

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

LAW AND JUSTICE LEGISLATION AMENDMENT BILL (No. 3) 1994

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,
the Honourable Michael Lavarch, M.P.)



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LAW AND JUSTICE LEGISLATION AMENDMENT BILL (No. 3) 1994

GENERAL OUTLINE

This Bill makes amendments of both a minor policy nature and a minor technical nature, including removing gender-specific language, to legislation within the Attorney-General's portfolio.

The Bill also consequentially amends legislation administered by the Departments of Industrial Relations, Immigration and Ethnic Affairs and the Treasury.

The Bill will

- (i) abolish the Security Appeals Tribunal, currently established under the *Australian Security Intelligence Organization Act 1979*, and create a Security Appeals Division of the Administrative Appeals Tribunal (AAT), established under the *Administrative Appeals Tribunal Act 1975* (AAT Act);
- (ii) make amendments consequential on the abolition of the Security Appeals Tribunal and the creation of a Security Division of the AAT to the:
 - *Administrative Decisions (Judicial Review) Act 1977*; and
 - *Migration Act 1958*;
- (iii) insert an additional reading-down provision in the *Acts Interpretation Act 1901*;
- (iv) amend the *Administrative Appeals Tribunal Act 1975* to give effect to the recommendations of the Report of the Review on the Administrative Appeals Tribunal. These amendments are directed at streamlining the procedures of the AAT and clarifying the powers of the AAT in procedural matters. The Bill will amend the Act by providing:
 - for two member hearings;
 - for the office of Conference Registrar;that, where the parties consent, the AAT may dispense with a hearing if the issues are suitable for determination in the absence of the parties;

that, after an application for review of a decision has been lodged, the decision-maker may only vary the decision where:

- the decision-maker is specifically authorised to do so by the relevant statute; or
- the AAT and the parties consent; and
- for review by the Tribunal of a taxation of costs.

Some changes to the Act recommended by the Review were enacted by *Administrative Appeals Tribunal Amendment Act 1993*.

The amendments will also provide that the AAT has the power to remit matters to the decision-maker for reconsideration at any stage of the proceedings;

- (v) make amendments consequential on the amendments to the *Administrative Appeals Tribunal Act 1975* to the:
 - *Estate Duty Assessment Act 1914*;
 - *Federal Proceedings (Costs) Act 1981*;
 - *Fringe Benefits Tax Assessment Act 1986*;
 - *Income Tax Assessment Act 1936*;
 - *Pay-roll Tax Assessment Act 1941*;
 - *Pay-roll Tax (Territories) Assessment Act 1971*; and
 - *Safety, Rehabilitation and Compensation Act 1988*;
- (vi) amend the *Federal Court of Australia Act 1976* to provide for a review on a question of law of awards made in arbitration;
- (vii) amend the *Judiciary Act 1903* to repeal section 77F(3); and
- (viii) remove gender-specific language from the *Administrative Appeals Tribunal Act 1975*.

FINANCIAL IMPACT STATEMENT

The Bill will not have a significant financial impact.

NOTES ON CLAUSES

Clause 1 - Short title

1. Clause 1 provides for the Act to be cited as the *Law and Justice Legislation Amendment Act (No. 3) 1994*.

Clause 2 - Commencement

2. Clause 2 provides for the commencement of the Act. Subclause 2(1) provides that, subject to subclause 2(2), the Act will commence on Royal Assent.
3. Subclause 2(2) provides that the items in Schedule 1 will take effect on 1 July 1995 or on Royal Assent, whichever is the later.

Clause 3 - Amendments

4. Clause 3 provides for the amendments contained in the Act. Subclause 3(1) provides that the Acts referred to in Schedule 1 are amended as set out in that Schedule and that the other items in that Schedule have effect according to their terms.
5. Subclause 3(2) provides that the Acts referred to in Schedule 2 are amended as set out in that Schedule and that the other items in that Schedule have effect according to their terms.
6. Subclause 3(3) provides that the *Administrative Appeals Tribunal Act 1975* is amended in accordance with Schedule 3, as well as being amended by items in Schedules 1 and 2.

