

Bills Digest
No. 91 2000–01

Remuneration Tribunal Amendment Bill 2000

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Remuneration Tribunal Amendment Bill 2000

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This Digest replaces the Digest dated 21 February 2001.

Remuneration Tribunal Amendment Bill 2000

Date Introduced: 29 November 2000

House: House of Representatives

Portfolio: Prime Minister

Commencement: Sections 1 to 4 commence on Royal Assent. The Schedule of amendments to the *Remuneration Tribunal Act 1973* commences on Proclamation, or 6 months after Royal Assent, whichever is the earlier.

Purpose

To amend the *Remuneration Tribunal Act 1973* to:

- make any determinations by the Remuneration Tribunal as to the classification and remuneration of principal executive offices mandatory, not advisory, and
- give the responsible Minister (rather than the Governor-General) power to declare which offices are principal executive offices, and to determine which classification and commencing remuneration applies to these offices.

Background

The Remuneration Tribunal was established by statute in 1973 to determine the allowances (including salaries) of members of Parliament, including Ministers, and to determine the remuneration of senior public servants and statutory office-holders.¹ The Tribunal continues to determine the allowances of members of Parliament, and the additional salary of parliamentary office-holders. It no longer has a role in determining the salaries of members of Parliament, but instead has an advisory role.² The Tribunal also has an inquiry and reporting function in relation to the salaries of Ministers and of judges.³

All of the Tribunal's determinations and reports relating to Commonwealth offices are matters of public record, and must be given to the Minister and tabled in Parliament. Either House of Parliament then has 15 sitting days within which it may pass a resolution disapproving of a determination.⁴

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The Tribunal also has an inquiry and reporting role in relation to the salaries of certain senior executive officers of higher education institutions.⁵

The Tribunal continues to have the power to determine the remuneration of statutory office-holders, such as judges, the Ombudsman, the Auditor-General and senior executive positions in many statutory bodies, such as the Australian Competition and Consumer Commission.⁶ The Tribunal can receive submissions or take evidence from parties, including the relevant employing body, before making determinations or issuing reports.⁷

Important changes were made to the Tribunal's jurisdiction in 1999, with the introduction of the *Public Service Act 1999* and the *Parliamentary Service Act 1999*. The Tribunal no longer has jurisdiction to determine the salaries of departmental Secretaries and heads of Executive Agencies. Although the Tribunal retains an advisory role in relation to their salaries, ultimately it is a matter for the individual departments and agencies to negotiate within the framework of individual workplace agreements.⁸

The 1999 amendments also gave the Tribunal power to create a remuneration framework for a category of offices called 'principal executive offices' (PEOs). The Governor-General, by regulation, declares certain offices to be PEOs.⁹ The Tribunal then has two functions:¹⁰

- to determine a classification structure for PEOs, and
- to provide advice to relevant employing bodies in relation to terms and conditions on which PEOs are to be held.

This classification structure, published by the Tribunal in December 1999, is, in the Tribunal's words:¹¹

designed to extend to the majority of full-time public office holders and their employing bodies flexibility to negotiate the fine detail of remuneration. The structure incorporates arrangements that currently apply to the Senior Executive Service of the Australian Public Service and to Departmental Secretaries. It allows public office holders to move into a total remuneration environment, with access to salary packaging and performance bonuses. The guidelines for the structure emphasise performance as the key factor in setting remuneration levels.

Despite the fact that the PEO structure is intended to be so broad-ranging, there are presently only 12 positions which are declared to be PEOs.¹²

The Tribunal has made an advisory determination consisting of five remuneration bands, and has recommended rules for associated benefits such as salary packaging, leave, separation benefits and travel allowances.¹³ However, the terms and conditions (including remuneration and allowances) of a PEO are ultimately a matter to be determined by the relevant employing body.¹⁴

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Following representations from the Tribunal,¹⁵ the Government has agreed to amend the *Remuneration Tribunal Act 1973* to make it clear that employing bodies are bound to act within the parameters set by the Tribunal for PEOs.

