review procedures which do not represent an attempt to achieve conformity with the scheme set down in the ART Bill. Given that these affect the rights of applicants for review, the failure of the Government to provide any explanation for the rationale behind these amendments in either the second reading speech or the *Explanatory Memorandum* is disappointing.

Exclusion from review for procedural defects

Currently, the MRT and RRT are obliged to consider an application for review which complies with the formalities.[152] The MRT and RRT have no jurisdiction to consider applications which are not made within the prescribed time limits,[153] but it seems they have a discretion to consider applications which only partially comply with the formal requirements.[154]

By contrast, the Bill makes it clear that if an applicant for review does not comply with the formal application requirements, including the form of the application and payment of the application fee, the IRD will have no power to review the decision.[155] These applicants will be excluded from merits review altogether, as they will almost certainly not be able to re-lodge a conforming application within the initial time limit prescribed, and the IRD has no discretion to extend the time limit.

Dr Kathryn Cronin, a Deputy President of the Australian Law Reform Commission, calls provisions such as this 'trip-wires'. She opines that such rules will catch 'not only … those who are perhaps scamming the system … but also the unwary … [who are] simply underskilled about dealing with bureaucracy.'[156] She concludes that:

> If you have too many rules that operate to trip the unwary in the system, you will have people going away with a profound sense of injustice that somehow, because of their lack of skills and ability, their lack of knowledge of what are complicated legislative arrangements, they were somehow cheated of a right to have a hearing and a reconsideration of a first instance decision.[157]

Natural justice removed?

The ART Bill expressly requires the ART in reviewing a decision to 'afford procedural fairness'.[158] Otherwise known as the 'hearing rule',[159] this is part of the requirement to afford natural justice.[160] This provision applies to five Divisions of the ART, but does not apply in the IRD because it is not reproduced in the migration review code.[161] In fact, breach of natural justice is expressly excluded as a ground of judicial review of migration decisions before the Federal Court.[162]

Despite the absence of an express requirement to afford procedural fairness and the explicit rejection of natural justice as a ground of judicial review before the Federal Court, it appears that nevertheless an obligation to accord natural justice arises either as a common law duty or as an implication from the statute.[163] Pursuant to section 75(v) of the Constitution, the High Court can grant the constitutional writs of prohibition, mandamus and certiorari and the equitable remedy of injunction to remedy a failure by the MRT or RRT to accord natural justice.[164] In other words, the survival of an implied obligation to accord natural justice is enough to activate the *constitutional* right to seek redress in the High Court, even where Parliament has abolished *statutory* rights to seek relief in the Federal Court.

However, this natural justice obligation can be excluded if the statute is construed as extinguishing or limiting the obligation to afford procedural fairness.[165] In the most recent case decided by the High Court, it was not argued that procedural fairness is excluded from the *Migration Act 1958*,[166] thus the Court presumed that it existed without examining the basis on which it was to be implied.[167] It has been suggested that the detailed procedural requirements contained in the migration review code are intended to exhaustively delimit or codify the content of the common law requirements of procedural fairness for migration review applicants. If this is so, there would be no obligation on the IRD to provide a fair hearing otherwise than by following the statutorily prescribed procedures. Thus, the failure to include an express requirement that the IRD, like all other Divisions of the ART, must 'afford procedural fairness' is potentially a significant omission and a serious diminution of applicants' existing right to seek relief before the High Court under section 75(v) of the Constitution in migration matters.

Reconstitution of IRD

The existing power to reconstitute the MRT or RRT for the more efficient conduct of review is retained when these tribunals transfer their functions to the IRD, although the terminology is changed.[168] This means that the President or IRD executive member can remove, add or replace one or more members, or even replace the only member, involved in hearing a particular case, if he or she thinks a differently constituted IRD would better achieve the ART's objective of 'fair, just, economical, informal and quick' review. Unlike at present, the President or executive member will not be required to consult with the sitting member and a senior member before making the decision to reconstitute the tribunal on efficiency grounds, but will be able to do so unilaterally.

The Bill also permits the President of the ART or the IRD executive member to reconstitute the IRD if a member or members have not complied with a direction relating to the review.[169] This power is arguably an unprecedented interference with the independence of IRD members, particularly as there is no power to reconstitute any of the other five Divisions of the ART because of a member's non-compliance with a direction. No explanation has been given as to why this necessary, or how it is envisaged it will work in practice.

No power to vary

The IRD will not have power to 'vary' a decision,[170] a power currently possessed by the MRT, RRT and AAT,[171] and which will be possessed by all five other divisions of the ART.[172] Although it may be possible in practice to achieve the same result by setting aside the original decision and substituting a new decision (the decision as it may have otherwise been varied),[173] why this power has been selectively removed in the case of migration matters has not been explained.

Standing

In general, the same classes of person will have standing to apply for review of a migration decision.[174] However, the standing requirements under the new migration code will be more restrictive for business visa decisions. Only the non-citizen who applied for the business visa or the person who is the subject of the decision will be able to apply for merits review of decisions relating to business visas. Others whose interests are affected, such as a family member who does not require a visa but has a right to remain in Australia, would no longer be able to apply.

Public or private review

The majority of reviews in migration matters will continue to be conducted in public.[175] Review of protection visa applications will continue to be conducted in private.[176] In addition, the review of protection visa character decisions, which is currently conducted in public before the AAT,[177] will be conducted in private before the IRD.[178]

Transitional provisions for review underway at transfer date

Transfer and non-transfer of members

The tenure of judges who are either the President or Deputy Presidents of the AAT is preserved[179] after the AAT is abolished. Those judges will continue in or resume their judicial offices within the Federal Court or Family Court, but they will not become members of the new ART.

All the current members of the MRT and RRT whose terms have not expired when the MRT and RRT are abolished will automatically be appointed as members of the Immigration and Refugee Division of the ART for a period of 12 months.[180] However, Principal Members and Senior Members of the MRT and RRT will become ordinary members of the ART. It seems that, in any event, neither the current Principal Member of the MRT nor the RRT will be with their respective tribunals at the time of the transfer to the ART.[181] It is not presently clear whether the Attorney-General intends to fill those foreshadowed vacancies in the interim.

By contrast, no provision is made for the transfer of any current members of the AAT or SSAT to the ART. The Attorney-General in his second reading speech on the ART Bill stated that:

> It is expected that many members will be chosen from those currently serving on the existing tribunals, bringing their experience and expertise to the new Tribunal.[182]

However, it appears that no approaches have been made to currently serving members of the AAT,[183] and that the members performing the work currently performed by the AAT will be appointed through a new appointment process. In answer to a question at Senate Estimates, a senior member of the Attorney-General's Department stated that '[o]f course, the existing members may wish to apply and they would be considered, but there will be a new appointment process.'[184] This means that before the ART commences operations, it will need to have recruited sufficient members to replace the existing AAT and SSAT members. If this is not done, no work will be able to be done in five of the ART's six divisions for a considerable period while appointments are made and training of members is conducted.

It seems the justification for transferring all members of the MRT and RRT is job security and stability. The terms of all the current members of the MRT and RRT are due to expire on 31 January 2001, in anticipation of the ART commencing on 1 February 2001. As the ART is currently not due to commence until 1 July 2001, it was deemed appropriate to give members some continuity, rather than to reappoint them for five months until July, then require them to reapply to become members of the ART.[185] However, this justification surely also applies to the SSAT's members, all of whose terms also expire on 31 January 2001.[186] Additionally, the terms of a number of part-time members, senior members and Deputy Presidents of the AAT are due to expire on 31 January 2001, and the overwhelming majority of part-time members' terms will expire at some point before July

2001.[187] No explanation is given as to why MRT and RRT members are given some measure of continuity whereas SSAT members and part-time AAT members are not.

No provision is made in the Bill for the transfer of staff of the existing tribunals, although the Attorney-General in his second reading speech stated that the ART 'where appropriate, will use the support personnel of the existing tribunals, retaining valuable corporate knowledge and ensuring continuity in the administration of the federal merits review system.'[188] It now appears that all staff of the existing tribunals will be transferred to the ART, and then the ART will conduct a rationalisation, which is anticipated to include staff cuts of approximately 15%,[189] or possibly 60 to 80 positions.[190]

The Administrative Review Council (the Council) is abolished by the Bill, but immediately re-established under the ART Bill.[191] All members of the Administrative Review Council will continue their appointments for the full length of their terms, and any inquiries or references to the Council that have not been completed by the time the AAT Act is repealed are also expressly continued in existence.[192] However, no provision is made for the transfer of staff of the Council.

Pension entitlements of presidential members of AAT

All judges who are presidential members of the AAT and non-judicial Deputy Presidents of the AAT who currently have an entitlement to pensions under the *Judges' Pensions Act 1968* will continue to be so entitled.[193] The rate for Deputy Presidents who are not Family Court or Federal Court judges will be, as at present, 82% of the rate for federal judges.[194]

Deputy Presidents of the AAT who have elected to be covered by the *Judges' Pensions Act 1968*[195] and who have served 10 years, but who do not currently have an entitlement to the judicial pension because they have not reached 60, will be deemed to be over 60, and so will receive a pension. The value of the pension will be reduced from the statutory rate of 60% of the judicial salary, taking into account that the Deputy President did not serve the full term until the age of 60.[196] There are two Deputy Presidents who will be covered by this provision, and who will receive reduced pensions as a result of this provision.[197]

However, Deputy Presidents who have not served in the AAT or other judicial office for at least 10 years will not qualify for the judicial pension. This is because judges must both attain 60 and have served for at least 10 years.[198] This may produce inequity and hardship, as these Deputy Presidents have elected to be covered by the *Judges' Pensions Act 1968* rather than receive superannuation, but will because of the abolition of the AAT now be entitled to neither.

Matters which will be transferred to the ART

The transitional provisions in **Schedules 15, 16 and 17** of the Bill apply to decisions made by the agency or Department before the existing tribunals are abolished, where review of them by the AAT, MRT, RRT or SSAT is not commenced or is not completed before the abolition time.

Applications not made before the ART commences operation

If a departmental or agency decision-maker has made a decision before the AAT is abolished, but the time for application for review to the AAT has not expired by the time the AAT is abolished, application for first-tier review may be made instead to the ART.[199]

If a migration or refugee decision is made, but no application for review has been made before the MRT and RRT are abolished, then the application for ART review must be made in accordance with the procedures in **Schedule 16** of the Bill.[200]

Where the SSAT has made a decision, but no application for review by the AAT has been made before the SSAT and AAT are abolished, a person can apply instead to the ART for first-tier review of that decision, subject to time limits.[201] It is interesting to note that ART review of SSAT decisions will be first-tier review, although one level of external review has already been had, before the SSAT.

Applications already in train when the ART commences operation

If an application has been duly made and accepted by the AAT, MRT, RRT or SSAT, but the relevant tribunal has not completed its decision, the matter is deemed to have complied with the application procedures for the ART, and will continue to be heard before the ART.[202] All these transitional cases will be heard by the ART as first-tier review cases. If the matter was before the MRT or RRT, the member or members who constituted the tribunal before its abolition will automatically continue hearing the case within the ART.[203]

Importantly, matters which are appealed from the SSAT to the AAT and transferred to the ART for completion will have no right of second-tier review in the ART.[204] This reflects the fact that SSAT decisions have already had one level of external review.[205]

Matters which will not be transferred to the ART

Certain classes of decisions in respect of which an application may currently be made for review to the AAT are excluded from the operation of the transitional provisions. These are:[206]

- applications for review of the refusal or cancellation of a migration business visa, the refusal or cancellation of a migration visa on character grounds, and criminal deportation decisions
- applications for review by the AAT of all decisions of the VRB, and
- applications for review of certain decisions of the SSAT.[207]

The *Explanatory Memorandum* does not provide any indication as to why these classes of decision are excluded from the transitional provisions. The Bill does permit regulations to be made making transitional provisions in relation to such decisions,[208] although there is

no indication whether regulations will in fact be made or whether the right of review will be lost in respect of these decisions.

