
COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

# SENATE

## LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

**Reference: Administrative Appeals Tribunal Amendment Bill 2004 [2005]**

TUESDAY, 1 FEBRUARY 2005

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**SENATE**

**LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE**

**Tuesday, 1 February 2005**

**Members:** Senator Payne *(Chair)*, Senator Bolkus *(Deputy Chair)*, Senators Greig, Ludwig, Mason and Scullion

**Participating members:** Senators Abetz, Barnett, Bartlett, Mark Bishop, Brandis, Brown, Buckland, George Campbell, Carr, Chapman, Colbeck, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Hogg, Humphries, Kirk, Knowles, Lightfoot, Lundy, Mackay, McGauran, McLucas, Nettle, Robert Ray, Ridgeway, Sherry, Stephens, Stott Despoja, Tchen, Tierney and Watson

**Senators in attendance:** Senators Bolkus, Brandis, Ludwig, Mason and Payne

**Terms of reference for the inquiry:**

Administrative Appeals Tribunal Amendment Bill 2004

## WITNESSES

**Committee met at 9.04 a.m.**

**MORAN, Mr Simon James, Principal Solicitor, Public Interest Advocacy Centre**

**CHAIR**—Good morning. This is the public hearing for the Senate Legal and Constitutional Legislation Committee's inquiry into the Administrative Appeals Tribunal Amendment Bill 2004. The inquiry was referred to the committee by the Senate on 1 November 2004 for report by 10 March 2005. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee does prefer all evidence to be given in public, but, under the Senate's resolutions, witnesses do have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

I welcome our first witness today, Mr Simon Moran, representing the Public Interest Advocacy Centre. PIAC has lodged a submission with the committee which we have numbered 12. Do you wish to make any amendments or alterations to that submission?

**Mr Moran**—No.

**CHAIR**—I invite you then to make an opening statement. At the conclusion of that statement we will go to questions from members of the committee.

**Mr Moran**—Thank you for the opportunity to address the committee on the Administrative Appeals Tribunal Amendment Bill. The Public Interest Advocacy Centre is an independent and nonprofit legal and policy centre located in Sydney. Our charter is to undertake strategic legal and policy interventions in public interest matters in order to foster a fair, just, democratic society and empower citizens, consumers and communities. While PIAC's work focuses on the interests and rights of individuals, it is achieved through systemic litigation and policy work. The centre's clients and constituencies are primarily those with least access to economic, social and legal resources, and therefore those who are potentially most vulnerable to the abuse of government power.

PIAC's submission to this committee is informed by the experience of our clients in matters before the Administrative Appeals Tribunal. The tribunal plays a central role in the network of bodies that review government power. The tribunal ensures that government does not abuse the exercise of its powers and that its decisions conform to the requirements set by the parliament. The tribunal can only fulfil its functions if it has a high status and authority within the legal and the general community, if it is independent from government and if it is accessible to applicants, in particular to unrepresented applicants.

While PIAC believes there are positive provisions in the bill, it is concerned that a number of provisions are hostile to these critical attributes of the tribunal. Firstly, PIAC believes that the status and authority of the tribunal will be undermined if the qualification requirements for the president are relaxed in the manner proposed by clause 15, which permits a non-Federal Court justice to be appointed as president. In addition, PIAC believes that such an appointment would lead to a significant loss of experience and expertise within the tribunal. Secondly, PIAC believes that the actual or perceived independence of the tribunal will be undermined if the amendments relating to the removal of tenure for the president, deputy

president and other senior members and the empowering of the minister to appoint members to panels are passed. As the tribunal reviews government decisions, it relies on its independence from government for its integrity and the confidence of the public. Any diminution of even the perception of independence will, we believe, be damaging for the tribunal. Thirdly, PIAC believes that additional burdens could be imposed on applicants if the amendment which gives the tribunal power to require applicants to amend their statement setting out their reasons for review is passed.

One of the key attributes of the tribunal is its accessibility to unrepresented applicants. This will be diminished if unrepresented applicants face legalistic hurdles which they are unable to meet. PIAC believes that the cumulative impact of these amendments—the ones which we have referred to in our submission—will undermine the authority, status, independence and accessibility of the tribunal. Furthermore, the amendments which we have highlighted undermine not only the tribunal but also the rights of Australians to government accountability. The tribunal and the legislation which gives it its jurisdiction underpin the rights of individuals to government accountability. By undermining the independence and effectiveness of a body assigned to determine rights, parliament will be undermining the rights themselves. That concludes my opening statement.

**CHAIR**—My first question relates to your observations about the effect of no longer having a requirement that the president be a Federal Court judge. The argument put in the second reading speech and the explanatory memorandum—and the argument generally put for the bill—is that that in fact allows for a greater range of people from whom the president can be selected. That is regarded as advantageous. Is PIAC not in accord with that view?

**Mr Moran**—We have suggested in our submission that the particular expertise and status requirements of a president fit very well with the appointment of a Federal Court judge. The tribunal has a range of members appointed to it. I think that in terms of offering a varied perspective the tribunal already does that through the appointment of different types of members.

**Senator BOLKUS**—I presume that the president has powers over and above those of other members. Can you enumerate some of those? Why they are more appropriately exercised by someone with judge status?

**Mr Moran**—The president has powers over not only the management but also the procedures of the tribunal. I think that in terms of determining procedures for non-judicial tribunal members in particular the president's expertise and experience in Federal Court proceedings is invaluable. Generally, the president has a major guiding hand in providing directions for all members for proceedings. I think that capacity can only really be filled by a Federal Court judge.

**Senator LUDWIG**—In addition to that, though, they have powers to determine whether matters will be referred on, don't they?

**Mr Moran**—They do.

**Senator LUDWIG**—In fact, they become the gatekeeper. As I understand the legislation, they will determine whether or not matters can go to the Federal Court.

**Mr Moran**—Yes. Their experience in hearing such matters in the Federal Court is, I think, invaluable.

**Senator LUDWIG**—So your view, as I understand it, is that it is important to have someone with a judicial background who will also be able to deal with the broader issues involved in the position. They will be able to deal with matters that may be referred on to the Federal Court in addition to dealing with administrative requirements. Pivotal in the new role will be the ability to deal with the wider administrative tasks that they now have or will have under this legislation.

**Mr Moran**—Yes. The way we view it is that the president has a major role in the direction of the tribunal and not simply in referring matters on. This is where their expertise as Federal Court judges is activated. As general guiding individuals for the tribunal, they really set a standard for procedural matters. In our experience the tribunal has good procedures and has been effective. Our experience has been that that has come very much from the president and the president's experience in the Federal Court.

**Senator LUDWIG**—There is also an argument that a provision similar to this one, to do with the qualifications of the person, is reflected in the native title legislation. Do you have anything to say about that?

**Mr Moran**—I am not very familiar with the native title legislation. We do not undertake work in that area.

**Senator LUDWIG**—As I understand it, they would perform a mediation role in that capacity, but in this instance they make decisions on expensive or certainly complex legal issues. But I can ask the department about that. Do you have a view about the position under this legislation which would allow a multimember tribunal not to have a presidential or vice-presidential member or someone with a legal qualification?

**Mr Moran**—Our experience has been with single members; we have generally not had any experience with multimember tribunals at the AAT. We have appeared in a number of matters at the SSAT, and multimember tribunals work very well at that level. Whether or not a presidential or deputy presidential member is required often depends upon the legal complexities of a particular matter. Most of the matters that we have taken to the tribunal have been particularly complex. A presidential or deputy presidential member, with their experience, is very useful for directing the tribunal and assisting the other members of the tribunal to get on top of those complex legal matters.

**Senator LUDWIG**—What if you couple that issue with the involvement of the decision maker in the review process? The legislation now seems to suggest that there is a change from when the primary decision maker either would not participate or would participate in a neutral way in the appeal process. It seems to me that there is a potential conflict in this legislation where the involvement of the decision maker in the review process is not so qualified. Have you had a look at that particular provision?

**Mr Moran**—I have not had a look at that particular provision. Our experience in the SSAT, as well as with this tribunal, is that the original decision makers do not take an active role and the tribunal takes a much more inquisitorial role. We think that has worked very well in the past and there does not appear to be any compelling need to change that.

**Senator LUDWIG**—There does not appear to be a minimum with respect to the tenured positions either.

**Mr Moran**—No, there is a maximum of seven years.

**Senator LUDWIG**—There is a maximum of seven years but there is no minimum, and the argument seems to be that that would allow for flexibility. Is there a point where flexibility would be seen to fly in the face of good administration, in terms of not setting a minimum—one, two or three weeks—for a person to be appointed?

**Mr Moran**—Clearly, if someone is appointed for one week, depending upon their level of experience and expertise, that may well impede appropriate administration. I think a minimum amount of time would be extremely useful if you were going to create limits. It is essential for garnering the knowledge of the various pieces of legislation and the process for people to have expertise, which will be built up over time. The AAT covers a very broad variety of pieces of legislation. To get on top not only of the Administrative Appeals Tribunal's procedures but also of that legislation, you need a minimum amount of time.

**Senator LUDWIG**—Have you had an opportunity to have a look at the good faith provisions in the ADR?

**Mr Moran**—No, we have not looked at the ADR.

**Senator LUDWIG**—I will not ask you a question in that area then. The other area you raised was in relation to the migration area under clause 226, which you expanded on in your original submission. As I understand it, you argue that the president reviewing certain migration decisions alone may give rise to difficulties down the track. Is there an opportunity for legal challenges to eventuate out of that?

**Mr Moran**—The proposed amendment to the act seemed particularly legalistic. It is our opinion that it could well be used by applicants, if they are dissatisfied with the tribunal member appointed, because of the specific criteria set out in the amendment. There are a number of criteria in relation to relevant expertise and the complexity of the matter. The president has a discretion as to who to appoint to hear the matter. There could well be a challenge to presidential decisions because they directly affect an applicant whose matter is being heard before a particular tribunal member.

**Senator LUDWIG**—In the sense that they would be challenged on the basis that the president either did not have regard to A, B, C, D or E in making the decision or should have had a greater regard for those factors? That is in schedule 1 of the amendments at item 226. I am just trying to get a sense of it.

**Mr Moran**—Yes. The president has that discretion. He must take into consideration those criteria you have referred to. There is great potential there to question that decision. Even the sense that there is a discretion could lead to applicants filing applications in the Federal Court seeking to challenge that decision.

**Senator LUDWIG**—I will leave my colleagues some other matters to raise with you but I was also interested in one other matter. Do you know whether the minister has any other role in these amendments other than being able to select members for divisions? Everywhere else

it seems to me that the Governor-General is the pivotal position in terms of resignation or other things. But in terms of signing divisions it seems to be the minister.

**Mr Moran**—That was the only provision we could identify.

**Senator LUDWIG**—I could not find anything anywhere else, either. Do you have any comment in relation to why that would be so? Is there something that the minister could do that the Governor-General or president could not do?

**Mr Moran**—It does not leap out at me.

**Senator LUDWIG**—No, it did not to me, either. Thank you very much.

**Senator MASON**—To follow on from a couple of Senator Ludwig's questions, in relation to the appointment of members, senior members, presidents and so forth, what is wrong with restricting their appointments to seven years? It is a different world now. Academics and senior public servants all have their terms limited. This is not a court; it is a tribunal. What is wrong with limiting the appointments to seven years? If someone is no good, why shouldn't we be able to get rid of them and not have to reappoint them?

**Mr Moran**—Your question has probably highlighted why it is important, and that is because there is a distinction here. This is not a court; this is a tribunal. It does not have the powers or the constitutional protection of a court. Therefore, in order to maintain and ensure its independence—which is particularly important in this area because it does relate to the use of government power and government decisions—tenure is critical.

**Senator MASON**—I used to be an academic years ago and academics used to argue along those lines as well—that there should be lifetime appointment. Indeed, senior public servants did, as you will recall. Does that argument really apply? Isn't seven years good enough?

**Mr Moran**—With an adjudicative body like this and with the nature of the decisions that it is considering, tenure gives at least the perception of independence. That remains important. The other members do not have that tenure. It is really just the presidential, deputy presidential and senior member positions.

**Senator MASON**—Can you help me here? You oppose expanding the powers of the president to direct that a member not take part in proceedings if it is in the interests of justice and to reconstitute the tribunal if it is in the interests of achieving the expeditious and efficient conduct of the proceeding. In what circumstances would use of that power be envisaged?

**Mr Moran**—I think that was our difficulty: we can envisage circumstances where a tribunal member is sick or is unable to perform their functions for some critical reason; we could not find a good justification for changing the constitution of the tribunal in the circumstances which this amendment seems to suggest, where a tribunal has already part-heard a matter or is already deeply involved in a matter. I think what we have suggested in our submission is that in many respects the interests of justice would require the matter to be reheard from the beginning so that the new tribunal is fully aware of all the issues.

**Senator MASON**—And your contention is that, in any case, if a member is sick or whatever the power already exists to cater for that exigency?

**Mr Moran**—Yes. We see that power as being used in the last possible scenario, and not really to be used more flexibly, with a discretionary nature, by the president.

**Senator MASON**—When I look at this, it does not gel well. It sends out red lights, but I cannot quite work out in what circumstances it should be used except to say that it could be used in circumstances that might be unfortunate. That is all.

**Senator BRANDIS**—Mr Moran, I was worried about that as well. I am looking at section 23 of the act, which would be replaced by the new provision, and I must say that it seems to me to cover the ordinary cases in which a member, being unavailable, would need to be replaced or substituted. But under the proposed new section 23(2)(b)(iii) there seems to be a brand new power for the president to give a direction to a member not to continue to take part in the proceeding. Do you agree with me that that seems to contemplate that the direction is in relation to a pending or current proceeding?

**Mr Moran**—It seems to suggest that.

**Senator BRANDIS**—Just help me here: I cannot see, other than in subsection (9), which is expressed in the most vague terms, about 'the interests of justice', any statutory guidance to the president on the exercise of power conferred on him or her by this new section.

**Mr Moran**—'The interests of justice' is remarkably vague.

**Senator BRANDIS**—Indeed. Is there anywhere else in the bill where some guidance is given as to the exercise of that power?

**Mr Moran**—I am not absolutely certain. I do not think so.

**Senator BRANDIS**—Are you familiar with—because I must confess I have never seen one—an act constituting a court or tribunal which gives to the chief justice or the president or the senior member of the court or tribunal the power to, in effect, stop a member of the court or tribunal from proceeding with the hearing of a current proceeding? Are you aware of any analogous provisions?

**Mr Moran**—No. A scenario that I can think of is where a tribunal member demonstrates some bias. In that scenario an applicant might well make an application to the Federal Court seeking that the matter be quashed.

**Senator BRANDIS**—And if a royal commissioner—we had a case like this in my state of Queensland a few years ago—were alleged to be exhibiting bias then they could be liable to an injunction to stop them proceeding. But that is part of the general law.

**Mr Moran**—Those rights are there without the amendment.

**Senator BRANDIS**—One other small thing: in your recommendation 5 you object to the tribunal being given power to require the filing of an amended statement of grounds. What is wrong with that? That would be a power inherent in the tribunal anyway.

**Mr Moran**—The difficulty we have with that provision is that it seems to relate specifically to people who have legal representation. That was the context explained in the explanatory memorandum. We do not have a difficulty when individuals have legal representation. I think the amendment was aimed at applications that had been filed simply saying 'not made according to law' in respect of which legal representation was clearly

inadequate. However, with applicants who are unrepresented a request for further particulars, in relation to their reasons for review, is really not going to take the matter any further.

**Senator BRANDIS**—Sorry, I just do not follow that. I appreciate that an unrepresented party is not going to be able to formulate their case in the traditional legal manner. Often one finds an unrepresented party needs, in a sense, the assistance of a court or tribunal to define exactly what their ground of complaint is for the very reason that the person does not have a lawyer.

**Mr Moran**—I think that is right. This amendment does not really do that. It requires the person to, as I see it, go away, think about it a bit more, rephrase the statement and bring it back to the tribunal. The current approach in the tribunal is one where at directions hearings and preliminary hearings the tribunal undertakes the role that you have suggested in trying to distil from the applicant the real nature of their review and the reasons that they are seeking the review. So the current processes seem to work sufficiently well to achieve that goal of refining the elements of the review.