Main Provisions

Powers exercisable by Ministerial declaration, not regulations

Currently, PEOs are created by the Governor-General through regulations. Under the Bill, they will be created by a written declaration from the responsible Minister (the Minister for Finance and Administration): **proposed subsection 3A(1)**. In conformity with this new procedure, the replacement definition of ‘PEO’ in **proposed subsection 3(1) (item 2)** includes any office or appointment declared by the Minister to be a PEO. It also contains a list of 12 named offices, which correspond to the 12 existing PEOs created through regulations.

In addition, the Minister has power to assign PEOs to a specific classification within the structure determined by the Tribunal, **proposed subsection 3A(2)**. This has the effect of fixing the remuneration, superannuation and travel allowance within a wide ranging band.¹⁶ The Minister has a discretion to go further and give the employing body a written notice fixing the commencing remuneration of a particular PEO at a specific point within that salary range, **proposed subsection 3A(4)**.

So, for example, if the Minister assigned a particular office as a PEO Band C, that would require the employing body to fix a total remuneration anywhere between \$170,000 and \$270,000. The Minister may restrict this discretion by giving a written notice to the employing body fixing the commencing remuneration of the PEO at, for example, \$200,000. During the course of the PEO’s term of office, the employing body would be solely responsible for any salary increases within PEO Band C, and the size of such salary increases, within the limits prescribed by the Tribunal.¹⁷

The Minister may also temporarily assign a PEO to a classification, or temporarily fix the commencing remuneration, **proposed subsections 3A(3) and (5)**. These decisions last only for the term of a particular office-holder’s appointment. The Explanatory Memorandum notes that this will permit the temporary assignment of a particular PEO to a higher classification, for example:

when a person with specific or highly valued skills or experience occupies an office for a particular period and there is an intention to review the level of remuneration when the office falls vacant.¹⁸

Finally, the Minister has the power to make a written declaration stating which person, authority or body is the ‘employing body’ for a particular PEO, **proposed section 3B**.¹⁹

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This replaces the current procedure, whereby the regulations declare which body is the relevant employing body for a PEO.

Accountability

There are two main accountability mechanisms chosen in the Bill: consultation with the Tribunal, and publication in the *Gazette*. First, the Minister must seek the advice of the Tribunal before declaring an office to be a PEO, assigning a PEO to a classification band or fixing the commencing remuneration, whether temporarily or permanently. The Minister must also take the Tribunal's advice into account in making a decision, **proposed subsection 3A(6)**.

Secondly, every declaration of an employing body for a PEO, that an office is a PEO, or that a PEO is assigned to a specified classification, must be made by written instrument, a copy of which must be published in the *Gazette*, **proposed section 3C**. However, a number of declarations, even relating to different PEOs, may be made in the same instrument, thus avoiding unnecessary proliferation of paperwork.

A decision fixing the commencing remuneration for a particular PEO does not have to be made in written instrument and notified in the *Gazette*. But it does have to be notified in writing to the relevant employing body, **proposed subsection 3A(4)**.

Unlike regulations, Ministerial declarations will not be disallowable instruments. Thus, while they will be public documents by virtue of their publication in the *Gazette*, there will be no opportunity for Parliamentary scrutiny, as there currently is for determinations made through regulations.

Tribunal's functions

Currently, the Tribunal determines the classification structure for PEOs and advises the bodies which employ PEOs as to the remuneration, terms and conditions for PEOs.²⁰ Under the Bill, this will continue, but the Tribunal's determination of the remuneration, terms and conditions of PEOs will be binding rather than advisory, **proposed subsection 7(3D)**. The Tribunal must have regard to the superannuation entitlements of PEOs assigned to a particular classification in determining their conditions of remuneration, **proposed subsection 7(3F)**. The Tribunal may hold inquiries before making these determinations.

In addition, the Tribunal will have the ability to make recommendations relating either to PEOs generally, or one particular PEO or certain PEOs, **proposed subsection 7(3E)**. These recommendations may relate to any matter.

