

The Style and Format of the ART Legislation

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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 consequential 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 consequential bill and partly accounts for its length and its apparent complexity. The other thing to remember about a consequential 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 consequential 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.