**Senator BRANDIS**—I would have thought that if you had a complaint about this it would not be that it imposed an extra burden on unrepresentative applicants but that it was unnecessary because, as I said before, the tribunal would already have that power implicitly.

**Mr Moran**—One of the reasons we are opposed to it is that we are not sure where it leads. If the applicant does not then file a statement or if the applicant files a statement that remains insufficient, what is the next step for the tribunal?

**Senator BRANDIS**—The ultimate step would be to strike out the proceedings. If a comprehensibly formulated statement of the grounds of complaint cannot be provided the proceedings should be struck out, shouldn't they?

**Mr Moran**—That is the logical conclusion we thought this provision would lead to.

**Senator BRANDIS**—What is wrong with that?

**Mr Moran**—In this particular circumstance, it impacts greatly on people who are unrepresented. If unrepresented people do not have the assistance of the tribunal, which they currently do have in that phase of preliminary hearings, then simply requiring them to redraw their statement of reasons for review is not going to achieve anything.

**Senator BRANDIS**—But it becomes circular, doesn't it? If you are an unrepresented party and you cannot formulate your claim, you do not have a justiciable claim before the tribunal. It is really not to the point to say, 'Well, maybe there's a claim there and if you had a competent lawyer to present it for you, you could get it up or you could knock it into shape.' If you cannot formulate your claim, you do not have a justiciable claim.

**Mr Moran**—The current process is that the claim is formed with the tribunal's assistance. We often have clients who have very clear cases but they simply cannot articulate them because of lack of—

**Senator BRANDIS**—I understand that. Those who have practised in the courts have all seen that, but I would have thought that this power actually assists and augments the tribunal in fulfilling that role rather than the contrary.

**Mr Moran**—I suppose we do not think that it is really necessary for the tribunal.

**CHAIR**—Thank you very much for assisting the committee, Mr Moran. If anything does arise in our deliberations on which we need to seek advice from PIAC, I hope we can contact your office.

**Mr Moran**—You can.

[9.35 a.m.]

**CUNNINGHAM, Mr Christopher Anthony, Executive Member, Federal Litigation Section, Law Council of Australia; and Member, Administrative Appeals Tribunal Liaison Committee, Law Council of Australia**

**ROBINSON, Mr Mark Anthony, Member, Administrative Law Committee, Litigation Section, Law Council of Australia**

**CHAIR**—I welcome the representatives of the Law Council of Australia, Mr Chris Cunningham and Mr Mark Robinson QC. The Law Council has lodged a submission with the committee, numbered 15. Do you wish to make any amendments or alterations to that submission?

**Mr Robinson**—No.

**CHAIR**—We now invite you to make a short opening statement. At the conclusion of that we will go to questions from members of the committee.

**Mr Robinson**—Thank you.

**Mr Cunningham**—Just before my learned friend makes that address, I should just point out one matter by way of disclosure: my wife is a part-time member of the Administrative Appeals Tribunal.

**CHAIR**—Thank you, Mr Cunningham. That is duly noted for the record.

**Mr Robinson**—I should also note that, upon your opening, you referred to me as Queen's Counsel. I am not Queen's Counsel; I am a junior counsel at the Sydney bar.

**CHAIR**—I apologise, Mr Robinson. We inadvertently promoted you.

**Mr Robinson**—I should also say that I am a member of the Administrative Law Committee of the Litigation Section of the Law Council of Australia. I have been for many years. I practise in the area of administrative law—state, federal and local government matters—and I have been for six years a part-time judicial member of the Administrative Decisions Tribunal of New South Wales, sitting in the general division and hearing freedom of information matters and privacy matters generally.

If I could briefly talk to the submission that has been lodged by the Law Council and make some other comments, I would be grateful. The Law Council itself is described briefly in the annexures to the submission as the peak national representative body of the Australian legal profession. It was established in 1933. It represents at the federal level about 40,000 Australian lawyers, through their representative bar associations and law societies. The Law Council speaks for the Australian profession on the legal aspects of national and international issues, on the federal law and on the operation of federal courts and tribunals. Its aim is to work for the improvement of the law and the administration of justice. That is who we speak for.

The submission itself is there for the committee to see. The main points that arise for the committee that I wish to draw attention to are the following. The first is having a judge as the head of the AAT. The Law Council would certainly prefer the status quo to continue, with a

judge as the head of the AAT. This is particularly so in the context of the proposed bill, which would increase the role and function of the head of the AAT. The situation before the bill is that it is desirable for many reasons for the head of the AAT to be a sitting judge of the Federal Court of Australia. The proposed changes in the bill make that even more so, because the AAT head is going to get significantly increased functions and powers. That makes significantly stronger the case for the head of the AAT to be a judge.

For example, the reconstitution powers in proposed sections 20B, 23 and 23A must be exercised judicially. That does not mean as a judge; it means exercised in a proper manner, balancing the evidence and balancing all the considerations in a proper, lawful fashion. In the common law that is called exercising a decision judicially. It makes sense that that is best done by a judge at that level of seniority. Also, referrals to the Federal Court on questions of law should really be formulated and articulated and sent up to the Federal Court by a judge, and in some cases that judge—the head of the AAT—can also sit on the very appeal that is referred by the AAT to the Federal Court. There is a lot of benefit in doing that.

The Law Council's submission is resounding on this in that it has spoken to all of its constituent bodies and it is supported throughout Australia by all of the Law Council's constituent bodies: the head of the AAT should be a sitting judge or, if it has to be the case, a retired Federal Court judge. These powers have to be exercised with great care and temper and based on experience and, in this case, preferably judicial experience.

The second issue that is of significance is the fixed terms issue. The proposed repeal of sections 8(1) and 8(2) leaves section 8(3) with the words 'member' and 'up to seven years'. 'Member' is defined in the definitions section as any member, presidential or non-presidential. In effect, it means that members can be appointed for up to seven years. It is not a seven-year blanket appointment; it is up to seven years. It could be three years, as the Refugee Review Tribunal appointments were at one time, for example. It could be seven years or it could be two years. The appointment is for up to seven years. We oppose that quite strenuously. We want quality appointments in the AAT and we want them to serve without fear or favour, particularly at the head.

**Senator BRANDIS**—You do not say that for all members, though, do you? As I understand it, it is the status quo that members are appointed for up to seven years but the longer tenure is for the president or, I think, the deputy president. Is that right?

**Mr Robinson**—That is the case.

**Senator BRANDIS**—So your remarks are limited to the proposed change to the tenure of the president or deputy president?

**Mr Robinson**—The top two layers, yes. As to those two significant issues—tenure and the head of the AAT—I entreat you to give significant weight to, and I would endorse, the Administrative Review Council's submission in this regard, particularly the second and third pages of that submission, which tells you why these issues are important. If you look at the make-up of the Administrative Review Council—I am sure the committee are aware of that make-up since the ARC is within the bailiwick of the very legislation you are dealing with—you will see that the combination of members of that committee making those statements is of

extraordinarily significant weight going to this topic. We would endorse those comments as to why the head of the AAT should be a judge.

As to multimember tribunals—the third issue that I wish to speak to generally—we simply say that one should be a lawyer on a multimember tribunal. Administrative law is difficult enough for lawyers. The Commonwealth has an extraordinarily large number of statutes, the make-up of which is often extraordinarily complicated and difficult. It is difficult enough for lawyers, I have to tell you. To have a multimember tribunal on which there is not one lawyer is not a situation that practitioners would wish to face; it would make life extremely difficult. A large part of the Federal Court reports that I scanned this morning in my chambers dealing with the legal interpretation of administrative law matters that arise from Commonwealth legislation involve matters that are before the AAT. Statutory construction and the interpretation of this very difficult legislation in many spheres of the jurisdiction of the AAT are quite important.

The fourth issue was one practice and procedure matter: requiring the applicants to amend their statements very early in the piece. We opposed that. We say, simply, that it can be done later. Also, one must remember why the AAT was set up. The applicants do not necessarily have to prove that something was wrong with the original decision. They do not have to prove an error in the original decision. The AAT was set up to give applicants a fair go and for the tribunal to hear matters afresh. Very often the tribunal is guided by the original decision but, for legal purposes and for most purposes, the original decision can be set aside and the AAT can approach matters afresh with a clean sheet. It is a little tough to force the applicant at the start to present an analysis that is critical or is a critique of what was wrong with the original decision, particularly identifying legal errors and errors of rationality and logic. It presumes that all applicants are able to do that equally. For disadvantaged applicants, for self-represented applicants, it is a very big ask. If it needs to be done, it can be done later at the preliminary conference or after the preliminary conference. The applicant can then be asked: 'What is really wrong with the original decision? Can the tribunal adopt it or part of it?' That would save time and allow the tribunal to adopt the expertise of the original decision maker, and that is important.

But the tribunal cannot and should not always defer to the expertise of the original decision maker. There is no point in having a tribunal if it is simply going to look at and correct, as it were, the original decision. We have a wonderful tribunal, nearly 30 years in operation. It is held up as, and is, a world-standard tribunal. Many state tribunals have been modelled in part on it, including the one on which I sit in New South Wales. The AAT has been a globally significant, effective tribunal. The second reading speech effectively admits that and that it is working well. The provisions that attempt to dumb it down, in a sense, are very much opposed by the Law Council. That is all I wish to say in my opening statement.

**CHAIR**—The Law Council's submission makes some observations about the consultation process attached to the drafts and the early stages of this bill. Can the Law Council make any observations on the extent of that consultation and their satisfaction or otherwise with it?

**Mr Robinson**—Very briefly , as I understand it, the Law Council was sent a document which set out in column numbers what the government intended to do in a generic sense. We commented on that—and that is annexed to the submission of the Law Council at annexure A.

Unfortunately, on the left-hand side of those six or seven pages is reference to 33 numbers. They are not item numbers in the bill, because the bill had not been drafted at that stage. If I could, I will tender to the committee the letter which was sent to us by the then Attorney-General, which sets out the item numbers to which the Law Council has responded.

**CHAIR**—Thank you.

**Mr Robinson**—That was even before the exposure draft had been circulated.

**CHAIR**—Yes, I understand.

**Mr Robinson**—The document I have just circulated to you is the proposed amendments. This Law Council submission was made in response to that. The next thing to occur was that the exposure draft was circulated. We had an opportunity to respond to that briefly. The submissions in annexure B perhaps go to the exposure draft. The submissions at the beginning of the document—the primary submissions—go to the bill itself. The short answer to your question is no: we are not completely content with the participation we have been permitted to engage in.

**CHAIR**—So there were no roundtables or consultations of that nature. There were two pieces of correspondence sent to the Law Council.

**Mr Robinson**—There was no consultation of a roundtable nature with the Commonwealth of which I am aware. If there was not, there should have been, because these kinds of amendments in this particular bill really do need to be assessed individually with regard to their initial impact. Then one needs to pull back and look at the amendments in the context of the act as a whole. It certainly is a bill that would benefit from a roundtable discussion between the Law Council and the drafters.

**CHAIR**—And other interested bodies, one assumes.

**Mr Robinson**—Indeed.

**CHAIR**—I have not done a clause-by-clause comparison of the two annexures of the Law Council's submission with the final bill, but can you give us some idea of whether any of the Law Council's views were taken on board in that process?

**Mr Robinson**—On my reading of it, no. The first submission was a very broad and general submission because we were—

**CHAIR**—Responding to a document.

**Mr Robinson**—dealing with that broad and general document. In many places, the administrative law section of the Law Council was not able to deal with anything that had any substance other than a proposition.

**CHAIR**—I understand.

**Mr Robinson**—But in terms of the things that we said we opposed or ought to be qualified, I have not picked up any changes that we have suggested that ought to have been picked up.

**CHAIR**—Thank you. I appreciate the information you have provided on that.

**Senator LUDWIG**—Just so that I am clear on that, the process that was undertaken was that there was an exposure in general form, you responded to that with proposed amendments in a general form and, as far as you are aware, they were not picked up in any substantive form within the final draft of the bill. The issues that you raised in the primary stage still remain. Is that a short summary of where we are at now?

**Mr Robinson**—Yes.

**Senator LUDWIG**—Did the government clarify why they did not pick up any of those issues that you substantively objected to?

**Mr Robinson**—No. Not to my knowledge.

**Senator LUDWIG**—So the main or critical one that you object to is the expansion of the qualification requirement. You do not object to part of it; you object to the point that devolves the appointment to a level where any legal practitioner with five years experience could be appointed.

**Mr Robinson**—The appointment of the head is on a rotational basis of two or three years, up to seven years. So any lawyer of five years standing can be appointed for any period up to seven years as the head of this tribunal. That is not a thing to look forward to.

**Senator BRANDIS**—Any lawyer of five years standing can be appointed a Federal Court judge.

**Mr Robinson**—Indeed. Upon that appointment, that lawyer gains the benefit of judicial experience, judicial decision making, running hearings and, most significantly, the authority that comes with that appointment. That authority is respected and adhered to by all lawyers around the country and in the common law world. It is also respected, appreciated and acknowledged by all private citizens.

**Senator MASON**—Does that mean that the appointment bar to the AAT is more difficult than it is to the Federal Court?

**Mr Robinson**—We are talking about the level at which a lawyer can be appointed as a member. That is one level. As I understand it, we are talking about the head of the tribunal.

**Senator MASON**—Yes, the president. Isn't it Senator Brandis's point that you can be appointed as a judge of the Federal Court after five years as a legal practitioner?

**Mr Robinson**—Yes.

**Senator MASON**—But to be appointed as president of the AAT you need to be a Federal Court judge. So it is more difficult to be appointed as president of the AAT than it is to be appointed as a Federal Court judge because the bar is higher.

**Mr Robinson**—We are talking chalk and cheese as far as I see it. What you are saying is correct and I cannot dispute it. But for a tribunal that remakes decisions of executive decision makers—we are not talking about a court but about an executive entity—to be independent is to be seen to be independent . For an entity that works in a sense outside of the executive and not as part of the mainstream ordinary executive something is needed to lift that entity out of—

**Senator MASON**—To garner the prestige.

**Mr Robinson**—To garner the respect, the quality personnel needed to do the job and the cooperation and respect for the authority of the entity—not just respect for the idea of an AAT, but to do what it says, when it says and not just because you are statutorily obliged to do it but because the person requesting you to do it has this additional authority. That is really what it is all about in the sense of why we are saying it is essential to have a judge as head of the AAT. It removes the body from the general body of executive decision makers and it gives it status, recognition and respect. You only have to look at the time Her Honour Justice Deidre O'Connor was head of the AAT. She undertook a review of the tribunal over a number of years and produced an 800-page report. She looked at every aspect of the tribunal. I have to say that if an executive who was a lawyer with five years standing had taken control of the tribunal that person would not have been able to garner the support, cooperation or manpower necessary to undertake a review of the tribunal from within itself to produce that kind of cooperation.

**Senator MASON**—So your point is that it is not so much a matter of ability, it is rather a matter of the prestige attached to the office. It is a matter of the latter rather than the former.

**Senator BRANDIS**—And you also make an institutional and cultural point: the more you 'de-judicialise' the AAT, the more you almost fold it into the Public Service.

**Mr Robinson**—Indeed.

**Senator BRANDIS**—Is that the essence of what you are saying?

**Mr Robinson**—That fear you have just described is the fear of many. That is not necessarily a fear that I hold but it is certainly a fear that is possible. Personally I do not believe that that would happen, but it can happen.

**Senator BRANDIS**—Definitely.

**Mr Robinson**—And you are dealing with what can happen. If parliament makes that change, it is there for someone to, as it were, fold back the tribunal into the mainstream executive to, as I said in my opening statement, dumb it down; that is perhaps unfair and too strong, but that is what I mean by using those words.

**Senator MASON**—We understand the point.

**Senator LUDWIG**—So, in summary, you think that, if this were allowed to occur, it damages not only the standing but the status of the tribunal?

