



ADMINISTRATIVE REVIEW COUNCIL

Our ref: 04/6780

4 February 2005

Senator Marise Payne
Chair
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Senator Payne

Inquiry into the Administrative Appeals Tribunal Amendment Bill 2004

I refer to the appearance of the President of the Council, Mr Wayne Martin QC, before the Committee on 1 February 2005 to give evidence regarding the Administrative Appeals Tribunal Amendment Bill 2004 (the Bill).

During the course of his evidence, Mr Martin offered the services of the Council's Secretariat to research whether there were existing provisions equivalent to the proposed sections 23 and 23A of the Bill, regarding reconstitution of the Tribunal.

Set out below are the Secretariat's findings in this regard. While we have not discovered any provisions that are identical to the proposed sections, there are a number of sections in Commonwealth or State legislation relating to reconstitution of tribunals that may assist the Committee in its inquiry.

Wayne Martin QC
Professor John McMillan
Robert Cornall
Stephen Gageler SC
Andrew Metcalfe
Major General Paul Stevens AO (rtd)

Justice Garry Downes AM
Professor David Weisbrot
Professor Robin Creyke
Richard Humphry AO
Melanie Sloss SC
Sue Vardon AO

Proposed section 23

I understand that the aspect of the proposed section 23 which is of particular interest to the Committee is the power of the AAT President in s 23(b)(iii) to direct a member not to continue to take part in a proceeding. Section 23(9) would require the President to be satisfied that the direction is “in the interests of justice”, and also to consult the member concerned. A similar requirement appears in section 23(11) as to further reconstitution of a multiple member Tribunal.

The explanatory memorandum for the Bill gives (at page 18) examples of directions that would be in the interests of justice:

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

We have not been able to identify any existing provision that empowers the president of a tribunal (however described) to direct reconstitution “in the interests of justice” or some similar phrase. There are examples of a president being given more specific powers to deal with conflict of interest or perceived bias. There are also examples of a president apparently being given broader powers of reconstitution that are not confined to conflict of interest or perceived bias.

Conflict of interest

Specific provisions dealing with a conflict of interest are common in legislation establishing a tribunal. In all the examples we have examined, there is an obligation on members to disclose any conflict of interest to their tribunal’s president and/or to the parties to the proceeding.

In some legislation, however, there is also a power for the tribunal’s president to direct a member not to take part in or continue to take part in proceedings once the president is aware of the member’s conflict of interest. Such a power can be found in the legislation governing the NSW Administrative Decisions Tribunal,¹ the Veterans’ Review Board,² the Social Security Appeals Tribunal³, the Australian Competition Tribunal⁴ and the Copyright Tribunal⁵ and in the existing AAT legislation.⁶

¹ Item 14(2), Schedule 3, *Administrative Decisions Tribunal Act 1997* (NSW).

² Section 165(2), *Veterans' Entitlements Act 1986*.

³ Item 18(2), Schedule 3, *Social Security (Administration) Act 1999*.

⁴ Section 40(2), *Trade Practices Act 1974*.

The legislation governing the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT) lacks an equivalent power of direction, but a member with a conflict of interest cannot take part in a review unless the consent of the Principal Member is obtained (along with that of the applicant).⁷ A similar provision also exists for the National Native Title Tribunal.⁸

Perceived bias

We are only aware of one example of a specific power to reconstitute a tribunal because of an apprehension of bias. The Chairperson of the Superannuation Complaints Tribunal may reconstitute the Tribunal if he or she thinks it is desirable “to remove any perception of bias”.⁹

Broader powers of reconstitution

The President of the Victorian Civil and Administrative Tribunal may at any time give notice to the parties to a proceeding that he or she seeks the reconstitution of the Tribunal.¹⁰ The Victorian legislation does not appear to place any limits on the grounds as to which the President may give for seeking reconstitution. In addition, this power is not confined to the President – any member of the Tribunal may seek reconstitution.

