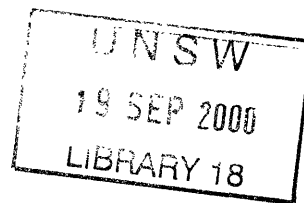


SOCIAL SECURITY



Including Student Assistance Decisions

Opinion

The Administrative Review Tribunal Bill

The SSAT celebrated its 25th anniversary in July 2000. It is possible that this will be the last anniversary, and the last year of the SSAT as a separate entity. The Administrative Review Tribunal Bill was introduced into Parliament on 28 June 2000. The Bill has been referred to the Senate Legal and Constitutional Legislation Committee. It is now expected that the Administrative Review Tribunal (ART) will come into operation in February 2001. There may of course be further changes following the referral to the Senate Committee. However, it is likely that the new Tribunal will in most respects follow the current Bill.

The Bill preserves the wording of the objects of the Tribunal (s.3):

- (c) to ensure the Tribunal provides an accessible mechanism for reviewing such decisions that is fair, just, economical, informal and quick; and
- (d) to enable the Tribunal to review decisions in a non-adversarial way.

However, it is likely that the new Tribunal will in fact operate in ways that are very different to the practice and procedure of the current SSAT — and of the other first tier Tribunals.

The ART will have a separate President and CEO, which differs from the

current arrangement for the SSAT, or the Refugee Review Tribunal (RRT), where the Principal member, however named, was also the CEO. There is also no requirement for the President to be a judge, as distinct from the current requirement for the AAT, nor does there appear to be any requirement that the President be legally qualified. This may make it harder for the President of the new body to have the same status and position the President of the AAT currently has.

The ART will conduct first tier and in some instance second tier reviews. That is, appeals from the departmental decision maker, and some internal review of its own decisions at first instance. The powers of the Tribunal will be the same as the SSAT — that is the Tribunal may affirm, vary or set aside the original decision, and if setting aside, substitute a new decision or remit the matter to the primary decision maker for reconsideration in accordance with any directions or recommendations of the Tribunal.

First tier reviews will generally be by one member Tribunals, though the President may direct that the Tribunal consist of two or three members where it is appropriate to do so.

In this Issue

AAT Decisions

- Newstart allowance: Activity Test; unemployed
Castleman ... 47
- Newstart allowance: fraud, effect of bankruptcy on overpayment debt, waiver
Dobson ... 47
- Family allowance overpayment: special circumstances
Gibbons ... 48
- Family payment debt; request to pay on an estimate; administrative error; special circumstances
Agresti ... 49
- Family payment; overpayment; rate; 'with regard to'; notifiable event; write-off; waiver; special circumstances
Couch ... 50
- Disability support pension
Hudson ... 51
- Age pension: resident of Australia
Raad ... 53
- Lump sum payment: compensation part of a lump sum; special circumstances
Wolfe ... 54

Background

- Family allowance estimate debts explained
... 55

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In the majority of cases, the decision maker will have the right to appear before the Tribunal. This again is a departure from the procedure of the SSAT, though it conforms to that of the AAT. It may mean that the process of first tier review will be more lengthy than is currently the case. For some applicants this may also mean that the process is less 'user friendly', but for the Tribunal there may be benefits in being able to question the primary decision maker.

The hearing will be held in public, but it may be held in camera if the Tribunal considers it appropriate to do so. A review may also be done 'on the papers' without hearing evidence in person from any of the parties if the Tribunal has given written notice of its intention to do so and it considers it appropriate to do so. The ART will have the power to order preliminary conferences, and to make consent orders, as the AAT does currently, but the SSAT does not.

Where new information becomes available the Tribunal must consider whether to refer the new information to the original decision maker and ask the original decision maker to reconsider the decision, taking into account factors set out in the Act; the Tribunal can request the original decision maker to reconsider the decision even without new information becoming available.

The lodging of an application for review does not automatically stay the original decision, but it may be stayed subject to conditions — the current situation is that the Secretary has power to continue payments during review.

Decisions may be given orally — which is currently the situation for the AAT but not the SSAT.

There is no right to apply for review from the first tier to the second tier, but leave may be granted by the executive member, or in some cases the President, if the executive member, or President is satisfied that there is an issue or principle of general significance or there is a 'manifest error of law or fact' (agreed to by both the applicant for the first tier review and the original decision maker). The application for leave is to be 'on the papers'. This is a major change from the current situation, where there is a right to apply for review of SSAT decisions to the AAT.

It is possible for both parties to agree to forgo the second tier review right, and then leave may not be granted, even were there to be a manifest error of law or fact.

Appeals from the ART are to the Federal Court from either a first or a second tier review. Appeal from a first tier decision is in a strictly limited range of circumstances, and from a second tier decision on a question of law only — with some limited exceptions.

In some instances the appeal may be transferred to the Federal Magistrates Court. The Federal Magistrates Court is itself a totally new body. The impact on the administrative review process of having appeals from a specialist body transferred to one which may have no particular expertise in the areas, and may not have the volume of work to build up such expertise quickly, will need to be assessed.

The Bill envisages that the ART will have investigative powers. Again, it remains to be seen to what extent the new body will initiate its own investigations. The RRT had these powers, and used them to good effect to obtain information otherwise not available to the decision maker. It is, however, an expensive option for the Tribunal.

The Tribunal will have the following Divisions:

- the Commercial and General Division
- the Immigration and Refugee Division
- the Income Support Division
- the Taxation Division
- the Veterans' Appeals Division
- the Workers' Compensation Division
- any other Division specified in the regulations.

Each division has an executive member, senior members and members. Each division has only one executive member, and an executive member cannot be appointed to more than one division; other members are appointed to at least one division, one of which is to be the member's primary division.

The Minister responsible for each division must be satisfied, having regard to the person's qualifications and experience, that the person should be appointed. This is again a change from the current arrangement, where the relevant Minister is not directly involved in the appointment process. There will be a number of different Ministers involved in the selection process for the ART, including the Attorney-General, the Minister for Immigration and Multicultural Affairs, the Minister for Family and Community Services, the Treasurer and others. There is the potential for the appearance of appointment other than on the basis of merit.

The Bill requires the members to enter into a written performance agreement with the President or the executive member of the member's primary division. Clause 24 of the Bill sets out what will be in the performance agreement:

- (2) The performance agreement is to deal with the performance by the member of the duties of his or her office and in particular is to require the member to:
 - (a) participate in a performance appraisal scheme; and
 - (b) be accountable for his or her productivity and performance; and
 - (c) assist the President, in such manner as the President requires, in managing the administrative affairs of the Tribunal; and
 - (d) recognise the need for compliance with the code of conduct.

Agreement not to cover substance of decisions

- (3) However, the performance agreement is not to deal with the substance of particular decisions made by the member, or in which the member participates.

Compliance

- (4) The member must comply with the performance agreement.

Note: If the member does not comply, he or she may be subject to a direction under s.26 or removal from office under s.28.

This is a substantial departure from the conditions under which the members of the SSAT have been appointed in the past. The independence of members in reaching a decision is preserved. Nonetheless, this appears to be another step away from seeing administrative Tribunals as 'quasi-judicial'. This, together with the much broader scope for removal from office set out in cl.28 of the Bill must raise some further concerns as to the ability of the new Tribunal to be, and be seen to be, completely independent of the Department whose decisions under review. Tribunal members have never had the same security of tenure as has applied to the judiciary. It now appears they may have considerably less than they have had in the past.

[A.B.]