**Mr Robinson**—Absolutely.

**Senator LUDWIG**—The other area that seemed to be central to your argument is allowing a multimember tribunal to operate without the presence of one presidential or senior member. You say that that issue should not be addressed in the way it is in the bill and there should be a presidential or senior member. That would mean they would have legal qualifications.

**Mr Robinson**—Indeed.

**Senator LUDWIG**—Do you say that the bill should not proceed with those provisions?

**Mr Robinson**—Absolutely. You would agree with that, Chris?

**Mr Cunningham**—I would agree with that, yes.

**Senator LUDWIG**—The other area which seemed central to your argument is enabling the tribunal to require an applicant to amend insufficient statements. I think that was canvassed by Mr Moran and Senator Brandis. Do you have anything to add in relation to that particular point? I think you were present during that exchange.

**Mr Cunningham**—From a practical point of view, there must be some time limit put on when that process of demanding a reformulated application is made. In most of the divisions, you start off with the application and the department puts in its reasons for the decision and the documents that they say are relevant. But, in practice, it is only when they actually sit around a table and discuss the issues that both parties work out exactly where they are at odds in relation to that decision. If an applicant, especially if they are an unrepresented applicant, is put to the task of reformulating something that they know is wrong but they are not sure why because they do not have the benefit of reading all the documents, getting medical evidence if necessary and all the other preliminary things that they require before they can make a value judgment, even as an applicant in person, then the system will become harsh and unfair, particularly to unrepresented applicants before the tribunal.

**Senator LUDWIG**—In terms of unrepresented litigants in this process, do you say that they should be of such a standing that they can formulate a statement of claims that is sufficient so that they do not fall foul of this provision? If that is the point that they have to get to, does it not fall foul of the objective, which seems to suggest the provision of a mechanism of review that is 'fair, just, economical, informal and quick'?

**Mr Cunningham**—Exactly. Encapsulated in those words is assistance from the tribunal, not a position of forcing an unguided applicant into reformulating something in an area that is probably quite complex to him. If it is a social security case and he is given an act with 1,600 provisions in it, how is he going to get that right first time?

**Senator LUDWIG**—Let alone the tax act.

**Mr Cunningham**—'I do not like the decision' is what he will come and say first. Of course that needs guidance from those sitting on the tribunal: to help the person and not put pressure on them. I suppose my concern is, yes, at the end of the day, it does have to be efficient and effective but there should be a recognition that you cannot expect that right at the start. The applicant—like the respondent, like the department—is entitled to have a reasonable amount of information to make a value judgment as to what their case is. I see that there will be unfairness if expedition is put ahead of fairness in the equation in regard to those words.

**Senator LUDWIG**—The other area I was looking at is item 106: 'Decision-maker must assist Tribunal'. New provision 33(1AA) states:

> In a proceeding before the Tribunal for a review of a decision, the person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding.

That seems to be a significant change from what occurred before, where it was incumbent upon the primary decision maker to take a neutral stance. In this instance, it does not seem to suggest that the primary decision maker has to take a neutral stance. Is there a potential for a conflict of interest to arise where the decision maker could take a potentially adversarial role in defending their primary decision?

**Mr Robinson**—To some extent. The agencies turn up at the tribunal now and do, in the main, one of three things: (1) they say nothing, because they do not really care; (2) they defend their decision, as it were, and fight tooth and nail and say, 'We were right and the tribunal should adopt what our officer determined'; or (3) they try to help the applicant in some way, because they feel sorry for the applicant—they thought it was a harsh decision and in subtle ways they try to assist the tribunal to change the decision. In the main it is (1) and (2), but sometimes it is (3).

This provision seems to me to be directed towards the first position, where the agencies will turn up and just not say anything. They will not assist the tribunal. They will say, 'It's a matter for you. We'll give you the act and the documents that we have to'—the T documents, or the section 37 documents—'and we'll comply with the statute, but we won't assist you any further. It's a matter for you. If you get it wrong, that'll be entirely on your head.' It is that sort of attitude that, I have to say, one or two agencies that come to mind display fairly regularly. Those agencies will not be able to do that anymore when this provision comes in. So it is a good provision. The Law Council's submission addresses it briefly and says it would be preferable for that provision to say not just 'to assist the tribunal' to come to any decision but 'to come to the correct or preferable decision'. That is an amendment that the Law Council has suggested. But I think that is the mischief that the provision is aimed at—to stop these agencies from turning up and saying: 'It's a matter for you. We're just here because we have to be. We're going through the motions.' It is a good provision in the main, subject to the changes suggested in the submission.

**Senator LUDWIG**—In respect of the referral of questions of law to the Federal Court, which is the president's position, if the president was sitting on a multimember panel or heard the matter at the first instance and then they were the person who decided on whether the question of law should or should not be referred to the Federal Court, is there is a potential for conflict of interest to arise?

**Mr Robinson**—There is possibly a potential for conflict to arise, but that would be dealt with by the president in accordance with the president's understanding of conflict principles. At that level it would be preferable to have a judge, preferably a judge familiar with dealing with these conflict issues, who would deal with it appropriately. I said in my opening submission that it would be possible for the president to sit on a matter referred by the president. That has happened in the past, and I think that is referred to in the explanatory memorandum.

**Senator LUDWIG**—Yes.

**Mr Robinson**—But if there were a difficulty in it—if the president had to come back and sit on a matter that he or she had decided as a judge in the Federal Court—then that is something that would be either raised by the president or, if not, agitated in the Federal Court as a question of law, as an error of law. So if the president had a conflict of interest in that regard, it might also spill over into ostensible or apprehended bias, which would be a ground of judicial review or an error of law. So I think the general law will take care of your concern. If not, before it got to that, the president would advise himself or herself appropriately so as not to get into that position.

**Senator LUDWIG**—Have you had an opportunity to look at the ADR provisions, particularly at the scope and content of the principle of good faith?

**Mr Robinson**—Yes, we have.

**Senator LUDWIG**—It seems that in relation to the good faith provisions the ADR provisions are expanded but that there is no sanction for not proceeding in good faith. In other words, the ADR procedures generally rely on parties coming to the table in good faith but they are directed, in a sense, to enter ADR procedures. So there may in fact be a reticence or a resistance by one party to enjoin in ADR procedures and in that instance they may come to the table not in good faith but in bad faith, or with little faith perhaps, and the bill does not say what will happen if that is perceived or recognised by the tribunal. That process then becomes perfunctory or a quick step to where the parties actually want to go. Does that detract from the overall procedure in your view?

**Mr Cunningham**—It is very much the same in the supreme courts. There is no sanction and in fact—

**Senator LUDWIG**—I am not suggesting there should be.

**Mr Cunningham**—No. It seems to work still. You can be forced to mediations and other ADR types of procedure. Experience-wise I do not think it will make a difference.

**Mr Robinson**—In addition, it is something that needs to be monitored by the Commonwealth after it is enacted. You will recall that when Her Honour Justice O'Connor made the review she instituted a pilot scheme of mediation. So the AAT has, for about 10 years or so, been tinkering with and utilising a scheme of mediation. So this has come after that period. Mediation before the AAT in some cases is a complete waste of time. For example, trying to mediate a freedom of information matter is very difficult—the situation is very often that they will give the documents or they will not. But there are matters where the Commonwealth will talk, and mediation has been useful in some areas but useless in others. In my view it would be better to allow the provision to go through and to monitor it to see if it is useful. It is either useful or not. If it is not useful some legislative change might be required to give it some further force or effect but at the moment it seems to me to be okay.

**Senator BRANDIS**—I would like to come back to this argument that was proceeding with Senator Ludwig about section 29 and the expanded reasons requirement. I am sorry; I must be missing something here. There is a pre-existing obligation under section 29(1C) of the act, subject to certain fairly obscure exceptions, that an application must contain a statement of the reasons for the application. So every applicant, unrepresented or not, is subject to that obligation and, as I read the statute—and I do not profess to be an expert on it—the supplying of such a statement is a condition upon which the jurisdiction of the tribunal to proceed to determine the case depends. Is that right?

**Mr Robinson**—I would not go so far. That would depend on an analysis of the High Court decision in Project Blue Sky and whether or not non-compliance with that provision would vitiate the application

**Senator BRANDIS**—I am not familiar with that. Ordinarily you have to provide a statement under section 29(1C), don't you?

**Mr Robinson**—It is a box on the form and I normally advise clients to put in the words, 'The decision is wrong.' And very often, at the preliminary conference you say what is wrong with the decision and, more to the point, the client says what he or she wants to happen—or the usually unrepresented litigant says what he or she wants to happen. They say, 'The decision is wrong for these reasons and this is what I want.' It is in that discussion—

**Senator BRANDIS**—Mr Robinson, would you agree that to say a decision is wrong and to say a decision is not correct are synonymous? There is no difference between saying 'the decision is wrong' and saying 'the decision is not correct,' is there?

**Mr Robinson**—It depends on whether the decision is discretionary or whether the decision must be one way or the other based on the application of criteria listed in the act or regulations.

**Senator BRANDIS**—I would have thought that most people would think that to say a decision is wrong or to say a decision is incorrect are essentially the same thing.

**Mr Robinson**—That may be.

**Senator BRANDIS**—All the proposed amendment does is say that the tribunal can—

**Senator LUDWIG**—Excuse me, Senator Brandis, did Mr Robinson concede that wrong and incorrect are the same?

**Mr Robinson**—If there was a discretionary aspect to the decision under review, 'wrong' could mean that it was the wrong choice of a number of open choices. 'Incorrect' means, as I understand it, that there is only one correct answer and this was the incorrect answer.

**Senator LUDWIG**—They are not synonymous in that sense. You can arrive at a correct decision, although it may be wrong for you in terms of how it affects you or what you think of it. That is the idea of the AAT, as I understood it. The AAT stands in the shoes of the decision maker and makes the correct or preferable decision.

**Mr Robinson**—A decision can be correct if it has fulfilled all the statutory criteria. It can be not the preferable decision if there was a discretion in the statute and it has not been exercised in the way you want it to be.

**Senator LUDWIG**—Thank you.

**Senator BRANDIS**—Thank you, Senator Ludwig. Taking that up, I cannot readily see why there is anything wrong with the tribunal, once satisfied that the statement is not sufficient for it to identify the respects in which the decision is not correct or preferable, asking for those respects to be identified.

**Mr Robinson**—There is nothing wrong with that, in principle.

**Senator BRANDIS**—That is what it says.

**Mr Robinson**—We oppose it because of the practical impact it would have on unrepresented litigants. It is all right when litigants have their lawyers present. Their lawyers can articulate at the preliminary conference or in response to a tribunal's formal request for a statement as to why the decision was wrong.

**Senator BRANDIS**—With respect, Mr Robinson, you seem to suspect that the members of the tribunal exercising this power are going to do so, in relation to unrepresented litigants, in a harsh and oppressive way. Why would the members of the tribunal be any less inclined to be helpful, within the appropriate measure of maintaining neutrality, to an unrepresented litigant in fulfilling a requirement made under the proposed amendment than they are at the moment?

**Mr Robinson**—The tribunal will presumably use this power; otherwise there would be no point—

**Senator BRANDIS**—It may use the power. Its use of the power is conditional upon it forming an opinion that it cannot reasonably proceed without a further statement or a further elaboration of grounds.

**Mr Robinson**—I go back to what I said briefly in my opening comments: this process may be of some assistance to the tribunal; it may help the tribunal get its head around, as it were, the real issues in contest, but at the end of the day—

**Senator BRANDIS**—But it does not even start until the tribunal is of the opinion that it cannot, to use your expression, get its head around the issues.

**Mr Robinson**—The tribunal is a merits review tribunal. It is designed to receive decisions from executive decision makers and review the application on a clean sheet basis.

**Senator BRANDIS**—You advise your clients to say the decision is wrong. The most obvious first question for a member of the tribunal faced with a merits review based on that ground is to ask the applicant either in person or through their lawyer, 'Why is it wrong?' As I read it, all this does is formulate the capacity of the tribunal to require a statement of why the applicant says the decision is wrong.

**Mr Robinson**—At the end of the day it is not a relevant inquest. What is relevant are the correct and preferable decision, the evidence that is put before the tribunal and what should be done with this application. What happened before the executive decision maker is not strictly relevant. That is how the tribunal conducts its business.

**Senator BRANDIS**—But even a merits review by way of rehearing—

**CHAIR**—Senator Brandis, please let Mr Robinson finish.

**Mr Robinson**—If you appear before the tribunal, for example, and you argue that the decision below—the executive decision—contains six errors of law, four denials of natural justice, three relevant or irrelevant considerations and did not take into account your parent statement and all the other statements that you submitted, the tribunal will say, 'Tell us something relevant, please.' It will say, 'We are here to merits review the decision, to undertake a fresh review.' That is why the tribunal was set up the first place. So the inquiry that we are speaking of, although it is significant—I am not suggesting it is insignificant—and although it may found the jurisdiction of the tribunal—something which I do not accept, but it might found partly the jurisdiction of the tribunal—at the end of the day, when one comes to the hearing, it is not what the hearing is about. The tribunal will shut you down. It will stop you from making a submission that the decision below was afflicted by some error. It will say, 'We are now dealing with the matter; let us determine it.'

**Senator BRANDIS**—Mr Robinson, I understand the distinction between a merits review and a review by rehearing. But are you going so far as to say that the effect of this provision would be a backdoor method in effect to change the character of the tribunal's jurisdiction so that it is no longer purely a merits review and no longer purely a rehearing?

**Mr Robinson**—No, it merely throws up hurdles to applicants.

**Senator BRANDIS**—I did not think you were saying that. So I come back to where I started: it seems to me that all this does is give the tribunal, if it is of the opinion that it does not sufficiently understand what it is being asked to do, the right to require a clarification of what the applicant is asking for.

**Mr Robinson**—My response to that is that the very act of applying is asking the tribunal to review the decision—to come to the correct or preferable decision—and to do that it must have a hearing of some description.

**Senator BRANDIS**—I think we have done that to death. I do not think this is the subject of your submission, but you may have heard the discussion we had with the Public Interest Advocacy Centre before about proposed section 23(2)(b)(iii), giving the president the power, in relation to the current preceding, apparently, to direct a member not to continue to take part in the proceeding. In proposed subsection (9), the only statutory guidance evidently given is that the president has to be satisfied that the direction is in the interests of justice. Do have any comments to make about that? I think we would be interested to know if you are aware of any analogous provisions.

**Mr Robinson**—Where is the 'in the interests of justice' provision?

**Senator BRANDIS**—In proposed subsection (9) on page 24.

**CHAIR**—Subsection (9) is dealt with on page 18 of the bill.

**Senator BRANDIS**—Have you got proposed section 23(2)(b)(iii), Mr Robinson?

**Mr Robinson**—Yes.

**Senator BRANDIS**—As I read the existing section 23, which is repealed—

**Mr Cunningham**—Clause 66 of the bill?

**Senator BRANDIS**—There is no power of direction in the president under the existing act, so 23(2)(b)(iii) is new.

**Mr Cunningham**—Yes.

**Senator BRANDIS**—Then the only guidance I can see as to the exercise of that power is in subsection (9).

**Mr Robinson**—Proposed section 23 is about availability. 23A is about achieving expeditious and efficient conduct of the proceedings.

**Senator BRANDIS**—My point is that 23(2)(b)(i) and 23(2)(b)(ii) are what is comprehended by availability under the existing provisions of the act, but 23(2)(b)(iii) it seems to me is new, and it is an additional element beyond unavailability, although they are in an omnibus way then grouped into a definition of 'unavailable member'. But under

23(2)(b)(iii) a member might become unavailable because the president intervenes to stop them proceeding to the determination of the current hearing—

**Mr Robinson**—In the interests of justice.

**Senator BRANDIS**—I do not think that is in the statute, so I am just interested in your views about that.

**Mr Robinson**—My view is that I am more concerned about the operation of 23A and how that can work as well. On the face of it, it seems to me to be a bizarre power that is not really necessary.

**Senator BRANDIS**—I will give you the opportunity to speak to that but, before you do, can you just address my question?