The parties to the proceeding have the right to make submissions following receipt of a notice. Unusually, it is the Tribunal as presently constituted rather than the President that ultimately decides whether reconstitution should occur.

In Western Australia, it appears that the President of the State Administrative Tribunal has a blanket power to alter the constitution of the Tribunal. There is no indication from the provision that any consultation is required, or that the President must have particular grounds for exercising his or her power.¹¹

As already noted, there is specific provision for reconstitution of the Veterans’ Review Board where a member has a conflict of interest. However the

⁵ Section 144A(2), *Copyright Act 1968*.

⁶ Section 14(2) of the AAT Act.

⁷ Sections 402(1)(b) and 467(1)(b) of the *Migration Act 1958* for the MRT and RRT respectively. If the Principal Member has a conflict of interest, the consent of the Minister is required.

⁸ Section 122(2), *Native Title Act 1993*.

⁹ Section 9(1A)(a), *Superannuation (Resolution of Complaints) Act 1993*.

¹⁰ Section 108, *Victorian Civil and Administrative Tribunal Act 1988* (Vic).

¹¹ Section 11(8), *State Administrative Tribunal Act 2004* (WA).

legislation also appears to contemplate that matters not resolved at their first hearing can be re-allocated by the Principal Member as a matter of course.¹²

Proposed section 23A

If enacted, the Bill would insert a new section 23A into the AAT Act. This section would enable the President to reconstitute the Tribunal for the purposes of a particular proceeding if he or she “thinks that the reconstitution is in the interests of achieving the expeditious and efficient conduct of the proceeding”.

The explanatory memorandum for the Bill gives examples (at page 19) of addition or substitution of a member where knowledge and expertise is required in relation to matters to which the proceeding relates, or removal of a member where a matter is not complex and expertise is not required.

The nearest equivalents to this provision we have identified relate to the Migration Review Tribunal and Refugee Review Tribunal. In both instances, the Principal Member may add or remove members for a particular review if he or she “thinks the reconstitution is in the interest of achieving the efficient conduct of the review in accordance with [the relevant Tribunal’s objective]”.¹³ Both Tribunals have the objective of “providing a mechanism of review that is fair, just, economical, informal and quick”.¹⁴

However, there are additional criteria that must be satisfied before the Principal Member’s power to reconstitute is enlivened. First, the Principal Member must consult with the member(s) constituting the Tribunal and with an additional Senior Member. Secondly, one of two circumstances must arise:

- the Principal Member is satisfied that there is insufficient material before the Tribunal for the Tribunal to reach a decision on the review, or
- a prescribed period has elapsed since the Tribunal was constituted.

The prescribed period is presently 2 months for decisions relating to detainees, and 3 months otherwise.¹⁵

The other provision we have identified that bears some resemblance to the proposed section 23A relates to the Superannuation Complaints Tribunal. The Chairperson of that Tribunal may reconstitute if he or she considers it desirable

¹² Sections 143 and 144, *Veterans' Entitlements Act 1986*. See especially s 144(3).

¹³ Sections 355A (MRT) and 422A (RRT), *Migration Act 1958*.

¹⁴ Sections 353(1) (MRT) and 420(1) (RRT), *Migration Act 1958*.

¹⁵ Regulations 4.26 (MRT) and 4.30 (RRT), *Migration Regulations 1994*.

“to ensure the timely performance or exercise of the Tribunal’s functions or powers under this Act”.¹⁶ There do not appear to be any other requirements or limitations placed upon the Chairperson.

I hope this information will be helpful to the Committee in its deliberations regarding the Bill. If the Committee wishes to obtain any clarification or additional information concerning the research that we have undertaken, please do not hesitate to contact me or my colleague, Trevor Mobbs on tel. 6250 6348 or e-mail trevor.mobbs@ag.gov.au.

Yours sincerely

Margaret Harrison-Smith
Executive Director

Tel. 6250 5801
E-mail margaret.harrison-smith@ag.gov.au

¹⁶ Section 9(1A)(b), *Superannuation (Resolution of Complaints) Act 1993*.