Procedures for matters transferred

The Bill contains a number of provisions designed to assist with the smooth and efficient transfer of incomplete and uncommenced review proceedings from the AAT, MRT, RRT and SSAT to the ART.[209]

The entitlement to participate in review will not alter when matters are transferred to the ART. All persons who are parties to an incomplete proceeding before the AAT or SSAT for review will continue to be participants in the first-tier review before the ART.[210] Similarly, those who have applied to become parties before the AAT will have their applications dealt with by the ART in accordance with substantially similar criteria.[211] Further, applicants who are statutorily disentitled from appearing before a hearing of the MRT or RRT will continue to be disentitled during the continuation of their case before the ART.[212]

The ART must have regard to all evidence and documents relating to a case which were before the AAT, MRT, RRT or SSAT. The ART may permit a person to give the same evidence again before the ART, but is not obliged to, and may instead rely on the transcript of evidence given before the AAT, MRT, RRT or SSAT.[213]

In general, the ART will take up matters at the point where the AAT, MRT, RRT or SSAT left them, thus eliminating the need for duplication of procedural steps. So, steps taken under existing legislation will be deemed to have been taken under the ART Bill. For example:

- requirements in existing legislation to give notices and provide statements of reasons will satisfy the analogous requirements contained in the ART Bill[214]

- opportunities to provide additional information, to comment on information or to appear and give evidence before the MRT or RRT will continue to be available when the case is transferred to the ART[215]

- all the evidence, records and documents relating to the review of decisions and other affairs of the AAT, MRT, RRT and SSAT, will be transferred to the ART[216]

- directions given by the AAT, MRT, RRT or SSAT before they were abolished will continue to have effect as if the directions had been made by the ART, including directions that hearings be conducted in private[217] and summonses to appear to give evidence or produce documents.[218]

- specific review procedures of the existing tribunals will continue before the ART, including the ability to give evidence or appear before the MRT or RRT by telephone or closed circuit television,[219] the AAT's discretionary power to waive payment of

application fees,[220] and the SSAT's power to declare that social security payments continue until review is finalised[221]

- certificates given by the relevant Minister in relation to the non-disclosure of information will continue in effect as if they had been granted under the ART Bill[222]
- any stay of the operation of a decision granted by the AAT will continue to have effect during first-tier review by the ART[223]
- an opinion given by the Federal Court as to a question of law referred to it by the AAT is binding also on the ART,[224] and
- anything said or done during a preliminary conference or mediation conducted under the AAT Act will continue to be inadmissible in evidence in proceedings before the ART.[225]

Importantly, a party who is represented in a matter which has been commenced before, but not completed by, the AAT or SSAT will continue to have a right to be represented before the ART, both in relation to first-tier and any second-tier review,[226] and will not require leave of the ART. Parties assisted by an interpreter before the MRT or RRT will continue to have the assistance of that same interpreter available until their case is heard to completion.[227]

The President of the ART is responsible for preparing the final annual reports of the AAT, SSAT, MRT and RRT after these tribunals have been abolished.[228] As the ART is a completely separate entity from these tribunals, and no provision is made for the transfer of any of the staff of the four tribunals, nor for the transfer of AAT or SSAT members, this is a curious obligation.

Continued effectiveness of completed AAT decisions

Matters dealt with under the AAT Act and other current legislation will continue to be effective despite the abolition of the tribunals. Thus, decisions of the AAT, MRT, RRT and SSAT, including decisions confirming settlements agreed between the parties, will continue to have effect even after the tribunals are abolished.[229]

In addition, if the AAT, MRT, RRT or SSAT has remitted a decision to the original decision-maker for reconsideration, the decision-maker must still reconsider the decision even if the tribunals have been abolished before the reconsideration has been completed.[230]

Interestingly, the ART will assume the obligation to provide a statement of reasons if the AAT, MRT, RRT or SSAT has not provided a written statement of reasons for its decision prior to being abolished.[231] The MRT, RRT and SSAT are statutorily required to prepare written reasons.[232] If the tribunal concerned has drafted a statement of reasons for the decision, the ART will simply have to provide the document to the party who requested it. However, as the AAT is not required to provide written reasons for a decision,[233] and the

request for reasons may made by a party after the AAT has actually been abolished,[234] the ART may find itself in the predicament of being statutorily required to give written reasons for a decision it did not make. Problems may also arise where members of the MRT, RRT or SSAT leave having made a decision but without providing a written statement of reasons for it. If these provisions are to stand, consideration needs to be given to a requirement that all members of existing tribunals, but particularly AAT members, prepare written reasons for all decisions which will be handed down shortly before the transfer to the ART.

Review of completed tribunal decisions

The rights to obtain review of tribunal decisions are neither diminished nor enhanced. The existing rights, namely:

- to appeal from a decision of the AAT to the Federal Court on a question of law[235]
- to apply for judicial review of decisions of the AAT or SSAT under the *Administrative Decisions (Judicial Review) Act 1977*,[236] or to apply for modified judicial review of decisions of the MRT or RRT under Part 8 of the *Migration Act 1958*[237]
- the Minister for Immigration and Multicultural Affairs' power to substitute a more favourable decision for that of the MRT or RRT,[238] and
- any other rights to apply for review of decisions of the AAT, MRT, RRT or SSAT,[239]

are expressly preserved, despite the abolition of the existing tribunals.

The Federal Court is currently required to sit as a Full Court when hearing matters coming from a tribunal which is constituted by or includes a Judge as a member. The Bill provides that the Federal Court has the discretion to sit as a single Judge in determining interlocutory applications[240] from tribunals, and may determine these applications without an oral hearing.

Drafting error

There is a drafting error in **subclause 40(9) of Schedule 15**. The subclause is continuing the effect of section 190 of the *Social Security (Administration) Act 1999* in relation to a power which is supposed to exist under subsection 1218A(2) of the *Social Security Act 1991*. However, section 190 was repealed[241] and subsection 1218A does not contain a power, rather a statutory right. It appears that the subclause is continuing the effect of a repealed provision, and should simply be deleted.

Regulations

Proposed section 6 contains power to amend the Bill or other Acts through regulations, if the amendments are 'consequential on' the repeals and amendments made by the Bill and

the ART Bill. Regulations may also cover matters of a transitional or savings nature arising from the transition from the AAT Act to the ART Bill. The regulations may have retrospective effect if they are made within a year of the commencement of the Bill.[242]

Amendments to Acts are usually effected through statute, not regulations. However, given the number of Acts amended by the Bill and the complexity and length of the Bill, it seems defensible to permit regulations to make what the *Explanatory Memorandum* describes as 'any necessary consequential amendments that are inadvertently not provided for in this Bill'.[243]

It is of concern, however, that the power to make consequential amendments to other Acts through regulations seems quite widely drafted and may permit amendments to Acts which make more than mere straightforward or drafting-type amendments. The Bill does not define what amendments will be considered 'consequential on' the enactment of the ART Bill. The present Bill is parenthetically entitled 'Consequential and Transitional Provisions', but it does much more than merely make technical amendments. It alters, and in the case of migration decisions substantially replaces, the operation of the ART Bill for particular review jurisdictions. If these amendments are considered 'consequential', it is possible that the regulations could also make changes of substance, for example, modifying the operation of the ART Bill in respect of particular classes of decisions, on the basis that these substantive modifications were 'inadvertently not provided for' in the present Bill.[244]

The main mechanism for scrutiny of such amendments is through the power of either House of Parliament to disallow regulations within 15 sitting days after they are tabled.[245] The Senate Standing Committee on Regulations and Ordinances does scrutinise regulations, but it performs a technical legislative scrutiny rather than examine their desirability as a matter of policy.[246]

The power to amend Acts by regulation is known as a 'Henry VIII clause', because that king was renowned for his extensive use of such powers during his reign. Legal commentators, Pearce and Argument, caution that 'such clauses vest an enormous amount of power in the executive government' and this power is capable of being abused, even if there is no evidence it has been abused to date.[247]

Concluding Comments

A 'comprehensive, coherent and integrated' system?

When the Administrative Review Council proposed the amalgamation of the existing tribunals and the creation of the ART, it hoped to achieve a return to the 'comprehensive, coherent and integrated system of Commonwealth administrative law' envisaged in the Kerr Committee report of 1971.[248]

The merits review scheme proposed by the ART Bill and this Bill certainly appears to be comprehensive. The sheer volume of the legislation, comprising 154 pages setting out the structure and procedures of the ART, and 416 pages of amendments and exemptions from the general scheme, lends weight to this impression. The self-contained migration review code contained in **Schedule 14** appears to have accounted for every conceivable possibility. In particular, the provisions in the migration review code exhaustively prescribing the manner and form of giving and receiving of documents, and the date on which documents delivered by various methods are deemed to have been received are comprehensive and clear. The transitional arrangements for cases which are underway at the time the AAT, SSAT, MRT and RRT are abolished also appear to have comprehensively dealt with all the potential permutations.[249]

However, a number of features of this Bill cast doubt on whether the scheme created is in fact a coherent and integrated system, or whether, as Robin Creyke has observed, the 'framework for the new tribunal … is conceptually muddy.'[250] There are many distinctions drawn in the Bill between categories of case which have no stated rationale and appear to be inconsistencies of treatment. Some of the more significant differences which have been pointed out in this Digest are listed below.

Exclusion of major jurisdictions – veterans' affairs and migration

Most fundamentally, the lack of integration is illustrated in the exclusion of veterans' and migration matters from the scope of the new scheme. The VRB continues in existence as a separate tribunal, despite the abolition of the other major Commonwealth merits review tribunals. Further, migration and refugee decisions are exempted from all the provisions in proposed Parts 4 to 10 of the ART Bill (unless those procedures are specifically inserted into the migration review code). As Creyke has commented:

> This differential treatment for close to half the ART's projected case-load of 40,000 cases per annum [migration and veterans' matters] … means that any vision of a 'comprehensive, integrated and coherent' framework for the new body must be discarded.[251]

First-tier or second-tier review

Another example of a failure to meet the stated objectives is that some decisions which have already had one level of merits review before coming to the ART will be heard in the first tier of the ART, whereas others will be heard directly in the second tier of the ART. In the field of veterans' affairs, decisions which have had review by the RC will be heard in the first tier of the ART, with a further possibility of review before the second tier of the ART with leave, whereas the review of all decisions of the VRB will be conducted in the second tier of the ART. This is despite the fact that both categories of decision have been through one level of merits review. The justification given is that the VRB conducts external merits review whereas the RC provides only internal merits review.[252]

However, the justification is not consistently applied in other jurisdictions. The transitional provisions in **Schedule 15** permit review by the ART of decisions made by the SSAT before it was abolished. Yet, although the SSAT is an external merits review body like the VRB, these decisions will be reviewed in the first tier of the ART.[253]

Transfer of members of MRT and RRT, but not AAT and SSAT

A further discrepancy occurs in the area of transfer of membership of the existing tribunals. The Attorney-General has stated that '[i]t is, of course, expected that there will be considerable continuity of membership between the existing tribunals and the ART.'[254] However, the Bill reveals that all current members of the MRT and RRT will automatically be transferred to the ART for a period of 12 months, whereas current members of the AAT and SSAT will not.[255]

Continuation of specific procedures in some jurisdictions but not others

Another inconsistency of approach is demonstrated in the fact that some jurisdictions retain their own specialised procedures relating to matters such as privacy of review and multi-member panels, whereas other jurisdictions are stripped of their individualised procedures relating to the same matters.