**Mr Cunningham**—I have not really considered it in detail and I guess that the problem with it is that it gives no criteria upon which the president can make that decision.

**Senator BRANDIS**—I know this is not a court; it is a tribunal, but I have never seen a provision that gives the president of a tribunal, the chief judge of a court or the head of any body obliged to act judicially the power to intervene, to take a member of that bench off the hearing of a current proceeding. Have you?

**Mr Cunningham**—No.

**Senator BRANDIS**—It just strikes me as an alarming provision.

**Mr Cunningham**—I suspect it may have something to do with if the president perceives that a member is ill and for some reason—

**Senator BRANDIS**—But that is already covered by the existing act.

**Mr Robinson**—Yes, but it goes further.

**Mr Cunningham**—Yes, but it seems to go further. It applies where the president believes that, not where the person—the member—perceives it. But it does not give any criteria or guidance.

**CHAIR**—In the interests of time and in view of the fact that the Law Council has not had an opportunity to make a submission on this point, would it be possible for the representatives of the Law Council to take Senator Brandis's concerns up and perhaps respond to the committee briefly in writing?

**Mr Robinson**—We are comfortable dealing with it now.

**CHAIR**—I am just concerned that Senator Brandis—

**Senator BRANDIS**—That is my last issue.

**CHAIR**—Mr Robinson, you advised that you wish to move on to 23A, as I understand.

**Mr Robinson**—My comment was that 23(2)(b)(iii) is new and it is bizarre.

**Senator BRANDIS**—Have you ever seen anything like it in any analogous statute?

**Mr Robinson**—I am not aware of anything that could possibly be relevant or analogous to that. Also, proposed section 23A, in which the hearing can be reconstituted by different members after the hearing has been completed—

**Senator BRANDIS**—Just take us through that, Mr Robinson.

**Mr Robinson**—Proposed section 23A, 'Reconstitution of Tribunal to achieve expeditious and efficient conduct of proceeding,' does not apply in the Security Appeals Division. In proposed subsection (2), if the hearing of the proceeding has commenced or is completed—that is the emphasis there: a completed hearing—the president may direct that the tribunal be reconstituted by shuffling the members in accordance with paragraphs (a), (b) and (c) if it is expeditious or efficient. That is a bizarre provision: if it might increase the flexibility or increase the efficiency of the tribunal.

**Senator BRANDIS**—In both cases really, because it seems to operate alternatively on current proceedings or completed proceedings. In either case, to add or remove a member or substitute members while the game is still in play or to do so for different reasons after the proceedings are completed, I agree with you, seems to be very bizarre.

**Mr Robinson**—That is all we have to say on that.

**CHAIR**—We can take those matters up further with the department. On reflection or on consideration of the *Hansard* record if there is anything that you wish to add on either of those points, it would be helpful if you would provide that information to the committee in writing.

**Senator MASON**—I have one quick question on tenure.

**CHAIR**—It would need to be very quick, Senator Mason.

**Senator MASON**—It is about the seven years for senior members, deputy presidents and presidents. In your discussion with Senator Ludwig your objection seemed to be that the statute, which uses the words 'up to', could be interpreted to include terms up to a maximum of seven years. If, however, the amendment read, and this is hypothetical, 'appointed for seven years'—not 'up to a maximum of' but 'for seven years'—would you have the same objection?

**Mr Robinson**—Yes.

**Senator MASON**—Still?

**Mr Robinson**—Yes, indeed. Seven years is fine, but you want status for the tribunal and you want members who are fearless of the government and who are independent and seen to be independent, and that comes with, unfortunately, tenure.

**Senator MASON**—Lifetime?

**Mr Robinson**—Certainly seven years or more. It certainly comes with tenure. The president or the deputy president needs to have the satisfaction that he or she has security of appointment. Whether that is for 14 years or for life, it is certainly for a significant period—

**Senator MASON**—You do not think seven years is long enough?

**Mr Robinson**—so that the member can serve without fear or favour and can be seen to be, and be, independent.

**Senator MASON**—I just hear the argument in relation to, as you know, senior public servants and academics—everyone uses the argument—that seven years is a long time.

**Mr Robinson**—Academics do not determine significant issues affecting the lives of people.

**Senator MASON**—But senior public servants do.

**Mr Robinson**—Indeed.

**CHAIR**—I think that brings our deliberations with the representatives of the Law Council to a close. Thank you both very much. As I indicated, if there is further information you can or wish to add in relation to those last two issues or any other then it would be of assistance to the committee if you would do so in writing.

[10.36 a.m.]

**MARTIN, Mr Wayne Stewart, President, Administrative Review Council**

*Evidence was taken via teleconference—*

**CHAIR**—By teleconference I welcome Mr Wayne Martin QC from Perth, representing the Administrative Review Council. The Administrative Review Council has lodged a submission with the committee, which we have numbered 11. Do you wish to make any amendments or alterations to that submission?

**Mr Martin**—No, thank you.

**CHAIR**—The committee apologise—we know that it is very early in Perth. We are very grateful for your attendance by teleconference, particularly in view of the time difference. We invite you to make an opening statement and, at the conclusion of that, we will go to questions from members of the committee.

**Mr Martin**—On behalf of the Administrative Review Council, I am very grateful to have been given the opportunity to address our submission. I am very sorry that I could not be physically present to speak to you. As you will have seen from the submission, the council is generally supportive of the bill, which is not terribly surprising, because some of its provisions have their source in specific recommendations that we have made over the years. Other provisions are generally consistent with the philosophy which underpinned the council's report entitled *Better decisions: review of Commonwealth merits review tribunals* that was released some years ago. In particular, those aspects of the bill that are designed to enhance the flexibility and efficiency of the tribunal by removing restrictions on the composition of the tribunal are generally consistent with that report. Some of the specific provisions of the bill have their source in our recommendations. The proposal to give the Federal Court power to make findings of fact on appeal from the tribunal so as to avoid having to remit the matter to the tribunal in order to complete it, and the power of the tribunal to obtain documents claimed to be exempt under freedom of information, stem from specific recommendations we have made.

The one issue which we do not support is the proposal under the provisions of the bill to enable the president, who is not a judge of the Federal Court, to be appointed. There are, essentially, five reasons why we do not support that proposal. The first, of course, is the vital issue of independence. In this area there are perhaps two aspects of independence that need to be considered: both actual and perceived independence. Of course, in the area of the courts it is common to embody that notion in the expression 'justice must not only be done but be seen to be done'. The president is the public face of the tribunal and he has a vital role in organising and discharging its business. We think it is important that he or she be, and be seen to be, independent of government.

There are two aspects of the bill that seem to us to increase the importance of that actual and perceived independence. The first is the proposal to abolish tenure of members of the tribunal. Of course, a Federal Court judge would, by virtue of that office, have tenure in the court until the age of 72 and to that extent would have secure employment and so, in the

discharge of his or her functions, would have security of at least some office. The other aspect of the bill that makes it more important for the president to be independent is the powers given to the president in relation to the composition and recomposition of the tribunal. Again, we think it is very important that those powers be exercised by somebody who is both actually and perceived to be independent.

The second main area of argument that we think supports retention of the requirement that the president be a judge concerns the quality of decision making. If the president is a judge of the Federal Court we think it more likely that he or she will be experienced in the process of weighing evidence and evaluating competing submissions in order to come to a decision. That is the essential role of the tribunal. It is also likely that he or she will be eminently legally qualified and that can be important in resolving some of the difficult questions of law that come before the tribunal. It is also likely that he or she will be of high standing within the community. For those various reasons we think the continuation of the requirement to be a judge would enhance the quality of the decision making of the tribunal.

The third area that we think supports retention of the existing provision concerns the coordination of proceedings in the tribunal with proceedings in the Federal Court. It is not uncommon for one set of issues to give rise to concurrent proceedings in both the tribunal and in the Federal Court under either the Judicial Review Act or section 39B of the Judiciary Act. In the past it has been possible and very convenient, both to the parties and to the institutions involved, to have the same person presiding over the proceedings in both the court and the tribunal. If the president of the tribunal were not a judge of the Federal Court that capacity would be diminished.

The fourth reason concerns relationships within the tribunal. Inevitably, judges must remain members of the tribunal because there are some areas of jurisdiction of the tribunal that can only be discharged by a judge, such as under the Electoral Act and some other areas. It would seem odd, though, that if there were members of the tribunal who were judges they were subject to direction by a president who was not a judge and if they were subordinate in the hierarchy of the tribunal to a president who was not a judge. That in turn might cause some concerns within the Federal Court and perhaps make it harder to get Federal Court judges to serve on the tribunal.

The fifth and final reason is that the removal of the requirement for judicial office on the part of the president would seem to us to be contrary to a trend that has emerged in the states and elsewhere. In Victoria, there is the Victorian Civil and Administrative Tribunal; in New South Wales, there is the Administrative Decisions Tribunal; and, most recently, in my own state of Western Australia there has been the creation of the State Administrative Tribunal. In all of those tribunals, the senior officer of the tribunal is also a judge. In the United Kingdom, following the recommendations of the Leggett committee, at the most senior levels within the tribunal structure in that country judges will hold office. So for all those reasons we do not support the proposal in the bill to remove the requirement that the president of the tribunal be a serving Federal Court judge.

There are two other aspects of the bill that I will touch upon briefly before I move over to questions. The issue of tenure or term of employment is of course an important issue and gives rise to a vexed and continuing contest between the considerations of independence on

the one hand and those of accountability or efficiency on the other. Tenure is very important for securing independence but on the other hand can create problems in terms of accountability and efficiency in the discharge of the business of the tribunal. The achievement of independence of the tribunal is vital. What I have already said acknowledges the importance of that. Sometimes in Australia questions of independence have arisen. But the issues of accountability and efficiency are practical day-to-day issues that arise much more commonly than questions of independence, fortunately. Therefore, a balance has to be struck between those competing considerations.

The bill strikes that balance by removing tenure and suggesting a maximum term of seven years. We do not disagree with that proposal but we think it would be desirable to introduce some minimum term. We have in the past suggested differing terms of between three and five years as appropriate minimum terms of appointment in order to ensure that the officeholder does have at least some security of tenure. The bill does not have any provision in relation to minimum appointment and we think some provision to that effect, either three or five years, would be desirable.

The last topic I will touch upon concerns the objects clause. We looked long and hard at it and debated it at some length, and in the end we concluded that the objects to be expressed are appropriate. We particularly support those aspects of the objects clause that refer to informality and expedition, and that is again consistent with what we said in our *Better decisions* report. The inclusion of the words 'fair and just', we think, puts those objectives in an appropriate context so that the achievement of fairness and justice is still vital in the work of the tribunal. So we think the objects clause does strike an appropriate balance. They are the only things I wish to say by way of an opening statement.

**CHAIR**—Thank you very much, Mr Martin. The committee has a number of questions. I know that you were able to follow at least briefly the conclusion of the evidence from the Law Council, and some of our questions may touch on those areas.

**Senator LUDWIG**—Mr Martin, you make a submission with respect to how the Freedom of Information Act works and particularly section 64(1), where the tribunal appears to be able to obtain, inspect or have access to the document, but not the other parties. In your view would that operate unfairly or harshly on the applicant in these matters?

**Mr Martin**—In our view no it does not. Of course, the issue with freedom of information proceedings is whether the applicant will have access to the document. If the applicant in accordance with traditional approaches to natural justice is given the document at the time that the tribunal receives it, then, effectively, the case is over. So in our view there has to be some departure from the ordinary rules that govern these proceedings in order to enable the tribunal to see the document without the applicant seeing it, in the unusual circumstance of a freedom of information case. At the moment, the inability of the tribunal to receive those documents without going to the parties does somewhat hamper the tribunal in its conduct of the proceedings.

**Senator LUDWIG**—So you would say that it is a positive addition.

**Mr Martin**—We would, and it is consistent with a recommendation that both we and the Australian Law Reform Commission made in a report dealing with freedom of information some years ago.

**Senator LUDWIG**—Have you seen section 23 operate elsewhere in administrative law?

**Mr Martin**—I have to say that I have not done a search of the other provisions. I think there are various provisions within the various tribunals that give the presiding member power with respect to the constitution of the tribunal. Whether there are provisions that are the exact equivalent of this I am afraid I cannot answer off the top of my head, but I could get somebody within our secretariat to make some inquiries in that regard and perhaps put something in writing if that would assist the committee.

**Senator LUDWIG**—Thank you, that would assist the committee. When you go to the EM, at item 66 it suggests that a member will become unavailable—and this is about halfway through the EM—where:

- he or she stops being a member
- he or she is not available for the purposes of the proceeding, or
- he or she is directed by the President not to continue to take part in the proceeding.

I can understand the first two dot points, but for the further dot point the EM does not go on to explain what circumstance might arise where the president might direct. That is the particular area I am interested in, and whether you have seen those provisions before and what circumstances could arise where, part the way through or even after a completed proceeding, the president might direct the member not to continue to take part in the proceeding. Have you ever seen that occur?

**Mr Martin**—We have not seen that occur. We as counsels did give quite some detailed consideration of these provisions because they are obviously important, and the power conferred by section 23B(3) does, of course, raise the spectre of possible interference in the course of the tribunal proceedings. That power is novel. The two powers in paragraphs 1 and 2 I think essentially replicate the existing provisions of the act, but the power of direction to not continue to take part is novel. At page 18 the EM does give some examples in relation to conflict of interest, and I am looking at the fourth last paragraph of the EM where it says, 'The member has made a public statement that could prejudice the impartiality of the proceeding.'

**Senator LUDWIG**—Yes.

**Mr Martin**—We look at this provision as essentially being, if you like, a consequence or corollary of the increased likelihood that the tribunal will sit composed entirely of members without legal training. Under the new arrangements it is much more likely that the tribunal will sit with a member or members who do not have legal training. In that scenario there seems to us to be an increased likelihood that one or more members may not accurately assess the extent to which, for example, they may have a conflict of interest or the extent to which they should not continue because, as the EM points out, they may have made a public statement.

Another example that comes to mind is that unfortunately the judicial system in Australia has encountered instances in which judicial officers have found it impossible to make a

decision. After having conducted a hearing there have been instances in various states where some years pass without the officer actually handing down a decision. It is in circumstances like that that one could envisage the power being exercised, or perhaps when there is misconduct by a member of the tribunal. We would certainly see that as being an exceptional or extraordinary circumstance. But if, perish the thought, that situation did arise, this section would enable the president to intervene and sort the situation out without having to wait for an appeal to the Federal Court. The only other remedy in ordinary circumstances would be to enable the case to take its course. Then there would have to be an appeal to the Federal Court and it would have to start again. So in circumstances where there may be non legally trained members, this section gives the legally trained president the power to stop the thing going completely and utterly off the rails.

Again, we were guided in our eventual conclusion to support this provision by subsection (9) of section 23, which requires that the president not give a direction unless he or she is satisfied that it is in the interest of justice. The president must have consulted the member concerned so that the member who is the subject of the direction has some measure of natural justice by being consulted by the president, and the president must be satisfied that it is in the interest of justice. When the president moves to exercise the power under 23A by subsection (5), he or she must consult the parties to the proceedings before exercising that power. So it is an exceptional power and an unusual power, and there are safeguards built into the provisions in relation to its exercise. On balance, we do not think it is likely to cause interference with the independence of the tribunal. We think it likely that, assuming the president is a Federal Court judge, it would increase the likelihood that the power would only be exercised in those sorts of extreme cases to which I have referred.

**Senator LUDWIG**—And if they were not a Federal Court judge?

**Mr Martin**—Then I suppose one has the increased spectre of the power possibly being used for political purposes. As I mentioned earlier, it is these sorts of powers that we think reinforce the need for the president to continue to be a judge of the Federal Court. In that circumstance, one could have greater confidence that the power would only be exercised for the purposes for which we think it is being conferred and not for any improper purpose.

**Senator LUDWIG**—If you recast your view in terms of the legislation allowing both for a president not to be a Federal Court judge and for this power to be given, do you still hold the view that it is a reasonable power?

