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 Justic*e. 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.