SCHEDULE 1 - AMENDMENTS RELATING TO THE ABOLITION OF THE SECURITY APPEALS TRIBUNAL

Part 1 - Amendments of the *Administrative Appeals Tribunal Act 1975*

Item 1 - Subsection 3(1)

7. Item 1 of Schedule 1 amends subsection 3(1) (Interpretation) of the Act by defining terms which will be used in the exercise by the Administrative Appeals Tribunal of its new jurisdiction to review security assessments.

Item 2 - Subsection 19(2)

8. Item 2 of Schedule 1 amends subsection 19(2) (Divisions) of the Act by inserting new subparagraph 19(2)(baa). New subparagraph 19(2)(baa) will create the Security Appeals Division of the Administrative Appeals Tribunal to exercise this new jurisdiction.

Item 3 - Section 19

9. Item 3 of Schedule 1 further amends section 19 of the Act by inserting new subsection 19(3B). New subsection 19(3B) will prohibit any non-presidential member of the Administrative Appeals Tribunal with past or present ASIO employment from being assigned to the Security Appeals Division. This amendment reflects existing subsection 42(2) of the *Australian Security Intelligence Act 1979* (ASIO Act).

Item 4 - Section 19

10. Item 4 of Schedule 1 further amends section 19 of the Act by inserting new subsection 19(6). New subsection 19(6) will require certain jurisdiction of the Administrative Appeals Tribunal to be exercised by the Security Appeals Division. The work of the former Security Appeals Tribunal will, therefore, be carried on in a separate Division of the Administrative Appeals Tribunal.
11. The jurisdiction under the *Archives Act 1983*, currently vested in the Administrative Appeals Tribunal, was added to the work of the Security Appeals Division because its efficient exercise requires a degree of familiarity with national security matters. It is more administratively convenient if only one Division of the Tribunal has to acquire this familiarity.

Items 5 - 9

12. Items 5 to 9 of Schedule 1 are complementary. Items 5, 7, 8 and 9 prevent the application of existing sections 21 (Constitution of Tribunal for exercise of powers), 21A (Reconstitution of Tribunal in certain cases), 22 (Member Presiding) and 23 (Member of Tribunal ceasing to be available) of the Act to the constitution of the Security Appeals Division.
13. Item 6 inserts new section 21AA. New section 21AA will make specific provision for the constitution of the Security Appeals Division. The new provision reflects existing sections 45, 51 and 53 of the ASIO Act.

Items 10 - 11

14. Items 10 and 11 of Schedule 1 are complementary. Item 10 excludes existing section 27 (Persons who may apply to the Tribunal) of the Act.

15. Item 11 inserts new section 27AA in the Act. New section 27AA will provide for a more restrictive provisions regarding applications to the Tribunal under the ASIO Act. This provision reflects existing sections 54 and 63 of the ASIO Act.

Items 12 - 13

16. Items 12 and 13 of Schedule 1 operate together to prevent existing section 28 (Persons affected by decision may obtain reasons for decision) of the Act from applying to matters over which the Administrative Appeals Tribunal's jurisdiction can only be exercised by the Security Appeals Division (see Item 4 above).
17. Section 28 of the Act is excluded because the rights of affected persons in matters over which the Security Appeals Division will exercise jurisdiction are governed by existing section 38 of the ASIO Act and subsection 40(5) of the *Archives Act 1983*.

Items 14 - 15

18. Items 14 and 15 of Schedule 1 also operate together. They modify section 29 (Manner of applying for review) of the Act to the extent necessary to accommodate the review of security assessments, along the lines of existing section 54 of the ASIO Act.

Item 16 - After section 29A

19. Item 16 of Schedule 1 inserts new section 29B. New section 29B will, along the lines of existing section 56 of the ASIO Act, require the Tribunal to give copies of any application to review a security assessment to ASIO and to the agency to which the assessment was supplied.

Items 17 - 22

20. Items 17 to 22 of Schedule 1 prevent certain provisions of the current Administrative Appeals Tribunal Act from applying to reviews of security assessments. The excluded provisions are sections 30 (Parties to proceeding before Tribunal), 30A (Intervention by Attorney-General), 31 (Tribunal to determine persons whose interests are affected by decision), 34 (Conferences), 34A (Mediation) and 35 (Hearings to be in public except in special circumstances).
21. The provisions dealing with such matters in connection with review of security assessments are set out in the proposed section 39A (see Item 36), which is based on existing section 58 of the ASIO Act.