**Mr Martin**—That would increase the risk, if you like. Even if our view were not accepted and the president were not a Federal Court judge, we think it likely that the holder of that office would be somebody with equivalent qualifications, experience and standing within the community to a Federal Court judge. It would be a very bad thing for the future of the tribunal if the holder of the office of the president were not a person held in very high regard within the community whose independence was absolutely established and beyond question. It would only be in the scenario that the president were not a person of high legal standing whose independence was beyond question that one would really, in practical terms, see section 23 operating to interfere dramatically with the independence of the tribunal in its day-to-day running. That would be a theoretical scenario if the requirement that the president be a judge of the court were removed.

**Senator LUDWIG**—That is a potential at some point.

**Mr Martin**—It is a potential, yes. That is as high as you could put it.

**Senator LUDWIG**—Do you say that the multimember tribunals which can be constituted without a person with legal qualifications are a positive move?

**Mr Martin**—Yes, we think they are a positive move. Again, we think it unlikely that they will be a common feature of the structure of the tribunal, but there may be cases in which it would be desirable to have members with different ranges of experience, not necessarily legal experience, sitting to compose a tribunal. There might be different professional disciplines, perhaps medical and some other field of expertise, appropriately engaged in the one case without the need for a lawyer. Lawyers are often helpful in tribunal proceedings but they are not essential, and one can easily imagine cases in which—

**Senator LUDWIG**—I am not sure that I would tell the lawyers that one!

**Mr Martin**—I may get criticism from some of my colleagues but, again, this is another example in which section 23A might conveniently operate. For example, you might start a case in the confident expectation that there are not any tricky legal issues involved but then, part way through running, it might emerge that in fact there is a difficult legal question. The parties themselves might want the tribunal reconstituted to include a lawyer. In that circumstance, section 23A would operate to enable the president to add another member part way through, such as a member with legal experience. We see 23 and 23A as being, if you like, the corollary or consequence of the new approach to flexibility in the constitution of the tribunal and a move away from an insistence upon every tribunal having a lawyer as a member.

**Senator MASON**—That is a benevolent hypothesis though, isn't it?

**Mr Martin**—It is—if one were to adopt a more paranoid view one could attribute more sinister motives to it; but we think that is the underlying purpose of it. In relation to lawyers, the tribunal sits to make administrative decisions. Almost all the administrative decisions that are made in this country are made by people who are not lawyers. If we thought it was essential to be a lawyer to make every administrative decision, government would stop. Just because it is a review does not necessarily mean that you need to have lawyers.

**Senator BRANDIS**—Other than the desirability of augmenting the expertise of the tribunal in unforeseen circumstances, what do you say are the other policy reasons for 23A?

**Mr Martin**—It is to cover the unforeseen circumstances that one cannot foresee—I am in danger of getting Rumsfeldian here about the known unknowns! It is really, I think, to enable a whole variety of circumstances ranging from the desirability of augmenting the tribunal's expertise through to misconduct, appearance of conflict, inability to make a decision—a whole raft of things that might give rise to the desirability of changing the tribunal while running rather than having to wait until the thing has run its course, go to the Federal Court, quash it, come back and start again.

**Senator BRANDIS**—I think you would understand the intuitive objection to the idea of vesting in anyone a power to reconstitute a tribunal in the course of a hearing. I do not think that is necessarily, as you said, a paranoid view. The idea of a court or tribunal, being seized

of a case, having its membership changed in the course of the proceedings does seem alarming to me. I understand your argument about augmentation in the event of it being discovered that expertise needs to be added to the panel, but I am not so sure about removing members of the tribunal who have embarked upon the proceedings.

**Mr Martin**—A scenario that comes to mind is a situation in which a party makes a submission to the tribunal that a member should not sit because of a conflict of interest.

**Senator BRANDIS**—But they would make that at the start, wouldn't they?

**Mr Martin**—Yes, they would. But let us say the member rules against that submission and says, 'We're now going to go on with the hearing,' and the case is a long case and is going to be listed for hearing for several weeks or perhaps even months, which is not unheard of in the tribunal. The parties are then exposed to a very substantial expense which, because of the cost regime in the tribunal, they are unlikely to ever recover. If it appears to the president that the member has plainly got that issue wrong then this section would give the president the power to say: 'Look, you've got it wrong. You shouldn't sit. I will now put in another member of the tribunal.' Otherwise, the case simply has to run its course in a situation in which there is every reason to think the member should not be sitting. People will spend hundreds of thousands of dollars potentially, get a decision that is flawed, have to go to the Federal Court, get it quashed and then start again. That is the sort of scenario that we see the section being intended for. Of course, if the president were to use the power for a purpose other than a proper purpose then the president could themselves be the subject of litigation.

**Senator BRANDIS**—It seems to me that the ground for adding a member is expertise but the ground for removing a member is misconduct.

**Mr Martin**—Yes. Misconduct or—

**Senator BRANDIS**—Apprehended misconduct.

**Mr Martin**—Apprehended misconduct, yes.

**Senator LUDWIG**—The other area that comes to mind is item 176 paragraphs 45(1)(a) and (b) where the existing paragraphs are substituted by a new paragraph (a), which states:

(a) a question must not be so referred without the concurrence of the President ...

In this instance of the proposed changes—where the president may not be a Federal Court judge and the panel may constitute the president, who then has the power to refer or not refer their own decision on—is there a potential for a conflict of interest to arise?

**Mr Martin**—I do not really think so. The reason I see item 176 included is, again, perhaps as a corollary of the increased likelihood of tribunals being constituted by persons who are not legally qualified. I think there is seen to be a danger that in that circumstance a party might go along and say, 'I want this question of law to be referred to the Federal Court.' The lay member might think, 'Oh, gosh, it's a question of law; it's quite hard,' and off it goes to the Federal Court when in fact it might be a fairly simple question that could be more expeditiously dealt with some other way—for example, by the use of the power under 23A that we have just been talking about, by augmenting the tribunal by introducing a legally qualified member. So I think the purpose of the provision is really to enable the president to filter questions of law that are going off to the Federal Court and to consider whether it might

not be more expeditious to resolve the question within the tribunal before it goes to the Federal Court. I think that that objective can be achieved whether or not the president is a judge of the Federal Court.

**Senator LUDWIG**—We have covered section 23 and there are a couple of others that you may say are corollaries of the new provision which provides that the president may not be a Federal Court judge and that panels may not have lawyers on them. That begs the question: would it have been easier to have left that alone rather than bring about a change to a multimember tribunal which does not have a lawyer included on it? As a consequence you would not need the additional paragraphs and safeguards which then, in some submissions, open up the potential for conflicts of interests to arise and also for perhaps a more negative view to survive.

**Mr Martin**—One of the concerns with the tribunal, and it was a concern that the council gave voice to in the *Better decisions* report, is that it is seen in some quarters, and I think rightly so, as having been overly legalistic. It was important for the tribunal to get off on the right foot and to establish its independence and the fairness and justice of its operations, and it did so very effectively. The first president, Sir Gerard Brennan, was a jurist of the highest order but he did cast the tribunal in a very legalistic direction. The clear thrust of these amendments is to move away from that legalistic direction and to make it less formal, more administrative in focus and less legalistic. If you accept that policy objective, which we as a council do, then these other consequences seem to us to follow.

**Senator LUDWIG**—Item 106 inserts a provision at 33(1) that the decision maker must assist the tribunal. The Law Council indicated that it supported that provision with the caveat that it should come to the 'correct or preferable' decision, for that to be included within that. Do you support that change?

**Mr Martin**—I would not oppose it but it seems to me to be otiose, with respect, because the other provisions in the act require—the jurisprudence requires the tribunal to come to that decision. I am putting this poorly.

**Senator LUDWIG**—No, I understand your point.

**Mr Martin**—The nature of the decision to be arrived at is dealt with elsewhere. This is simply giving effect to the obligation of the decision maker to assist the tribunal to arrive at that decision, not to specify what the decision should be—that is really dealt with somewhere else. In other words, it is implicit in the word 'decision' that it be a decision of the quality that the tribunal must make.

**Senator LUDWIG**—Yes, otherwise it is not a decision that the tribunal can make.

**Mr Martin**—Yes, quite.

**Senator LUDWIG**—The other area where it was raised was that it might create a position where the primary or the original decision maker may open the position where, instead of assisting the tribunal in a positive sense, they assist the tribunal in defending the decision.

**Mr Martin**—Yes, the tribunal does operate to an extent in an adversarial environment, and so there is nothing inconsistent with this provision in the decision maker defending his or her decision. But, on the other hand, the way this provision is intended to operate is to require the

decision maker to provide information to the tribunal to assist the tribunal in reviewing that decision. The decision maker cannot simply sit, for example, on the statement of reasons and the documents but must respond helpfully to questions that the tribunal might direct to it for the provision of information outside that strict decision—for example, information relating to the policy that lies behind the decision—so that the tribunal can be fully and properly informed. I think that is the sort of thing it is directed to. It is designed to encourage decision makers not to, as it were, simply act as adversarial litigants—consistently, of course, with the model litigant policy of the Commonwealth anyway.

**Senator LUDWIG**—In item 73, after subsection 25(4), there is a provision inserted that says:

*Tribunal may determine scope of review*

(4A) The Tribunal may determine the scope of the review of a decision by limiting the questions of fact, the evidence and the issues that it considers.

Do you see that as a beneficial provision?

**Mr Martin**—Yes, we do. Again, we certainly take it to be implicit within the section. It would not empower the tribunal to abdicate its jurisdiction or responsibility but, rather, for the purpose of exercising the jurisdiction and performing its responsibility, identifying those matters that truly are an issue and that truly require to be reviewed. For example, in a decision that may be multifaceted—there might be eight or 10 different aspects of the decision—this section enables the tribunal to say, 'It is only aspects A, B and C that are truly in issue, and therefore we will not ourselves review those other aspects that are not in issue.' But for this provision it might be said that, because the tribunal stands in the shoes of the decision maker to take that decision, the tribunal has the task of reviewing each and every aspect of the decision, whether the parties put it in issue or not. I think this section is really intended to facilitate the tribunal focusing on what really is in issue, and only on that, so that it does not have to do unnecessary work. Again, we see that as beneficial—read, as we would read it, as being consistent with only the exercise, not the abdication, of jurisdiction.

**Senator MASON**—The ARC was established to advise the Commonwealth on administrative law matters. Was the ARC consulted on these amendments?

**Mr Martin**—Yes, we were, and we gave advice to both the department and the Attorney.

**CHAIR**—Was any of the advice the ARC provided taken up in the final draft of the bill?

**Mr Martin**—Yes, some of the matters we raised were taken up in the final draft. The one issue we remained at loggerheads on was the issue of the presidency.

**Senator MASON**—With respect to tenure—removing the president and deputy president from the equation; let us just talk about the senior members—would you or the council have any objection if senior members were not given lifetime appointment but were appointed for a period of seven years—not for up to seven years but for seven years?

**Mr Martin**—We have no objection to that all. We are of the view that the balance between independence and accountability and efficiency supports the notion of limited-term appointments, but appointments have to be long enough not to jeopardise independence. We

have previously said that a period of three to five years meets that requirement; seven years would obviously meet it.

**Senator BRANDIS**—Of course, another way of further securing independence would be to stipulate that members appointed for seven-year terms could not have their appointments renewed. What do you think about that? I think that is the situation of the Auditor-General and, indeed, the Clerk of the Senate.

**Mr Martin**—There are other examples of that as well. Again, the problem is that if you have somebody who is doing a very good job—and in a country of limited population, like Australia, these people do not grow on trees—it seems a shame not to be able to continue to utilise their talents.

**CHAIR**—Mr Martin, thank you very much for assisting the committee. I again apologise for detaining you at the commencement of proceedings.

**Mr Martin**—It has been a pleasure. I will ask my secretariat to conduct some reviews in relation to provisions the equivalent of sections 23 and 23A and see if we can find anything.

**CHAIR**—That would be extremely helpful. Thank you.

[11.15 a.m.]

**BOLTON, Ms Genevieve, National Liaison Officer, National Welfare Rights Network**

**FINLAY, Ms Jackie, Principal Solicitor, National Welfare Rights Network**

**CHAIR**—Welcome. The National Welfare Rights Network has lodged a submission with the committee which we have numbered 6. Do you wish to make any amendments or alterations to that submission?

**Ms Bolton**—No.

**CHAIR**—I invite you to make a brief opening statement at the conclusion of which I will invite members of the committee to ask you questions.

**Ms Bolton**—We would like to thank the committee for inviting us to appear before you today to provide comment in relation to the proposed amendments to the Commonwealth Administrative Appeals Tribunal Amendment Bill 2004. The National Welfare Rights Network is an incorporated body. It is a national peak body. Its members consist of specialised welfare rights centres throughout all the states and territories in Australia as well as individual welfare rights workers who work in generalist community legal centres throughout Australia. Our area of expertise is in relation to social security law, and our members provide advice, assistance and representation to clients who are challenging decisions made by Centrelink. That is where our expertise lies.

In relation to the work we undertake, we both represent clients throughout the merits review process, which includes the Commonwealth AAT and the Federal Court. Both Ms Finlay and I conduct quite a bit of work and represent clients in the Commonwealth Administrative Appeal Tribunal. On that basis we believe we are well placed to provide comment in relation to the proposed amendments as they affect the practice and operation of the tribunal.

We welcome many of the proposed amendments in the bill. We will highlight some of those. Firstly, we welcome the amendments that impose a statutory obligation on the parties to assist the tribunal and a responsibility on the parties to provide the tribunal with relevant documents. That imposes an objective test as opposed to a subjective test. We believe that these are necessary statutory protections. They encourage government departments to comply with well-established model litigant rules, which are not legally binding. The proposed amendments offer those necessary statutory protections.

We also welcome the proposed amendments in relation to empowering both the Federal Court and the Federal Magistrates Court to make findings on matters of fact. We believe that this will assist in providing finality in the process for many matters that come before the Federal Court, rather than having to remit them back to the Commonwealth Administrative Appeals Tribunal. We believe that will be a positive step for all the parties concerned. We also welcome the amendments in relation to authorising conference registrars to issue directions in relation to directions hearings which are held in the tribunal.

However, we are concerned that there are several aspects of this bill that will fundamentally alter the structure and functions of the tribunal. We are of the view that some

aspects of this bill would diminish the capacity of the tribunal to perform its duties, and we are concerned that some of these provisions will also threaten the reputation and performance of the tribunal. In this respect, our major concern is in relation to the proposal to abolish the requirement that the president be a judge of the Federal Court. In our submission to the committee, we outlined a number of reasons why we recommend that this provision be opposed. We also note that it comes at a time when the government is also proposing that there be an increase in the powers of the president, particularly in relation to the reconstitution provisions. In our experience of working in the merits review system, these powers are unprecedented. We have significant concerns in relation to them and the potential that they may be misused.

We also believe that it is necessary to have the president be a Federal Court judge because of the range and volume of the matters that come before this tribunal. This tribunal is very different in character to a number of other specialised tribunals—for example, the Refugee Review Tribunal, the Migration Review Tribunal and the Social Security Appeals Tribunal. It is a much bigger tribunal. The case workload is much more significant and the work or jurisdiction of the tribunal crosses a number of very complex areas of law. For this reason, we believe that the person best placed to be president of the tribunal is in fact a Federal Court judge. We also believe this because of the interconnectedness or interaction between the operation of the Administrative Appeals Tribunal and the Federal Court. Particularly in the light of the proposals in relation to empowering the Federal Court to deal with questions of fact, we believe again that the best-placed person will be a Federal Court judge, because someone who has a detailed knowledge and understanding of the processes of both the Administrative Appeals Tribunal and the Federal Court will actually enhance the effectiveness and operation of those provisions.

Our other major concern is in relation to the provisions that deal with security of tenure. Again, we note our concern that there is a proposal to remove the requirement of the president being a Federal Court judge as well as a proposal to remove security of tenure, which would result in the president of the tribunal not having security of tenure. We believe that that would leave the tribunal open to, or vulnerable to, political interference.