For example, ASIO reviews and refugee reviews are currently conducted in private before the AAT or RRT, and will continue to be held in private before the ART. Taxation review proceedings may be conducted in private at the request of the applicant, and this provision will be maintained before the ART. However, social security reviews, which are always heard in private before the SSAT, will be required to be conducted in public before the ART.

Similarly, applications for review of security assessment decisions will continue to be heard by a panel of three ART members. In reviewing applications for refugee protection visas, the number of ART members assigned may actually be an increase over the present position.[256] However, social security reviews, which are currently ordinarily heard by a panel of three, will be reduced to a single member in most cases.[257] In the absence of any explanation, it can only be assumed that the Government considers that in the SSAT 'multi-member panels are being used unnecessarily, increasing costs and delays.'[258] This seems surprising, given the evidence that the SSAT with its three-member panels is said to be the cheapest and fastest of all the current review tribunals.[259]

A third procedural inconsistency is that multi-member ART panels may be constituted in the IRD to provide 'developmental experience' for IRD members, but not to provide 'developmental experience' for members of any other division.[260] However, the proposed amendments to the Bill tabled by the Government in the House of Representatives, which remove 'developmental experience' as a criterion for constituting multi-member panels in the IRD, would remove this inconsistency.

Fourthly, it is of concern that the IRD, unlike all other Divisions of the ART, is under no express obligation to afford procedural fairness.[261]

A transparent system?

A number of features of the proposed system contained in the Bill and the ART Bill give rise to concerns about the transparency of the proposed merits review process. As discussed above, there is at least a theoretical concern that regulations may make substantive amendments to merits review rights.[262]

Of greater concern is the fact that, despite early assurances to the contrary from the Attorney-General,[263] the directions will not be disallowable instruments, and thus will not be subject to Parliamentary scrutiny. This is of particular concern given the power of the Minister to make directions, which will prevail over directions made by the ART executive, and which will relate to a number of important matters, especially in the migration jurisdiction.[264]

Another attribute of the Bill which lacks transparency is that no explanation is given in the *Explanatory Memorandum* or second reading speech for a number of substantive alterations made, particularly within the migration portfolio. Some of these include:

- applicants for review of a security assessment decision made by ASIO will lose the right to have the assessment reconsidered if fresh evidence becomes available, even after the tribunal has completed its review[265]
- the standing requirements to apply for review of a decision relating to a business visa will become more restrictive[266]
- the IRD, unlike all five other divisions of the ART and unlike the present MRT and RRT, will not have power to vary a decision,[267] and
- the exclusion from the operation of the transitional provisions of certain classes of matter.[268]

Further, the requirements that the ART prepare the final annual reports for each of the AAT, MRT, RRT and SSAT,[269] and in some circumstances even prepare statements of reasons for decisions handed down by those previous tribunals,[270] can only detract from the level of accountability in the transitional period.

A 'fair, just, economical, informal and quick' system?

The ART will be required to be 'fair, just, economical, informal and quick'.[271] The Digest (Bills Digest No 40 of 2000-01) for the ART Bill evaluates whether the procedures contained in that Bill achieve the objective. In addition, some of the amendments in the present Bill appear designed to facilitate this, including:

- the broad power to give directions (providing it does not become an opportunity for Ministerial control over or agency capture of the ART Divisions),[272]
- the expanded jurisdiction of the Small Taxation Claims Tribunal in respect of quick and easy review matters,[273] and
- the ability of certain taxation objectors to elect to terminate a review in the ART and transfer proceedings to the Federal Court.[274]

However, a considerable number of the amendments contained in the Bill may make it more difficult for the ART to fulfil this objective to the extent currently achieved by the existing tribunals. In the social security jurisdiction, a number of amendments to conform to the scheme of the ART Bill will result in a decreased ability to provide fair, informal and quick review. For example, social security applicants will lose the automatic right of a second tier of external merits review, which is of critical significance for a substantial minority of applicants. In addition, most social security applications will be determined by a single member, without the benefit of the present multi-disciplinary multi-member panels used by the SSAT and without a guaranteed right of second tier review. It hardly appears conceivable that a single ART member will be able to match the current speed and efficiency of the SSAT. Even if these objectives are achieved, it is likely to be at the expense of fairness, as there will be no safety net of a right of second tier review to rectify erroneous decisions hastily made. Further, social security applicants may no longer be able to make an application for review orally or over the telephone.[275]

Some of the amendments to the social security jurisdiction go further than implementing the ART Bill procedures. For example, the Secretary must be present at hearings, whereas at present he or she is excluded from hearings before the SSAT, and under the ART Bill generally there is a discretion not to appear.[276] As Creyke has commented, 'the burden of the loss falls on those in the income support division, the least powerful politically of the [ART's] constituency.'[277]

In the migration and refugee jurisdiction, amendments to conform to the scheme of the ART Bill will also decrease the 'fairness' of merits review, although they may well increase its speed. For example, applicants for review of decisions relating to criminal deportation, business visas or refusal or cancellation of visas on character grounds will no longer have a right to representation.[278] The emphasis on review on the papers, the ability to end a review without making a decision if the applicant failed to comply with a formal requirement, and the absence of a right to appear or call witnesses all tend to reduce the fairness of migration review.[279]

Some of the amendments to the migration review jurisdiction which may adversely affect the quality of review provided are not explicable on the basis of implementing the ART Bill procedures. These include the lack of an express obligation to accord procedural fairness, the ability to reconstitute the ART if a member has not complied with a direction, and the statutory prohibition on the ART accepting an application for review which has not complied with formal requirements, including time limits.[280]

Errors

Finally, it should be pointed out that the Bill contains a few errors. Some of these are mere typographical errors, which have been corrected by the amendments proposed by the Attorney-General.[281] However, other typographical errors have not been corrected by the proposed amendments.[282] There is also an erroneous reference to a repealed provision in **Schedule 15**.

Of most significance are the anomalies and inconsistencies generated by the use of a definition of 'decision-maker' in relation to veterans' reviews which cross-refers to subsection 175(1) of the *Veterans' Entitlements Act 1986*. The result of this drafting is that decisions of the VRB will be treated differently and applicants will be accorded different rights according to whether the VRB affirmed, varied or set aside the RC's original decision.[283] There seems to be no coherent basis for making such a distinction and the proposed amendments do not address this problem adequately.

Conclusion

Welfare rights advocate Sandra Koller claims the Bill 'does not do what it was supposed to do, which was just amalgamate. It does something worse: it gets rid of the rights of administrative review for ordinary, disadvantaged people.'[284] While this is clearly an overstatement, the Bill does much more than merely make consequential amendments to the major merits review jurisdictions. A number of these amendments do not appear to be consequential upon the amalgamation of the existing merits review tribunals. Dr Griffiths, representing the Law Council of Australia, has expressed the opinion that the Bill 'leans too heavily towards the bureaucratic desire for certainty at the expense of individual rights and justice.'[285]

Endnotes

In the Endnotes, '**proposed new section'** is used to refer to modifications to the provisions of the ART Bill which are made by this Bill through the ASIO Schedule, Taxation Schedule, Social Security Schedule, Veterans' Schedule or Family Assistance Schedule.

'**Clause'** is used to describe provisions of Schedules which stand alone, such as Schedules 15 to 17, and the ASIO Schedule, Taxation Schedule, Social Security Schedule, Veterans' Schedule and Family Assistance Schedule which will be appended to other Acts by Schedules 5, 7, 9, 11 and 13. '**Item'** is used to describe provisions of amending Schedules, such as Schedules 4, 6, 8, 10, 12 and 14.

Only references to the provisions of the Bill (including changes made by the Bill to the ART Bill), are printed in bold type. The unamended provisions of the ART Bill itself are in ordinary Roman type.

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1 This is currently the first parliamentary sitting date in 2001: http://www.aph.gov.au/senate/committee/ADVERT/lc_artbill.htm (24 November 2000).

2 Attorney-General Daryl Williams AM QC, *Seminar: Administrative Law in Transition – the Proposed Administrative Review Tribunal*, Senate Legal and Constitutional Legislation Committee, *Hansard*, 25 October 2000, p. 1.

3 This assumes passage of the Bills by the Senate, either without amendment or with amendments acceptable to the Government, soon after the Senate Legal and Constitutional Legislation Committee reports in February 2001. The substantive provisions of this Bill and the ART Bill are due to commence 12 months after Royal Assent, unless an earlier date is fixed by Proclamation: **proposed subsection 2(2)** of the Bill and **proposed subsections 2(2) and (3)** of the ART Bill.

4 **Proposed section 4**.

5 **Item 202 of Schedule 14**.

6 **Item 29 of Schedule 10**.

7 **Items 124, 125, 126, and 460 of Schedule 1 and items 101, 109, 395, 401 and 402 of Schedule 3** may be delayed until certain items of the *Broadcasting Services Amendment (Digital Television and Datacasting) Act 2000* commence. Similarly, **items 463 to 469 of Schedule 1** and **items 265 and 266 of Schedule 2** may be delayed until the *Renewable Energy (Electricity) Act 2000* commences.

Item 132 of Schedule 1 and **item 74 of Schedule 2** will not come into operation at all if the *Classification (Publications, Films and Computer Games) Amendment Act (No 2) 2000* commences prior to the substantive provisions of the ART Bill. Similarly, **items 569 and 570 of Schedule 1** and **items 308 and 309 of Schedule 2** and **item 577 of Schedule 3** will not come into operation at all if the *Tradesmen's Rights Regulation Repeal Act 2000* commences prior to the substantive provisions of the ART Bill.

8 The only persons who may apply for review of ASIO's decisions are persons in respect of whom a security assessment has been made (**proposed new section 61** of the ART Bill, substituted by clause 2 of the ASIO Schedule. See also subsection 27AA(1) of the AAT Act). A security assessment is a written opinion provided by ASIO to a Commonwealth agency as to whether certain conduct relating to a particular person would be consistent with security requirements. This may cover a variety of conduct, for example, hiring a person as an employee, promoting a person to a position of trust and confidence, or granting a person access to classified information. In reviewing security assessment decisions, the ART must be constituted by three members, at least one of whom must have relevant experience in relation to the applicant's field of employment, or matters of the kind to which the assessment related (**proposed new section 69** of the ART Bill, substituted by clause 4 of the ASIO Schedule. See also section 21AA of the AAT Act). The review is conducted in private, and restrictions on the publication of evidence apply (**proposed new sections 100 and 100A** of the ART Bill,

substituted and inserted by clause 10 of the ASIO Schedule. See also section 35AA and subsection 39A(5) of the AAT Act). Expanded provisions permitting ASIO or the Attorney-General not to disclose information, including to the applicant, also apply (**proposed new sections 77 and 101** of the ART Bill, substituted by clauses 5 and 11 of the ASIO Schedule. See also sections 38A and 39B of the AAT Act). The ART's findings are not published, but a copy is given to the applicant, ASIO, the Commonwealth agency involved and the Attorney-General (**proposed section 132A** of the ART Bill, inserted by clause 14 of the ASIO Schedule. See also section 43AAA of the AAT Act). If an applicant is successful in his or her application for review, the ART has power to award costs against the Commonwealth (**proposed section 156A** of the ART Bill, inserted by clause 21 of the ASIO Schedule. See also section 69B of the AAT Act).

9 **Item 7 of Schedule 4**.

10 Subsection 54(2) of the *Australian Security Intelligence Organisation Act 1979*.

11 See proposed sections 63 and 65 of the ART Bill. The availability of fresh evidence in relation to a particular applicant's security clearance is unlikely to raise an issue or principle of general significance. It is unclear whether the other ground for review, manifest error, could include an error which becomes manifest only when fresh evidence which was not before the ART becomes available. In any event, the availability of second-tier review on this ground is considerably restricted by the requirement that both parties agree that the error is manifest.

