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Administrative Law in Transition —
The Proposed Administrative Review Tribunal

This edition contains edited proceedings of a one day AIAL seminar, held in conjunction with the Senate Legal and Constitutional Legislation Committee, at Parliament House in Canberra on 25 October 2000.

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ADMINISTRATIVE REVIEW TRIBUNAL—THE GOVERNMENT'S PROPOSALS

The Hon Daryl Williams AM QC MP[*]

I am very pleased to have this opportunity to speak to you about the government's proposals for the Administrative Review Tribunal ('ART'). What I propose to do is to give you an overview of the ART legislation and of the government's objectives in seeking to set up this new system.

I introduced the bill—that is, the main bill—to establish the ART on 28 June 2000. The consequentials bill, the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000, was introduced on 12 October. Subject to passage of the legislation, the government intends that the ART will commence operations on 1 July 2001.

The ART is to replace four existing tribunals: the Administrative Appeals Tribunal ('AAT'), the Social Security Appeals Tribunal ('SSAT'), the Migration Review Tribunal ('MRT') and the Refugee Review Tribunal ('RRT'). This will represent the most significant reform of the Commonwealth merits review system in 25 years.

The ART Bill will establish a single merits review tribunal that provides ready access to review that is fair, just, economical, informal and quick. The tribunal will operate in a user-friendly manner and will have the capacity to tailor its procedures to suit the requirements of particular classes of applicants. It is designed to deliver more effectively than the present system the principal objectives of every merits review system—administrative justice to individuals, government accountability and a high standard of government decision making. The fact that structural reforms are needed should not of course be seen as a criticism of the members and staff of the existing tribunals. I know that they will continue to maintain an effective and highly regarded tribunal system right up to the establishment of the new tribunal.

The AAT was established in 1975 to provide administrative justice and to ensure government accountability. The intention was to create a single, independent tribunal with a very broad jurisdiction to review the exercise of administrative discretions. More than 360 different enactments now confer jurisdiction on the AAT, and each of those enactments is amended under the consequentials bill. It is the largest consequentials bill ever drafted.

However, despite the wide range of the AAT's jurisdiction, specialist tribunals continued to be established. In 1994, this Institute held a workshop entitled 'Towards a tribunal non-proliferation treaty'. In 1995, the Administrative Review Council also published a report calling for the unification of existing merits review tribunals into a single tribunal. Other aspects of administrative review at the Commonwealth level were discussed by the Australian Law Reform Commission in its report published in February on the federal civil justice system entitled *Managing Justice*. Its finding that the median duration of cases in the AAT was longer than for cases in the Federal Court and Family Court is of particular concern. One of the reasons for creating the ART is to provide a generally quicker and more accessible review mechanism, particularly compared to the AAT.

The new tribunal will not only benefit applicants; the amalgamation of a number of separate specialist tribunals means considerable savings to the community as a whole. This will be through the eradication of unnecessary and wasteful duplication in resources and infrastructure across separate tribunals. The ART will cost less to run than the combined cost of the tribunals it will replace. The ART legislation comprises two bills. The main bill provides for the establishment, structure, membership and functions of the tribunal. It sets

[*] *Federal Attorney-General.*

out the general processes for applying for review, the grounds on which second-tier review will be available and the manner in which reviews are to be conducted, and it provides for access to the courts in respect of ART decisions. However, other Acts will give jurisdiction to the tribunal, just as they currently give jurisdiction to the AAT.

The consequentials bill does a number of things. It abolishes the existing tribunals by repealing the *Administrative Appeals Tribunal Act 1975* and other legislative provisions governing the tribunals. It amends the Commonwealth Acts that currently provide for review by one of the four existing tribunals so that they provide for review by the ART under the ART Bill. It modifies the ART Bill by making specific provision for procedures to be followed by the ART in reviewing certain classes of decision. The greatest modifications of the bill are, not surprisingly, in the area of migration decision making. The bill also makes provision for the transfer to the ART of matters that are before any of the four tribunals just before their abolition. Finally, it preserves appeal and review rights in respect of decisions made by or matters before the existing tribunals where the appeal or review has not been completed by the time the ART comes into existence. The Senate Legal and Constitutional Legislation Committee will examine both bills and has said it will report on the first sitting day in 2001.

The ART will be constituted by six divisions. The jurisdiction of the MRT and RRT will be exercised by the Immigration and Refugee Division. The jurisdiction of the SSAT will be exercised by the Income Support Division. The work of the AAT will be divided among four divisions: the Taxation Division, the Veterans' Appeals Division, the Workers Compensation Division and the General and Commercial Division. The divisional structure is intended to ensure that the ART is able to retain the advantages of the specialist tribunals. In particular, members will be appointed with the right expertise for their division and, where necessary, special procedures can be put in place for a particular division or for particular classes of matters within a division.

The ART will be headed by a President. It will also have executive members, senior members and other members appointed for terms of up to seven years. Members will be appointed by the Governor-General to a particular division on the recommendation of the minister responsible for the division. Appointment or assignment to more than one division is possible. Each division will be headed by an executive member and there will also be a Chief Executive Officer. Applications for the positions of President and CEO closed on 13 October 2000. Executive member positions are expected to be advertised in November, with other members to be advertised for in 2001. The President will not have to be a judge. The bill also does not set out specific qualifications for the appointment of members. However, before a minister recommends that a member be appointed, the minister must be satisfied that the member has appropriate qualifications and experience to do the work of the division to which he or she is to be appointed.

The ALRC's *Managing Justice* report recommended that merits review tribunals set performance standards for members. A former President of the AAT, Justice Jane Mathews, has also recommended that members of review bodies be accountable through compliance with performance indicators and a system of performance appraisal. The government agrees. The ART Bill requires members, other than the President, to enter into performance agreements and to comply with a code of conduct. However, the bill also provides expressly that performance agreements cannot deal with the substance of decisions by members. This is designed to ensure that members, though required to meet performance standards, are independent in their decision making. Members will enter into agreements with the President, an executive member or a senior member.

Some concerns have been expressed already about the independence of the ART. One of the sessions today is devoted to this issue. These concerns appear to arise out of a number of features of the ART Bill: the President does not have to be a judge; members are appointed for terms of years; six ministers will be making recommendations for the appointment of members; and the way in which the ART will be funded. The government

does not consider that these concerns are justified. The ART Bill expressly states that one of its objects is to provide for the tribunal to review the merits of decisions independently of the persons or bodies who made them.

The appointment provisions in the bill are the same as those currently in place in relation to the AAT, SSAT, MRT and RRT. The minister with portfolio responsibility currently recommends appointments to the tribunal. With the exception of the AAT, no qualifications for appointment to the existing tribunals are set out in legislation. Nor do any of the existing tribunals, except the AAT, have to be headed by a judge. Most appointments to all the existing tribunals are for terms of years; only the AAT has some tenured members. The government believes that term appointments are compatible with independence, and the President of the Administrative Review Council, Mrs Bettie McNee, recently expressed the same view. The Ombudsman, for example, is a term appointment.

The removal provisions which will apply to ART members are also very strict. If the current appointment arrangements do not raise concerns about the independence of the existing tribunals, it is difficult to see why substantially the same arrangements will raise concerns about the independence of the ART. Nor does the government believe that the funding arrangements which will apply to the ART will interfere with independence. Funding will eventually be provided through the six departments whose ministers are responsible for recommending appointments to particular divisions of the tribunal. The SSAT is currently funded in this way, and it has not been suggested that this arrangement interferes with its independence.

The fact that six ministers will be responsible for recommending appointments to the ART is not a change from the present situation, except in the number of ministers. Only one minister, the Attorney-General, will have responsibility for the ART as a whole. The new tribunal will provide for independent review within the framework and culture of an executive body.

The *Managing Justice* report stressed that Commonwealth review tribunals constitute part of the executive arm of government and provide administrative, not judicial, decision making in dispute resolution processes. The ALRC noted that a review body is not intended to identify the winner from two competing parties, but to make the correct and preferable decision after considering the whole of the evidence. The Commission also noted that review tribunals such as the MRT, RRT and SSAT were intended to be investigative with the tribunal controlling the proceedings, defining issues, deciding on the factual material to be considered and calling witnesses on its own motion. It concluded that the legislation and practice of review tribunals should further emphasise the administrative and investigative character of tribunal processes.

The views of the ALRC are reflected in a number of provisions in the ART Bill. The ART Bill states that one of its objects is to enable the tribunal to review decisions in a non-adversarial way, except where this would be inappropriate. A decision maker may opt not to be a participant in a review but a decision maker who participates must use his or her best endeavours to assist the tribunal to make its decision on the review. The bill expressly requires the tribunal to act with as little formality and technicality as a proper consideration of the matters permits and it is not bound by the rules of evidence. The ART is also empowered to determine the scope of the review by limiting the questions of fact, the evidence and the issues it considers.

The ART is required to take reasonable measures to ensure that participants in the review understand the tribunal's procedures, the implications of a decision and the tribunal's reasons for making a decision. The Chief Executive Officer of the tribunal is also obliged to provide all reasonable assistance to people to prepare their applications. The ART will have a discretion to decide a review on the papers. Such a power was recommended by the

ALRC. The ART will be able to conduct a review on the papers only where it would be consistent with the duty to afford procedural fairness and after seeking the views of participants. Representation will be at the discretion of the tribunal unless an Act or the practice and procedure directions provide otherwise. The ART may permit a person to be assisted in some other way before the tribunal.

Generally, participants to reviews will bear their own costs. However, there will be cases where portfolio legislation expressly empowers the tribunal to award costs in particular classes of matters.

The provisions of the ART bill dealing with representation have been criticised, particularly by the Law Council of Australia. The government's intention is that representation be available in cases where it is really necessary but that it should not be the norm. It is expected that most first-tier reviews will be conducted by a single member. However, the ART can be constituted as a multimember panel if the President considers that an application raises a principle or issue of general significance or if additional expertise is required. Currently, most Commonwealth administrative decision making is subject to only one tier of external review. There are two exceptions to this. The AAT provides a second tier of review of decisions made by the Social Security Appeals Tribunal and the Veterans' Review Board. However, within the AAT itself there is no second tier of review. The ART, like the AAT, will continue to provide second-tier review of decisions of the Veterans' Review Board. The government has decided that the current right of veterans to access a second tier of review should continue. It has also decided that, as at present, there will be no second-tier review of most migration matters. In all other cases the ART will have power to grant leave to apply for second-tier review of a first-tier ART decision on limited grounds.

The President or an executive member may grant leave to a person to seek second-tier review. The decision on leave will generally be made on the papers. Leave will only be granted where the first-tier review was conducted by a single member and the President or executive member is satisfied that the application raises a principle or issue of general significance or where the applicant and the original decision maker agree that the first-tier decision involved a manifest error of law or fact and the President or executive member agrees. Therefore, in practice most second-tier reviews will be reviews of decisions made by single members where a principle or issue of general significance is raised.

The ART's procedures are aimed at creating an environment which is informal, flexible and responsive. They should go a long way to making the process of seeking review less intimidating for applicants, empowering them in many cases to appear before the ART without the need for specialised assistance. The cross-appointment of members to more than one division has the potential to make available to the tribunal a broader range of expertise. It will encourage the cross-fertilisation of ideas and practices between divisions. A single large tribunal will also enhance career opportunities for members and staff. The creation of a second-tier review structure considering issues of general significance has the potential to increase the precedential value of ART decisions. The ART will also be better placed than are the existing tribunals to improve the community's awareness of the availability of merits review. In short, the government intends the ART to provide fair, effective, efficient and accessible merits review with the flexibility of structure and procedure to last well into the 21st century. The ART legislation demonstrates the government's continuing commitment to improve the quality, responsiveness and affordability of the federal civil justice system.

THE MODEL FOR THE ART

The ART and Values I

Justice Deidre O'Connor[*]

It always seems to me to be a very wise thing when one is considering change to ask the question: why are we changing? I have been on the speaking circuit for too long and have often told audiences—you generally only get a laugh from this from students at universities—that one of the great lies of the 20th century is: I am from the government and I am here to help you. There is a deep-seated cynicism, which I am sure is being exhibited politically in arenas, thankfully, away from administrative review at the moment, about the processes of government, and in particular about probity. In other words: what are they on about; are they operating properly; how are they going to affect the way in which I live my life? The administrative review system, when you go back to read the seminal documents that set it up in the seventies, was intended really to offer to the Australian public something that it did not have before, certainly not in the form in which it was ultimately drafted in the legislation that set up the federal administrative review system, and which I am tired of saying, but which of course you all do know, is regarded as world's best practice. It was intended really to play a role that perhaps in other countries is played by rights which arise under constitutional guarantees. I have said elsewhere that we do not have a bill of rights in this country but we do have with the current system the capacity to have individuals complain or, to put it more positively, assert their right to question the behaviour of the executive government.

Over the last 25 years in which the system has been operating, the amount of interference—and I use that word even though it has a colour to it—that government legislation and programs have in the lives of ordinary Australians has increased. One watches the number of bills in which AAT review is given and, when we get a new legislation list, it climbs virtually every month. We are now up to 360 pieces of legislation. There were very few, in fact, on the agenda for review by the AAT when the system was set up. So you have an incremental increase in government decision making that affects individuals.