We are also concerned that it would enable very short-term appointments to be made. For example, we note that at the moment it is not uncommon in a tribunal such as the Social Security Appeals Tribunal for people to be appointed for three years. Another by-product of shorter term appointments is that they are less likely to attract the high-calibre and best-qualified people to these positions, and that will then have the effect of diminishing both the work and the value of the tribunal. In our submission, it would be very unlikely for, say, someone who has built up a practice at the bar over a 10- or 15-year period to be attracted to a position on the tribunal where there is only the security of a two- or three-year term. We are also concerned in relation to the fact that it would undermine the public confidence in the tribunal process and that where tribunal members, having served such short terms, are not reappointed, there could be a perception that political considerations have come into play.

Our final concern is in relation to the reconstitution powers. As I indicated at the start, our understanding is that these are unprecedented powers. We understand that the effect of these powers could well be that a matter involving significant evidence and testimony as well as

legal submissions could be heard over a number of days and then at the end of the taking of the evidence in the submissions a decision could be made to reconstitute the tribunal, particularly if it involves issues of credibility. That could have a significant prejudicial effect on the outcome of a hearing process. As indicated in our submission, we note that the explanatory memorandum had some specific examples as to where it may be necessary to reconstitute the tribunal. We do not quibble with those examples. What we say, though, is that they should be specifically stated in the legislation rather than a very broad power given to the tribunal. That needs to also be considered within the context of the proposal that the president is not a Federal Court judge as well. Those are our opening comments.

**CHAIR**—Thank you very much, Ms Bolton. Ms Finlay, did you wish to add anything?

**Ms Finlay**—No, thank you.

**CHAIR**—Ms Bolton, I think you said, and your submission confirms this, that your work overwhelmingly is in administrative review in Australia. You are the peak body that represents the community legal sector in this area?

**Ms Bolton**—Yes, in the area of social security law.

**CHAIR**—Were you consulted in any way by the Attorney-General's Department on the preparation of the bill?

**Ms Bolton**—Yes, we were.

**CHAIR**—What submissions did you make in that regard?

**Ms Bolton**—We provided some detailed submissions to the Attorney-General's Department. We were provided with a summary in respect of the proposed amendments and we provided some detailed submissions in respect of those.

**CHAIR**—Were any of your submissions, as far as you are aware, taken up in the presentation of the final bill?

**Ms Bolton**—No, I don't think they were.

**Ms Finlay**—I think some of the comments in the explanatory memorandum addressed a lot of our initial concerns. While the content of the bill is not substantially different from the proposals that were given to us, certainly the EM reassured us on a number of our earlier concerns.

**CHAIR**—But the EM is not the law.

**Ms Finlay**—No, it is not. It was just a very brief table that we were given initially. It gave us some context for what the provisions were designed for.

**CHAIR**—Did you get the exposure draft of the bill after you got the table?

**Ms Bolton**—Yes, we did.

**CHAIR**—Okay, thank you very much.

**Senator LUDWIG**—In regard to freedom of information, you heard the earlier explanation by the ARC in relation to that. Do you accept or reject the position that in fact it assists the tribunal and it was a recommendation which arose from the decision of the Federal

Court? Do you say that it should be still the case that the exempt document which is provided to the AAT be made available to the applicant as well?

**Ms Bolton**—Our concern is essentially based on procedural fairness and a situation where a document may be provided to the tribunal that may be adverse to a party's case but the party is not then given an opportunity to comment on the contents of the document.

**Senator LUDWIG**—Costs is another area on which you may be interested to make a submission. At clause 197 and further there seems to be the ability for additional costs. In fact, there is a review of the costs to be brought in. Clause 197 states that this schedule will 'apply in relation to a summons issued after the commencement of this item' and other matters like that. Have you turned your mind to whether or not these changes to the AAT in relation to the provision of a summons will impose additional costs on applicants that you may represent?

**Ms Finlay**—In our written submission we addressed the concern that particularly consumers in the social security jurisdiction would be required to pay substantial costs to have parties give evidence. We understand that the tribunal can waive these fees. We felt that, if a provision such as the obligation to pay fees for compliance with a summons were introduced, there should be a specific legislative measure stating that if a person is in financial hardship the Commonwealth will waive the right to recover those fees.

**Senator LUDWIG**—That was not picked up by the Commonwealth.

**Ms Finlay**—No.

**Senator LUDWIG**—Are you satisfied with the current drafting or do you still stand by the view that there should be a waiver?

**Ms Finlay**—We still say that a waiver should be included.

**Senator LUDWIG**—Proposed section 23 seems to provide ways for the removal of members. The EM, as you said, explains further what those circumstances might be. Is it your position that those circumstances should have been contained in the primary legislation rather than in the EM?

**Ms Bolton**—Essentially our concern about the way the legislation is currently drafted is that it provides for very broad power. It would empower the president to reconstitute the tribunal. We understand and appreciate that there may be some exceptional occasions or circumstances when that would be warranted. We are of the view that those circumstances should be readily identified and subjected to the scrutiny of parliament. That is best achieved with their being spelt out in the legislation rather than their being left to the discretion of the tribunal once the legislation has been enacted.

**Senator LUDWIG**—Have you turned your mind to whether there should be an exhaustive or non-exhaustive list of the matters that the president should take into consideration when removing someone or exercising that power under proposed section 23?

**Ms Bolton**—We are of the view that it should be an exhaustive list.

**Senator LUDWIG**—In respect of the position of the president, you state very strongly that it should be a person who is a Federal Court judge or at least a judge and not someone with

simply five years experience in the law. I read your submission and I understand your position. I am trying to gauge the strength of your view in relation to that.

**Ms Bolton**—I could not put that in stronger terms. That is why we are here. It is our most significant concern. We believe that a practitioner with five years experience would not be at all appropriate to head up the Commonwealth Administrative Appeals Tribunal.

**Ms Finlay**—Our main concern about some of the additional powers being given to the president under the act is the proposal to change the qualifications required to be president.

**CHAIR**—That has been reflected in a number of submissions.

**Ms Finlay**—Our ogranisation, along with other organisations, would be less concerned about some of those increased powers if a Federal Court judge were to control the tribunal.

**CHAIR**—I will go to the objects clause briefly, to which you refer on a number of occasions suggesting that the use of the words 'quick' and 'economical' is, in your view, not appropriate. But the objects clause still includes the words 'fair' and 'just', which I understand to be of importance to your organisation's views. Is it not possible or not appropriate to combine them, as has been done? Why is your view so strong in that area?

**Ms Bolton**—Certainly when an objective of being fair and just incorporates being able to resolve a matter in an economical way, we do not dispute that. Our concern, though, is that if those objectives are enshrined in the objects clause there is the potential that the objective of being 'quick and economical' will be given more weight and take precedence over the objective of being 'fair' and 'just'. It is much easier for a tribunal to be able to show that they are meeting the objects of quick and economical, far more so than the objects of fair and just. For that reason we would be concerned that those objectives may be pursued at the expense of a fair and just process.

**CHAIR**—But you make that submission based on your feeling more than anything else. Is that correct?

**Ms Bolton**—It is a concern. In terms of our work, we represent clients in both the Social Security Appeals Tribunal and the Administrative Appeals Tribunal. The Social Security Appeals Tribunal does have those as its objectives.

**CHAIR**—Fair and just, quick and economical?

**Ms Bolton**—Yes. The practices and procedures are reflected by that in terms of dealing with matters in a speedy way. We come from the perspective of representing clients that have the benefit of that speedy process in the Social Security Appeals Tribunal and then being able to access the Administrative Appeals Tribunal. Our experience is that most of the cases that go to the second review, the AAT, generally require very detailed consideration of complex factual matters and complex legal matters that require a much more studied approach. We are concerned that putting 'economical' and 'quick' as objectives of the AAT may be sending the tribunal the wrong message in terms of where the priorities lie.

**Ms Finlay**—One example of a fairly complex matter that we deal with is where the person is a member of a couple. That becomes very contentious. That determines whether you can get a single rate or a partnered rate of payment. At the Social Security Appeals Tribunal the hearings generally go for about 1½ hours—sometimes they will extend to two hours for an

issue involving a member of a couple. At the AAT those hearings generally take a full day to 1½ days to be heard because of the complexity and the amount of factual information that you need to obtain. To provide our clients with the opportunity to have, I guess, a quick go at it and see how it goes and then provide the opportunity for both parties—Centrelink and our clients—to appeal to the Administrative Appeals Tribunal and have the matter investigated further is a great opportunity at the second level of appeal.

**Senator MASON**—Is the law complex as to what a couple is?

**Ms Finlay**—Yes, extremely complex. It is the factual inquiry that makes it difficult. There is no one factor that makes you a member of a couple or not; it is a matter of weighing up at least two dozen factors.

**Senator MASON**—So it is not an intuitive feeling; rather, it is a question of law.

**CHAIR**—Thank you very much. I appreciate that clarification. It assists at least my consideration of that particular matter. As there are no further questions, I thank you both very much for your submission and your presentation this morning. They have been very helpful to the committee.

[11.40 a.m.]

**DAVIES, Ms Amanda, Assistant Secretary, Administrative Law and Civil Procedure Branch, Attorney-General's Department**

**MEREDITH, Mr Jonathon Everard, Legal Officer, Civil Justice Division, Attorney-General's Department**

**CHAIR**—I welcome representatives of the Attorney-General's Department. There is no submission from the department. The bill stands in its own right. I invite you though, if you wish, to make a short opening statement. At the conclusion of that, we will go to questions.

**Ms Davies**—As you rightly point out, the bill stands in its own right and so I do not have an opening statement per se. There is one matter that I might mention, because it has been mentioned several times this morning. There seems to be a slight misconception in relation to the existing provisions for multimember panels. Although it would be the norm that there be a legally qualified person on multimember panels, it is not actually a requirement under the act as it currently stands. Although the norm is that senior members are legally qualified, it is not a requirement that they be legally qualified. I thought that might clarify that.

**CHAIR**—Thank you for clarifying that. We will go to questions. Perhaps we will start with the question of consultation, which we have spoken to most of the witnesses about today. In terms of the release of the informal table of proposed amendments, followed by the exposure draft, were significant changes made as a result of consultation?

**Ms Davies**—There certainly were changes made as a result of consultation. Clearly, many stakeholders made comments regarding the qualifications for president and that was not changed. But, for example, the National Alternative Dispute Resolution Advisory Council made a number of recommendations around the provisions for alternative dispute resolution, which were picked up. There was a change made that I am aware of resulting from the submission made by the Welfare Rights Network, which again was in relation to alternative dispute resolution and the introduction of a cooling off period on agreements coming out of that. That was as a result of that submission. There were also a number of matters that were addressed in the explanatory memorandum in order to clarify the intention of provisions so as to address specific concerns that have been raised.

**CHAIR**—Thank you very much for that.

**Senator BRANDIS**—Nobody who we have heard from this morning likes the idea that the president should not be a Federal Court judge. What violence would it do to the legislative objectives of the bill if we were to retain the requirement that the president be a Federal Court judge?

**Ms Davies**—The government's view is that that restricts unnecessarily the pool of qualified people.

**Senator BRANDIS**—There are 50 Federal Court judges and most of them know something about administrative law.

**Ms Davies**—I am not in any way suggesting that they are not appropriate candidates, but there may also be retired judges who are equally qualified and would, for example, bring to bear the experience that was mentioned in a number of the comments that have been made. There may be judges—or retired judges, again—at a state level who have the same sort of requisite experience. There may also be people who are not currently appointed to a bench or who have not been appointed to a bench who would certainly be qualified to be appointed. As has been mentioned, the alternative requirement of being on the rolls for more than five years is the same requirement that applies to all the courts at the federal level, the High Court included, so it cannot be said to be a low benchmark.

**Senator BRANDIS**—Well, it can be said to be a lower benchmark if one has a status quo which requires that a lawyer of a particular standing—that is, a Federal Court judge—must be the president, and that is removed. It is not necessarily a lower benchmark, but it may be.

**Ms Davies**—I am sorry; I said low, not lower.

**Senator BRANDIS**—Ms Davies, I am sure you did not write this bill, and I understand, particularly having listened with care to Mr Martin from the Administrative Review Council, that the policy objective of the bill might loosely be described as making the tribunal more efficient and flexible. But I cannot see for myself how maintaining the judicial integrity and independence—if only its symbolism—that a mandatory requirement that the president be a Federal Court judge would bring would, in other than a theoretical way, detract from the broader objectives of the bill to make the tribunal more efficient and flexible.

**Ms Davies**—I think the government's view is that there is nothing to say that Federal Court judges will not be appointed again as president—

**Senator BRANDIS**—No.

**Ms Davies**—but that the president has a range of functions and powers and needs to bring a range of qualities. Some of those qualities are administrative, some are to do with managing the organisation, some are to do with managing its workload and its membership, and others are to do with procedures and practices in particular matters or kinds of matters. And, yes, that mix of skills may well reside in a Federal Court judge, but it may also reside in a judge from another court—a Federal Court magistrate, for example—or somebody who has not been appointed to the bench. The practice has been that a judge who is appointed is generally someone who is already a sitting judge, but again there is no actual requirement in the legislation as it stands that—

**Senator BRANDIS**—You mean that you could appoint somebody as president of the tribunal and commission them as a Federal Court judge simultaneously. I understand that.

**Ms Davies**—So the assumptions that a Federal Court judge will necessarily have reasonably long-term experience on the bench or with the Federal Court and with those procedures are assumptions based on practice rather than being legislatively required at the moment.

**Senator BRANDIS**—I understand that, Ms Davies; that is a fair point. However, I cannot help thinking that there is a symbolic value as well in mandating that the head of the tribunal should be a Federal Court judge. I forget which witness it was, but somebody earlier this

morning—I think it might have been the Law Council witnesses—seemed, to me at least, to be making the point that they do not want to see the Administrative Appeals Tribunal cease to be regarded as primarily an agency that administers a body of law and with, to a large degree, a judicial character and become in effect yet another set of Public Service decision makers. Having a Federal Court judge as the head at least sends a symbolic message that, whatever else it is, this is a body which has judicial characteristics—not a court, but a body which has judicial characteristics.

**Ms Davies**—I think that the balance for the tribunal between—and I guess, when you say 'judicial characteristics', I am interpreting that as relating to its authority, its gravitas—

**Senator BRANDIS**—And the fact that it adjudicates upon the rights between citizen and government.

**Ms Davies**—But it is making administrative decisions; it is not adjudicating in that way.

**Senator BRANDIS**—It is adjudicating in the sense that it is making reasoned decisions in relation to rights according to criteria.

**Ms Davies**—But it is different to a court making decisions.

**Senator BRANDIS**—I understand that.

**Ms Davies**—Where that balance lies is probably open to a variety of opinions.

**Senator BRANDIS**—You do not say, do you, Ms Davies, that it would destroy the legislative intention of the bill for it to be amended to require the president to be a Federal Court judge?

**Ms Davies**—I think the bill has a number of intentions. The government certainly sees that as an important provision.

**Senator BRANDIS**—In your view, is it integral?

**Ms Davies**—The bill has several components and it is one of those components. You could take out all of the alternative dispute resolution provisions, and that is one component. Whether you could say any of them are integral or not is probably open to debate.

**Senator LUDWIG**—Tenure is another issue that is raised by a number of submitters. There is a concern that the 'up to seven years' provision could be open to abuse in the sense of a person appointed for a short term, because there is no minimum. What do you say about that?

**Ms Davies**—I can see the point. The ARC recommends three to five years as being appropriate. Seven years could be appropriate. There is a range of possibilities. But there are some circumstances where either the individual who is being appointed or the needs of the tribunal could require shorter term appointments, and it would be unfortunate to prevent those. The kinds of things I am thinking of are where, for example, somebody is at an age where they are proposing to retire in the not too distant future but are happy to continue for two years.