12 See section 14ZZ of the *Taxation Administration Act 1953*.

13 Under sections 14ZX and 14ZY of the *Taxation Administration Act 1953*, decisions by the Commissioner of Taxation to refuse an extension of time to lodge a taxation objection, and decisions by the Commissioner on the merits of taxation objections are reviewable.

14 In addition to other conditions on third parties becoming participants in the review process, the applicant for review must agree to their participation (**proposed new subparagraph 84(1)(d)(iv) of the ART Bill**, inserted by clause 3 of the Taxation Schedule. See also section 14ZZD of the *Taxation Administration Act 1953*). All taxation review proceedings (except those in the Small Taxation Claims Tribunal) may be in private if the applicant so requests (**proposed new subsections 100(6) and 142(2A)** of the ART Bill, inserted by clauses 4 and 20 respectively of the Taxation Schedule. See also section 14ZZE of the *Taxation Administration Act 1953*). If proceedings are in private, the ART must endeavour to ensure in its published reasons for decision that the applicant cannot be identified (**proposed new subsections 136(7) and 142(4)** of the ART Bill, inserted by clauses 7 and 21 respectively of the Taxation Schedule. See also section 14ZZJ of the *Taxation Administration Act 1953*). The Commissioner is not required to give a taxpayer a statement of reasons for a decision on a taxation objection, and does not have to notify the taxpayer of the right to review (**clause 11 of the Taxation Schedule** and **proposed new section 14ZZA** of the *Taxation Administration Act 1953*, inserted by **item 12 of Schedule 6**. See also section 14ZZB of the *Taxation Administration Act 1953*). Taxation decisions are not stayed during review by the Tribunal or Federal Court, and remain enforceable during that time (**clauses 16, 18 and 19** of the Taxation Schedule, disapplying proposed sections 121 and 171 of the ART Bill. See also section 14ZZB of the *Taxation Administration Act 1953*).

15 **Items 9 and 10 of Schedule 6**.

16 **Proposed new section 68A** of the ART Bill, inserted by clause 1 of the Taxation Schedule. See also section 24AC of the AAT Act.

17 In **clauses 5, 6, 8, 9, 10 and 17** of the Taxation Schedule. Clauses 5 and 6 modify **proposed subsections 124(4) and 125(3)** of the ART Bill to allow the Commissioner 60 days to reconsider a decision where requested to by the ART, instead of the 28 day time limit currently specified. Clause 8 inserts **proposed new subsection 161(3A)** of the ART Bill, which will allow different practice and procedure directions to be made for the Taxation Division and for the Small Taxation Claims Tribunal. Clause 9 inserts **proposed new subsection 172(1A)** of the ART Bill, which will require the Small Taxation Claims Tribunal to consider the interests of the applicant before deciding to refer a question of law to the Federal Court. Clause 10 inserts **proposed new paragraph 194(2)(ba)** of the ART Bill, which will permit regulations to be made to ensure the correct fees are paid when claims are referred to the Small Taxation Claims Tribunal after the fee has already been paid. Currently, section 14ZZC of the *Taxation Administration Act 1953* gives applicants 60 days to apply for review of a decision by the Commissioner, but this time limit is not replicated in **proposed new subsection 141(2A)** of the ART Bill, inserted by clause 17.

18 See items 10 and 14 of Schedule 6 (inserting **proposed new subsection 14ZZ(2) and paragraph 14ZZN(1)(b)** into the *Taxation Administration Act 1953*).

19 Sections 24AA and paragraph 24AC(1)(a) of the AAT Act. It also has automatic jurisdiction in applications for a review of a refusal by the Commissioner to grant an extension of time to lodge a taxation objection: paragraph 24AC(1)(b) of the AAT Act and this will continue under the ART: **proposed new paragraph 68A(3)(b)** of the ART Bill, inserted by clause 1 of the Taxation Schedule.

20 See **proposed new section 68A** of the ART Bill, inserted by clause 1 of the Taxation Schedule. Another new feature is that the disputed amount may be determined by reference to the taxpayer's tax liability, rather than the gross amount of a deduction.

21 Section 24AA of the AAT Act and sub-regulation 19AA(2) of the *Administrative Appeals Tribunal Regulations 1976.*

22 Proposed section 143 of the ART Bill.

23 Because review of decisions of the VRB will be conducted at second-tier level, the amendments remove references to first-tier ART review and to 'original decisions' made by Departmental officers.

24 Some of the veteran-specific provisions are described in this footnote. The RC is specified as a person who may apply for and participate in review (**proposed new section 66 and paragraphs 84(1)(a) and (b)** of the ART Bill, substituted by clauses 22 and 30 of the Veterans' Schedule. Compare subsections 176(2) and (6) of the *Veterans' Entitlements Act 1986*). The documents that will satisfy the entitlement to a statement of reasons are specified (**proposed new subsection 57(6)** of the ART Bill, inserted by clauses 15 and 83 of the Veterans' Schedule. Compare subsection 176(3) of the *Veterans' Entitlements Act 1986*). A maximum period of 12 months is prescribed for an extension of the time in which a person may lodge an application for review (**proposed new subsection 142(2A)** of the ART Bill,

inserted by clauses 68 and 86 of the Veterans' Schedule. Compare subsection 176(4) of the *Veterans' Entitlements Act 1986*). The effective dates of certain determinations are also prescribed (**proposed new section 135A** of the ART Bill, inserted by clauses 65 and 85 of the Veterans' Schedule. Compare section 177 of the *Veterans' Entitlements Act 1986*).

25 Section 135 of the *Veterans' Entitlements Act 1986*. These are decisions under the *Veterans' Entitlements Act 1986* relating to pensions for war-caused incapacity (section 14), increase in rate of incapacity pension (section 15), Australian Defence Force and peacekeeper pensions (Part IV), and attendant allowance (section 98).

26 Subsection 175(1) of the *Veterans' Entitlements Act 1986*.

27 Under sections 57, 79T, 115, 118ZS of the *Veterans' Entitlements Act 1986*. These are decisions under the *Veterans' Entitlements Act 1986* relating to service pensions for age, invalidity, partner or carer (Part III); income support supplement (Part IIIA); allowances other than attendant allowance (eg funeral benefits, recreation transport, decoration allowance) (Part VI); and the grant of seniors health cards (section 118ZF).

28 Subsections 175(2), (2AAA), (2AA) and (4) of the *Veterans' Entitlements Act 1986*.

29 **Proposed new section 176** of the *Veterans' Entitlements Act 1986* (inserted by item 28 of Schedule 8) and **proposed new section 66** of the ART Bill (substituted by clause 22 of the Veterans' Schedule).

30 See **proposed new subsection 177(1)** of the *Veterans' Entitlements Act 1986* (inserted by item 28 of Schedule 8) and **clauses 20, 21 and 22** of the Veterans' Schedule.

31 See **proposed new subsection 177(2)** of the *Veterans' Entitlements Act 1986* (inserted by item 28 of Schedule 8) and **proposed Part 2** of the Veterans' Schedule.

32 The Hon Daryl Williams AM QC, Second reading speech on the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000, House of Representatives, *Hansard*, 12 October 2000, p. 21408.

33 See text below accompanying footnotes 252 and 253.

34 Proposed sections 6, 55 and subsection 67(2) of the ART Bill.

35 Definitions of 'decision-maker' and 'first-tier decision' inserted into **proposed new section 6** of the ART Bill by clauses 1 and 2 of the Veterans' Schedule.

36 The RC is defined as the decision-maker if the VRB has affirmed or has varied the decision of the RC, but the VRB is deemed to be the decision-maker if the VRB on review has set aside the RC's decision and substituted its own decision. This interpretation is expressly confirmed by the *Explanatory Memorandum* to the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000, p. 82.

37 **Proposed new section 59** of the ART Bill as modified by clause 16 of the Veterans' Schedule. Where the VRB has affirmed or varied the RC's decision, the ART's power is to review the adequacy of the RC's statement of reasons for decision, but not the reasons given by the VRB. However, where the VRB has set aside the RC's decision and substituted its own

decision, the ART has no power to review the adequacy of the RC's statement of reasons, but may review the VRB's reasons.

38 **Proposed new sections 124 and 125** of the ART Bill, modified by clauses 50 to 55 of the Veterans' Schedule. The ART has power to remit a matter to the 'decision-maker' for reconsideration, whether because fresh evidence is available, or for another reason. Where the VRB has affirmed or varied the RC's decision, the ART must request the RC to conduct the reconsideration. However, where the VRB has set aside the RC's decision and substituted its own decision, the reconsideration must be conducted by the VRB, not the RC. This is contrary to the structure established by the ART Bill, pursuant to which reconsideration of a decision, if necessary, should be conducted by the person or body who first made the decision, not by a review tribunal.

Finally, **proposed new section 134** of the ART Bill, as modified by clause 61 of the Veterans' Schedule, will deem the ART's decision to be the decision of the RC if the VRB affirmed or varied the RC's decision. However, the ART's decision will be deemed to be the decision of the RC if the VRB set aside the RC's decision. The significance of the deeming provision is unclear.

39 **Proposed amendments 20-26**, modifying the operation of clauses 85, 87(1), 94, 128(1), 129(1), 136(2) and 153(2)(a) of the ART Bill: House of Representatives, *Hansard*, 7 December 2000, p. 20766.

40 It is the definitions of 'decision-maker' and 'first-tier decision' in proposed section 6 of the ART Bill effected by **clauses 1 and 2** of the Veterans' Schedule, which are dependent on subsection 175(1) of the *Veterans' Entitlements Act 1986*, which are the root of the inconsistency.

41 This power is contained in subsection 31(1) of the *Veterans' Entitlements Act 1986*.

42 The power is contained in subsection 31(2) of the *Veterans' Entitlements Act 1986.*

43 Section 31 of the *Veterans' Entitlements Act 1986* is continued in existence, as amended by **item 4 of Schedule 8**. Clause 48 of the Veterans' Schedule modifies the operation of **proposed subsection 123(1)** of the ART Bill to provide that, during review by the ART, the RC must not alter the decision under review until the review and any appeals brought in relation to it have been finalised. However, this restriction is subject to an exception in proposed subsection 123(2) of the ART Bill, which permits review during ART proceedings if another statute expressly permits that. This exception has the effect of preserving the operation of subsection 31(2) of the *Veterans' Entitlements Act 1986*.

44 It would be simpler for clause 48 of the Veterans' Schedule simply to state that proposed section 123 of the ART Bill is disapplied for veterans' matters. This has been the approach adopted in the income support division: **clause 53** of the Social Security Schedule and **clause 54** of the Family Assistance Schedule.

45 **Proposed section 144A** of the *Social Security (Administration) Act 1999* (inserted by item 37 of Schedule 10) and **proposed section 111A** of the *A New Tax System (Family Assistance) (Administration) Act 1999* (inserted by item 26 of Schedule 12).

46 These are the grounds specified in proposed section 65 of the ART Bill for the grant of leave for second-tier review.

47 SSAT, *Annual Report 1998-1999*, p. 56. The corresponding statistics are not provided in the SSAT *Annual Report 1999-2000*.

48 **Schedule 10** amends the *Social Security Act 1991* and the *Social Security (Administration) Act 1999*, and **Schedule 12** amends the *A New Tax System (Family Assistance) (Administration) Act 1999*.

49 'Disapply' is a technical legal drafting term, which arises as a result of the complex structure of the consequential amendments made by the Bill. The ASIO Schedule, Taxation Schedule, Veterans' Schedule, Social Security Schedule and Family Assistance Schedule all modify the application of the general provisions contained in the ART Bill, creating customised procedures only for the classes of decisions dealt with in the respective Schedules. These modifications will not result in amendments to the ART Bill itself. Rather, the amendments are contained in separate Schedules to some of the legislation creating rights of administrative review. Under these Schedules, certain provisions of the ART Bill will apply in a modified form, or will not apply at all, for specific classes of decisions. That is, for a defined class of decisions, but not for the remaining decisions, the general procedures in the ART Bill are 'disapplied' and specific procedures are 'substituted'.