The system that was set up is what I call an audit process of that bureaucratic action. The benefits of bureaucratic action are very great. I do not wish to be suggesting that the sorts of work and decisions that are being made by the executive and departments are of themselves a bad thing. It is obviously the will of people: it has passed through the Australian parliament. I am not critical of that. But, when there is a vast bureaucracy that affects the lives of individuals, it seems to me that individuals are entitled to have an appropriate degree of protection from bureaucratic error. In my view the current system does this.

I know that one could describe the four tribunals that are being amalgamated as having different cultures. But by and large, from the meetings that I have been having with the heads of these tribunals over the last two years, it seems that we share a lot of common values as well as having our own particular work and cultures. The question one should ask is: will the amalgamated tribunal as it currently exists in the bill before the Australian Parliament protect the good features of the present system and provide opportunities for improvement of that system? There is no doubt that the *Better Decisions* report was focused on improving the system and that amalgamation of the tribunals was intended not only to

[*] *President, Administrative Appeals Tribunal.*

save money. I presume the government will publish the financial details of the way in which that money is going to be saved at some stage. I do not think it is yet on the public record. I have a great deal of scepticism as to whether one can, with the current proposal for amalgamation, save much of the administrative costs that the current tribunals have not already shaved from their budgets and dealt with appropriately.

So we should be asking these questions: how can the amalgamated tribunal, the ART, improve what the Australian public already has? How can it improve the quality of the decisions that are made? What improvements in service are going to result from amalgamation? How will the Australian public benefit from the amalgamation? I confess that I started to get a degree of fatigue when reading this consequential bill on the computer, so I have not read every single one of the amended acts, but I have read the ones where I perhaps suspected that there might be things that could bear upon the questions that I have raised there. It does seem to me that there is in this bill an increase in the capacity for the Executive, in a range of different ways, to be intimately involved in the operation and control of the review system. I think that should be given enormous and detailed scrutiny because we are reviewing the decisions of the bureaucracy and the role that bureaucrats have in controlling the way in which that is done.

Whether it be the appointment of members or the funding and all the other issues that are going to be discussed today, that should be the measure. If there is seen to be an impediment to what is arms-length, independent, quality decision making offered to ordinary people in a way that allows them to have a real review of the decisions that have been made by the bureaucracy and that they are challenging, I think we have to say that you have to apply the 'if it ain't broke, don't fix it' epithet. I cannot resist saying that as the Attorney was interested in quoting parts from the ALRC's report on managing justice, I would like to quote from paragraph 12.210 of the report about a client or a person who went through the system at the AAT. She said:

> I was given all help required and was made to feel confident in presenting my own case. This was my first experience of anything of this type. I was not confident until I became involved with dealing with the AAT staff and received their help, advice and informative material. Even a video of a typical AAT hearing was made available to me.

I thought that was not a bad comment on the way in which the AAT operates in helping unrepresented people.

The last comment I would make is that, for anybody to say that you can give assistance to unrepresented people—especially in an environment where access to legal services is very much diminished—without spending money on it, that is a fraud. It costs a lot of money to create support to help unrepresented people. If unrepresented people are also people who do not have the benefit of, say, tertiary education or a background which would enable them to navigate that system, you may have a vastly diminished administrative system. I would like to see governments contributing more money to this process of review—flexible, non-legal and all the other things are given. It does not seem to me that cheaper is necessarily going to be better.

As my parting shot can I say to you, so that you can have some comparison for looking at what is now seen as the vastly expensive administrative review system, that for the total budgets of the four tribunals that are being amalgamated—and in today's dollars, because I did the figures—you can get administrative review by those four tribunals for 10 years into the future for what it has cost this country to produce one Collins class submarine.

The ART and Values II

Dr Kathryn Cronin[*]

I decided that I would focus on the values issue associated with this tribunal. I am looking backward as well as forward. Obviously, my role in oversighting the gestation of this tribunal derives from the work that we at the Australian Law Reform Commission did in the *Managing Justice* report. That was work looking at the federal-civil justice system. It was not just looking at the AAT and the other major review tribunals but also at the Federal Court and the Family Court. That vantage point is a very useful one for actually having some sort of intimation about what works and what does not work in our federal justice system. I will certainly draw on it today for some observations about the proposed tribunal.

When we were looking at the ART we began with what is the incontrovertible assumption that you must bring to looking at the federal tribunal system, and that is that our Constitution mandates that these are administrative processes rather than judicial processes and that, although adjudicators in tribunals, in common with judges, do much of the processing associated with fact finding, with making judgments and with forming opinions as to legal rights and obligations, they are also, without any doubt, different. I will not go into the range of differences, including obviously the inability to exercise judicial power, but in the *Managing Justice* report we tried to look in terms of practice and procedure and see what it is that tribunals do that is different, whether that is a matter that should be emphasised and enhanced, and how that might be done.

This is a model that, although it is there and is clearly part of our constitutional arrangements, we have never really given full debate to. One of the useful sidelights of this proposed new tribunal is that it does allow us an opportunity to say: what is an administrative process as opposed to a judicial process? In this model we focused on the investigative powers of the tribunal, which must be different from a judicial process if, at the end of the day, you are trying to make the correct decision rather than a decision that derives from the presentations given to you by the parties.

We also focused on informality. Certainly, informality is something more than just sitting around a table without a dais. In our view, informality must encompass other ways of communicating about cases with the sorts of parties that tribunals have. We also looked at issues of flexibility.

Although you can see in your civil judicial model that we are now moving towards something approximating a discontinuous trial that you see in the civil code countries, we assumed there must be some greater flexibility in the sorts of arrangements that you can have in an administrative tribunal system as opposed to a judicial court system. We also looked at the human dimensions that are associated with tribunals, which are very different from courts, and these derive from a number of different factors. First of all, they come from the fact that tribunals have part-time members with all of the managerial issues that arise in terms of training and skilling-up people who are not necessarily closely and continually associated with the working of the tribunal. Tribunal members also have much more varied backgrounds than one would find in your judicial system. Regarding the types of applicants that tribunals deal with, particularly the AAT, there is as varied a client base as you might have in the Federal Court but with a preponderance of an underskilled applicant class. Notionally, the working presumption about having tribunals is that courts are not necessarily good at dealing with those underskilled applicants and the tribunals ought to be better.

[*] *Deputy President, Australian Law Reform Commission.*

We also looked at issues of representation and how you factor that into tribunals.

We found across each of the entities we were looking at—the AAT, the Federal Court and the Family Court—that, notwithstanding what I think is a fairly significant public and government bias that has always been against lawyers in particular but perhaps representation in general, having a representative did help. Particularly in the AAT it was shown to help. The major way in which it helps is that it assists in reaching a compromise. While not all of the matters that go through our review systems are matters that can be easily or appropriately compromised, there are certain ones where that focus is very much part of the working system.

In our view, if you are looking for a compromise, you simply will not get it unless you have some skilling-up of the parties to deal with negotiation and to broker a settlement within that interlocutory process.

We also looked at the other feature of tribunals that I think is often overlooked, including by government. That is that government is the consistent player. In our system, happily, we have mandated that it is a consistent model player. That ought to make a significant difference to the way that our federal tribunals can work. We made a whole series of recommendations associated with what a new tribunal system should look like and a number of those have been taken up in the bill, which is very nice. I am not sure that everyone will agree with us—certainly in the way in which they are cast in the bill—but we were of the view that there should be provisions that enhance the investigation power of tribunals in order to be able to deal with what is a problem in some of the jurisdictions in the AAT—that is, discredited, repeat, partisan experts. Certainly, the provisions about being much more flexible in the way that you get expert evidence are a very good feature of the bill—that you have much more flexibility in obtaining information, including by piggybacking on the department's investigative power, and more control over hearing processes. This is something that you also find in the court system.

One of the notes of caution that I would sound is that we should be looking not just at what is done in the bill but how it is done. If I have a real concern about the arrangements it is in connection with what I see as a very rule based system of modelling the tribunal. The rule based system has a number of features. When we were looking across our federal justice system there was no doubt that we had a clear recognition that all of the rules of the justice system are extraordinarily closely interconnected.

So if you alter one bit you may find another part does not work as well. Provisions in the bill, such as where you have to get members to think about having a hearing, while notionally they may look good, may lengthen the processes. It may end up having a rather more elongated tail to it than was intended.

The other thing about rules is that we need to look at why we have them and the types that we craft because, although we focused on these procedural matters as being features of the administrative process, when governments underscore the fact that these tribunals are administrative, they are talking about it more in terms of a model where you are seeking to constrain eccentric decisions, where you are seeking to limit discretion, where you are seeking to make sure that the decision makers attend to policy. What they are looking for is a model where you have much of a control over a substantive outcome rather than necessarily only these procedural arrangements of how you get there. The rule based arrangement in the bill, I think, is a cause for concern. Apart from everything, there are a lot of rules. There are practice directions coming from ministers, the President and executive members. All with a varying array of bite.

When we began looking at the Family Court and the Federal Court we also saw lessons that could be learned about using rule based systems because the Family Court had a very prescriptive, undifferentiated case management system which was loudly and consistently howled down as being inappropriate in that court. In the Federal Court judges sit easily and in a rather more tailored fashion on top of their rules. We were very clear in our report about saying two things about rules. The first was that you should guard against prescriptive rules because everything in this system is different. It is not just making a tailored rule for a class. There are different cultures in different types of case systems. There are different cultures in different cities. Advocates work in quite different ways, agency lawyers work in different ways, in different cities.

Comment is made consistently in reports on courts and tribunals overseas that rules of courts and tribunals should be guidelines and not trip-wires. Unfortunately, I can see that a lot of the rules that we have here are trip-wires. They are trip-wires not just for the members—although a number of them are directed at members—but for applicants in particular. We want to guard very carefully against setting consequences for a failure to honour a rule that are both adverse and generally operative so you end up having your rules not only catching those who are perhaps scamming the system—in all review systems there will be some of those, and migration has a high sensitivity to the existence of scammers in its review system—but also the unwary. When there are rules that say, 'Unless you comply with directions, you haven't made a proper application and the tribunal can't review it'—particularly where the review tribunal, as in the migration ones, cannot extend a time limit for lodging—not only those people who are seeking to extend their stay inappropriately in Australia, but also the large numbers of people who are in these tribunals who are simply underskilled about dealing with bureaucracy will be caught.

Finally, I want to take up a point that Justice O'Connor made. I think all of the overseas research about courts and tribunals that we are looking at is saying something terribly important about the people who go to them. First of all, they have some very clear expectations about what they will meet, and we have to take account of their expectations. The research also shows that people who have had experience of courts and tribunals can distinguish very clearly between an unhappiness at securing a substantive outcome and their feelings about how they were dealt with in the process. Although there is a lot in the bill about the objectives and the rubrics that talk about giving people a meaningful, fair and impartial process, we should not forget that that is absolutely critical to the system. Chief Justice Gleeson said recently that the only criterion for judging courts and tribunals is the measure of success they have in ensuring public confidence in their independence, integrity and impartiality. If there are too many rules that operate to trip the unwary in the system, people will go away with a profound sense of injustice that somehow, because of their lack of skills and ability, their lack of knowledge of what are complicated legislative arrangements, they were cheated of a right to have a hearing and a reconsideration of a first instance decision.

The Style and Format of the ART Legislation

Sandra Power[*]

Generally, the bills are drafted on plain English principles. That is particularly apparent with the principal bill, the ART Bill. It has a logical structure. It has a narrative form. It is designed so that it will be able to be easily used by the users of the ART system. The procedures are expressed simply and the procedures ought to be able to be followed quite readily. It includes things like an overview of the legislation and diagrammatic representations of going for first-tier and second-tier review and of how the appeal system works.

However, all the ART bills are structured like the AAT legislation is structured. The AAT Act does not confer jurisdiction on the AAT. It establishes the AAT. It provides for its membership and staffing and it gives it powers and functions. But the AAT's jurisdiction itself is conferred by other legislation. Part of the answer to the question about the length of the consequentials bill is that in fact, if you put together all the current legislation dealing with the four tribunals to be amalgamated and all the legislation which confers particular jurisdiction on the AAT, you would have a lengthy piece of legislation as well.

Similarly, the ART Bill itself provides for the staff, the membership and the management of the ART. It deals with who can apply for review and the levels of review that are available. It gives powers and functions to the ART and it sets out its usual procedures. Other Acts will confer actual jurisdiction on the ART. Those Acts will empower people to apply to the ART for review of specified classes of decisions, and in some cases those other Acts will modify the ART's procedures and provide for the ART to be constituted in a particular way. That is again dealt with by the consequentials bill and partly accounts for its length and its apparent complexity. The other thing to remember about a consequentials bill, of course, is that no-one has to read it from beginning to end, except possibly members of the ART who will have to apply it. Users of the tribunal system will have to look at the ART Bill and then at the particular legislation that confers a power on the ART to hear particular kinds of applications.

The ART Bill describes some provisions as 'core' ones. These are provisions that cannot be modified by regulations made under other Acts. As far as possible they are to be interpreted as not being modified by other Acts of the Commonwealth. This provision recognises the basic legal position. The ART Bill simply cannot stop other later Acts making inconsistent provision, nor can it stop other Acts authorising the making of regulations that make inconsistent provision. However, the provisions about the core provisions in the ART Bill indicate Parliament's intention that the core provisions are to prevail over other legislative provisions if there is any inconsistency, as far as that is possible. Nonetheless, there will be modifications of the ART Bill, just as the AAT Act is modified by other Acts. It is proposed that some of these modifications be made by the consequential and transitional bill itself, and the preference in that is for those modifications to be as few as possible. This preference is consistent with the objectives of the ART legislation, one of which is to achieve consistent approaches to merits review across the whole of Commonwealth administrative decision making.