**Senator LUDWIG**—What age is that?

**Ms Davies**—That depends on the individual. I do not think there is a specific age.

**Senator LUDWIG**—They could simply resign if they are contemplating retirement.

**Ms Davies**—They could, but they may—

**Senator LUDWIG**—We are informed that you no longer get to retire in a full-time capacity.

**CHAIR**—Keep on working!

**Senator LUDWIG**—So a person may choose to retire at a particular age in the future. They can resign.

**Ms Davies**—Sure.

**Senator LUDWIG**—They do not necessarily have to have a short-term tenure to meet that—

**Ms Davies**—That is true, but if they know their intentions at a certain point, they may prefer to make that clear to everybody so that there is no uncertainty about it. On occasions there have been quite short-term appointments made to deal with the exigencies of appointments processes. As you would be aware, when there are forthcoming vacancies, those positions are advertised and there is a process whereby people express interest et cetera. While it is obviously undesirable, on occasion the timing of various things may mean that those processes cannot be completed in a timely fashion. It may be that a short-term appointment is desirable to ensure that there is not a lack of a member, and with that person's agreement it can be made.

**Senator LUDWIG**—How long is a short-term appointment, in your view?

**Ms Davies**—In the circumstance I was talking about, it would probably be a period of months while a process is on foot. That is not something that you would see as a desirable minimum term, but it may be that those sorts of appointments are desirable for the tribunal to be able to carry on its business and desirable for the individual member if they are seeking reappointment for a longer term.

**Senator BRANDIS**—Your point is that for a very specialised case you might have to shop around to find the right expert who can competently deal with it.

**Ms Davies**—Or where you have a combination of events that delay an appointment process, you may need to make appointments to carry you through a period.

**Senator LUDWIG**—In respect of the involvement of the decision maker in the review process, do you see any potential for conflicts to arise, particularly when, if the president is a person who, if the legislation was in place in its current form, is not a judge of the Federal Court, they may state a case for a statement of law to be referred on—or may not, as the case may be. Do you say that that is an adequate provision or do you say there should be other safeguards in place?

**Ms Davies**—The provision relating to referral of questions of law?

**Senator LUDWIG**—Yes. The difficulty that has been raised in a number of submissions is that the provisions might seem fine when you take them individually, but when you put them together and couple that with a president who potentially is not a Federal Court judge, and you couple that with the power under section 23—whereby they can exercise considerable

control on a member of a panel, the minister rather than the Governor-General can put members on a panel, the tenure is gone, the ability to have short-term appointments is unspecified—it creates a position whereby the president, together with the minister, might appear to have exceptional control. So you then have the potential for conflicts of interest to arise. I take it that you disagree with that, but I would like to know how you have gone about dealing with some of those perceptions.

**Ms Davies**—There are a number of aspects rolled into that. I think that some of the concerns are driven by an assumption that if the person is not a Federal Court judge then they will have a lesser capacity or will bring diminished capacities to the position. I do not think that that is a necessary assumption. The qualifications are the same as for appointment to the Federal Court, so an assumption that a person of the same capacity and qualities would be appointed whether or not they were actually a member of the Federal Court is a reasonable assumption.

In terms of conflict of interest, I do not see that provisions aimed at essentially ensuring that the system works efficiently and that there is flexibility to respond—for example, to a situation where particular expertise is required in a proceeding, and so a reconstitution of the panel, or the perception that issues which were raised in the first instance which required particular expertise but which settle very quickly and therefore do not need an expert who has been appointed to a panel for a particular proceeding to continue on it, and therefore that person is able to cease to be a member of that panel because their expertise is no longer needed—as necessarily giving rise to any of those kinds of conflicts of interest.

In terms of referrals to the court, we are required to have a high level of legal expertise. The process of ensuring that the court's time is not unnecessarily taken up with referrals of matters—particularly if you do have panels or individual members hearing matters who are not legally qualified and who might simply require further guidance, or where the matter can be resolved within the tribunal without going off to the court—again should ultimately provide a better service for applicants because it avoids time-wasting processes.

**Senator LUDWIG**—Is the current tribunal, the AAT, failing in these respects?

**Ms Davies**—I am not in any way saying that it is failing in these respects, but it has been in existence for almost 30 years. No institution continues without the need for improvements to its processes.

**CHAIR**—I wish that were true, Ms Davies. That was a sweeping generalisation.

**Senator LUDWIG**—Yes, I thought I would let that go through to the keeper. In my experience—although it is limited—what usually happens is that there is usually a mischief or a problem that has been identified in a review. We read the review, we see where there has been a failing of a particular institution and in some way there are recommendations made for its improvement. I think that is one of the roles that this committee takes on. Where are the reasons, the mischiefs or the problems that have beset the AAT to require these changes to make it an improved version? I have not been able to see them or identify them. Perhaps you could point them out to me.

**Ms Davies**—I guess there is not one individual source. Certainly, the Administrative Review Council's report *Better decisions*—

**Senator LUDWIG**—Yes, they have identified some recommendations which they support, but they do not support the recommendation that the president not be a federal court judge as well as a number of other recommendations.

**Ms Davies**—There are other reports, like *Managing justice*. There are a number of provisions that arise from recommendations from that report.

**Senator LUDWIG**—But 23 does not arise from any of those as far as I can recollect.

**Ms Davies**—Not to my knowledge, no.

**Senator LUDWIG**—And the president does not arise from any of those?

**Ms Davies**—No.

**Senator MASON**—There is a general head—is it flexibility?

**Ms Davies**—Certainly that is a very important aspect of it. I am not sure that I would go as far as Mr Martin, but the perception is that when it was established the tribunal was established in a fairly legalistic way. Its procedures were set up and—

**Senator BRANDIS**—I do not think that is right at all, Ms Davies. If you look at the way administrative law was before this tribunal was established and you read the Kerr report, the whole point of the tribunal was to have a fairly simple and linear mode of review of administrative decisions rather than the old prerogative writs.

**Ms Davies**—I am not suggesting that it was—

**Senator LUDWIG**—It was trendsetting in terms of the introduction of T documents, the production of information and the informal atmosphere before a tribunal—no robes and so on and so forth.

**Senator BRANDIS**—I rather miss certiorari and mandamus and all of that.

**Senator MASON**—I think that Ms Davies is right—isn't she, Senator Ludwig?—that Mr Martin's point was that it is more legalistic than it otherwise might have been because Sir Gerard Brennan was the first president.

**Ms Davies**—And if you look at what it was coming from and what it was an alternative to, certainly it was far less legalistic, but—

**Senator BRANDIS**—In fact, you might almost say very Benthamite, Ms Davies.

**Ms Davies**—that does not mean that we always have to sit where we were.

**Senator BRANDIS**—That does not mean it is incapable of improvement. I understand that.

**Senator LUDWIG**—The other point was at item 36. Where else in the legislation is the minister mentioned with powers to assign a non-presidential member? That is what this provision does. But I was curious because everywhere else it seems to be the Governor-General who accepts a resignation and does all of those other things. Why is the minister now placed into the process here?

**Ms Davies**—My understanding is that it is really to provide a speedier response—to be able to respond more quickly and easily to requests, for example, from the president for members to be assigned to additional divisions or whatever.

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

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

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

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

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

**Ms Davies**—Sure.

**CHAIR**—Is there any other tribunal at Commonwealth level where the minister makes direct assignments in that way?

**Ms Davies**—I am not sure that other tribunals have divisions in quite the same way.

**Senator LUDWIG**—The AIRC has panels and the president assigns those panellists.

**CHAIR**—Could you check on that please?

**Ms Davies**—Certainly.

**Senator LUDWIG**—Where does clause 23—that is, the reconstitution of tribunals if a member is unavailable—come from? Where is it being drawn from?

**Ms Davies**—I am not aware that it is drawn from a precedent.

**Senator LUDWIG**—It is not from better decisions or any of the administrative reviews?

**Ms Davies**—Not to my knowledge.

**Senator BRANDIS**—I think you will find that the existing section 23 provides for reconstitution in the case of unavailability.

**Ms Davies**—Yes.

**Senator BRANDIS**—But what seems to be being slipped in here by the new clause 23(2)(b)(iii) is the right of the president to remove a member. That is not part of the existing act.

**Ms Davies**—That is certainly the difference, yes.

**CHAIR**—Where does that come from?

**Ms Davies**—As I said, I am not aware of a specific precedent in any other legislation that gave rise to that clause. I am not aware of one. I am not saying that there is not one, but I am not aware of one.

**CHAIR**—Could you check, please?

**Senator BRANDIS**—It is a pretty extraordinary power, isn't it? We were discussing clause 23A as well before.

**Ms Davies**—Again, I think Mr Martin outlined quite effectively some of the reasons that it could be seen as desirable. It is not something that one would expect to be used other than extremely rarely. But there are instances that I am sure we could all point to, for example, where parties are simply unable to obtain a decision. The ability to remove—

**Senator BRANDIS**—That is right.

**Senator MASON**—That would be benign. That was the point that Mr Martin made.

**CHAIR**—What is the extent of that problem in the AAT right now?

**Ms Davies**—I am not aware that it is a—

**Senator BRANDIS**—I understood Mr Martin's argument. It was a good argument. But, notwithstanding there are arguable policy justifications for it in terms of efficiencies, it is nevertheless an extraordinary and, as far as we can tell, unprecedented power. That rather assists the other limb of Mr Martin's argument, which is that such a power, if it is to be there, needs the safeguard of being placed in the hands of a Federal Court judge. It is all very well to say that we have an extraordinary power for efficiency reasons, but, if it is an extraordinary power, it needs particularly strong safeguards to protect against the abuse of its exercise, doesn't it?

**Ms Davies**—It needs to be placed in the hands of an appropriately qualified person, but whether that appropriately qualified person is necessarily a Federal Court judge I think is a separate question.

**Senator BRANDIS**—I do not think anybody is saying that the only wise and just people in the country are Federal Court judges, but they are an efficient pool who can prima facie be assumed uniformly to have those estimable qualities.

**Senator LUDWIG**—Not a bad starting point.

**Ms Davies**—I am certainly not disputing that they are a good starting point, but whether they should be the end point is the question, isn't it?

**CHAIR**—What is the definition of the interests of justice?

**Ms Davies**—It is not defined in the legislation.

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

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

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

**Senator BRANDIS**—Chair, can I just contribute to this seminar?

**CHAIR**—It is not a seminar, Senator Brandis; it is a hearing.

**Senator BRANDIS**—I am being sarcastic.

**CHAIR**—If you want a seminar, go to a Trade Subcommittee meeting with Senator Conroy.

**Senator BRANDIS**—In fairness to you, Ms Davies, as I read it, it seems to be that the scheme of this is that where it says 'in the interests of justice' you should probably read that down to mean 'in the interests of the administration of justice'—in other words, to adopt a functional rather than a normative approach to construing that provision. Would you agree with that? I think that helps a little bit. It makes it a little bit less vague.

**Senator MASON**—It is an interest in public policy. The public interest.

**CHAIR**—But, unfortunately, Ms Davies, it is not in the bill and it is not in the explanatory memorandum, so in fact there is no guidance available.

**Ms Davies**—The explanatory memorandum gives examples—

**CHAIR**—I do not think people are going to be relying on this hearing for guidance—at least, I hope not, given what is currently on the record in relation to the definition of the interests of justice.

**Ms Davies**—The explanatory memorandum gives examples of matters that would be in the interests of justice, but, no, neither the bill nor the explanatory memorandum seeks to define it.

**CHAIR**—This committee has spent a lot of time, many years and many hearings, examining the value of what is expressed in explanatory memoranda and the importance of what is not expressed in legislation. It is an ongoing concern to the committee, which I just note for the record.

**Senator LUDWIG**—As was explained by one of the submitters, there is also a utility in having a president as a Federal Court judge, in that if they refer a matter or question of law to the Federal Court they can sit on that as well and deal with it. So there is a saving and a utility involved. What do you say about that?

**Ms Davies**—There may well be instances where it is desirable. There might be instances where a president would feel that it was not desirable for them to participate.

**CHAIR**—They will not be able to if they are not a Federal Court judge.

**Senator LUDWIG**—No. You see, it is ruled out completely in the sense that under this legislation it cannot occur, whereas under the present legislation it can occur, in the interests of the administration of justice.

**Ms Davies**—There are of course other presidential members who are also Federal Court judges. The president is not the only Federal Court judge who is able to participate in tribunal matters.

**Senator BRANDIS**—Did the government, in making this decision, consult the Federal Court judges, or the Chief Judge of the Federal Court speaking on behalf of the Federal Court judges, to ascertain their opinion?

**Mr Meredith**—No.

**Senator BRANDIS**—Does it strike you that the body that has the peak professional and governmental expertise in relation to this—that is the Administrative Review Council, which before this committee made the most conservative submission—nevertheless doubted the wisdom of removing the mandatory Federal Court judge provision?

**Ms Davies**—It is very clear it is not a popular proposal.

**Senator BRANDIS**—Who is in favour of it, apart from the Attorney-General's Department? Which stakeholder involved in the work of the AAT is a proponent of this?

**Ms Davies**—I do not think this has arisen because it is being proposed by any particular stakeholder. It is a decision that the government has made as to the way it wishes to proceed.

**Senator LUDWIG**—So the minister is the only proponent of it?

**Ms Davies**—It is a decision the government has made.

**Senator MASON**—It is not quite the same thing, necessarily.

**Senator BRANDIS**—A friendless reform.

**Senator LUDWIG**—Without substance and reason, I suspect, because there is no other place we can find to substantiate it—but I think we have made that point. There are a number of submitters who have gone to the issue of clause 95 that the 'Tribunal may request amendment of insufficient statement'. As I understand the arguments put, some argue against that provision while, at least to a certain extent, it is supported in part where it might occur later in the proceedings—where at some point in the proceedings it might be advisable or helpful for the tribunal to request amendment when there is insufficient statement. But this does not seem to give them that option; it seems to occur at the beginning. What is the remedy that that is designed to overcome? Is there a problem that currently exists with the documents and the statement of reasons that requires addressing and how widespread is that?

**Ms Davies**—My understanding is that there is a practice, for applicants who are legally represented, of statements of reasons essentially saying that the decision was wrong. I do not think that the reference to that this morning was an isolated practice. In particular, where an applicant is legally represented, the capacity should be there to identify with some more precision the reasons in order to seek to identify the matters in issue as early as possible. Certainly there are processes, as a matter proceeds, which allow for that to happen but there seems to be no reason why legal representatives could not provide some further detail at that point that would assist the tribunal in, for example, considering the processes appropriate for an expeditious approach to a particular proceeding.

**Senator LUDWIG**—As I understand it, what you want them to do in this section is to say why the original decision was wrong or incorrect. Is that the purpose?

**Ms Davies**—There is already a requirement to include that statement where it is of no assistance to the tribunal. Where the tribunal considers some further information would be of some assistance, it will have the ability to request that.

**Senator BRANDIS**—I agree with you, as you would know from listening to questions earlier in the morning. Nevertheless, just to get it on the record, what do you say to the suggestion that seemed to be coming from the witnesses from the Law Council that that provision, although it does not inform, might nevertheless in substance prejudice the nature of proceedings before the tribunal as merits reviews based on a rehearing de novo?

**Ms Davies**—I think that is a slight misconception of what would be included. It is not—

**Senator BRANDIS**—They forswore that they were going so far as to say that, but the gentleman did seem to be saying in effect, 'If you require the reasons to be given, you are detracting from the character of proceedings before the tribunal as a merits based rehearing.' I do not agree with him, but nevertheless it is a pretty important point. What do you say about that?

**Ms Davies**—As I say, I think that is a slight misconception of what further information or information in the first place might be being provided. It is not necessarily an argument about the process that occurred, the way that decision was reached or whatever. It may also be elucidating aspects of a decision. I think somebody this morning was referring to a multifaceted decision. It may be that specific aspects of it are wrong because fact A, B or C was not taken into account by the decision maker, and fact A, B or C should be.

**Senator BRANDIS**—The witness earlier today said that, if you get into that process of analysis, you are not having a merits review; you are narrowing the function of the AAT from merits review or a hearing de novo—a rehearing—to, in effect, an appeal on stated grounds from the pre-existing decision. What do you say about that?

**Senator LUDWIG**—By way of explanation, what he then went on to say was that the decision maker, when applying the correct or preferable decision, removes the reasons that were given by the decision maker from the consideration. Because it is a de novo hearing in relation to whether it is a correct or preferable decision, the reasons that were given become redundant. So, when you then say that it is an insufficient statement and that they should elucidate or provide greater reasons, the decision maker is of no benefit.