50 See **clauses 2, 3, 9-24, 27-38, 40-43, 45-47, 54-64, 66-68, 71, 74, 76, 77, 81-84, 87 and 89** of the Social Security Schedule, and **clauses 1, 3, 7-19, 23-25, 28-39, 41-48, 55-65, 67-72, 74, 75, 79-81, 83, 86 and 88** of the Family Assistance Schedule.

51 *Explanatory Memorandum* to the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000, p. 97.

52 **Proposed new paragraph 8(f)** of the *Social Security (Administration) Act 1999*, as modified by item 12 of Schedule 10.

53 This obligation will only apply to the ART in conducting first-tier review: **proposed new subsection 133(1)** of the ART Bill, as substituted by clause 69 of the Social Security Schedule. See section 9 of the *Social Security (Administration) Act 1999*. There is no corresponding obligation in family assistance law.

54 The ART's ability to request the Secretary to use these powers is slightly broader than the SSAT's present power, in that it extends to information that a person 'may have' (not just has) that 'may be' (not just is) relevant to the review proceeding. Compare **proposed new section 79A** of the ART Bill (inserted by clause 39 of the Social Security Schedule and by clause 40 of the Family Assistance Schedule) with section 166 of the *Social Security (Administration) Act 1999* and section 129 of the *A New Tax System (Family Assistance) (Administration) Act 1999*.

55 Although altering a decision while it is being reviewed by the ART is generally prohibited by proposed section 123 of the ART Bill, this provision is disapplied for social security reviews by **clause 53** of the Social Security Schedule and **clause 54** of the Family Assistance Schedule. This has the effect of continuing the Secretary's power under section 126 of the *Social Security (Administration) Act 1999* and section 105 of the *A New Tax System (Family Assistance) (Administration) Act 1999* to reconsider a decision during the review process.

56 **Clauses 69 and 72** of the Social Security Schedule, which insert proposed subsections 133(1), (1A), (1B) and (2A) into the ART Bill. Compare sections 150 and 151 of the *Social Security (Administration) Act 1999*.

57 **Proposed new subsections 155(2), (3) and (4)** of the ART Bill, inserted by clause 86 of the Social Security Schedule and clause 85 of the Family Assistance Schedule. Compare section 176 of the *Social Security (Administration) Act 1999* and section 140 of the *A New Tax System (Family Assistance) (Administration) Act 1999*.

58 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634. See also John McMillan, 'Review of Government Policy by Administrative Tribunals' (1998) *National Law Review* 10 at [34].

59 It is curious, however, that the relevance of policy to the ART's decision-making is made explicit only in relation to income support applications, and not in other areas.

60 Section 154 of the *Social Security (Administration) Act 1999* and section 116 of the *A New Tax System (Family Assistance) (Administration) Act 1999*. Under proposed section 141 of the ART Bill, application procedures are not specified, but will be set out in practice and procedure directions. It will not be known until practice and procedure directions for review of social security decisions are issued whether the facility to apply for review orally will be preserved or not.

61 Section 168 of the *Social Security (Administration) Act 1999* and section 131 of the *A New Tax System (Family Assistance) (Administration) Act 1999*.

62 Until recently, the Social Security Appeals Tribunal was required to be constituted by a minimum of three members and a maximum of four members in each case. It could be constituted by one or two members only if there were 'special circumstances justifying' this: section 1328 of the *Social Security Act 1991*. In 1999, this provision was repealed and replaced with clauses 10 and 11 of Schedule 3 of the *Social Security (Administration) Act 1999*. These provide that the number of members of an SSAT panel is in the discretion of the Executive Director, but must not exceed four members. Despite this legislative change the SSAT has continued to sit with three-member panels—consisting of a legal member, a welfare member and a public administration member—in most cases: Margaret Carstairs, Acting Executive Member of the SSAT, *Seminar: Administrative Law in Transition – the Proposed Administrative Review Tribunal*, Senate Legal and Constitutional Legislation Committee, *Hansard*, 25 October 2000, p. 32.

63 Evidence of Ms Fleming to the Senate Legal and Constitutional Legislation Committee, 12 December 2000, *Hansard*, p. 108.

64 **Proposed new subsection 84(1)** of the ART Bill, modified by clause 43 of the Social Security Schedule and clause 44 of the Family Assistance Schedule. He or she cannot decline to be a participant in the ART review (**proposed new subsection 87(1)** of the ART Bill, modified by clause 45 of the Social Security Schedule and clause 46 of the Family Assistance Schedule). Nor can the Secretary apply to the ART to cease to be a participant (**clause 44** of the Social Security Schedule and **clause 45** of the Family Assistance Schedule disapply proposed section 85 of the ART Bill).

65 Sandra Koller, National Welfare Rights Network, *Seminar: Administrative Law in Transition – the Proposed Administrative Review Tribunal*, Senate Legal and Constitutional Legislation Committee, *Hansard*, 25 October 2000, p. 46.

66 See **proposed new subsection 105(2)** of the ART Bill (inserted by **clause 48** of the Social Security Schedule and **clause 49** of the Family Assistance Schedule).

67 Another advantage conferred on the Secretary is the immunity from compulsion under practice and procedure directions made either by the ART or the person conducting the inquiry: **proposed new subsections 108(2) and 117(2)** of the ART Bill (modified by clauses 49 and 51 of the Social Security Schedule and clauses 50 and 52 of the Family Assistance Schedule).

68 See **proposed new subsection 110(1A)** of the ART Bill (inserted by **clause 50** of the Social Security Schedule and **clause 51** of the Family Assistance Schedule).

69 See proposed section 85 of the ART Bill, which is disapplied for social security reviews, although the reason for this is not clear.

70 **Item 201 of Schedule 14** repeals Division 9 of Part 5 of the *Migration Act 1958*, which dealt with referrals to the AAT from the MRT, and **item 202 of Schedule 14** repeals Part 7 of the *Migration Act 1958*, which included provision for referrals from the RRT.

71 **Proposed section 343B** of the *Migration Act 1958*, inserted by **item 90 of Schedule 14**.

72 A few of the specific migration procedures which continue to apply, with only technical amendments, are described in this footnote. The Minister for Immigration and Multicultural Affairs has power to substitute a decision more favourable to the applicant for the decision of ART (**proposed section 351** of the *Migration Act 1958*, amended by items 96 and 97 of Schedule 14). The ART has power to hear oral evidence by telephone or closed circuit television (**proposed section 366** of the *Migration Act 1958*, amended by items 169, 170 and 171 of Schedule 14). Witnesses before the ART may not be examined or cross-examined (**proposed section 366D** of the *Migration Act 1958*, amended by item 177 of Schedule 14). The provisions for the appointment of interpreters also carry over (**proposed section 366C** of the *Migration Act 1958*, amended by item 176 of Schedule 14).

73 Part 7 of the *Migration Act 1958*, which currently deals with review by the RRT, will be repealed and its provisions amalgamated into the expanded Part 5.

74 For example, **items 1, 2, 3, 14, 15, 16, 21, 23, 24, 25, 30, 31, 32, 35, 47, 69, 203, 204, 209, 211, 219 and 222 of Schedule 14** remove references to the MRT, RRT and AAT and replace them with references to the ART. **Items 29, 41, 42, 43 and 46 of Schedule 14** remove references to the AAT Act and replace them with references to the ART Bill. **Items 44, 45, 50-56, 58-68 of Schedule 14** insert new definitions and terminology which are found in the ART Bill, for the sake of consistency between the migration code and the ART Bill.

75 For example, section 53 of the *Migration Act 1958*, relating to the Minister's communication with the applicant, is repealed, but the substance reappears in **proposed subsections 52(3A), (3B) and (3C), and proposed section 494D** of the *Migration Act 1958*. Paragraph 66(2)(d) of the *Migration Act 1958*, which sets out the requirements for notice of a right of review, is repealed, but reenacted in **proposed section 340** of the *Migration Act 1958*.

76 **Proposed section 338** of the *Migration Act 1958*, amended by items 72, 75, 76, 77, 81 and 83 of Schedule 14.

77 **Proposed subsection 338(4A)** of the *Migration Act 1958*, inserted by item 82 of Schedule 14.

78 **Proposed section 338A** of the *Migration Act 1958*, inserted by item 86 of Schedule 14. Compare section 411 of the *Migration Act 1958*. Two classes of decision that are currently RRT-reviewable decisions are not going to be reviewable by the ART. These are a decision made before 1 September 1994 that a person is not a refugee, and a decision made before 1 September 1994 to refuse to grant or to cancel a refugee visa: paragraphs 411(1)(a) and (b) of the *Migration Act 1958*. The reason for this exclusion is presumably that all decisions made before 1 September 1994 have now been reviewed or are six years out of time to apply for review.

79 **Proposed section 338D** of the *Migration Act 1958*, inserted by item 86 of Schedule 14. Compare paragraph 500(1)(a) of the *Migration Act 1958*.

80 **Proposed section 338C** of the *Migration Act 1958*, inserted by item 86 of Schedule 14. Compare paragraphs 500(1)(b) and (c) of the *Migration Act 1958*.

81 **Proposed section 338B** of the *Migration Act 1958*, inserted by item 86 of Schedule 14. Compare paragraph 500(1)(b) of the *Migration Act 1958*.

82 **Proposed section 343A** of the *Migration Act 1958*, inserted by item 90 of Schedule 14.

83 Section 32 of the AAT Act.

84 The power to issue directions is discussed in more detail in the text below accompanying footnotes 138-149.

85 **Proposed subsection 366A(3)** of the *Migration Act 1958*, as amended by item 174 of Schedule 14. Outside the ART, an applicant for review may be represented by a lawyer or other assistant to understand correspondence from the tribunal, and to prepare documents, statements and submissions: section 366A(4) of the *Migration Act 1958*.

86 Subsections 366A(1) and (2) of the *Migration Act 1958*.

87 **Proposed subsection 366A(2)** of the *Migration Act 1958*, as amended by item 172 of Schedule 14.

88 **Proposed subsection 306(2)** of the *Migration Act 1958*, inserted by item 48 of Schedule 14.

89 **Proposed subsection 52A(2A)** of the *Australian Citizenship Act 1948*, inserted by item 244 of Schedule 14.

90 **Proposed subsection 11A(7)** of the *Immigration (Guardianship of Children) Act 1946*, inserted by item 251 of Schedule 14.

91 This is so whether the Minister makes the initial decision, or overrides a decision of a departmental officer or the ART. See the definition of 'non-reviewable Minister's decision' in **proposed section 337** of the *Migration Act 1958*, (inserted by item 58 of Schedule 14), referring to decisions made under sections 501A and 501B, and subsections 501(1), (2) and (3), 501F(2) and (3) of the *Migration Act 1958*. Under **proposed subsection 501C(11)** of the *Migration Act 1958*, as substituted by item 223 of Schedule 14, decisions by the Minister

under subsection 501C(4) not to exercise the power to revoke his own decision after representations have been made concerning the person's character are also not reviewable. Curiously, these decisions are not included in the definition of 'non-reviewable Minister's decision' in **proposed section 337** of the *Migration Act 1958*. Although this makes no substantive difference, it would assist with consistency, which is a main object of the Bill.

92 Definition of 'non-reviewable Minister's decision' in **proposed section 337** of the *Migration Act 1958*, (inserted by item 58 of Schedule 14), referring to decisions made under subsections 500A(1) and (3) of the *Migration Act 1958*.