The Attorney noted that the greatest modifications would be found in the area of migration decision making, and that is certainly the case. However, the purpose of those modifications is to keep in place as much as possible the current rules governing review of migration decisions by the MRT and the RRT. So the drafter was really faced with a choice: either to make very substantial amendments to the ART Bill to reflect the current arrangements or to

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replace parts of the ART Bill with a self-contained code in the Migration Act through amending the existing provisions of the Migration Act. The choice was made to replace many of the parts of the ART Bill, although many of the provisions in those parts are reproduced in the migration code. This was considered to be the most user-friendly choice in that it would make the migration code easier to understand and therefore more accessible to users of the migration review system. However, it is not a model that I expect will need to be followed in other areas of decision making.

The consequential and transitional provisions bill also modifies veterans legislation for the purpose of enabling reviews by the ART of the Veterans' Review Board decisions to be dealt with as a second-tier review. Those second-tier reviews are not subject to the leave requirement that applies in the case of the review of other decisions. Under the ART Bill you have to get leave to get second-tier review, but that does not apply to veterans. Again, there are modifications in the consequential and transitional provisions bill that deal with social security and family assistance matters and decisions. These are primarily intended to deal with the fact that the Secretary of the Department of Family and Community Services is the decision maker for the purpose of those laws.

The schedule to the consequential and transitional provisions bill contains quite a few paired schedules. For example, schedule 8 contains amendments to the veterans' entitlements legislation. Those amendments are designed to transfer the jurisdiction of review from the AAT to the ART. There is then a schedule 9, which puts in a new schedule to the *Veterans' Entitlements Act 1986*. That sets out the modifications of the ART Bill that will apply in the case of review of veterans' decisions.

Practice and procedure directions are important because it will be necessary to look at them to understand the full package. The ART Bill refers throughout to various, specified things being dealt with by practice and procedure directions. That was done partly to avoid the sort of rule based excess that Dr Cronin refers to. It is true that the President, a Minister or an executive member of a Division can issue directions, but the directions are limited. It is only where a provision of the ART Bill refers to something being dealt with by the practice and procedure directions that the directions can deal with that subject matter. The ART Bill does not give the power to ministers, for example, to make directions requiring the ART to apply a particular government policy.

I would like to say something briefly about the transitional provisions included in the large consequentials bill because they also account for some of its complexity. The life of those provisions is limited. They are really only applicable in relation to decisions that were made before the ART legislation comes into existence. They provide a way of dealing with those decisions. The object of these transitional provisions is to ensure that applicants are not disrupted by the transition to the ART and to ensure that their existing rights are preserved to the maximum possible extent.

Essentially, the transitional provisions deal with how to handle decisions that were made before the ART comes into existence. The ART will come into existence on Royal Assent, but the jurisdiction will be conferred on it only when parts 4 to 10 of the ART Bill come into existence, which is intended to be 1 July next year. This is called AAT abolition time—possibly not a very happy expression—in the consequential and transitional provisions bill. There are a number of circumstances that could exist at the time the ART comes into existence:

- no application may have been made for a review of a decision before the ART is abolished;
- an application may have been made but not completed;

- a review may have been completed by the AAT or one of the other tribunals at the time the tribunal ceases to exist, but no appeal has been instituted;
- an appeal has been instituted but not finalised; or
- an appeal may have been finalised but the matter has been remitted to the AAT or another tribunal.

Where a decision was made before the ART comes into existence, applications will be able to be made to the ART rather than one of the existing tribunals. People will continue to be entitled to be notified of decisions made before the abolition and to obtain statements of reasons or additional statements of reasons for those decisions. Generally, where an application has been made to an existing tribunal and review has not been completed, the ART will simply continue with the review as a first-tier review. Whoever was a party beforehand will continue to be a party, and if somebody was represented beforehand they will continue to be able to be represented, whatever the rules of the ART would otherwise be. When no appeal has been instituted, parties will retain their right to appeal, and where an appeal is in progress the courts will hear that appeal as if the AAT Act or other legislation had not in fact been repealed. Where an appeal has been finalised and a matter is to be remitted to the AAT or to another tribunal, it will be remitted to the ART to deal with, and the ART will be able to deal with it, whatever the other tribunal could have done.

There are also some transitional provisions that are designed to ensure the smooth transition to the ART. We know of course that the tribunals will be doing all they can to finalise matters before the ART comes into operation and, where that is not possible, I am absolutely certain they will be leaving matters in a state where the ART can pick them up fairly easily. But the consequential and transitional provisions bill specifically provides that evidence and records relating to reviews before one of the existing tribunals will be transferred to the ART. The ART will be required to have regard to evidence given before one of the other tribunals to be abolished. It can permit parties to give the same evidence again, but it is not required to do so. If it does not permit a party to give the evidence again, that will not be a ground for an appeal to the Federal Court. The government's intention behind all the transitional arrangements is to ensure that the transition from the existing system to the ART proceeds without causing difficulties and additional cost to litigants and without disturbing the rights of applicants who are seeking review.

THE HUMAN FACE OF THE ART

Appointments and Structure

Margaret Carstairs[*]

I have just a few points to make, starting with procedures for appointment of members to the ART. I think Justice O'Connor has already touched on the importance of open and transparent appointment processes. In my view, that is a proposition that is now axiomatic. It is certainly emphasised in the 1995 report of the ARC, *Better Decisions: Review of Commonwealth merits review tribunal*s, that open processes will ensure that a tribunal consists of members who have the skills necessary to perform the tribunal's functions effectively and that they are able to operate free of undue influence. It is, indeed, necessary for public confidence in the system as a whole that people can be appointed for their skills and abilities and that the appointment is merit based.

Will we have this in the ART? The principles are certainly there in the bill in clause 15. I think it can be taken that the ARC's recommendations in their report in 1995 and other reports that have touched upon these subjects have been heeded. The selection criteria for the President and the Chief Executive Officer certainly show that very detailed thought has gone into setting out what will be required to fill the roles and expectations of those positions. The selection criteria for the position of President require a person who shapes strategic thinking; achieves results; cultivates strong working relationships; exemplifies personal drive and integrity; communicates with influence; has tribunal decision making skills, and understands the full merits review system and policy environment. The comment is often made that it is hard to imagine that a human being will fill the role that is expected of the President and the CEO, because it is a prodigious task ahead to bring the tribunals together. But it seems to me that the selection criteria help to focus on what these skills are. I think the short time frame within which to do these things may, however, create some problems—for instance, the fact that remuneration for tribunal members is not yet known. One hopes that this will not mean that potentially worthy applicants, particularly for the position of the President, might be discouraged from applying.

The second issue that I want to touch on is the issue of transparency and independence where the minister's approval or approvals have to be sought. This is provided in clauses 15 and 16 of the ART Bill. As this is the current practice in relation to the SSAT, we as a tribunal do not have the problem with this that many who have criticised a provision such as this appear to have. Our own experience has been a healthy one and there has been a lack of interference.

However, my concern is simply with cross-appointments requiring the agreement of all the affected ministers. It seems to me that this may well prove to be a cumbersome mechanism, particularly for the talented persons who might otherwise be appointed to several divisions. It is often the case that there can be delays in appointment processes and I wonder whether this is a mechanism that will be unduly cumbersome. In bringing these tribunals together, there are certainly economies to be got from sharing facilities, and access for people needing to access the system will be simplified. But real enhancements can come from membership of these tribunals: the competencies of members can be enhanced where they are able to sit in different divisions and learn the practices of others.

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I wonder whether this requirement to have the agreement of ministers for cross-appointments may prove an impediment to cross-appointments. I think that would be unfortunate. I see this interaction of memberships as one of the primary benefits of bringing the tribunals together.

A third issue under this topic of procedures of appointment is that the ART presents an opportunity for the tribunal to be more effective as a large whole with the ability to sit in different divisions. Already this occurs in the SSAT. We have members who sit on some of these other Commonwealth tribunals, and certainly on other state tribunals. The experience in Victoria with the amalgamation of various tribunals into the VCAT seems, from speaking with VCAT members, to have been primarily a positive one. It seems, though, that there may be some potential to undermine this bringing together at the start given that it is proposed to treat membership of different divisions differently at the commencement of the ART. This is now allowed for in the provisions made in schedule 16 to the Consequential and Transitional Provisions Bill, which is a special provision for those members of the tribunals moving into the migration division. There may well be sound argument for doing this, but I would have thought that there was a better argument to be mounted for appointments being, as I said earlier, openly and transparently fresh at the start, especially starting a new tribunal.

On the second subject of tenure, it is an interesting one to include in matters to be raised here. I suppose that is because, again, coming from a background of a tribunal like most of these tribunals that are being amalgamated, the issue was settled really quite long ago. Indeed, as Justice O'Connor, in speaking on the subject of tenure and independence at the Australian Institute of Judicial Administration conference in Sydney last year, also pointed out, the AAT had, since the 1990s, moved in many instances to appointments on terms in senior positions. So for the Commonwealth tribunals the debate, I think, is fairly long past on this one. Whilst it is often an argument that tenure can ensure independence—and clearly a case can be mounted for tenure on that basis—I do not think that the obverse is invariably the case. Once again, the SSAT's experience has been that, despite terms of three years and even despite direct funding by the department whose decisions we review, our independence has been assured and our decision making has not been interfered with.

In opting for terms not exceeding seven years, the ART Bill has gone beyond the ARC's recommendations in the *Better Decisions* report, which recommended terms between three and five years. Obviously, the bill accepts that tenure is not desirable. One important aspect of having term appointments is the potential to make effective the operation of other provisions in the bill allowing for the codes of conduct and performance agreements. In my view—and, again, coming from a tribunal where performance reporting has been part of the way we interact with our members without problems—I think there is an important role for agreement making with tribunal members as long as those processes are transparent, consultative and in the public arena. I think it makes plainer to tribunal members what the expectations on them are, and I am certainly pleased to see that the bill ensures that the substance of decision making is not to be an aspect of performance agreement making.

In my view, there is a more important practical debate than the tenure versus terms one—that is, the question of the length of terms. It seems to me that it will be necessary for the new tribunal to show confidence in its new membership by giving full terms to members. Our own experience in the SSAT has been that, since the ART proposal was announced, there have been no three-year terms given to members. Some terms have, indeed, been less than six months; all have been less than two years, I believe. It makes it very hard to both get and keep good members if you are on an endless cycle of appointment processes. Again, to quote Justice O'Connor at that conference last year, indeed to quote the *Better Decisions* report, terms shorter than three years are undesirable since they do not give members any sense of security.

I think that proposition would be very difficult to cavil with.

The last topic for my purview is that of the constitution of review panels. Those of you who know something about the SSAT would be aware that our pattern has been to operate with multimember panels in multidisciplinary hearings. The ART Bill in clause 69 states that there will only be two- or three-member panels in limited circumstances. We have suggested that the presumption of single-member panels is unnecessarily restrictive in its wording. We are rather comforted to see that this must be thought so also for the migration division, as that clause has been amended in the Consequential and Transitional Provisions Bill for that division.

Another aspect of constitution of review panels of some concern is second-tier review. Whilst in the ART Bill one of the bases for constituting a multimember panel is that the matter involves an issue or principle of general significance, the use of a multimember panel rules out access to second-tier review. It seemed to us ironic that it is those cases that have been identified as having in the first instance an issue of general significance that may, for both parties, be ones that would actually need second-tier review.

The general title to this session is 'The human face of the ART'. I would just close by saying that for the SSAT there are some other aspects of the ART that will be of interest; that is, the provisions for public hearings, and the fact that the ART will be the last tier of merits review, where the SSAT has not been previously. Those who are in the Income Support Division will have a higher profile than members in the SSAT where there are no public hearings, where decisions are not a matter of public record and where members do not have a high profile. It seems to me that as a tribunal we have had the benefit of a wonderful and, in some instances, outstanding membership who have been insufficiently recognised in review settings in Australia. As we will be comprising somewhere between a quarter and a third of the decisions in this new tribunal, I will be pleased that the membership will have that better recognition and more of a face.

Codes of Conduct

Robin Creyke[*]

Throughout the 10-year process which has led to the introduction of the ART Bill and its accompanying Consequential and Transitional Bill, the focus has been on the simplification of review. In the objects clause of the ART Bill, the nearest object which relates to this aspiration is to provide an accessible mechanism for reviewing decisions that is fair, just, economical, informal and quick. I propose to concentrate instead on the issue of accessibility. How accessible is the ART likely to be to those coming into contact with it?

The *Macquarie Dictionary* defines 'accessible' as '(1) easy of access, approachable; (2) attainable'—and gives an example 'accessible evidence'; '(3) open to the influence of'—and gives as an example 'accessible to bribery'. I expect the drafter overlooked the third of these meanings when drawing up the objects clause. However, the first of those meanings—'ease of access' and 'approachability'—is, I assume, the principal meaning the drafter had in mind, although the second, that the ART provides 'attainable or available evidence or information', is something that the government may also have hoped would be achieved.