**Ms Davies**—If the reasons are that the decision was wrong because I am in fact a member of a couple because I meet A, B, C, D, E criteria, then that is not about getting into the reasons for the original decision being made so much as identifying the factors and the issues that are now to be considered.

**Senator BRANDIS**—I suppose you could go on to say, Ms Davies, that the applicant before the tribunal has some sort of a persuasive onus, so the tribunal does not just make decisions in the air. It has to make decisions on the basis of the reasons advanced as to why that decision ought to be arrived at. Those reasons have to be advanced by the applicant.

**Ms Davies**—Certainly the tribunal cannot make decisions if it does not have the information before it that gives it a basis for making the decision. That is not to say that this is the only opportunity.

**Senator BRANDIS**—I do not read the provision as requiring any higher burden on the applicant than that.

**Ms Davies**—I agree.

**CHAIR**—What flows, though, if, under 29(1B), the applicant's amended statement still does not satisfy the tribunal as a sufficient statement?

**Ms Davies**—There is no sanction for not being able to further elucidate. It is simply about giving the tribunal the ability to seek that further information if it considers it is desirable to do so. The applicant who is unable, for whatever reason, to provide further information is not going to be disadvantaged by that.

**CHAIR**—So their original statement will stand if the request for a more sufficient statement is still not regarded as adequate.

**Ms Davies**—Presumably the further statement, even if it is not adequate, would also become part of the documentation. But, if it had not actually assisted the tribunal dramatically, we would move on.

**Senator BRANDIS**—Is that right? I am not sure that follows.

**CHAIR**—It kind of stops nowhere.

**Senator BRANDIS**—The tribunal does not even get to that point unless it is already of the opinion that its statement under section 29(1)(c) is insufficient for it to adjudicate the matter. I would have thought that, if a tribunal properly directing itself decided that what was before it was not sufficient to enable it to address any justiciable issue, its right course would be to dismiss the application. I am not saying it should not, but that seems to logically follow, because, if you look at the words, it has to be of the opinion that it does not have enough to go on.

**Ms Davies**—Which is not to say that the obligation to provide reasons has not been satisfied.

**Senator BRANDIS**—No. If a statement is provided under 29(1)(c), the decision maker forms an opinion that that is not sufficient for him to act upon and the applicant seeking the determination in his or her favour cannot do any better, shouldn't the application then be dismissed?

**Ms Davies**—The explanatory memorandum states quite clearly that the requirements for lodging the application, including the original statement, would have been met—would have been taken to have been satisfied.

**Senator BRANDIS**—That is a formal requirement only. This seems to be a more substantive requirement.

**Ms Davies**—The range of applicants that come before the tribunal is very wide.

**Senator BRANDIS**—I am not saying it is an onerous requirement; I am just saying that I do not think the conclusion is right that, if the applicant cannot satisfy a requirement made by the tribunal under this new provision, it means that the application just goes on as if nothing had happened. I do not think that is right. I think that the tribunal should then dismiss it.

**Ms Davies**—I think the tribunal has a range of options and one of the options may well be to go into a conferencing or some other kind of process which is designed to assist the applicant to identify and present the matters that he or she needs to present. I do not think it is as simple as automatically dismissing the application if it cannot be done initially in writing.

**Senator LUDWIG**—Do you say there is a power to dismiss or there is no power to dismiss?

**Ms Davies**—There is no specific power to dismiss on the basis that the further statement does not provide sufficient information.

**CHAIR**—But there is nothing to stop dismissing it?

**Senator LUDWIG**—Or striking it out?

**Senator BRANDIS**—Let us clarify what we mean by 'dismiss'. It could either at that point terminate the proceedings or ultimately determine the application against the applicant. It could do one of either of those things, couldn't it?

**Ms Davies**—As I said, the explanatory memorandum makes clear that not elucidating, if you like, the matters further in a further statement, is not a basis for finding that the original application was not valid.

**Senator BRANDIS**—In full.

**Ms Davies**—It is not a basis for finding that the application has not met the requirements of a valid application. I do not think that the fact that the tribunal had sought a further statement of reasons—and it is not an obligation; it is something that is discretionary for the tribunal—would make any significant difference to whether the tribunal continues to consider an application or not. I do not have information on the proportion of matters that would be struck out at that point, but I would suspect it is fairly low because, as I said, the nature of many of the applications means that some further conferencing or other kind of process designed to at least bring out further information and see whether there is a matter to be determined or not is part of the culture of providing a fairly informal merits review process.

**Senator BRANDIS**—I would have thought that if an applicant cannot provide a logical, rational, formulated argument as to why a decision of the tribunal should go in his or her favour, then inevitably the proceedings should be resolved against the applicant. They have the burden of persuasion, don't they?

**Senator LUDWIG**—The reality of what happens is a bit tougher, though, I think.

**Senator BRANDIS**—I understand that for unrepresented litigants it does not happen in that structured, formulaic way. But, at the end of the day, the tribunal does have to perceive there to be a rational, supportable argument to persuade it to resolve the proceedings in the applicant's favour. No matter how unsophisticated the expression of that might be, unless

there is sufficient ground it cannot resolve the proceedings in the applicant's favour, and nor should it.

**Senator LUDWIG**—The tribunal can see the correct or preferable decision and come to that conclusion, even on a badly presented case.

**Ms Davies**—Yes.

**Senator BRANDIS**—A badly presented case—

**Senator LUDWIG**—Or even a badly explained case or even a case where they explain something differently.

**Senator BRANDIS**—is different from a groundless case. I think that all this is doing is saying that if the grounds advanced before the tribunal are too obscure for it to act upon, it can ask that those grounds be expressed. That seems to me to be all it is saying.

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

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

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

**Ms Davies**—Certainly there are instances where, rather than a conference being required to ask the specific questions that would come up with the same answers, it may well be that it can be done more efficiently through the provision of a further statement.

**Senator LUDWIG**—In regard to clause 226, the migration area, there is an argument presented by the submitters that it requires a person of greater standing to deal with those matters because of the seriousness of the consequences that that decision might provide to an applicant. What do you say about that? The way it provides now is that a presidential member would hear those matters. Now it is being devolved. Do you say that is in the interests of quick and economical and fair and just decisions? What was behind that amendment?

**Ms Davies**—There is a range of factors that the president has to take into account in constituting the tribunal for any particular proceeding. I think that range of factors would be sufficient to encompass ensuring that a person of an appropriate level constitutes the tribunal for those matters. Whether that automatically in every single instance necessarily needs to be a person at that same level is again something that is not clear.

**Senator LUDWIG**—So matters of deportation orders and visa refusals may still be heard by a presidential member, but, in other instances that fall under the Migration Act where they may not visit such a serious consequence upon an applicant, you say under this legislation there will be greater flexibility to allow other members or ordinary members to hear those matters.

**Ms Davies**—The intention is to provide the president with the ability to constitute the tribunal appropriately for particular proceedings rather than legislation enshrining the constitution of the tribunal for particular matters or kinds of matters. There is a range of factors that the president must have regard to, and that range of factors is intended to ensure

that it is not an arbitrary or casual decision; it is one that is taken with proper regard to the appropriate person or persons to consider particular proceedings.

**Senator MASON**—Ms Davies, how many members—by that I do not mean presidential, deputy presidential or senior members—of the AAT are there?

**Senator BRANDIS**—And part-time members.

**Senator MASON**—Senator Brandis just reminded me about part-time members—members, senior members. What are the numbers, Ms Davies? Do you know?

**Senator LUDWIG**—They were designed to provide flexibility, Senator Brandis.

**Ms Davies**—I am a bit loath to add up on the spot.

**Senator MASON**—Even roughly would probably do for the moment.

**Senator LUDWIG**—You can correct that later if you like.

**Mr Meredith**—There are approximately 80 members of the tribunal.

**Senator BRANDIS**—Is that full-time and part-time, or just full-time?

**Mr Meredith**—That is full-time and part-time.

**Senator MASON**—The secretary has just given me the annual report for the AAT, and I am looking at it. Mr Meredith, do those 80 members include presidential members and senior members?

**Mr Meredith**—I cannot clarify that. I am talking about presidential members and senior members, but I am not talking about presidential members who are judges, as opposed to tenured deputy presidents.

**Senator LUDWIG**—Of the full number of those, can you provide a breakdown of how many are currently tenured and how many are judges or part-time? I think that covers the gamut.

**Mr Meredith**—We can do that.

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

**Ms Davies**—In the context of tenured members, we can confirm it, but my information is that there are four senior members who are tenured and one deputy president who is tenured. It has not been the practice for quite some years for tenured appointments to be made of either deputy presidents or senior members. The last one that was made was in, I believe, 1989. So since 1989 deputy presidents and senior members have been appointed for terms.

**Senator MASON**—That was going to be my question, Ms Davies!

**CHAIR**—What is the average length of those appointments?

**Ms Davies**—For that entire period, I would have to go and check. In recent years, as you would be aware, with proposals for the administrative review tribunal on foot, there certainly were some shorter term appointments made to facilitate the commencement of the new tribunal, should that legislation have passed. Of appointments that were made during 2004, the vast majority were for a period of three years or more, and there were a small number made for less than three years.

**Senator MASON**—So the proposal then, Ms Davies, to restrict the terms of appointments for all members to seven years would primarily impact upon the president and presidential members.

**Ms Davies**—In practice, yes, because as I said there have not been tenured appointments made at the deputy president or senior member level for some time.

**Senator MASON**—I do not want to repeat the discussion we had earlier, but it would seem—Mr Martin, speaking on behalf of the council, echoed this—that there is no problem in principle of appointments at that level being for a contract term. Thank you very much.

**CHAIR**—Ms Davies, a couple of the submissions we have received made some well-articulated observations about questions of independence and confidence in one's own position. One submission in particular made the observation about members of the judiciary that not every case that a judge decides involves the government as a party but every case that is decided by this tribunal, by definition, involves government as a party. So aspects of independence and the implications of leaving one's former career to take up a relatively short-term appointment—you have mentioned three years—are all part of the mix of the issues that are under discussion. In fact there have been observations that there is potential for a person who is taking up a three-year appointment, and who will wish to seek renewal at the conclusion of that period, to be placed in an invidious position where they are consistently adjudicating on matters involving matters involving government yet seeking from government renewal of their term. There are some serious independence implications involved in that process because of the proposals before the committee. What is your comment on that?

**Ms Davies**—Well, at one level, if government did not expect that there would be adjudications against it as well as in favour of it we would not have a tribunal.

**CHAIR**—I would not put that idea into anyone's head, Ms Davies.

**Ms Davies**—There is an understanding that bureaucrats and government decision makers will on occasion get it wrong and the mechanism needs to be there to correct that. I think that there are any number of statutory offices that are independent, are perceived to be independent, and are fairly resolute in that, and which hold government accountable and/or put forward policy positions that may well not be ones government agrees with where the office holders do not have tenure. I am thinking of people like the Ombudsman, the Auditor-General and Human Rights and Equal Opportunity Commission members. I am not saying they are analogous decision makers, but there are a range of people who hold government accountable in various ways.

**Senator MASON**—We may be talking about different things here. In the case of appointments for three years, sure, I think the chair is right: they really could compromise people. On the hand I do not believe—and I am speaking for myself here—that every member should be appointed for life. What about an appointment for seven years? I think that is long enough for people to show their expertise but not so long that they could be cruelled by the next government because they made some decisions against it. There has to be some compromise, surely?

**Ms Davies**—My feeling is that there have to be a range of possible terms. Any minimum number will be a fairly arbitrary number and there will be arguments for and against it. As I

said, the ARC has previously suggested that three to five years would be the appropriate sort of range. Seven years could be an appropriate term but I do not think it is necessarily a minimum.

**Senator BRANDIS**—Ms Davies, wouldn't you accept the point of Senator Payne's question? I think it has been the pretty familiar experience of people who practice before the courts that the more specialised the tribunal—particularly a tribunal which always deals with one institutional litigant—the greater the risk of its being clientised by that institutional litigant. I know this is not a litigation model so forgive me for using the word 'litigant' but I think you know what I mean, don't you?

**Senator MASON**—I will jump in there, Ms Davies, because Senator Brandis has hit the nail on the head in the way the Immigration Review Tribunal operated. There were specific concerns, weren't there, particularly in relation to that tribunal? The claim was that members were being intimidated by government that their contracts would not be renewed et cetera. I do not know how true that is—that is not the point. But Senator Brandis's question hits the point that you are dealing with: not just the department of immigration, making decisions often against government but also, if members' terms are very short, then their capacity—

**CHAIR**—They are not being protected.

**Senator MASON**—They are not being protected and their capacity to judge or adjudicate freely might be compromised.

**Ms Davies**—We are talking about the existing position. We are talking about appointments that have been made to the tribunal over the last decade and a half. They have been for a range of terms—some short, some longer—of up to seven years. I am not aware of criticisms either that individuals were pressured or that that kind of pressure was brought to bear on anybody or that that decision making has been compromised by the terms that members have held over that period.

**Senator MASON**—All of those claims were flying around.

**Ms Davies**—I am not aware of them.

**CHAIR**—We have a couple of submissions to this inquiry that you might like to read then.

**Senator BRANDIS**—But whether those claims were made and whether or not they were right is a broader point, which is my point. That is, a specialist tribunal, dealing in every case with the same institutional party is, if only subconsciously, at risk of being acculturated to the approach and policy goals of that party, isn't it? You see that everywhere. You see it in local government courts, dealing always with councils on one side of the register. You see it in licensing courts, dealing always with licensing issues, with a small number of institutional parties. But the more specialised the court or the tribunal, the greater the risk that it will be acculturated to the institutional party, and that is something that needs to be guarded against too.

**Ms Davies**—The only comment I make is that, while at one level it is one institutional party, at another level it is a large number of departments and agencies. It is the Commonwealth coming through.

**Senator BRANDIS**—But this is a divisionalised tribunal. You can have the department of social security on one side in one division and the Commissioner of Taxation on one side in another division and so on.

**Senator LUDWIG**—And the threat of the minister selecting the divisions.

**Ms Davies**—The Attorney, not the—

**Senator LUDWIG**—Yes, the minister.

**Ms Davies**—The minister administering this.

**Senator LUDWIG**—Yes. The minister then selecting the members for the division. A member might come from a particular area, who is 'captured' by the department, then ends up in those divisions.

**Senator BRANDIS**—'Clientised'.

**Ms Davies**—I didn't know that was a verb.

**CHAIR**—Finally, one of the reviews in this area which has been drawn to our attention is the UK's review of their administrative review tribunals. I understand they have come down on the side of judges presiding. Is that the case?

**Ms Davies**—That is my understanding, yes. One factor to take into account in relation to both the UK and state tribunals that have been referred to earlier today is that the separation of powers issues are different. Neither the state tribunals nor the UK tribunals have the same level of strict separation of powers constitutionally. My understanding is that it is envisaged for the UK, and at least for some of the state tribunals, that some judicial powers will actually be exercised by the judge who is presiding, so that there will be a greater mixing of the functions than is possible at the Commonwealth level.

**Senator BRANDIS**—Going back to the discussion we have just had, one of the powerful reasons for having judges running these things is that judges, by their professional background and training, tend to be better at distancing themselves because of the likely generality of their past experience and the fact that they are accustomed to dispute resolution rather than it being drawn from a particular sphere of expertise other than the expertise of dispute resolution, if you follow me. Ideally, judges, through their professional training and habit of mind, have a greater capacity to maintain a critical distance and not be 'captured', to use Senator Ludwig's expression.

**Ms Davies**—On the assumption that a judge appointed as president would have been a sitting judge for some period of time, that is an experience they would bring to bear, yes.

**CHAIR**—As there are no further questions, thank you, Ms Davies and Mr Meredith, for assisting the committee. There are a number of issues that we have asked you to have a look at. If you would assist the committee by responding on those, that would be very helpful. I thank all of the witnesses who have given evidence to the committee today.

**Committee adjourned at 12.50 p.m.**