93 Three examples of this are given in this footnote. First, the existing legal protection and immunity of tribunal members, applicants and witnesses is extended to the representatives and assistants of applicants (**proposed section 373** of the *Migration Act 1958*, substituted by item 181 of Schedule 14. Compare proposed subsection 144(4) of the ART Bill). Secondly, ART staff, in addition to officers of other agencies such as Customs, the Australian Quarantine Inspection Service or the Australian Federal Police, will now have access to DIMA's movement records if the Minister authorises them to (**proposed paragraph 488(2)(f)** of the *Migration Act 1958*, inserted by item 215 of Schedule 14). Thirdly, fines are inserted as an alternative to the terms of imprisonment for the existing offences contained in the *Migration Act 1958*. The offences are failure to comply with a summons, refusal to be sworn or answer questions, giving false or misleading evidence, contempt of the ART, disclosing confidential information: (**proposed sections 370, 371, 372, 372A and 372B** of the *Migration Act 1958*, substituted by item 180 of Schedule 14). The offence of disclosing information in contravention of a direction by the ART (**proposed section 372C** of the *Migration Act 1958*) is new for AAT decisions, but replicates the existing subsections 378(3) and 440(3) of the *Migration Act 1958* for MRT and RRT decisions.

94 For example, the Bill creates a code for giving and receiving documents and the times when documents are deemed to have been received (**proposed sections 379AA to 379G** of the *Migration Act 1958*, inserted by item 201 of Schedule 14, deal with documents relating to ART decisions, and **proposed sections 494A, 494B, 494C and 494D** of the *Migration Act 1958*, inserted by item 216 of Schedule 14, deal with documents relating to Ministerial decisions. Compare sections 379A and 441A of the *Migration Act 1958*, and regulation 5.03 of the *Migration Regulations 1994*). The Bill will not require the ART to invite parties to the handing down and give 14 days notice (as is currently required by sections 368A and 368B of the *Migration Act 1958*). The ART will be able to give its decision orally (if the applicant or a representative of the applicant is present) or in writing, and must give a copy of the written decision and statement of reasons for decision to the applicant (**proposed sections 367, 368, 368A** of the *Migration Act 1958*, inserted by item 179 of Schedule 14).

95 **Proposed section 346A** of the *Migration Act 1958*, inserted by item 90 of Schedule 14, is the same as proposed section 143 of the ART Bill.

96 **Proposed section 353B** of the *Migration Act 1958*, inserted by item 106 of Schedule 14, is the same as proposed section 108 of the ART Bill.

97 **Proposed section 352** of the *Migration Act 1958*, inserted by item 98 of Schedule 14, is substantially the same as proposed section 127 of the ART Bill.

98 **Proposed section 368B** of the *Migration Act 1958*, inserted by item 179 of Schedule 14, is substantially the same as proposed section 138 of the ART Bill. Curiously, whereas proposed subsection 138(3) of the ART Bill gives two examples of 'obvious errors', namely typographical errors or inconsistency between the decision and the reasons, the provision of the *Migration Act 1958* which has been inserted contains no such clarifying examples.

99 This power, in **proposed subsections 349(2) and (2A)** of the *Migration Act 1958*, inserted by item 95 of Schedule 14, is the same as proposed subparagraph 133(2)(c)(ii) of the ART Bill. Currently the MRT and RRT only have power to remit matters for reconsideration by the Department in prescribed categories of case: paragraphs 349(2)(c) and 415(2)(c) of the *Migration Act 1958*.

100 **Proposed subsection 374(3)** of the *Migration Act 1958*, inserted by item 181 of Schedule 14, is the same as proposed subsection 153(3) of the ART Bill. The Bill also replicates proposed subsection 153(4) ART Bill, which provides that if the applicant is responsible for witness expenses, the witness may recover his or her fees and expenses as a debt from the applicant (**proposed subsection 374(4)** of the *Migration Act 1958*, inserted by item 181 of Schedule 14).

101 **Proposed section 378A** of the *Migration Act 1958*, inserted by item 195 of Schedule 14, is similar to proposed section 50 of the ART Bill. Currently, the Principal Member of the MRT may only delegate his or her functions to a senior member, and the Principal Member of the RRT may delegate to a member, but neither may delegate to public servants or consultants, sections 405 and 470 of the *Migration Act 1958*.

102 **Proposed amendments 34 and 35**, modifying item 195 of Schedule 14: House of Representatives, *Hansard*, 7 December 2000, p. 20766.

103 Bills Digest No 40 of 2000-2001, p. 10.

104 Subsections 360(2) and 425(2) of the *Migration Act 1958*.

105 **Proposed section 360A** of the *Migration Act 1958*, inserted by item 148 of Schedule 14.

106 **Proposed subsection 360(1)** of the *Migration Act 1958*, inserted by item 148 of Schedule 14. Review on the papers will be prohibited only if directions have been issued which state that a class of decisions must not be reviewed without a hearing, **proposed subsection 360(2)** of the *Migration Act 1958*, inserted by item 148 of Schedule 14.

107 The existing provision which requires that, if the ART has not already decided to determine the review in the applicant's favour, it must give the applicant the opportunity to comment on material that would be reason for affirming the decision under review, is maintained with minor alterations: **proposed section 359A** of the *Migration Act 1958*, as amended by items 137, 138 and 139 of Schedule 14. In addition, a new provision is inserted requiring the ART to give the applicant an opportunity to provide documents, written statements about facts or written submissions about whether the review should be conducted on the papers or not, and about the issues raised in the application, **proposed subsection 360B(1)** of the *Migration Act 1958*, inserted by item 148 of Schedule 14.

108 **Proposed section 347D** of the *Migration Act 1958*, inserted by item 90 of Schedule 14.

109 **Proposed section 360C** of the *Migration Act 1958*, inserted by item 148 of Schedule 14.

110 *Explanatory Memorandum* to the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000, p. 186.

111 Dr Peter Nygh, Principal Member, RRT, *Seminar: Administrative Law in Transition – the Proposed Administrative Review Tribunal*, Senate Legal and Constitutional Legislation Committee, *Hansard*, 25 October 2000, p. 47.

112 **Proposed section 361** of the *Migration Act 1958*, inserted by item 148 of Schedule 14.

113 Proposed subsections 96(1) and (2) of the ART Bill.

114 **Proposed subsection 361(1)** of the *Migration Act 1958*, inserted by item 148 of Schedule 14.

115 Subsections 360(1) and 425(1) of the *Migration Act 1958*, section 39 of the AAT Act. Applicants for review before the MRT and RRT currently do not have a right of appearance only when the tribunal has decided to determine the review in the applicant's favour, subsections 360(2) and 425(2) of the *Migration Act 1958*.

116 **Proposed subsection 361(2)** of the *Migration Act 1958*, inserted by item 148 of Schedule 14.

117 **Proposed section 361B** of the *Migration Act 1958*, inserted by item 148 of Schedule 14.

118 Compare sections 361 and 426 of the *Migration Act 1958*. Subsection 39(1) of the AAT Act requires an applicant to have 'a reasonable opportunity to present his or her case'.

119 **Proposed paragraphs 361B(1)(b) and (c)** of the *Migration Act 1958*, inserted by item 148 of Schedule 14.

120 **Proposed section 366C** of the *Migration Act 1958*, as amended by item 176 of Schedule 14.

121 Sections 362B and 426A of the *Migration Act 1958*.

122 Subsections 359C(1) and 424C(1) of the *Migration Act 1958*.

123 Subsections 359C(2) and 424C(2) of the *Migration Act 1958*.

124 See **proposed section 362B** of the *Migration Act 1958*, amended by items 157, 158 and 159 of Schedule 14, and **proposed section 362C** of the *Migration Act 1958*, inserted by item 160 of Schedule 14.

125 Apart from this provision, there may be an obligation on the ART to take positive steps to inquire into disputed matters, or to seek information which is centrally relevant and readily available. This may be part of the obligation to afford procedural fairness: see *Minister for Immigration, Local Government and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 303 per Toohey J. Alternatively or additionally, such failure to investigate may be a category of 'unreasonable' decision-making in the *Wednesbury* sense: see *Prasad* v *Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 175-176 per Wilcox J.

126 **Proposed paragraphs 362B(1)(c), 362C(2)(c) and (3)(c)** of the *Migration Act 1958*, inserted by items 159 and 160 of Schedule 14.

127 **Proposed section 362D** of the *Migration Act 1958*, inserted by item 160 of Schedule 14.

128 **Proposed section 362F** of the *Migration Act 1958*, inserted by item 160 of Schedule 14. The 14 days runs from the date of receipt of the notice under **proposed section 362E** of the *Migration Act 1958* from the ART that the review is ended.

129 **Proposed paragraph 475(2)(d)** of the *Migration Act 1958*, substituted by item 204 of Schedule 14.

130 **Proposed paragraph 362F(4)(b)** of the *Migration Act 1958*, inserted by item 160 of Schedule 14.

131 The Hon Daryl Williams AM QC, Second reading speech on the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000, House of Representatives, *Hansard*, 12 October 2000, p. 21410.

132 Ibid.

133 Proposed sections 128 and 129 of the ART Bill.

134 Proposed section 132 of the ART Bill.

135 Section 354 of the *Migration Act 1958*; subsection 21(1) of the AAT Act.

136 Section 421 of the *Migration Act 1958*.

137 **Proposed subsection 354(1)** of the *Migration Act 1958*, as amended by item 109 of Schedule 14.

138 **Proposed subsection 354(3)** of the *Migration Act 1958*, substituted by item 112 of Schedule 14.

139 **Proposed amendment 33**, modifying item 112 of Schedule 14: House of Representatives, *Hansard*, 7 December 2000, p. 20766.

140 Sections 353A and 420A of the *Migration Act 1958*.

141 **Proposed subsection 353A(1)** of the *Migration Act 1958*, as amended by item 100 of Schedule 14.

142 **Proposed subsection 353A(2A)** of the *Migration Act 1958*, inserted by item 104 of Schedule 14.

143 **Proposed subsection 353A(1)** of the *Migration Act 1958*, as amended by item 101 of Schedule 14. The matters that the Bill envisages will be contained in the directions include the manner and form in which a variety of documents are provided by the applicant (**proposed section 347A** of the *Migration Act 1958*, inserted by item 90 of Schedule 14) or by the Secretary of the Department (**proposed subsections 347C(2) and (3)** of the *Migration Act 1958*, inserted by item 90 of Schedule 14) and by the ART (**proposed subsections 347B(2) and 367(1)** of the *Migration Act 1958*, inserted by items 90 and 179 of Schedule 14). Directions may also specify classes of review that are to be conducted in an adversarial way, contrary to proposed paragraph 3(d) of the ART Bill (**proposed subsection 353A(5)** of the *Migration Act 1958*, inserted by item 105 of Schedule 14).

144 Guidelines currently cover the way in which the Principal Member or a Senior Member of the MRT exercise their discretion relating to the constitution of the MRT for review, subsection 354(2) of the *Migration Act 1958*. The analogous discretion reposed in the ART President and IRD executive member will in future be covered by directions: **proposed subsection 354(2)** of the *Migration Act 1958*, inserted by item 110 of Schedule 14.

145 Subsections s 352(2) and (3) of the *Migration Act 1958* currently specify a time limit of 10 working days (or 2 working days for applicants for bridging visas who are in immigration detention) for the Secretary to provide documents and reasons for decision after an application for review is made to the ART. Time limits will in future be covered by directions: **proposed section 347C** of the *Migration Act 1958*, inserted by item 90 of Schedule 14.

146 Directions will specify the following matters currently governed by regulations: time periods and the manner in which notice of an application for review of a character decision is given by the ART to the Secretary of the Department (**proposed subsection 347B(2)** of the *Migration Act 1958*, inserted by item 90 of Schedule 14. Compare subsection 500(6E) of the *Migration Act 1958*); and the time period within which to provide information or comment on information available to the ART (**proposed subsections 359B(2), (3), (4) and (5)** of the *Migration Act 1958*, amended by items 142-147 of Schedule 14).