At present, although the Tribunal may give advice on employment conditions, ultimately it is the employing body which determines the terms and conditions, including remuneration,

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of the PEO or PEOs it employs. If the employing body wishes to determine a PEO's terms inconsistently with the Tribunal's classification structure, it must first request the advice of the Tribunal,²¹ but it is not legally obliged to follow that advice.

The Bill will change that. **Proposed subsection 12C(2)** provides that an employing body will only be able to determine a PEO's terms and conditions inconsistently with the Tribunal's classification structure with the written consent of the Tribunal. Thus, ultimately any exemption from the standard classification will be a matter for the Tribunal, not the employing body.

Item 13 provides that, as a transitional measure, PEOs who transfer from regulation under the present system to the system proposed in the Bill will continue to hold office on their existing terms and conditions, for the term of their appointments. This will mean that any determination made by the Tribunal as to the classification structure that is inconsistent with their current employment arrangements will not apply to those individuals. However, the Tribunal's determination will apply to the PEO once the current office-holder's term of appointment has expired.

Concluding Comments

The Explanatory Memorandum states that the broad declaratory powers of the Minister to make decisions which are currently made by regulation are 'measures designed to improve accountability.'²² Under the Bill, there will be less direct accountability in the creation of PEOs, as this will be done by Ministerial declaration, rather than by regulation. Unlike regulations, the Minister's declarations will not be disallowable instruments, and hence will not be subject to Parliamentary scrutiny and control. It may be necessary to declare PEOs by Ministerial declaration rather than regulations, to achieve the aim of significantly increasing the number of offices within the PEO structure, as it may become cumbersome to create a large number of PEOs by regulations.²³ However, it remains possible to state that Ministerial declarations will be disallowable instruments, thus preserving Parliamentary accountability while facilitating efficiency in decision-making.

By contrast, there will be increased accountability in relation to the remuneration and other terms and conditions of employment of PEOs. The Remuneration Tribunal's current advisory role will be strengthened to an effective determinative role. Currently, employing bodies have the final say in determining the terms and conditions of PEOs, after consulting with the Tribunal. This will no longer be the case. Power to assign PEOs to a band within the Tribunal's classification structure, and to fix a commencing remuneration, will be given to the Minister, not the employing body. Under the Bill, the employing body will be able to alter a PEO's employment arrangements during a term of appointment only in conformity with the Tribunal's determinations, and must obtain written approval from the Tribunal before departing from the general determinations.

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It could be argued that transferring responsibility for determining the terms and conditions of PEOs from the bodies which employ them to the Minister and the Tribunal threatens the independence of the employing bodies. However, the Minister's powers, unlike the employing body's, will be subject to public scrutiny and increased accountability. In this way, responsibility is transferred from the employing body to be shared between the Minister and the Tribunal.

Endnotes

- 1 Section 7 of the *Remuneration Tribunal Act 1973*. The salaries of members of Parliament are designated in subsection 7(1) as 'allowances', in accordance with the terminology used in section 48 of the Constitution.
- 2 The Parliament itself now determines the salaries of members of Parliament under the *Remuneration and Allowances Act 1990*. However, the Tribunal provides advice to the Parliament, pursuant to subsection 5(2C) of the *Remuneration Tribunal Act 1973* and subclause 1(3) of Schedule 3 of the *Remuneration and Allowances Act 1990*.
- 3 Section 6 of the *Remuneration Tribunal Act 1973*.
- 4 Subsections 7(6), (7) and (8) of the *Remuneration Tribunal Act 1973*.
- 5 Vice-Chancellors, Principals and other chief executive officers of higher education institutions that are not Commonwealth institutions, and their deputies: subsection 6(2A) of the *Remuneration Tribunal Act 1973*. The Tribunal has an advisory role only in relation to executive officers of the Australian National University, the University of Canberra and the Australian Maritime College: subsection 5(2) of the *Remuneration Tribunal Act 1973*.
- 6 These, along with a broad range of other positions, now fall within the definition of 'public office holder': subsections 7(3) and 3(4) of the *Remuneration Tribunal Act 1973*.
- 7 Section 11 of the *Remuneration Tribunal Act 1973*.
- 8 The *Public Employment (Consequential and Transitional) Amendment Act 1999* amended the *Remuneration Tribunal Act 1973* to give effect to these changes. The Tribunal also has an advisory role in relation to the Public Service Commissioner, the Merit Protection Commissioner, the Parliamentary Service Commissioner and the Parliamentary Merit Protection Commissioner: subsections 5(2B) and (2D) of the *Remuneration Tribunal Act 1973*.
- 9 Paragraph 3(4)(ra) of the *Remuneration Tribunal Act 1973*.
- 10 Subsection 5(2A) of the *Remuneration Tribunal Act 1973*, inserted by item 759 of the *Public Employment (Consequential and Transitional) Amendment Act 1999*.
- 11 Remuneration Tribunal *Annual Report 1999-2000*, http://www.dofa.gov.au/remtribunal/1999-2000_activities.html.
- 12 Although the Parliamentary Secretary to the Minister for Finance and Administration, Mr Peter Slipper, states that there are currently only 11 PEOs: Second reading speech on the