Items 23 - 24

22. Items 23 and 24 of Schedule 1 amend section 35 (Hearings to be in public except in special circumstances) to confer power on the Tribunal to protect the identities of witnesses. The power under this section will be available generally but not in relation to the review of security assessments.

Item 25 - After section 35

23. Item 25 of Schedule 1 inserts new section 35AA, which is based on section 71 of the ASIO Act. New section 35AA will enable the Tribunal to prevent disclosure of information about a proceeding relating to the review of a security assessment.
24. New section 35AA is separate from section 35 because proceedings in the Security Appeals Division relating to the review of security assessments are not open to the public in the same way as other proceedings in the Administrative Appeals Tribunal.

Items 26 - 33

25. Items 26 to 33 of Schedule 1 prevent various provisions of the Administrative Appeals Tribunal Act, which deal with specific procedural matters, relating particularly to disclosure, from applying in relation to reviews of security assessments.
26. The excluded provisions are sections 35A (Participation by telephone etc), 36 (Disclosure not required: Attorney-General's public interest certificate), 36A (Answering questions where Attorney-General intervenes on public interest grounds), 36B (Disclosure not required: State Attorney-General's public interest certificate), 36C (Answering questions where State Attorney-General intervenes on public interest grounds), 36D (Public interest questions under sections 36, 36A and 36C), 37 (Lodging of material documents with Tribunal) and 38 (Power of Tribunal to obtain additional statements).
27. The provisions dealing with such matters in connection with the review of security assessments are set out in proposed sections 38A and 39B (see Items 34 and 36), which reflect sections 38, 57 and 59 respectively of the current ASIO Act.

Item 34 - After section 38

28. Item 34 of Schedule 1 inserts new section 38A. New section 38A will oblige ASIO to lodge documents with the Tribunal where an applicant who, because of a certificate by the Attorney-General, is not entitled to a

statement of the grounds for assessment applies for review. This new section reflects section 57 of the current ASIO Act.

Item 35 - Section 39

29. Item 35 of Schedule 1 inserts new subsection 39(2). New subsection 39(2) will prevent section 39 (Opportunity to make submissions concerning evidence) from applying in relation to the review of security assessments.
30. New section 39A (Item 36) will deal with such matters in connection with proceedings in the Security Appeals Division.

Item 36 - After section 39

31. Item 36 of Schedule 1 inserts new sections 39A (Procedure at certain hearings in Security Appeals Division) and section 39B (Certain documents and information not to be disclosed in proceedings before Security Appeals Division) in the Act.
32. New section 39A is based on section 58 of the current ASIO Act and new section 39B reflects section 59 of the ASIO Act. However, new section 39A will no longer require ASIO and the agency to which it supplied the security assessment to be absent when the Tribunal is hearing the applicant. It will no longer require the applicant or the representative of the applicant to be absent in all cases where the Tribunal is hearing ASIO or the agency.
33. The applicant must not be present at the presentation of material where the Minister responsible for the ASIO Act certifies that its disclosure would prejudice security or the defence of Australia. Where such a certificate is issued, the applicant's representative may only be present with the consent of the Minister. If the applicant's representative is present when such material is presented, he or she must not disclose it under penalty of imprisonment for 2 years.

Item 37 - Section 43

34. Item 37 of Schedule 1 amends existing section 43 (Review by Tribunal) by making it subject to new section 43AAA (Findings of Tribunal in certain proceedings before Security Appeals Division) and new subsection 65(3) of the ASIO Act (Reference of certain matters to Tribunal by Minister).
35. Section 43 contains various provisions relating to the Tribunal's powers and procedures on review. New section 43AAA modifies these powers and procedures in jurisdiction exercised by the Security Appeals Division so as to meet the special requirements of that jurisdiction.

36. New subsection 65(3) of the ASIO Act excludes these provisions from applying to references to the Tribunal by the Minister so that the decisions as to communication or publication of findings and alteration of records may, as at present, be taken by the Minister.