147 For example, directions may provide that review of certain classes of decisions must not be conducted on the papers (**proposed subsection 360(2)** of the *Migration Act 1958*, inserted by item 148 of Schedule 14), or that applicants must be given a right to appear and give evidence (**proposed subsection 361(3)** of the *Migration Act 1958*, inserted by item 148 of Schedule 14). Directions may also provide that in some categories of case applicants may be represented, (**proposed subsection 366A(2)** of the *Migration Act 1958*, amended by item 172 of Schedule 14), or that applicants may examine or cross-examine witnesses, (**proposed section 366D** of the *Migration Act 1958*, amended by item 177 of Schedule 14). Further directions may require that in certain circumstances oral evidence must be taken in private (**proposed subsection 365(2A)** of the *Migration Act 1958*, inserted by item 167 of Schedule 14), or that the ART must publish or must not publish its reasons for decision in certain classes of decision (**proposed subsection 369(1)** of the *Migration Act 1958*, inserted by item 179 of Schedule 14).

148 **Proposed subsection 353A(3)** of the *Migration Act 1958*, inserted by item 105 of Schedule 14.

149 Those directions are listed in **proposed subsection 353A(4)** of the *Migration Act 1958*, inserted by item 105 of Schedule 14.

150 **Proposed subsection 343B(2)** of the *Migration Act 1958*, inserted by item 90 of Schedule 14.

151 **Proposed section 362D** of the *Migration Act 1958*, inserted by item 160 of Schedule 14.

152 Subsections 348(1) and 414(1) of the *Migration Act 1958*.

153 It has been consistently held that the 28 day time limit is an 'inflexible and imperative requirement that denies the Tribunal jurisdiction to entertain an application for review lodged out of time'; see the authorities collected in *Fernando v Minister for Immigration and Multicultural Affairs* [2000] FCA 324 (22 March 2000) at [17].

154 There does not appear to be any authority directly interpreting sections 348 or 414 of the *Migration Act 1958*. However, subsection 47(3) of the *Migration Act 1958* expressly prohibits the Minister from considering an application which is not validly made. The absence of any such express restriction in the case of applications to the MRT and RRT is to be contrasted

with this provision. Further, cases interpreting section 47 have intimated that, in the absence of this express provision, substantial compliance with the application requirements would probably be acceptable and there would be power to consider such applications: *Wu v Minister for Immigration and Ethnic Affairs (*1996) 64 FCR 245 at 287-288 per R D Nicholson J. Substantial compliance with form is all that was necessary in *Hamilton v Minister for Immigration and Ethnic Affairs* (1994) 53 FCR 349. In *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 162 ALR 577 at 594, Gaudron and Kirby JJ expressed the view that 'it would be an error of law reviewable under s 476(1)(e) for the Tribunal to decline jurisdiction because of some technical error in the application for review.'

155 **Proposed subsection 348(1A)** of the *Migration Act 1958*, inserted by item 92 of Schedule 14.

156 Dr Kathryn Cronin, *Seminar: Administrative Law in Transition – the Proposed Administrative Review Tribunal*, Senate Legal and Constitutional Legislation Committee, *Hansard*, 25 October 2000, p. 13.

157 Ibid.

158 Proposed section 90 of the ART Bill.

159 The Latin phrase is *audi alteram partem*.

160 The requirement to afford natural justice also includes the rule against bias, and may include two further aspects, namely, the probative evidence rule, and a duty to inquire into matters centrally relevant to the issue.

161 Currently, the MRT and RRT have a statutory obligation to act 'according to substantial justice and the merits of the case': paragraphs 353(2)(b) and 420(2)(b) of the *Migration Act 1958*. This statutory obligation is removed by the Bill: **item 99 of Schedule 14** repeals section 353 of the *Migration Act 1958* and replaces it with a new provision omitting the substantial justice and merits requirement. **Item 202 of Schedule 14** repeals section 420 of the *Migration Act 1958*. However, it appears that 'substantial justice' simply means an obligation to conduct merits review rather than judicial review. Certainly, it does not import any particular procedural requirements to be followed: *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

162 Paragraph 476(2)(a) of the *Migration Act 1958*.

163 *Kioa v West* (1985) 159 CLR 550 at 584 per Mason CJ, 615 per Brennan J. In *Re Refugee Review Tribunal: Ex parte Aala* [2000] HCA 57 (16 November 2000), Gaudron and Gummow JJ at [37]-[39] (with whom Gleeson CJ at [5] agreed) considered procedural fairness arises as an implication from the statute conferring decision-making power, Hayne J at [167] expressly did not decide the source of the obligation, and Kirby and Callinan JJ accepted the existence of the obligation without discussing its origin. See also *Abebe v the Commonwealth; Re Minister for Immigration and Multicultural Affairs* (1999) 197 CLR 510 at 552-553 per Gaudron J.

164 In *Re Refugee Review Tribunal: Ex parte Aala* [2000] HCA 57 (16 November 2000), six members of the High Court granted prohibition and mandamus, and five granted certiorari. Callinan J at [217] declined to grant certiorari on the basis that section 75(v) of the

Constitution does not expressly mention certiorari, and paragraph 476(2)(a) of the *Migration Act 1958* excludes natural justice as a ground of judicial review.

165 *Re Refugee Review Tribunal: Ex parte Aala* [2000] HCA 57 (16 November 2000) at [40] per Gaudron and Gummow JJ, [167] per Hayne J.

166 *Re Refugee Review Tribunal: Ex parte Aala* [2000] HCA 57 (16 November 2000) at [128] per Kirby J.

167 In *Re Refugee Review Tribunal: Ex parte Aala* [2000] HCA 57 (16 November 2000) at [41], Gaudron and Gummow JJ suggested that paragraph 476(2)(a) of the *Migration Act 1958*, which excludes natural justice as a ground of judicial review before the Federal Court, 'assumes the existence of the requirement in respect of decisions' of the MRT and RRT. None of the other judges approved or disapproved this formulation.

168 **Proposed subsection 355A(1)** of the *Migration Act 1958*, inserted by item 120 of Schedule 14. Compare the current sections 355A and 422A of the *Migration Act 1958*.

169 **Proposed section 355A** of the *Migration Act 1958*, inserted by item 120 of Schedule 14.

170 **Proposed subsection 349(2)** of the *Migration Act 1958*, inserted by item 95 of Schedule 14.

171 Compare subsections 349(2) and 415(2) of the *Migration Act 1958* and paragraph 43(1)(b) of the AAT Act.

172 Proposed section 133 of the ART Bill.

173 The use of the power to set aside and substitute a new decision instead of the present power to vary the decision appears to be specifically contemplated in the *Explanatory Memorandum* to the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000, p. 169.

174 **Proposed section 344** of the *Migration Act 1958*, inserted by item 90 of Schedule 14. Compare the current subsections 347(2), 412(2) and (3) and 500(2) and (3) of the *Migration Act 1958*.

175 **Proposed subsection 365(1A)** of the *Migration Act 1958*, inserted by item 166 of Schedule 14. Compare the current section 365 of the *Migration Act 1958*.

176 **Proposed section 364B** of the *Migration Act 1958*, inserted by item 165 of Schedule 14. Compare the current section 429 of the *Migration Act 1958*.

177 Unless the AAT in its discretion directed a private hearing, on account of the confidential nature of the evidence or matter before it, section 35 of the AAT Act.

178 **Proposed section 364B** of the *Migration Act 1958*, inserted by item 165 of Schedule 14.

179 **Subclause 3(1) of Schedule 15**.

180 **Clauses 2 and 38 of Schedule 16**.

181 The acting Principal Member of the MRT, Ms Susanne Tongue, has been 'advised by the minister' that her term will not be extended beyond 31 January 2001: evidence of acting Principal Member Tongue, to the Senate Legal and Constitutional Legislation Committee, 4 December 2000, *Hansard*, p. 52. It is not clear why the acting Principal Member of the RRT,

Dr Peter Nygh, is leaving: statement of the Chair, Senator Payne, to the Senate Legal and Constitutional Legislation Committee, 4 December 2000, *Hansard*, p. 59.

182 The Hon Daryl Williams AM QC, Second reading speech on the Administrative Review Tribunal Bill 2000, House of Representatives, *Hansard*, 28 June 2000, p. 18405.

183 Evidence of Senior Member Hallowes to the Senate Legal and Constitutional Legislation Committee, 15 November 2000, *Hansard*, p. 46.

184 Evidence of Ms Leigh to the Senate Legal and Constitutional Legislation Committee, 22 November 2000, *Hansard*, p. 21.

185 Dr Peter Nygh, *Seminar: Administrative Law in Transition – the Proposed Administrative Review Tribunal*, Senate Legal and Constitutional Legislation Committee, *Hansard*, 25 October 2000, p. 31.

186 SSAT, *Annual Report 1998-99*, pp. 3945.

187 The Presidential members of the AAT who are judges of the Federal Court and Family Court, and some full-time Deputy Presidents and senior members of the AAT, have tenure: section 8 of the AAT Act. Seven of the nine current full-time senior members of the AAT have terms extending beyond July 2001: AAT, *Annual Report 1999-2000*, pp. 95-98. Although these terms will not continue automatically once the AAT is abolished, these members have employment security until such time as the ART commences.

188 The Hon Daryl Williams AM QC, Second reading speech on the Administrative Review Tribunal Bill 2000, House of Representatives, *Hansard*, 28 June 2000, p. 18407.

189 Evidence of Ms Leigh to the Senate Legal and Constitutional Legislation Committee, 22 November 2000, *Hansard*, p. 21; Evidence of Ms Leigh to the Senate Legal and Constitutional Legislation Committee, 15 December 2000, *Hansard*, p. 105.

190 Evidence of Ms Mountford to the Senate Legal and Constitutional Legislation Committee, 15 December 2000, *Hansard*, p. 84.

191 See **proposed section 3** of this Bill, and proposed section 174 of the ART Bill.

192 **Clause 53 of Schedule 15**.

193 **Subclause 3(1) of Schedule 15**.

194 **Subclause 3(2) of Schedule 15**.

195 One currently serving Deputy President, Deputy President Forgie, has elected to be covered by the Commonwealth Superannuation Scheme. All other current Deputy Presidents have elected to receive judges' pensions: evidence of Deputy President McDonald to the Senate Legal and Constitutional Legislation Committee, 15 November 2000, *Hansard*, p. 45.

196 **Clause 4 of Schedule 15**.

197 Deputy President Burns will be 59 and Deputy President McDonald will be 55 when the ART Bill commences. Both have served on the AAT for at least 10 years. See evidence of Deputy President McDonald to the Senate Legal and Constitutional Legislation Committee, 15 November 2000, *Hansard*, pp. 44–46.

198 Section 6 of the *Judges' Pensions Act 1968*.

199 **Subclause 21(1) of Schedule 15**. The ART may also extend the statutory time limit if it is reasonable in all the circumstances to do so: **subclause 21(2) of Schedule 15**. If no time limit for making an application for review is specified, or if the prescribed time limit has expired, the ART may nevertheless permit a person to make an application for review if it would be reasonable in all the circumstances: **clause 22 of Schedule 15**.

200 **Clauses 7, 8, 43 and 44 of Schedule 16**.

201 **Clauses 5 and 6 of Schedule 17**. The 13 week time limit for applications contained in the *A New Tax System (Family Assistance) (Administration) Act 1999* is continued: **clause 6 of Schedule 17**.

202 See **clause 24 of Schedule 15, clauses 9 and 45 of Schedule 16, clause 7 of Schedule 17**. If an application was made to the AAT before the AAT was abolished, but no time limit was prescribed for lodging the application, the ART will take over the AAT's present function of determining whether the application was or was not made within a reasonable time, **clause 23 of Schedule 15**.