Let me make a couple of brief comments about those meanings. It is true that in the second reading speech the Attorney commented that front counter and registry personnel in the existing tribunals are likely to be appointed to the ART. To that extent, these persons are likely to be an experienced and perhaps to some users familiar face when they approach the new body. And indeed, if and when all the tribunals are located in one tribunals complex in each capital city, that too will be a major advance. Co-location of the principal merits review bodies is long overdue. I envisage the position with some pleasure when we can point on a map of our major cities and other centres to a tribunals building or complex, just as we currently can do in relation to a court building or complex.

What about availability of evidence—the second of those meanings that I referred to?

Without wishing to encroach on the next session, just let me say that I have concerns about two aspects of the legislation. The first is that, if an applicant attempts to support his or her application with new evidence, the person may be required to start the process again; and the second is that the tribunal is able to limit the questions of fact, evidence and the issues it considers. Both these provisions, if used sensitively, could be managerial aids which will produce more efficient but still effective and fair outcomes. However, concern remains.

The first, 'sending the matter back to the agency', if used frequently, could slow down the process, frustrate the applicant and certainly not lead to accessible administrative justice. The second, 'limiting the scope of review', is contrary to the very concept of merits review. Merits review enables the reviewer to remake the decision in the same manner as the agency—that is, knowing what were all the facts; having all the evidence, including generally new evidence; and using the law which the agency applied. To limit any one of these factors for the reviewer is like asking the boxer to go into the ring with one hand tied. If this provision is an attempt to undermine the essential aspects of merits review as we know it, the clause is worrying. If it has the effect of reducing the quality of the outcome for the individual, it also reduces the accessibility of the review body in the second sense referred to, and that too will be a disappointment.

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Others have discussed the faces of those before whom our applicant will appeal—the members of the hearing panels. Suffice it to say that there are likely to be fewer of those with legal training, at least in some divisions. I noted that the Attorney-General on the *Law Report* in the last fortnight indicated that it was likely that the President and/or the executive members will be legally qualified. Indeed, in that context, it is interesting to note that in its 25-year history, I believe only two of the senior members of the AAT have not had that qualification.

To turn to the ART itself, I note too that there is some suggestion that in terms of the migration division of the ART that membership is simply to be rolled over. Since a high proportion of these members have legal qualifications, it is hoped that there is no overall quota of people with similar backgrounds for the whole tribunal, since the preponderance of legally qualified members in that division would lead to a disproportionate number without legal qualifications in other divisions. I think it is probably true that most of us would accept that legal qualifications and some legal expertise should be spread across the new body. It should also be remembered, as the experience of the SSAT shows, that it is not the possession of legal qualifications *per se* which leads to legalism. Careful choice of members can avoid people who are likely to bring a more formal approach to the process that is to be the preferred ethos of the new body.

I will now turn to codes of conduct. The introduction of a code of conduct for members is to be welcomed but with caution. It will depend on the terms of the code as to how useful it is and how well it can contribute to making the tribunal a user-friendly, efficient and fair environment. In that context, however, I would like to make two points. First, developing the code of conduct is to be undertaken, according to the ART Bill, by the President in conjunction with a committee. The committee is to consist of the President, two executive members and an outsider. Although the committee can consult others, those others have no formal voice. By contrast, there are rules committees for both the Administrative Decisions Tribunal in New South Wales and the Victorian Civil and Administrative Tribunal. For example, the rules committee of the Administrative Decisions Tribunal comprises an equal number of members of the Administrative Decisions Tribunal and community members—a more democratic and evenly balanced representation of user members. It is a pity that a comparable group was not set up for such an important initiative as the ART. The code of conduct, as you will be aware, unlike the practice and procedure directions, is legislative in nature and breach of it can result in dismissal. Hence, devising an appropriate and fair code is a very important task for the tribunal. Involving more users in the process would also be seen as enhancing its accessibility to the community.

Second, let me point out that there are to be consultants appointed to the ART. They are to be appointed under contract. They will not be members of the tribunal. They will not be bound by the code of conduct, nor will they be subject to performance agreements. Since these consultants, like members, are to mediate, conciliate, conduct preliminary conferences and undertake inquiries, to make the member but not the consultant subject to the code of conduct and performance agreement has the potential to undermine the user's perception of the independence of such employees. It also appears to be discriminatory and perhaps needs to be rethought. After all, when it is recalled that over 70 per cent of cases before the AAT are settled without a formal hearing, and it is precisely these non-formal functions which the consultants or inquiry officers are to undertake, the anomaly is the more striking.

So how accessible will the new body be? That will depend in part on the as yet unwritten practice and procedures. However, a wise woman with a wealth of experience in this area, Pam O'Neill—a former sex discrimination commissioner, first head of the Immigration Review Tribunal, former member of the National Native Title Tribunal and former member of the ACT Administrative Appeals Tribunal—once noted that the culture of a tribunal is created by its members, not by its structure or its rules. That has been the strength of the SSAT.

Provided appropriate appointments are made to the new body, provided there is sufficient opportunity for interaction between those members and provided those members have an independent voice, an appropriate culture could develop at the ART as well. They will be up against a formal prescriptive couple of bills which, to my mind, have not avoided the legal culture said to have infused the Administrative Appeals Tribunal. If that happens, to get around that problem and to create the culture will be the challenge, it seems to me, for the new President and the CEO of the ART. It may happen, but it is yet to be seen whether it will occur.

Legal Representation

Anne Trimmer[*]

Before I deal with the specific topic that I have been asked to comment on, I think it is important to briefly comment on the Law Council of Australia's position in relation to the ART legislation. In making these comments I should say that we have not yet been able to form any definitive view on the consequentials bill. The Law Council now supports, and always has strongly supported, the continued existence of a truly independent Commonwealth merits review tribunal. We agree that benefits and efficiencies may be gained by restructuring the AAT and other tribunals, and have already indicated our full support for a single tribunal structure.

It is our view that the legislation under discussion today includes changes to the current system that are inconsistent with the goals of the administrative review process. We are concerned that the restructure goes far beyond organisational changes and undermines the currently accepted principles of administrative review of which Australia is proud. The Law Council believes that there are five fundamental principles of administrative review: first, independence so as to achieve correct or preferable decisions; secondly, accountability and responsiveness; thirdly, promotion of better quality decision making; fourthly, fairness; and, finally, cost effectiveness.

The federal government justifies the amalgamation of the tribunals and structural reform of the merits review system on economic grounds. The explanatory memorandum to the Administrative Review Tribunal Bill notes that the reforms should deliver savings from 'economies of scale due to the elimination of the duplication of infrastructure and support services'. Moreover, the explanatory memorandum states that one of the goals of the restructuring is to 'rationalise resources and create efficiencies'. We consider that this is the driving factor behind the restructuring initiative and that the government has devalued the other four fundamental principles of administrative review.

Our main concerns in relation to the ART Bill are: first, reduced opportunity for merits review; secondly, compromised independence of the ART; thirdly, issues associated with the appointment and qualifications of members; fourthly, denial of a right to legal representation; and, lastly, the constitution of the panels themselves. A theme of the bill is a whittling away of the independence of the external merits review tribunal and its absorption into the bureaucracy. This is reflected in lack of tenure of members, the funding of divisions by departments, the concept of ministerial directions and the code of conduct and performance agreement requirements. Any reform which attacks the independence of the external merits tribunal must be regarded with caution.

A tribunal cannot hope to engage in impartial decision making which will have a normative effect on government decision making if it is not independent from and seen to be independent from the Executive. The Law Council has concerns about the perception of the ART's independence because the ART divisions are to be funded by portfolio agencies. The general division will be funded through the Attorney-General's Department. We acknowledge that this is a continuation of existing funding arrangements for the tribunals other than the AAT, but the Law Council does not consider this desirable. There is the potential for an agency to restrict or influence funding as a way of imposing pressure on the division either to manage with fewer resources or to comply with departmental policies. The funding of the

[*] *President, Law Council of Australia.*

ART by the very same department whose decision is under challenge could legitimately give rise to a reasonable apprehension of bias.

The proposal that portfolio ministers could issue directions that must be followed by the ART in reviewing decisions made under that particular minister's legislation raises similar concerns. Ministerial directions could be used to influence the substantive determination of cases by limiting the ability of members to take into account the individual circumstances of individual applicants. Under the proposed regime ministerial directions will prevail over directions issued by the President or executive members to the extent of any inconsistency. There is also no requirement for a responsible minister to consult with the President before issuing the directions. While proposed subsection 161(4) provides that all directions, including ministerial directions, must have regard to the objects of the Act as set out in section 3, the Law Council is not convinced that there is sufficient protection provided by this subsection. On any view, ministerial directions should be disallowable instruments.

The *Better Decisions* report noted that there is a general trend for government agencies to be held more accountable for performance against declared objectives and targets. In this context, the report recommended that review tribunals should develop appropriate appraisal schemes and that all tribunal members should participate in setting standards against which their performance is to be appraised. The Law Council agrees with the general observations and recommendations in the *Better Decisions* report about performance appraisal. The bill contains two linked concepts: performance agreements and the code of conduct. The coverage of a performance agreement is spelt out; the intended content of the code of conduct is not, although the code of conduct is a disallowable instrument. Members must comply with both the performance agreement and the code of conduct. Non-compliance may lead to a written direction from the President to improve members' performance and to comply with the code, which may also lead to the member being removed.

The removal powers relating to performance agreements and the code of conduct are ground-breaking and unprecedented. Currently, an AAT member who is not a judge can be removed by the Governor-General only if both Houses of Parliament in the same session pass a resolution to remove the member on the ground of proven misbehaviour or incapacity or the member becomes bankrupt. The Law Council is concerned that the combination of the imperative to enter into and comply with a performance agreement and the code of conduct, and the ever present risk of dismissal for non-compliance, impinge on the independence of tribunal members.

Having said that, let me turn now to the issue of legal representation. The Law Council believes the presumption in the ART Bill against legal representation is fundamentally misguided, as well as contrary to the recommendations of the *Better Decisions* report. As the experience of the SSAT indicates, it is not legal representation *per se* which produces an adversarial culture. If in a particular case a legal representative is not assisting the tribunal, the answer is for the tribunal to say so. The bill, as it stands, permits portfolio legislation to restrict or remove access to representation altogether. In other cases where the availability of representation is not excluded by legislation, whether or not it is granted will be at the discretion of the sitting member or members, subject to practice and procedure directions which may be issued by the portfolio Minister. We are not just talking about legal representation; it extends to any representation.

The case for maintenance of legal representation is obviously a difficult argument for the Law Council to mount. We will always be seen to be just promoting the role of lawyers to preserve their current role. But we assert that there is a strong public interest argument in seeking to maintain the right of representation. In many cases, representation is a means of redressing the power and resource imbalance implicit in an appeal by the individual citizen against the state.

An example is the review of a decision denying access to documents under the FOI Act. The relevant department may be represented by an experienced FOI officer who is well versed in the legislation and precedent. By contrast, it is unlikely that an applicant would have equivalent knowledge. In these circumstances there must be a right to representation. Legal representation of applicants before a tribunal not only assists the applicant in presenting a proper case but also assists the tribunal in obtaining all the relevant material in the case, including the benefit of appropriate cross-examination or the testing of information placed before the tribunal by the parties.

The Attorney, in a speech in September this year, quoted the ALRC *Managing Justice* report's finding that the median duration of cases finalised in the AAT was longer than for cases in the Federal Court or the Family Court. I venture to suggest that a key element in this may be the fact that many applicants before the AAT are unrepresented. Without the assistance of a lawyer to put concisely the issues at hand, it will often take a court or tribunal longer to hear an application. Rather than being a cost in the process of merits review, legal representation contributes to the speed and economy of the review process by assisting in the efficient presentation of the case, and to ensure all information is available to the tribunal for the tribunal's consideration.

Lawyers are skilled in the various processes leading up to a hearing for the early resolution of matters. Preliminary meetings, telephone conferences and other forms of mediation may often be more effectively handled by the applicant's legal representative. A personal appearance by the applicant in every matter is not appropriate for a number of reasons.

Often the applicant needs the help of lawyers with expertise in a particular area of administrative law. The applicant may be a company or another entity which employs a solicitor or legally qualified person to represent it in matters before the tribunal. The use of legal representatives by these applicants is the more economical course in the circumstances.

The Attorney, in the speech I referred to earlier, has said that one of the objects of the bill is to enable the tribunal to review decisions in a non-adversarial way, except where this would be inappropriate. The Law Council does not agree that the involvement of lawyers will automatically create an adversarial treatment of a matter before the tribunal. The Law Council asserts that there should be no presumption that representation is to be permitted only in exceptional or prescribed circumstances, nor that there be a power of veto in members. In particular, it would not like any presumption against representation to apply to review panel processes, nor to divisional processes in the taxation and commercial and general divisions. It feels strongly that applicants and agencies should have the option of being legally represented without this right being limited to particular circumstances. This right should be expressed in the governing statute of the ART.

In conclusion, the Law Council have already indicated support for the creation of one new tribunal, the ART, but we believe that the detail in the bill for restructuring the ART is misguided in part. The restructure goes far beyond any necessary organisational changes and it undermines the fundamental principles of administrative review. The ART will have a diminishing role in administrative law. It will be kept in check by the Executive through the use of general directions, policy directions, performance targets and other measures. These measures will reduce the independence of the ART and the members serving on the ART.

THE ART—AN ALP VIEW

Robert McClelland MP[*]

The issues we are looking at are very significant issues. In 1975, for instance, this was said during the second reading debate on the Administrative Appeals Tribunal Bill:

> This legislation and the companion legislation to establish the office of an Australian ombudsman are both extremely significant phases in the development within Australia not only of our administrative law; they are also momentous events in the evolution of our system of government.