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Remuneration Tribunal Amendment Bill 2000, House of Representatives, *Hansard*, p. 22941, 29 November 2000, in the definition of ‘PEO’ in proposed subsection 3(1) there are in fact 12. There are 17 PEOs listed in both Schedule 1 of the *Remuneration Tribunal (Miscellaneous Provisions) Regulations 1976* and in the Remuneration Tribunal’s *Principal Executive Office (PEO) Classification*, Determination 1999/15, <http://www.dofa.gov.au/remtribunal/dets/det.1999.15.html>.

Although five of the PEOs listed in the Regulations are not listed in the new definition, it appears that the Regulations have not been updated to reflect the fact that five of the offices pertain to bodies which have been sold by the Commonwealth or abolished by statute. These are the Chief Executive Officer of ANL Limited, the Managing Director of Australian National Railways Commission, the Chief Executive Officer of Commonwealth Funds Management Limited, the Chief Executive Officer of the Federal Airports Corporation and the Managing Director of Housing Loans Insurance Commission.

A further two are listed in the new definition under changed names: the Managing Director of the Australian Industry Development Commission is described in the list in the definitions as the ‘Chief Executive’, and the Managing Director of Public Employment Placement Enterprise Limited is renamed the Chief Executive Officer of Employment National Limited. According to the National Archives, the Public Employment Placement Enterprise Limited (PEPE Ltd) was replaced by Employment National on 1 May 1998.

- 13 *Principal Executive Office (PEO) Classification*, Determination 1999/15, <http://www.dofa.gov.au/remtribunal/dets/det.1999.15.html>.
- 14 Section 12C of the *Remuneration Tribunal Act 1973*.
- 15 *Remuneration Tribunal Annual Report 1999-2000*.
- 16 For example, PEO Band B has a total remuneration range from \$120,000 - \$193,800, PEO Band C has a total remuneration range from \$170,000 - \$275,400 and PEO Band D has a total remuneration range from \$250,000 - \$357,000: *Principal Executive Office (PEO) Classification*, Determination 1999/15.
- 17 Clause D1 of *Principal Executive Office (PEO) Classification*, Determination 1999/15 permits increases in total remuneration if productivity changes are demonstrated. The percentage increase is capped by the Tribunal.
- 18 *Explanatory Memorandum* to the Remuneration Tribunal Amendment Bill 2000, p. 3.
- 19 This is reflected in the new definition of ‘employing body’ in **proposed subsection 3(1) (item 1)**.
- 20 Subsection 5(2A) of the *Remuneration Tribunal Act 1973*.
- 21 Subsection 12C(2) of the *Remuneration Tribunal Act 1973*.
- 22 *Explanatory Memorandum* to the Remuneration Tribunal Amendment Bill 2000, p. 3.
- 23 This is the reason given in the second reading speech on the Remuneration Tribunal Amendment Bill 2000, House of Representatives, *Hansard*, p. 22941, 29 November 2000.

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