203 **Clauses 10 and 46 of Schedule 16**.

204 **Subclause 40(2) of Schedule 15**.

205 *Explanatory Memorandum* to the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000, p. 230.

206 **Clause 2 of Schedule 15**.

207 Applications to the ART under section 179 of the *Social Security (Administration) Act 1999* or under section 142 of the *A New Tax System (Family Assistance) (Administration) Act 1999* for review of the SSAT's decision will be reviewable under the transitional arrangements. No other applications for review of SSAT decisions will be covered by the transitional provisions. However, as these two sections appear to cover all the existing jurisdiction of the AAT on review from the SSAT, it is not clear which decisions, if any, are excluded by this subclause.

208 **Subclause 2(4) of Schedule 15**.

209 The objective of efficient transition from the AAT, MRT, RRT and SSAT to review by the ART is explicitly stated in **subclause 37(1) of Schedule 15, subclauses 29(1) and 62(1) of Schedule 16, and subclause 14(1) of Schedule 17**. The ART will also inherit the ancillary functions of the AAT, if such powers or functions fall within the definition of a 'related Tribunal function' as defined in paragraph 140(b) of the ART Bill: **clause 41 of Schedule 15**.

210 **Clause 28 of Schedule 15, clause 10 of Schedule 17**.

211 **Clause 29 of Schedule 15**.

212 **Clauses 13 and 49 of Schedule 16.**

213 **Subclauses 37(2) and (3) of Schedule 15, subclauses 29(2) and (3), 62(2) and (3) of Schedule 16, subclauses 14(2) and (3) of Schedule 17**.

214 **Clause 8 of Schedule 15** deals with the notice of a right to apply for review. **Clause 9 of Schedule 15 and subclause 8(4) of Schedule 17** deal with the right to a statement of reasons for the decision. **Subclause 25(a) of Schedule 15, subclauses 11(a) and 47(a) of Schedule 16, subclause 8(3) of Schedule 17** deal with the notice given to the decision-maker that application for review has been made. **Subclauses 25(b) and (c) and clause 27 of Schedule 15, subclauses 11(b) and (c), 47(b) and (c) of Schedule 16, subclause 8(5) of Schedule 17** concern the provision of statement of reasons and relevant documents to the Tribunal.

Applicants may still request a statement of reasons after the AAT is abolished, by applying under the new but substantially identical provisions of the ART Bill, and the ART will determine their request in accordance with these provisions: **clauses 10-13, 16 and 17 of Schedule 15**. Similarly, obligations to provide statements of reasons under the AAT Act will continue under the Bill; **clauses 14, 18 and 26 of Schedule 15**.

215 **Clauses 12 and 48 of Schedule 16**.

216 **Clause 5 of Schedule 15, clauses 3 and 39 of Schedule 16, clause 2 of Schedule 17**.

217 **Clause 34 of Schedule 15, clause 23 of Schedule 16, clause 13 of Schedule 17**.

218 **Clause 35 of Schedule 15, clauses 21 and 56 of Schedule 16**.

219 **Clauses 24 and 58 of Schedule 16**.

220 This is currently exercisable under paragraph 19(6)(c) of the *Administrative Appeals Tribunal Regulations 1976*, and is continued under **clause 50 of Schedule 15.**

221 **Clause 12 of Schedule 17**. Other procedures which continue include the MRT and RRT's power to order combined review of a number of decisions (**clauses 20 and 55 of Schedule 16**); the MRT and RRT's power to authorise persons to take evidence on their behalf (**clauses 22 and 57 of Schedule 16**); requests by the SSAT that the Secretary of the Department of Family and Community Services exercise his or her powers to require a person to provide information or documents (**clause 9 of Schedule 17**); and the AAT's powers relating to the taxation of costs, (**clause 51 of Schedule 15**).

222 This applies to certificates excluding confidential material from being disclosed in a decision-maker's statement of reasons, **clause 19 of Schedule 15**; certificates permitting non-disclosure of information or documents in the course of AAT proceedings where disclosure would be the contrary to the public interest, **clause 31 of Schedule 15**; certificates given under subsection 38(2) of the *Australian Security Intelligence Organisation Act 1979*, **clause 52 of Schedule 15**; and certificates given under sections 375, 375A, 376, 437 or 438 of the *Migration Act 1958*, **clauses 27 and 60 of Schedule 16**.

223 **Subclause 32(1) of Schedule 15**. If a party has requested the AAT to grant a stay of a decision, but the AAT has not made a decision in relation to the application, the application will be determined under the ART Bill: **subclause 32(2) of Schedule 15**.

224 **Clause 38 of Schedule 15**. Additionally, where the AAT referred a question of law to the Federal Court, but the Federal Court had not handed down its opinion before the AAT was abolished, the ART must wait for and abide by the decision of the Federal Court.

225 **Clause 33 of Schedule 15**.

226 **Clause 30 of Schedule 15, clause 11 of Schedule 17**.

227 **Clauses 25 and 59 of Schedule 16**.

228 **Clause 7 of Schedule 15, clauses 5 and 41 of Schedule 16, clause 4 of Schedule 17**.

229 **Clause 43 of Schedule 15, clauses 30 and 63 of Schedule 16, clause 15 of Schedule 17**.

230 **Clause 46 of Schedule 15, clauses 32 and 65 of Schedule 16, subclause 17(1) of Schedule 17**. If the SSAT has exercised its power to ask the Secretary of the Department of Family and Community Services or the Chief Executive Officer of the Commonwealth Services Delivery Agency to assess a rate or amount, the obligation to do so continues after the SSAT is abolished, **subclause 17(2) of Schedule 17**.

231 **Clauses 44 and 45 of Schedule 15, clauses 31 and 64 of Schedule 16, clause 16 of Schedule 17**.

232 Subsections 368(1), 368D(1), 430(1) and 430D(1) of the *Migration Act 1958*, subsection 177(1) of the *Social Security (Administration) Act 1999* and subsection 141(1) of the *A New Tax System (Family Assistance) (Administration) Act 1999*.

233 Subsection 43(2) of the AAT Act.

234 If the 28 day time period within which the provision of a statement of reasons may be requested expires after the AAT is abolished, **clause 45 of Schedule 15**.

235 **Clause 47 of Schedule 15.**

236 **Clause 48 of Schedule 15, clause 18 of Schedule 17.**

237 **Clauses 35 and 68 of Schedule 16**.

238 **Clauses 33 and 66 of Schedule 16**.

239 **Clause 49 of Schedule 15, clauses 36 and 69 of Schedule 16, clause 19 of Schedule 17**.

240 Interlocutory applications are applications relating to procedural matters, not the substance of the case. These are applications for leave to institute proceedings in the Federal Court, for an extension of time, for leave to amend the grounds of an application and for a stay of the tribunal's decision until the outcome of the Federal Court proceedings is known: **item 3 of Schedule 18**.

241 By the *Social Security and Veterans Entitlements Legislation Amendment (Miscellaneous Matters) Act 2000*.

242 **Proposed subsection 6(3)**.

243 *Explanatory Memorandum* to the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000, p. 4.

244 The Law Council of Australia has also expressed this concern: evidence of Dr Griffiths to the Senate Legal and Constitutional Legislation Committee, 15 December 2000, *Hansard*, p. 89.

245 Subsection 48(4) of the *Acts Interpretation Act 1901*. Regulations may also be subject to judicial scrutiny if a declaration is sought that they are *ultra vires* (that is, beyond the statutory power to make regulations) or via a collateral challenge to subsequent administrative

action. But these challenges may only examine the legal validity of the regulations, not the desirability of policies implemented through validly made regulations.

246 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (2nd ed), Butterworths, Sydney, 1999, p. 24. However, one of the matters the Committee does consider is whether regulations contain matter more appropriate for parliamentary enactment: Senate Standing Order 23(3)(d).

247 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (2nd ed), Butterworths, Sydney, 1999, p. 15.

248 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (1995), p. 140. See also Marcia Neave, 'Bureaucratic Rationality Versus Individualised Justice – New Developments in Australian Federal Administrative Review Tribunals', a paper presented at the *Conference on Best Practices in Administrative Justice*, Vancouver (October 1999) at p. 17, quoted in Robin Creyke, 'Tribunals: Divergence, Loss and Recent Jurisprudence', *Administrative Law Conference Proceedings*, Annual Public Law Weekend, Australian National University, 11 November 2000, p. 134.

249 See text above accompanying footnotes 179–227.

250 Robin Creyke, 'Tribunals: Divergence, Loss and Recent Jurisprudence', *Administrative Law Conference Proceedings*, Annual Public Law Weekend, Australian National University, 11 November 2000, p. 134.

251 Ibid.

252 See text above accompanying footnotes 25–32.

253 See text above accompanying footnotes 204–205.

254 The Hon Daryl Williams AM QC, 'A Unified System of Merits Review: The Establishment of the Administrative Review Tribunal' speech to *Law Institute of Victoria Annual Conference*, Melbourne, 24 August 2000.

255 See text above accompanying footnotes 180-187.

256 Applications for refugee protection visas may in some instances be heard by an ART sitting as more than one member, whereas currently the RRT must be constituted by a single member in all cases.

257 See text above accompanying footnote 62.

258 Renee Leon, 'Tribunal Reform: The Government's Position', *Administrative Law Proceedings* (1998), p. 357.

259 Sandra Koller, National Welfare Rights Network, *Seminar: Administrative Law in Transition – the Proposed Administrative Review Tribunal*, Senate Legal and Constitutional Legislation Committee, *Hansard*, 25 October 2000, pp. 45–46.

260 See text above accompanying footnotes 138–139.

261 See text above accompanying footnotes 158–167.

262 See text above accompanying footnotes 242–247.

263 The Hon Daryl Williams AM QC, 'Reform of the Merits Review Tribunal System' (May 1998), p. 3. See also Robin Creyke, 'Tribunals: Divergence, Loss and Recent Jurisprudence', *Administrative Law Conference Proceedings*, Annual Public Law Weekend, Australian National University, 11 November 2000, p. 135.

264 See text above accompanying footnotes 140–151.

265 See text above accompanying footnotes 10–11.

266 See text above accompanying footnote 174.

267 See text above accompanying footnotes 170–173.

268 See text above accompanying footnotes 206–208.

269 See text above accompanying footnote 228.

270 See text above accompanying footnotes 231–234.

271 Proposed section 3(c) of the ART Bill.

272 See text above accompanying footnotes 140–151.

273 See text above accompanying footnotes 19–22.

274 See text above accompanying footnote 18.

275 See text above accompanying footnote 60.

276 See text above accompanying footnotes 63–69.

277 Robin Creyke, 'Tribunals: Divergence, Loss and Recent Jurisprudence', *Administrative Law Conference Proceedings*, Annual Public Law Weekend, Australian National University, 11 November 2000, p. 139.

278 See text above accompanying footnotes 83–87.

279 See text above accompanying footnotes 104–120.

280 See text above accompanying footnotes 152–169.

281 Such as those contained in **clauses 83 and 85** of the Veterans' Schedule and corrected by **proposed amendments 27, 29 and 30**: House of Representatives, *Hansard*, 7 December 2000, p. 20766.

282 The writer is aware of drafting errors in **clause 8** of the Taxation Schedule and **clause 36** of the Veterans' Schedule.

283 See text above accompanying footnotes 34–40.

284 Sandra Koller, National Welfare Rights Network, *Seminar: Administrative Law in Transition – the Proposed Administrative Review Tribunal*, Senate Legal and Constitutional Legislation Committee, *Hansard*, 25 October 2000, p. 46.

285 Evidence of Dr Griffiths to the Senate Legal and Constitutional Legislation Committee, 15 December 2000, *Hansard*, p. 89–90.