They were the words of John Winston Howard in responding to the bill on 14 May 1975 on behalf of the Opposition. The creation of the tribunal was no doubt a momentous event—unquestionably so.

We do not have in Australia a bill of rights, and it is fair to say that the greatest infringements of individual rights can be by the executive. While we have a parliament elected by the majority of Australians, that mere fact in itself does not mean that individual rights are guaranteed. A government elected by a majority can be equally oppressive of the rights of individuals and minority groups as any totalitarian regime. Having a system of effectively working administrative law is vitally important, as John Howard indicated, in the evolution of our system of government. We take these proposals very seriously indeed.

In June the primary bill was tabled; just a few weeks ago the consequential bill was tabled with more amendments proposed than any other bill in Australian history. The position of the Labor Party is that we accept the justification for a review of the present system. Indeed, it was the former government that called for a review in 1993. Administrative review has been operating for a quarter of a century and, since the creation of the Administrative Appeals Tribunal, there is no doubt that other specialist tribunals, justified as they are, have been established on more of an *ad hoc* basis, and so there is justification for looking at bringing all these tribunals together under one umbrella. It makes sense to look at common systems—electronic information systems, library systems, training procedures. To what extent those efficiencies are achieved at the cost of independence is a substantial question. In our view, neither that independence nor the quality of the decision making process should be compromised.

The scope of administrative decisions in relation to ordinary Australians needs to be appreciated. Each year there are over 50 million decisions made by the executive arm of government that affect ordinary Australians. Only a small percentage of those are challenged but, to put it in context, more than 36 million are made in the social security area. Between 1997 and 1998 there were 43,074 internal reviews by Centrelink offices; 9,214 applications for external review by the Social Security Appeals Tribunal; 1,735 applications concerning social welfare decisions in the AAT; and some 33 related applications to the Federal Court. In that same year the Australian Taxation Office made more than 10 million decisions involving the amount of tax individuals and companies should pay. There were 76,229 objections to assessment, 1,604 matters were lodged for review by the AAT and 19 taxation appeals were filed in the Federal Court.

Clearly, below the Federal Court the role of the Administrative Appeals Tribunal is vital to a great many Australians. There are decisions made not only in the areas of social security and taxation but also in the areas of workers compensation, war veterans and widows entitlements, residence, business, temporary entry visas, customs matters and business

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[*] *Shadow Attorney-General.*

licensing. Literally, these decisions impact on the daily lives of a great many ordinary Australians. It is important to realise that these decisions and the need to seek review quite frequently happen at crucial times of people's lives or at times of great vulnerability—a child may become ill, the breadwinner may suffer an accident or one of the members of a family may become disabled and issues of carers are involved. These people are affected by decisions in times of greatest need.

As I keep emphasising, the ability to seek review of administrative decisions is such a vital check to the role played by the executive that structures that are working well should not be changed just for the sake of change or indeed for the sake of the budget bottom line. We do have one of the best systems of administrative review in the world and that is because it is based on genuine merits review, where the tribunal stands in the shoes of the decision maker and makes the decision afresh, thus offering the best prospects for a logical, sensible and fair outcome. Before we had the AAT, Australians were limited to the more complex, costly and difficult procedures of judicial review in the courts. While we say there is always room for improvement, it is incumbent on those proposing change to demonstrate how their change will be to the benefit of ordinary Australians and to justify the cost savings. We are not convinced, quite frankly, that that has been done.

While the Australian Labor Party supports, as I said at the outset, the notion of bringing the various specialist tribunals together under an umbrella body, we fear that the government's real motivation is the budget bottom line. The government openly say that they propose to save about $13 million over four years from the amalgamation. We question those figures. But, even then, to have that as the primary objective is to misapply the priorities. The top priorities have to be the independence of the tribunal and the quality of the decisions.

In terms of the suspicions that arise, we look at the situation in respect of veterans. When the proposals for amalgamation were initially put forward in 1977, it was proposed to bring the Veterans' Review Board under the umbrella. But, as a result of significant pressure from veterans bodies, the government has abandoned that proposal, which is a significant departure from the Administrative Review Council's recommendations in the *Better Decisions* report.

Veterans themselves are concerned about the current proposals because they are not satisfied that the quality of review in the proposed Veterans' Appeals Division will be equal to that of the current Veterans' Review Tribunal. But the question must be asked: if the decision to exempt veterans was made on the basis that the new system would not improve their circumstances, why then is this system good enough for the rest of Australia? The veterans, in our view, were more than justified in saying that they were not prepared to accept the proposed system. Australians are justified in saying that they are not prepared to accept the proposals—which will, we believe, diminish the quality of review and the independence of review.

The ALP has a number of specific problems with the model. Decisions must be of the highest quality and we are not convinced that is going to be the case, given the proposed structure of the tribunal.

Others have spoken of the numbers involved, but there are restrictions. For instance, senior members will account for no more than 10 per cent of total members and no more than 15 per cent of members of a division. Currently, senior members constitute about 30 per cent of the Administrative Appeals Tribunal. So, while reducing the number of senior members will result in some cost savings, it will diminish the ability of the tribunal to deal with more complex matters. It will reduce the ability of these senior members to lead and train more junior members. We also are concerned with the lack of tenure for full-time members. We think that is of concern, as is the fact that even though appointments of up to seven years

are proposed, no minimum period of appointment is prescribed. That is also of concern in the sense that short-term appointments make the tribunal member more vulnerable to pressure to do the bidding of the government.

That leads to a more meaty subject: the issue of funding. Questions are raised immediately when it is understood that funding is to be by the portfolio agency that will have its decisions reviewed by the particular proposed division of the Administrative Review Tribunal.

That, in itself, is going to be cumbersome, because the President and executive members are going to have to negotiate each year with the various departments, which will put them in an invidious position in terms of not only time but also the extent to which they have to plead and beg for additional funding or maintenance of funding levels if the minister is not happy with the decisions that have come forward. This will be the case whatever the calibre of the government of the day. Such pressure would not come only from a conservative government. Clearly, there are many instances where dissatisfaction was expressed by ministers of the previous Labor government about many decisions of the Administrative Appeals Tribunal and the Federal Court of Australia. That is why there must be structures in place which guarantee independence.

The proposed funding model is directly contrary to the recommendations in the *Better Decisions* report. While we have to concede that the Social Security Appeals Tribunal, the Refugee Review Tribunal and the Migration Review Tribunal are funded on that basis, we do not want to see the worst aspects of these specialist tribunals being incorporated into the new model of the Administrative Review Tribunal. We want the best aspects of all models to be applied to the new tribunal.

The other significant concern we have is with the appointment and removal of members of the tribunal. This is proposed to occur on the recommendation of the Minister whose department is going to be the subject of review by the particular division. While that was a recommendation of the *Better Decisions* report, it was also a recommendation of the *Better Decisions* report that either the Attorney-General's Department, the Special Minister of State or the Department of the Prime Minister and Cabinet be responsible for this amalgamated body, all being at arm's length from the decisions that are likely to be reviewed in these other areas. So it is misleading to suggest that that recommendation for ministerial involvement in the appointment process was a recommendation of the *Better Decisions* report. That is vitally important. We recognise that ministerial recommendation is currently the case in respect of the social security, migration and refugee areas but again why import the worst aspects of these specialist tribunals into the new body? We have got a particular concern about that.

We are also concerned that there are no minimum qualifications specified for the President of the tribunal. The Attorney-General is on the record as saying that in all likelihood it would be someone with legal experience. But why not specify the essential qualifications in the Act? We are also concerned that there are no specified minimum criteria for other members. For instance, one aspect of the *Better Decisions* report which was impressive was the listing of the qualities that are needed by a tribunal member in terms of core skills. These are things such as understanding the concept of merits review; some experience with administrative review principles; analytical skills; personal skills and also communication skills. None of those things is specified in the bill.

That also leads on to the greater ease of removing tribunal members. While the President's position will remain pretty well as it is—being subject to removal on the recommendation of the Parliament—other tribunal members will be able to be dismissed for issues relating to their non-achievement of performance targets, the code of conduct or the directions of the President. That again has significant repercussions for the ability of individual tribunal members to make decisions independently of the hierarchy. Particularly if there is pressure

on them to make decisions in a too abbreviated manner, to rush them through or to meet unreasonable targets, independently minded tribunal members might be under threat and that would be regrettable.

Another area of significant concern is the restrictions on second-tier review. We are very concerned about that. We think only a handful of decisions will meet the two criteria for second tier review specified in the bill, namely that the review was heard by a single member and the case raises a principle or issue of general significance, or that the parties to the first review agree that the decision involved a manifest error. In my 15 years experience as a legal practitioner specialising in litigation I not once saw that occur and I do not think it would occur.

The other area of great concern is the restrictions on representation. It will no longer be a right but at the discretion of the tribunal. Being a lawyer, I suppose I cannot speak with objectivity, but I can sincerely say that if I as a lawyer had to represent a person against an unrepresented litigant I would always prefer the other side to have representation. Why? Because more often than not the job of a good lawyer is to throw their own client around the room a few times to talk sense into them so that they can see reality, rather than to just offer the advice the client wants to hear. More often than not good lawyers from both sides would do that. They would tell their clients the facts, show them the true light of day, rather than let them go off because they had some particular obsession to express in a tribunal.

I think the involvement of lawyers unquestionably contributes to matters being settled. If matters are not settled and they go to trial, there is no question—all the evidence suggests that the involvement of lawyers significantly reduces the length of trials. It is in many ways penny wise and pound foolish to propose removing lawyers. I think they make a real contribution to sensible outcomes and to assisting tribunal members. To portray lawyers as promoting entrepreneurial litigation to build up costs is, I think, a gross overstatement. That happens to a very minor extent. In more cases than not the role of a good lawyer, as I say, will really be to tell clients in very firm language what the reality of the world is. I have seen that time and time again in my experience as a practitioner.

The final point we have concern with is the ability of ministers to issue practice directions which will prevail over those of the President or the executive. I think to even state that in itself supports the argument. How can you have a truly independent body where the minister whose decisions are being reviewed is entitled to give directions regarding practices and procedure and even indeed regarding guidelines for the appearance of lawyers?

To conclude, the position of the Labor Party is that we do not oppose the amalgamation of specialist tribunals *per se*, but, to quote the words of Justice Jane Mathews in 1998 when this proposal was first floated, 'The proposed amalgamation constitutes such a downgrading of the merits review system as to fundamentally threaten the quality and independence of external merits review.' Having seen the actual proposals from June this year, after they were tabled in parliament, I think her concerns were well founded. I think it is probably even worse than initially portrayed. It will unquestionably affect the quality of decisions and most certainly affect the independence of the decision making process. As I said, we are concerned that it actually draws on the worst aspects of the current specialist tribunals and incorporates those worst aspects into the new tribunal.

While we have not formed a final position in terms of the relevant caucus and shadow ministry procedures, I have to say that in my personal view, the bill is so fundamentally flawed that it would be extremely difficult to amend it to make it a reasonable proposition. Quite frankly, I think the proposal needs to go back to the drawing board to address some of these fundamental points that I have made and, more importantly, to address the concerns that others who are experienced in the area have made.

ADJUDICATION PROCEDURES WITHIN THE ART

A Client Perspective

Sandra Koller[*]

The National Welfare Rights Network, on whose behalf I am here to speak today, is a network of community legal centres that do social security law. We have people in cities and regional areas all around Australia. Our community legal centre workers—some of them are lawyers, some of them are non-lawyers—assist people with social security problems. Our assistance includes going to the Social Security Appeals Tribunal with people in some cases or advising them on how to solve their problem and what to do when they get there. Sometimes people contact us after they have been and we just hear how they went, for better or for worse.

Similarly, we do the same thing with the Administrative Appeals Tribunal. We are probably the nearest thing here today to being the direct voice of these clients.

The first thing I need to say is that administrative review is for consumers; it is not for the government and it is not for the bureaucrats. The whole rationale of administrative review is actually to solve problems for consumers. This is really important because it is their needs and expectations that have to be at the heart of consideration of this bill. Other matters, such as administrative convenience and how tedious it might be to organise the rosters for multimember tribunals, are secondary to the ultimate outcome of better decisions for consumers. They are the ones who should be at centre stage.

Having said that consumers should be at centre stage, what do we do with them? We need to look at the features of consumers. It appears to me that the current bill has been drafted without a lot of thought about what consumers' needs and expectations are. Consumers are going to act and behave totally differently from what the people who have drafted this bill have imagined. Consumers, to cut a long story short, have no idea of what to expect from the administrative review system. If they have any idea, they have got it from American television shows, and that does not help. They have no idea how to prepare: what things to take along, what not to take along, what might be relevant and what might not be relevant. Moreover, they play this game only once. Everybody else in the system is a repeat player, especially decision makers who can frame their decisions in such a way that they contain a lot of useful information in case they are going to be reviewed.

Similarly, that is the case with tribunal members. As for everybody else, assumptions become ingrained, and you forget some of the things that clients need to be told unless, mercifully, they happen to remember to ask about what their experience is going to be.

At the Welfare Rights Centre, we really make a point of asking people—whether or not we went with them—what the tribunal was like and what experience they had. The things that they report back are not what you would expect. Things such as formality make a huge difference to clients. Clients will often say, 'I went into the room. This man came in and everybody stood up. I didn't know that and it threw me.'