Item 38 - After section 43

37. Item 38 of Schedule 1 inserts new section 43AAA (Findings of Tribunal in certain proceedings before Security Appeals Tribunal). New section 43AAA reflects sections 60 and 61 of the current ASIO Act and sets out the powers and duties of the Tribunal in making findings in a security assessment review.

Items 39 - 41

38. Items 39, 40 and 41 of Schedule 1 amend cross references in section 46 (Sending of documents to, and disclosure of documents by, the Federal Court of Australia) of the Act to ensure that the new jurisdiction of the Federal Court to hear appeals and references on questions of law in security assessments does not lead to disclosure contrary to the public interest.

Item 42 - Section 66

39. Item 42 of Schedule 1 adds a note at the end of section 66 (Confidential information not to be disclosed) of the Act. This note will refer the reader on to section 81 of the ASIO Act (Secrecy), which imposes additional secrecy obligations on current or former officers of the Tribunal in respect of security assessment reviews.

Item 43 - Before section 70

40. Item 43 of Schedule 1 inserts new section 69B in the Act. New section 69B will enable the Tribunal to award costs in appropriate cases to successful applicants for review of security assessments. New section 69B reflects section 72A of the ASIO Act.

Item 44 - Transitional

41. Item 44 of Schedule 1 is a transitional provision which will ensure that despite the repeal of the provisions of the ASIO Act establishing the Security Appeals Tribunal, non-presidential members of it are taken to be members of the Administrative Appeals Tribunal for the unexpired portion of their terms of office.

Part 2 - Amendment of the *Administrative Decisions (Judicial Review) Act 1977*

Item 45 - Schedule 1

42. Item 45 of Schedule 1 adds subsection (w) at the end of Schedule 1 of the Act. Subsection (w) will provide that decisions of the Administrative Appeals Tribunal made on security assessment reviews are decisions to which the *Administrative Decisions (Judicial Review) Act 1977* does not apply.
43. This provision reflects section 62 of the ASIO Act and the listing of decisions under the ASIO Act in Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977*.

Part 3 - Amendments of the *Australian Security Intelligence Organization Act 1979*

Item 46 - Section 35

44. Item 46 of Schedule 1 deletes from section 35 (Interpretation) of the ASIO Act references to members of the Tribunal because these matters will now be dealt with in the Administrative Appeals Tribunal Act.

Item 47 - Section 35 (definition of "Tribunal")

45. Item 47 of Schedule 1 amends section 35 of the Act by changing the definition of 'Tribunal' from the Security Appeals Tribunal to the Administrative Appeals Tribunal. The ASIO Act will still contain some references to the Tribunal.

Items 48 - 49

46. Items 48 and 49 amend section 36 (Part not to apply to certain assessments) of the ASIO Act by up-dating references to provisions in the *Migration Act 1958*.

Item 50 - Subsection 37(5)

47. Item 50 of Schedule 1 amends subsection 37(5) (Security Assessments) to refer to the precise provision, instead of to the Division, under the Act under which applications for review of security assessments can be made to the Tribunal.

Item 51 - Division 3 of Part IV

48. Item 51 of Schedule 1 repeals Division 3 of Part IV (Establishment and Organization of Security Appeals Tribunal) of the ASIO Act.

49. The provisions of Division 3 of Part IV of the Act will be reflected in new section 21AA of the Administrative Appeals Tribunal Act or are no longer needed.

Item 52 - Section 54

50. Item 52 of Schedule 1 repeals existing section 54 and inserts new section 54. New section 54 will deal with many aspects of applications for review of security assessments.
51. New section 54 will replace existing section 54 with a provision which simply states what applications for review may be made to the Tribunal. These matters are dealt with in more detail in the new section 27AA and paragraph 29(1)(ca) of the Administrative Appeals Tribunal Act (see Items 11 and 15).

Item 53 - Sections 55 to 60A

52. Item 53 of Schedule 1 repeals sections 55 to 60A of the ASIO Act which set out the powers, duties and procedures of the existing Tribunal. Similar provisions will be inserted in the Administrative Appeals Tribunal Act (for example, see Items 16, 34, 36 and 38).

Item 54 - Sections 62 to 63

53. Item 54 of Schedule 1 repeals sections 62 (Findings not to be challenged) and 63 (Review of findings) of the Act. The findings of the Tribunal in security assessment reviews will not be subject to ADJR review (see Item 45) but will be subject to appeal or reference on questions of law to the Federal Court like any other decision of the Administrative Appeals Tribunal.
54. Existing section 63 will be reflected in subsection 54(2) of the ASIO Act (see Item 52) and section 27AA of the Administrative Appeals Tribunal Act (see Item 11).

Item 55 - Subsection 65(3)

55. Item 55 of Schedule 1 updates the references to the provisions to which a review under section 65 (Reference of certain matters to Tribunal by Minister) is not subject.

Item 56 - Division 5 of Part IV

56. Item 56 of Schedule 1 repeals Division 5 of Part IV (Procedure and Evidence) on the basis that adequate provision is already made by the Administrative Appeals Tribunal Act.

Item 57 - Heading to Division 6 of Part IV

57. Item 57 of Schedule 1 deletes the heading to Division 6 of Part IV on the basis that it only contains one section and should be part of Division 4.

Item 58 - Sections 72 to 80

58. Item 58 of Schedule 1 repeals sections 72 to 80 on the basis that they duplicate provisions in the Administrative Appeals Tribunal Act. A replacement for section 72A (Costs) is inserted in the Administrative Appeals Tribunal Act by Item 43 - new section 69B.

Item 59 - Sections 82 and 83

59. Item 59 of Schedule 1 repeals sections 82 and 83 on the basis that they duplicate provisions in the Administrative Appeals Tribunal Act.

Item 60 - Saving and transitional provisions

60. Item 60 of Schedule 1 is a transitional provision in relation to any uncompleted business of, or relating to, the Security Appeals Tribunal.

Part 4 - Amendment of the *Migration Act 1958*

Item 61 - Subsection 202(5)

61. Item 61 of Schedule 1 omits existing subsection 202(5) and inserts new subsection 202(5) of the Act. New subsection 202(5) will update references in the *Migration Act 1958* to the procedure for review of security assessments, in accordance with the above amendments.

SCHEDULE 2 - OTHER AMENDMENTS

Amendment of the *Acts Interpretation Act 1901*

Item 1 - After section 15A

62. Item 1 of Schedule 2 amends the *Acts Interpretation Act 1901* to insert an additional reading-down provision, new subsection 51AAA.
63. The provision is intended to provide guidance in the interpretation of provisions in Acts which have a valid application, but which can also be interpreted as having an invalid application. In some recent cases, (for example *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1) the High Court has found the invalid applications of such

provisions to be inseverable, and therefore has found the provision wholly invalid.

64. New subsection 15AAA(1) will provide that if a provision in its application to a particular person, thing, circumstance etc would exceed Commonwealth power, but would validly apply to another particular person, thing, or circumstance, the Parliament intended that the provision should not have the invalid application, but should have the valid application. This is subject to a contrary intention apparent in the Act concerned.
65. New subsection 15AAA(2) will specify two examples where a contrary intention will be apparent.
66. New subsection 15AAA(3) will make it clear that the specific examples of a contrary intention listed in subsection (2) are not to limit the cases where a contrary intention may be taken to appear for the purposes of subsection (1).
67. New subsection 15AAA(4) will provide that section 15AAA applies to a provision of any Act regardless of whether it was enacted before or after the commencement of section 15AAA.
68. New subsection 15AAA(5) will make it clear that new section 15AAA is not to derogate from existing section 15A of the *Acts Interpretation Act 1901*.
69. New subsection 15AAA(6) will define various terms which appear in new section 15AAA.

Amendments of the *Administrative Appeals Tribunal Act 1975*

Interpretation and Composition of the Tribunal

Items 2 - 4 - Section 3

70. Item 2 of Schedule 2 amends subsection 3(1) of the Act by revising the definition of "officer of the Tribunal" to include "Conference Registrar" and "District Registrar". These amendments are consequential to the amendments to section 24N at Items 11 - 14 of Schedule 2.
71. Item 3 of Schedule 2 amends subsection 3(1) of the Act by substituting a revised definition of "Tribunal". "Tribunal" will be defined to mean the Administrative Appeals Tribunal established by the Act and, in relation to a proceeding, the Tribunal as constituted for the purposes of the proceedings including a member or officer exercising powers of the Tribunal.