We would not think that would be such a big worry, but it sent a blinding light out to the client saying, 'You don't know the processes here. Warning, warning: you're out of your depth,'

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and they clam up. I believe that even the best tribunal members never hear the whole story from consumers. I suspect that, even behind the closed doors of my own office, I hear only a bit more. It is very important to look at the needs of users and how this works. Also, if the system is being redesigned to make it harder for consumers, which I believe this bill does, I believe we are going the wrong way. Consumers are already afraid to go to the tribunal and in fact take a lot of coaxing to go along. If they are not afraid, unfortunately they are overconfident because they think that if they can just see somebody sensible and explain their story the problem will be fixed and will go away. They think the solution is obvious and so are unable to attend to all the necessary preparations. This is the reality of the people who go to these tribunals.

Also, having received a decision they are not happy with or having had a previous unfortunate experience with the bureaucracy, which is usually why they are appealing, they are already a little suspicious that this tribunal is part of the government and so think it is going to be on the government side anyway. They come through the tribunal's doors with a bit of a feeling that might not be able to help them. This is why the system not only has to be utterly scrupulous, utterly transparent and utterly independent but also has to be seen to be such. It is not good enough to have provisions in an Act if we are going to rely on the good graces of the good people in the tribunal to try to avoid or hold off any future influence—it is not good enough. The consumer has to be able to reach that belief when they walk through the door; otherwise, they are not going to have faith in the process. If they do not have faith in the process, the tribunal system is not achieving the ultimate aim. It is a real challenge to bring consumers to the centre of this.

That brings me to the two-tier review, which probably sounds as though it is not much about procedure. However, the two-tier review is about procedure because at the moment we have the Social Security Appeals Tribunal and we have the Administrative Appeals Tribunal for social security cases. If you lose at the Social Security Appeals Tribunal you can appeal straight on—no problems. The reason the current processes are so successful you can observe only by stepping back and having a look at those two tribunals as they work together. It is necessary to see the composite picture to understand how the various disadvantages which are faced by the consumers I have just described are alleviated by the current system.

Currently, in many cases, consumers suddenly have no money and are in a desperate situation. They need a quick decision. Alternatively, they have some long, very complicated disaster that needs to be looked at really carefully, in detail. It is impossible to tell which is the case until they are through the door. You do not know whether you have a problem which you can solve reasonably quickly and needs one of those short time frame decisions or whether you have one of those nightmares—a filing cabinet that is full of files about this person and it is going to take forever to sort out.

With the current two two-tier system, firstly, the quick SSAT is about a one-hour hearing. Clients do almost no preparation; they just show up. It has a highly skilled, multimember panel which has skills to extract everything from this worried person, who has no idea what is relevant and what is not, and then reality test them so that they go out the door feeling they have had a fair go. It does this very quickly. It means that the clients who suddenly have no money can get their decision checked very quickly. This is critical in this area. We know that only 10 per cent appeal, so 90 per cent of people are satisfied with the Social Security Appeals Tribunal outcome at that level. Only 10 per cent need to appeal further. Those 10 per cent tend to be the people who had cases that were not suitable for the very quick SSAT process. Just because there are some cases that are not suitable for the quick SSAT process does not mean you abandon them and deal only with the large number. What it does mean is that you need something else to capture these cases.

The current bill, with its barrier to two-tiered review, (and it is a barrier) basically says that only one level of external review is available unless only one tribunal member heard the matter and it raises a principle that is an issue of general significance. Who decides that? How do you decide that? Consumers will not be able to argue that they have an issue of particular significance. They will not get up and be able to argue that they have an issue of particular significance. Also, I notice when we look at the bill that a decision is made on whether you have an issue of significance, (unless the tribunal automatically refers it up to the appeal panel), by written submissions—they cannot do that either—or if both parties agree that the first level decision had a manifest error of fact or law. I have to say that I have never seen that happen in 13 years. That will not happen.

This is single-tier review for our clients, which basically means that this 10 per cent, this batch of cases that were not suitable for the Social Security Appeals Tribunal, have got nowhere to get resolution. I am concerned about these clients. Yes, I can see why people would say, 'We only want really important cases to get a higher degree of scrutiny,' but when I sit down and try to figure out who is important and who is not or which case has got a significant issue, what it means for me working in a legal centre is that I have to look thoroughly at every single case that comes in my door. There is not enough of me to go around. There is hardly any legal aid in New South Wales for these kinds of cases. These community legal centres I speak of are really small operations. Some of our members of the National Welfare Rights Network have got only one worker in a huge geographic area. The reality is that the scrutiny of the cases to figure out who needs to be assisted so that they can get on to the higher tier is not available; it is not a reality.

Similarly, for the very same reasons I have described, representation for all of these clients is not available either. The loss of this second-tier structure builds in a really serious inequity because consumers stuff up when they go to the tribunal. You just get plain old injustice because they stuff up. They forget to say the critical thing, they do not bring the critical thing or, after they have been to the tribunal, they realise what going to a tribunal is all about but it is too late. They are the people who need to be able to go on to this second tier. Similarly, the ones with important issues are undetectable by me, my colleagues or anyone else. Their issue will never get there. I think this creates a huge injustice.

I think the second tier is critical to getting justice out of administrative review for the kinds of clients we are talking about, the really disadvantaged people who need a huge amount of help but who also need decisions really fast. The only way you can solve this, even though I know it was not the original design, is by what we actually have. What we actually have works really well. It presents a quick sift. It costs $758 per case. It is the cheapest tribunal around but the most effective for the poorest people in the country. I think it is so important that we save this tribunal to work as it does now and similarly enable that small amount of duplication for those people who need some more expansive process. I tried to figure out when I looked at this why on earth we were getting rid of this second-tier anyway, other than maybe if you were cynical you would think it was just cost cutting. I looked at the Administrative Review Council's *Better Decision*s Report—which I think was otherwise a really good report because it recommended representation, it recommended multimember panels, it recommended a whole load of things that are not in this ART Bill— to see why they wanted to get rid of this second tier. What was the reason? Have things changed? Is that reason no longer relevant?

The reasons put forward in *Better Decisions* for blocking that second tier were, first of all, preventing duplication. The evidence is that there is no documented overuse in the social security jurisdiction of appeals to the AAT. That one is out the window. Is it expensive? No, because the SSAT is only $758 anyway, and there is only such a small proportion of people who double up. It is not that. I think it was this one: there are a few problems in the veterans' jurisdiction. I think that is what it was. I think that was really the thing that made them think,

'We don't want this second-tier review.' I do not know for sure, but this is the only one that is left that I cannot quickly dismiss.

The thing is that the passage of time has dismissed that for us. The veterans are out of the ART first tier, but my clients are not. My clients will still suffer with the problem that was put into the report to solve somebody else's problem. This is really unfortunate. I think it is critical. As soon as we do not have two-tier review, we get all these procedural problems.

And the procedural problems that we get are partly because, now that we are at the last tier of review—the only tier of external review—the department wants to be there too. At the moment the Social Security Appeals Tribunal does not have the department physically present. This is a really important matter relating to access. If I had a dollar for every time a client has said, 'And the department will not be there, will they?' before they go to the SSAT, and I have been able to say, 'No, it's okay; just these three nice people around the table will be there,' my Centre would be rich. It is so important to clients—they ask about it all the time. The fact that the department wants to be there, as you can see through the bill, has created these labyrinthine processes that clients will not be able to understand.

It is relevant to a look at the Consequential and Transitional Provisions Bill as it affects social security. One of the few good things we have with the ART is conferences that people can go to before they go to the hearing. But the department does not have to go to them. But if my client does not attend a conference, their appeal is dismissed. This is in the Consequential Amendments Bill for the social security division. The cards are stacked against social security clients. It is not a level playing field. The bottom line is that there are many procedural problems, many trip-wires in this bill, as was mentioned by Kathryn Cronin. To unravel all of the injustices in this bill would require some awesome plan. This bill does not do what it was supposed to do, which was just to amalgamate. It does something worse: it gets rid of the rights of administrative review for ordinary, disadvantaged people.

Adjudication—Migration Decisions

Peter Nygh[*]

I represent an aspect of the tribunal-to-be which will stand in a very special position because the relevant legislation, described as the portfolio legislation—the amendments made to the *Migration Act 1958* in the consequential and transitional bill—provides that Parts 4 to 10 inclusive of the ART Bill, the primary bill, will not be applicable to the Immigration Review Dvision ('the IRD'). To put it another way, it means that only Part 1 (Preliminaries), Part 2 (Establishment, Structure and Membership of the Tribunal), and Part 3 (Administration of the Tribunal), will apply to the IRD. I should of course mention that Part 11 deals with the Administrative Review Council.

All other matters—therefore, the manner in which the Immigration Review Division operates—will continue to be governed as they are now by the provisions of the *Migration Act 1958* as amended and by substantial amendments made in the consequential and transitional bill.

In addition, of course, the Administrative Review Tribunal will constitute a merger between two existing independent tribunals—that is, the Migration Review Tribunal ('MRT') and the Refugee Review Tribunal ('RRT'). Although they are presently dealt with under separate parts of the Migration Act, they have a number of provisions in common. They also differ quite sharply, partly because they have grown up separately—and one obviously develops an independent culture if one lives separate and apart—and partly because the provisions that apply to them are quite different. The MRT holds public hearings and the RRT holds private hearings. The position of dealing with, say, the general migration issues and dealing with protection visa issues will remain the same. Whoever holds the position of executive member of the ART will have an interesting function in trying to meld, if he or she were to try it at all, those two different streams into a single body. That is going to be quite a challenge.

The fact that the Migration Act procedure will continue to apply will mean that the migration divisions will continue to be essentially of an inquisitorial nature. By that I mean something more than what is described in the ART Bill as non-adversarial. It means that there will be a system whereby the primary responsibility for collecting the evidence and conducting the hearing will continue to rest with the member rather than with the representative of one or other of the parties—and, indeed, one interested party, namely the department, is hardly ever there. That will continue to be the case. The exclusion of virtually the bulk of the legislation means that the procedural core provisions will not be applicable to the ART. Those core provisions in relation to procedure are covered in sections 90, 91 and 92. Section 90, which provides that the tribunal must afford procedural fairness, has no corresponding provision in the migration legislation. Section 91, which relates to rules of evidence, and which says that the tribunal is not bound by the rules of evidence, et cetera, has its counterpart in the migration legislation. Section 92, which says that the tribunal must act with little formality, also has its counterpart in the migration legislation. A number of provisions dealing with procedure have been adopted, as it were, from the primary bill. As Sandra Power explained, the idea is that the Migration Act will provide a self-contained code so that one does not have to flip from one piece of legislation to another and put it all together. Hence, some aspects of the primary bill have been incorporated into the portfolio legislation.

Another provision that has been translated is the provision for making decisions on the papers. At the moment under the Migration Act, the Refugee Review Tribunal may make a

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[*] *Principal Member, Refugee Review Tribunal.*

decision on the papers only if it is favourable to the applicant. The provisions in the bill will widen this and will allow a decision to be made on the papers which is either adverse or favourable to the applicant. However, in the case of an adverse decision, as in the primary bill, certain safeguards are inserted and, indeed, the applicant must be called upon to show why the Division should not proceed in the absence of further evidence.

My hunch is that, because of this, and also of course the sensitivities, since these decisions will be judicially reviewable, members are unlikely, except in the very clearest of cases, to proceed to make an adverse decision on the papers. First, it may be simpler to invite the applicant to a hearing rather than first invite the applicant to show cause why a hearing should not be held. There is in fact already provision under our system whereby we ask applicants whether they want a hearing, and sometimes they say no, in which case life is a lot easier.

The other provision, however, which will be very useful, and that is taken over from the primary bill, is the provision to end reviews early if the applicant does not turn up for the hearing or if there is a breach of any direction. Leaving the breach of direction aside, in the Refugee Review Tribunal last year 47 per cent of applicants did not attend for a hearing. Most of these applicants, I hasten to say, come from countries which do not on the face of it raise refugee issues, in the sense that they are countries which do not have a record of internal disturbance and violence, and several of those countries in fact have democratically elected governments. When we are dealing with some of the countries that are well known from the newspaper records then the rate of attendance approaches 100 per cent. At the moment, a written decision in respect of an applicant who does not attend still has to be given. It happens from time to time, I notice from the records, that such an applicant, not having attended the hearing and having had his or her decision affirmed, then proceeds to appeal to the Federal Court and there also frequently does not turn up and then has his or her application for judicial review dismissed.

The option therefore of saying, 'Well, provided you have received adequate notice, you have chosen not to turn up, even though it was not possible to make a decision in your favour on the papers,' and then to simply say, 'Because you did not turn up we end the review, and the original decision continues to stand,' should save both members and the Federal Court some unnecessary time and effort. Of course, there is also included, again copied from the primary bill, provision for reinstatement. In other words, in such a case where for any reason the applicant was sick, forgot the date or whatever, there is provision to seek reinstatement on conditions very similar to the defendant who comes into the District Court after a default judgment and says, 'Please set it aside. I want to come in and defend.' This is a very positive provision.

Much of the business of the tribunal will again depend on the directions that are given. At the moment the principal member gives practice directions both to members and to applicants. The portfolio legislation contains s.353A, which, like s.161 of the primary bill, provides for directions to be given by the minister, the President or the executive member. The provisions in s.353A are considerably wider than those in s.161 of the primary bill.

Therefore, it may pay to do some study on the implications. Directions are undoubtedly necessary. It is obvious that any tribunal must be able to fine-tune the way in which cases are to proceed. I also accept that, in certain situations, it is legitimate for the Minister to give certain directions as to whether or not priority should be given by the Tribunal to particular categories— for instance, we have a policy to give priority in allocating hearings to persons who are in detention. It is obviously legitimate for the Minister to give such a direction and to make it government policy; the difficulty is to draw a line as to where the legitimate interests of the Minister stops and where the legitimate interests of those who are in day-to-day charge of the Tribunal should prevail.

Immigration Matters

Doug Walker[*]

I want to cover some of the reasons behind why the Department of Immigration and Multicultural Affairs has such a comprehensive and self-contained code and also to put in context a few of the things that are challenges for us. I will start by saying that, at the time of the government's making its in-principle decision to establish the ART, it also made some decisions to make comprehensive changes to merits review in the Immigration portfolio. Those changes were enacted in late 1998 and came into effect in about June 1999. The desire in relation to the ART was that those reforms not be lost.

By and large, those reforms were consistent with the government's view of the procedures it would like to see for the ART.

What we have attempted to do is to make the comprehensive code self-contained in the Migration Act for ease of reference for all those who have to use it. It is also important to put in context that 97 per cent of the Immigration and Multicultural Affairs portfolio's merits review caseload is dealt with by the MRT and the RRT at the moment, with three per cent being dealt with by the AAT. Of that three per cent, two-thirds relate to character decisions and criminal deportation. Now that we have taken the opportunity with the ART to do some consolidation, the Immigration and Refugee Division of the ART will review all visa related decisions under the Migration Act, and the General Division of the ART will review citizenship decisions and decisions on registration of migration agents.

One of the challenges is the type of review processes that will in fact be used for character decisions. These are currently done, and have been done in the past, through an adversarial process. It is possible that ministerial directions may well be made to retain those sorts of processes within the ART and also in relation to how the tribunal is to be constituted, such as level of membership, whether it is multimember panels and so forth, and the procedures.

Moving on to some of the procedures, one of the important things that we have retained is the non-adversarial approach. In 97 per cent of our cases, the department does not appear before the tribunal, does not regard itself as a participant or a party. I think that it is important to recognise that the tribunal is undertaking an administrative decision making process. The objective that the department has is similar to that of the tribunal, and that is to arrive at the correct and preferable decision. It is not to actually be perceived as standing up to uphold a decision that may be inappropriate.

There are also resource implications. In fact, when people start talking about the financial costs of tribunals one thing often overlooked is the cost borne by agencies in the adversarial processes, such as having advocates and the filing of documents. Our processes for providing documents to both our tribunals at the moment is basically that the department file is handed over to the tribunal—warts and all. This in fact imposes some discipline on our record keeping to ensure that all our processes are well documented and retained. It also removes some of the issues of what we may or may not regard as relevant and a potential for dispute. We would envisage in the ART that review processes along those lines, without having the formal T documents of an AAT type process, would continue so that we can in fact contain our costs. Certainly, the government is not providing funds for additional departmental costs coming out of the reforms.

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Another important aspect is that, while the tribunal will have discretionary hearings, the Migration Act contains a comprehensive code of procedure to ensure that applicants have the opportunity to present all the material that they wish and the opportunity to respond to any material that is relevant that the tribunal may take into account in reaching its decision. Another important aspect is that the restrictions or rules in relation to representation relate specifically to appearances before the tribunal. There are no restrictions on having assistance and representation in the making of written submissions and preparation of documents. I think that at times when people talk about representation or lack of representation they seem to focus primarily on the hearing literally being solely the review. It is one mechanism or one avenue open to the tribunal for acquiring evidence for its decision.

The other important aspect of our process is that we also retain the specialised judicial review regime that is contained in Part 8 of the Migration Act; hence the removal of Part 10 of the ART Act from judicial review of immigration division decisions.

Essentially, the review rights and the review processes that currently exist with our two immigration portfolio tribunals will be retained. The only significant difference is the method of handing down decisions and the discretion to proceed to decision without a hearing.

THE ART—AN AUSTRALIAN DEMOCRAT VIEW

Senator Brian Greig[*]

It is important that we acknowledge that, while the ART Bill is a government bill, we are dealing with Parliament in its entirety and of course the government does not and has not for some time enjoyed a majority in the Senate. That is where senators and Senate parties will come into play. I hope to make it clear where the Democrats stand and what that may mean for this legislation.

The government proposal to merge four tribunals into one is the biggest reform in this particular area for some 25 years. As the Attorney-General said this morning, this has resulted in part in the greatest number of consequential amendments ever. I was reminded of how that seems to reflect or echo what appears to be the government's philosophy in a number of areas. In particular, I am thinking of the government's proposal to make changes to the Human Rights and Equal Opportunity Commission of a slightly similar nature in terms of reducing specialist commissioners into one umbrella organisation. That is a debate we have yet to have in the Senate. It is a good thing, however, that the bill currently before us has been sent to a Senate committee for scrutiny, debate, discussion and input. There has been substantial input, which gives us the opportunity for considered focus on the issue.

The Attorney-General has argued that what the agenda really is is quicker, accessible and cheaper opportunities for appeal. As a party, the Democrats are not opposed to reform *per se* but we want to be reassured that the reform is warranted, justified and equitable. I am concerned in a range of areas. I am concerned that recourse by citizens affected by unfair or unlawful decisions by government, a scenario for which any responsible government must allow, could be reduced in quality. I am concerned also that the proposed President of the ART will need to make the arrangements for funding with each of the departments—whose very decisions will be under review—to ensure administrative control over the ART.

I agree with previous speakers, and Justice O'Connor in particular, that the current AAT system is a very good one, if not the envy of comparable international jurisdictions. In the same way that Medicare—while not perfect—is, I would argue, an excellent model internationally for a national health system, our current AAT system is an excellent model and one which I think is supported, along with Medicare, by the electorate.

It is entirely logical that the government would want to strive for efficiency and effectiveness in the delivery of its services. To this end, the move to reduce operating costs incurred through running the existing tribunals in multiple locations is supported.

However, we are concerned to ensure that in relation to merits review tribunal operation, efficiency and effectiveness are measured in terms of achieving the best possible outcomes rather than savings in dollars and cents. The Social Security Appeals Tribunal, Migration Review Tribunal, Refugee Review Tribunal and Veterans' Review Board deal with highly complex changing regulations and legislation. That requires members of the tribunals to possess high levels of experience. Retaining, strengthening and utilising this experience can and should be considered a measure of efficiency and must not be sacrificed for short-term gain in reduced costs. Should this expertise be diminished, the long-term increase in costs resulting from an increased number of second-tier appeals would more than outweigh any short-term reduction in costs. Additionally, the proposal that access to second-tier review be limited to cases where a matter of general significance can be identified will serve only to

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deny justice to people who cannot afford to access private legal assistance. The complexity of issues renders multimember and multidisciplinary panels essential to deal with the complexities of legislation. This is very important. Democrat senators receive personal accounts from constituents who have been through the multidisciplinary and two-tiered stage of appeal. And even if the outcome was not in their favour, they do feel that they have been heard and are prepared to accept the finding. I think this bill overlooks that role of tribunals.

I share the particular concerns expressed by Anne Trimmer from the Law Council here this morning and in particular two points she raised: first, worries about compromising the independence of the ART, particularly through the way in which the Minister in charge of a department or departments if there be more than one will be the person responsible for appointments to the respective divisions of the ART; and, secondly, the denial of the right to legal representation. Given that so many people going through this appeals process or seeking access to it are very often disadvantaged, whether that be through the lack of formal education, having English as a second language or simply not being in a financial situation to hire lawyers or seek legal input. This is of great concern. In a political environment where legal aid funding and funding to community legal centres is diminished this concern becomes more acute. I am concerned also about restrictions on the availability of second-tier review. As the National Welfare Rights Network wrote to me very succinctly, in part: ‘The effect of compacting two-tier review down to one-tier review is that every review must be conducted in a manner befitting a last opportunity to correct a decision.’

The five main tribunals, the AAT, SSAT, MRT, RRT, and VRB, receive some 40,000 applications each year. Roughly one-third of those are upheld to a greater or lesser degree. And, as earlier speakers have said, in the AAT some 70 per cent of the total number of these cases are conciliated before they reach a formal tribunal process. So the great question is: is reform warranted and if so is this the right model?

The Democrats have yet to be convinced that the changes proposed will bring about the expected benefits of efficiency and economy. We agree that administrative review should never be static and that tribunals and bodies should always be subject to scrutiny and ongoing maintenance. But what is alarming about these bills is that they are dispensing with the more desirable aspects of the current system in favour of a structure which seems to militate against citizens. The cheap and cheerful quality, if you like, of the present structure should not be removed in favour of a process such as that in this bill which denies citizens natural justice. This is very much, if you like, people legislation. More so than so much other legislation, it very much impacts on lives and relationships. It does so through hip pockets, involving money, and it involves personal relationships. That is why absolute care is necessary in dealing with this legislation. This bill may have the effect, even if not intended, of actually disenfranchising people. It has the potential to shake a lot of people out of the system to the point where they do not progress with a claim.

Senator Andrew Bartlett[*]

I think the reason why two Democrats are not only here now but have been following proceedings in what I see as a very helpful event today is that we do think this is a particularly significant piece of legislation and it is one that we are paying a lot of attention to. It is extremely important and its consequences are quite far-reaching. Going back to the point made earlier today by the speaker from the Welfare Rights Centre, a crucial driving force from the Democrats’ perspective when we are considering this legislation is its impact

[*] *Senator for Queensland*

on consumers and the people who are trying to use these mechanisms to redress what they see as an injustice.

It is worth emphasising what that can mean for people. Although the veterans community still has concerns about the Veterans' Review Board being left out of this legislation, it was mentioned to me that that may well be an indication of the strength of voice and of organised advocacy that the veterans community has. By contrast, it may also emphasise how little voice people such as social security recipients particularly and, even more so, asylum seekers have in the process. It is worth emphasising that when you are dealing with issues like this in the area of migration, you are dealing with decisions which may mean long-term separation of families; when you are dealing with this in the area of social security, you can be dealing with decisions that may lead to people losing income, which can lead to them losing their housing or to family break-up; and, of course, when you are dealing with refugee asylum seekers, you are dealing with decisions which, if they are wrong, can lead to someone returning to face death. Those are pretty big responsibilities, and it is obviously very important that we make sure that the system works as effectively as possible. It is appropriate to re-emphasise the importance of those issues and the impact they will have on the people using the process.

From the comments the Attorney-General made earlier this morning, I gained the impression that, whilst he always has an open mind, he might need a fair bit to prise it open too far in terms of agreeing to amendments to this bill. But, from our point of view, the Senate's role is to consider legislation. Certainly, if we believe that it requires significant amendment, we will not hesitate to do so, and I am sure the same would apply to the Opposition. Similarly, if we believe that it is too flawed to support, we would not refrain from opposing it. I recognise the ongoing uncertainty about the commencement date of this bill and the structure of it. Those tribunal members here who are involved in that know that that means ongoing uncertainty, which is unfortunate, but the major priority obviously has got to be achieving the best possible system of justice for people including, I re-emphasise, those who are amongst the least powerful and who have the least voice in our community.

At the end of the day, Senate amendments always have to be considered by the government; they may not be accepted and they may be sent back. Often after all this inquiry process, all the submissions, amendments, proposals and debate, it can boil down to the very simple question: is what is being put forward, while maybe not perfect, at least better than the system it seeks to replace, or is it worse? At the end of the day, after the whole process and parliamentary debate, that may well be the core question that each of us will need to answer. Obviously, the Senate inquiry process and the general process of connection with the community will be important in terms of getting the community's viewpoint—and particularly the consumer's viewpoint—on whether overall we are going a step forward or a step back. That will certainly be a core question for us through this whole committee inquiry procedure and the parliamentary debate following it.

THE INDEPENDENCE OF THE ART FROM THE EXECUTIVE GOVERNMENT

Sue Tongue[*]

It is interesting to be talking about the improvements that we can make to the administrative law system. It is also timely that we have put independence of the tribunals as the last item on the agenda because that is really what tribunals do—they do independent merits review. There is no point in having a system of administrative review unless tribunals are independent. There is no point in having review if it is Clayton's review—a review that you have when you are not having a review. A lot of effort goes into administrative review, a lot of thought and a lot of commitment by a lot of dedicated people—and that is people in tribunals as well as people in departments.

I hope you detected from Doug Walker, that the immigration department understand deeply what administrative law principles are. A note that I am trying to give at the end of the day is some reassurance that the system works, that there are people working in the administrative law system now who deeply understand what the point of it is. We also have ministers who issue directions who know what administrative law is about. So it is not as if we are dealing with a group of people who are uninformed in this area.

We are all worried, though, because we know what can go wrong. We know what could happen if we got a minister who perhaps did not know, or if we got a tribunal member who was not quite right. That is really the question we are putting to ourselves: where do we draw the line in the sand with this legislation to make sure that we do not go back to the bad old days? Lots of administrative lawyers remember well the bad old days when governments did abuse citizens, when there was not transparency in the process, when people used to just get a squiggle on the bottom of their decision and not know where it came from. That is what I think we are all worried about. Anyone who can remember back to those days will know why we are so keen to see this system work well and why we need to focus on this question of independence.

That said, I want to say that I think it is a good thing for small organisations to be amalgamated—and this is purely from a corporate point of view. I do not know if you realise how small organisations struggle in the public administration system now. We have whole-of-government requirements that we all have to meet in all the tribunals. For instance, we have just put in our online strategy for getting onto the Internet and so on. Every single one of the tribunals is having to do that. Forty per cent of departments have not met that requirement, yet little organisations such as ours are being required to meet it too. We do not have a staff member dedicated to doing that stuff; we do the whole gamut of corporate issues.

So I think there are real advantages in sharing the corporate resources for the tribunals—and don't let us forget that when we start talking about our outreach as well, our client focus.

I am now going to talk about the three issues that are on the program. First of all, the Minister's power to direct. Lots of the so-called new provisions in the ART Bill, as we have said before today, are already contained in the migration jurisdiction. Already we have the Minister issuing directions and the principal members of the RRT and the MRT issuing directions. For example, in 1996 our Minister issued a direction when I was then the head of the Immigration Review Tribunal, the predecessor to the MRT. He issued a direction about

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how we should approach visitor visas and gave us a list of criteria to look at when we are looking at visitor visas. That direction was tabled in Parliament. It is publicly available. Indeed, if you are interested to see how we approach his direction you can go onto the Internet and look at all our published decisions. They are all there: you just need to click into visitor visas and there you will see what we have done with it. I should point out in that regard that our reversal rate on department decisions on visitor visas is 75 per cent. It has always been up around that level in the IRT and now in the MRT. The tribunal just goes along with the minister's direction in that area.

I have issued directions about how we go about the way we do our administrative reviews. I also issue principal member advices which suggest to members what is the best view of the law on a particular area. That does not bind the members but it is there to assist them because in our jurisdiction we often go for months before we get anything from the Federal Court that tells us what the law means. We do not have counsel appearing before us to argue the law to us so we decide what the approach could be and I issue an advice that is publicly available and there in our decisions. So the system is working with directions at the moment.

I can see the concern of people that there could be an aberrant direction but, as Justice O'Connor said, the key thing in this area is transparency. We all have it; we try to have it. One of the philosophies in my tribunal is that if we are open in our internal procedures it will be easier for us to carry that openness to our external procedures. So it infuses everything we do. All our statistical information is available on our intranet. Anyone in the tribunal can click in at any time and see all the details about what cases a member has, where they are up to, what is happening. It is all completely transparent. Really, sunlight is the best thing in the administrative law area.

On the subject of appointments, I definitely share the views of those who argue for selection of tribunal members on merit. One reason for that is that people should expect to have a member—and indeed citizens should expect to have any servant of the public—who is the best person for the job that the government can find. People who do not work in tribunals often think that tribunal members are like amateurs. It is not like that in a tribunal any more: you have to have a lot of skills, you have to be highly trained to do it, and not everyone can be. So it is very important that we get the best people for the job. In this area, as in many others, there is specialisation and it is no surprise that applicants for tribunal positions have often had previous experience on other tribunals. The other reason, which is probably a selfish one, that I favour merit selection is that it is easier to manage people who have been selected on merit. That is not to say that people who are appointed for other reasons cannot do the job; they often can; they often make very good tribunal members. It is just that in a system that prides itself on fairness it is only fair that the people who are selected for the tribunals are selected on merit.

The final point on the list that I have to talk about is funding. This is a very practical matter.

Anyone who has worked in government or indeed in any organisation knows how important funding is. Funding for tribunals is based on the premise that poor primary decision making leads to review. The theory behind this is that, if you have poor primary decision making, decisions are reviewed, and therefore departments should pay for decision making. It has been put to me that this is putting the greyhounds in charge of the rabbit hutch, which is one view. Carrying on with that analogy, I say that if we are going to have greyhounds in charge of the rabbit hutch we have to have clear rules of racing. I would like to see the people from the Prime Minister's Department and the Department of Finance put on white coats—I have not been to the dogs but I think the stewards have white coats. I want those people in white coats because my experience is that the problems arise when you go outside the normal model of funding. In the MRT and the IRT we have had a resource agreement with the

Department of Finance that pays us a fixed sum for every case finalised. It is a terrific system. We fight with them over how much they are going to give us but at least we know we can expect this much money if we do this many cases, and it is a fair way to go.

The problems arise when anything is done outside that system. For instance, if someone in a department has a bright idea about a new visa class and goes to Cabinet with this plan and does not mention to Cabinet—probably does not even think of it, as people do not often think about it—that there might be a need for review in this area. Cabinet is told there is going to be no cost to have this done. So it comes back to us and the tribunal says, 'Excuse me, are we going to get paid for doing this review?' and the answer can be, 'No, we forgot about you.' There is nothing in the Cabinet process that requires people to think about review. So that is why I want the Finance and PM&C people in white coats to say, 'Did you think about review?' I think that the funding model for the ART can work if the process is clear, is followed always and is transparent. It is very unfair to expect the President of the ART to spend time negotiating with departments over money or indeed negotiating with the different divisions about how much money they are going to get when that person has a much more important role, which is seeing proper administrative review done.

I want to make a few points that follow on from the discussion today. First of all, I think it is a bit dangerous to compare the costs of the tribunals; you are comparing apples and oranges. While it is said that the SSAT is the cheapest tribunal to run, I do not think anyone has ever done a proper analysis. The SSAT are backed up by their department much more than we are, so our costs cannot be compared with their costs—and that is a bit of a risk.

The other thing I wanted to talk about was the code of conduct for tribunal members. It needs to be noted that the *Public Service Act 1999* contains a code of conduct for public servants, and statutory office-holders are specifically included under that code of conduct. The MRT has performance agreements. They were publicly available at the time of the appointment of MRT members. Anyone can ring in and get a copy of the performance agreements—we are happy to make them available. A range of issues are included in assessing a member's performance, including the productivity statistics, number of appeals made against them and number of complaints. One of the most serious things I have had said to me about a tribunal member was in this last week when an applicant said, 'As soon as I heard who my member was, my solicitor said to me that I was going to have problems and that he was not going to find for me.' That kind of feedback for a tribunal member is quite important. It shows that out in the community there is a view that that member is not impartial and fair. Those kinds of things are brought up.

On the question of finding on the papers, I often find on the papers. We can only find in favour of an applicant on the papers. I have never had a complaint from someone saying that they wish they had had a hearing. If we find for them, they are very happy. The case management staff, of course, in the MRT do a lot of work with the applicants before they even come near a member, so they have been talked to. We have cases where we find against applicants because they failed to meet an objective criterion. Really, there is not a lot of point in having a hearing in those cases. We had about 100 of those in the IRT, where one of the criteria was that the applicant had been granted territorial asylum by the Australian government. You can count on the fingers of one hand how many people in 50 years have been granted that. It was a waste of time having a hearing. The only question was, 'Have you ever been granted territorial asylum?' We knew the answer was no, but we had to book the member, the interpreter and the security guards. The horizontal equity issue about the cost to the taxpayer comes into force there. They are the only issues I felt I had to pick up on.

CLOSING REMARKS

*Professor Dennis Pearce**

I want to step back a bit, because this is the last speech of the day, and perhaps try to look across the issues more than focus on the matters that have been listed for discussion today. It is about 30 years since Harry Whitmore, who really wrote most of the Kerr report—I do not think that is commonly known—came into my room at the university, which was next to his, and drew me a little diagram which set out the whole Kerr proposal. I was popeyed. I said to him, 'You'll never get this approved. There is just no way. No government will ever take this up.' He said, 'We'll give it a try—it is what should be there.' It was to my astonishment that they did pick it up, to a large extent. That system has been occasionally mentioned today as being of some considerable significance on the worldwide scene. We must not ever think to the contrary—it is. People do come here to study it, and they marvel at it. We should not be lightly putting aside a system that the rest of the world thinks is terrific and wonders how a government can function fully working with it. But they have, of course.

The focal point was the AAT—it was the major development. It was a single, high level, independent tribunal. They are three significant issues: single, high level and independent.

Subsequently, specialist tribunals did grow up. That ran counter to the general philosophy of the AAT, but I do not think it mattered because they dealt with, in the main, high volume and highly technical areas. It was probably better to have a separate tribunal dealing with those sorts of questions, at least at the first tier.

It seems to me that, when you come to look at the Administrative Review Tribunal, you have a very different body. I will take three characteristics of it. First of all, it is not a single tribunal. It is not really even an amalgam; it is a conglomerate. You have got a head who is common and you have got a chief executive who is common, but thereafter you really have a separate group of tribunals, broken up into divisions but with different rules relating to how they go about their procedures with different processes for appointment and different funding. In a sense, under one umbrella, there are a group of tribunals. I think it is important to recognise that it is not a single tribunal with lots of different divisions. It is a body which has got a head and then a series of different tribunals operating under it.

Secondly, it is a low level tribunal; it is not a high level tribunal. It is going to function at the single member level. The overwhelming number of cases will be dealt with by a single member and, according to my leaked information, it will be a poorly paid single member. The view is that the money will be lower than present tribunal members get, except perhaps the bottom level of the SSAT. So the people who are going to be brought in are going to be at the bottom level of the tribunal round. Thirdly, it is going to be a dependent tribunal—there is no question of that. We have talked a lot about that today and I will not go into it any further, except to say that there are a whole series of reasons why the tribunal is going to be more dependent, certainly more than the AAT, although not much different perhaps for the divisions as far as the migration and social security areas are concerned.

The other general thing is that the essential features that were seen as being the reason why the AAT was set up as a high level tribunal were, first of all, to give access to all relevant documents to the tribunal and to the parties. The proposal in the ART, which I do not think has been mentioned today, is that that is the starting point but it is possible for procedural directions to limit the material that is available to the applicant. So the applicant can be

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denied access to the material that has been used in the decision making process. That is a dramatic change from the position that was established 25 years ago.

Secondly, of course, is the question of representation. That has also been discussed today, but another angle to that and what was one of the driving forces for the concept of having representation was the position of the departmental advocate. The experience of tribunals prior to the establishment of the AAT in Australia and overseas was that applicants were not permitted to be represented, but when they got to the hearing they found a person who was very familiar with all this stuff and ran the show because that person was a trained departmental advocate.

The third element is the question of accessibility. I think that that probably is roughly evenly balanced, although I will come back in a moment to the question of the complexity of legislation and what that does mean for an applicant. I thought the way to see how this might all come together was to postulate a case. I have been, in a sense, talking about the past. Let us look three, four or five years into the future with the ART having commenced operation and just see how a case might be running. I say 'might'. You will accuse me of taking the worst scenario but I really am genuinely wanting to put how a case could be run.

I designate my applicant Jean—for no good reason; it was just the first name that came to mind. She has been affected by a decision and she has been told of her right of appeal. That is good. What she has then to do is to obtain the ART Act, the portfolio Act and the directions that are relevant. She then has to make an assessment about whether the directions are consistent with one another because if there is a ministerial direction it overrides the President's direction and, presumably, the senior member's direction. That cumulation of knowledge has to be obtained somehow or other. She will have to be very clever of course to be able to read it all, but nonetheless let us posit that she does it and finds her way eventually, having avoided Kathryn Cronin's trip-wires, into the tribunal room. She is not permitted to be represented.

When she gets to the tribunal room the first person she finds there is Jim, the departmental advocate. Jim is now dealing with his 2,000th case. He is a little bored because he has heard it all once or twice before, but he consoles himself with the thought that he is being paid more than the tribunal member. He also has the file and Jean does not because a direction has been made saying that she is only entitled to a statement of reasons. Then in comes Bill. Bill is the tribunal. He is a retired public servant. He has had an unfortunate event which means that it is very important that he gets some extra income, so he does this job of tribunal member to supplement his pension. His reappointment is coming up—he was appointed for two years—in six months. His performance agreement requires him to deal with four cases per day. This is the 150th time that Jim has appeared before him and he rather likes Jim and trusts him. I simply give it to you as a scenario. Jean does what she can and then Bill gives a rapid oral dismissal of the case.

I ask the question, at the end of that: is that a process of tribunal work that can be said to satisfy the Attorney-General's objects of government accountability and high-level government decision making? Jean was fortunate: the whole thing could have been simply decided on the papers and she could have got a rejection in the mail. You could say that that is not how the show will work, but what I have put is precisely permitted by the ART legislation and it is very attractive to governments wishing to save money. We are told that, really, the only reason for proceeding down this pathway is a cost factor. My outline may seem very negative, but it is not unreasonable as a presentation of the way in which this all could develop quite within the bounds of the material before us. It is not an improbable scenario.

So what is the alternative? If the driving force is cost, I think that there are other ways to achieve savings. It is possible to meet those savings—and the only savings we ever get presented to us are the savings relating to administration. So, if you had co-location of the tribunals, if the tribunals had access to joint facilities—the Internet, the library, the registry and so forth—and if you had a requirement that the heads of the tribunals were to meet with regularity and plan how the whole area could be run to save money, you could probably get to the same point that is being talked about. That is because if you go beyond those sorts of savings your savings are on the quality of decision making. That is the only thing left. The savings must come from ensuring that the members are paid poorly, that they get through lots of decisions and that you do not spend a lot of money on backup for them and on worrying about reasons for decisions and all of that sort of nonsense. If you go down the pathway of ignoring the impact on the group of people who are affected by government decision making and just say that this has to become more cost-effective, you are betraying the trust that was accepted by government in 1975, when this whole scheme was put in place.