72. Item 4 of Schedule 2 amends subsection 3(1) of the Act by inserting definitions of "Conference Registrar", "District Registrar" and "proceeding".
73. "Proceeding" will be defined to include an application for review, an incidental application in the course of, or in connection with, an application for review, other applications that may be made to the Tribunal including an application for a costs certificate under the *Federal Proceedings (Costs) Act 1981* and any matter referred to the Tribunal for inquiry or review under an Act. Matters may be referred to the Tribunal for inquiry and/or review, for example, under section 65 of the *Australian Security Intelligence Organization Act 1979* (Reference of certain matters by Minister for a report by the Tribunal) or under section 11 of the *Ombudsman Act 1976* (Ombudsman may recommend that the principal officer of a Department or authority refer a matter to the AAT for an advisory opinion).

Item 5 - Section 5

74. Item 5 of Schedule 2 amends section 5 of the Act to provide that the Tribunal consists of the President, other presidential members, senior Members and other members.
75. These amendments will ensure that the Tribunal is clearly and consistently defined for the exercise of its powers for various purposes.

Constitution of the Tribunal for the exercise of powers

Item 6 - Subsection 21(1)

76. Section 21 of the Act provides for the constitution of the Tribunal. Item 6 amends subsection 21(1) by omitting the subsection and substituting new subsections 21(1), (1AA) and (1AB). These provisions will give greater flexibility in constituting the Tribunal by allowing the Tribunal to be constituted by a 3 member, 2 member or single member Tribunal as appropriate.
77. New subsection 21(1) will provide that, unless specifically authorised, the Tribunal may not be constituted by more than 3 members.
78. New subsection 21(1AA) will provide that the Tribunal as constituted for a proceeding must not include more than one presidential member who is a judge - this reiterates existing subparagraph 21(1)(aa) and is designed to facilitate the most efficient use of resources of the members of the Tribunal while at the same time recognising that in complex matters it is appropriate for a judge to sit on the Tribunal.

79. New subsection 21(1AB) will provide that where the Tribunal is constituted by 2 or 3 members at least one of those members must be a presidential member or a senior member.
80. Currently the Tribunal may only be constituted by 2 members where one member has ceased to be a member or is unavailable, under section 23 of the Act. The ability to constitute 2 member Tribunals will give the Tribunal greater flexibility in managing its resources, is more cost effective, and may lead to matters being dealt with more quickly by the Tribunal.

Item 7 - Subsection 21(1A)

81. Subsection 21(1A) of the Act provides for the Tribunal to be constituted in a certain way for the exercise of powers under specified sections. Item 7 of Schedule 2 makes a consequential amendment to subsection 21(1A) to insert references to subsection 34A(4), and sections 69A and 69B. This will ensure that the powers of the Tribunal to endorse a mediated agreement under subsection 34A(4), and its powers in relation to costs under new sections 69A and 69B may only be exercised by a Tribunal constituted in accordance with subsection 21(1A).

Reconstitution of Tribunal in certain cases

Item 8 - Subsection 21A(3)

82. Item 8 makes a consequential amendment to subsection 21A(3) of the Act to reflect new subsections 21(1) (1AA) and (1AB), by substituting a new subsection 21A(3).

Two member hearings

Item 9 - Subsection 23(2)

83. Section 23 of the Act currently provides that the Tribunal may only be constituted by 2 members where one member has ceased to be a member or is unavailable. Existing subsection 23(2) deals with the situation where a proceeding is reheard and allows the Tribunal to have regard to the record of, and evidence given in, the first proceeding at the rehearing.
84. New subsections 21(1), (1AA) and (1AB) will allow the Tribunal to be constituted by 2 members whenever it is appropriate to do so. Item 9 of Schedule 2 amends section 23 by omitting existing subsection 23(2) - this provision is reinserted as new subsection 23B which deals with all cases where a proceeding is reheard by the Tribunal.

Disagreement where Tribunal constituted by 2 members

Item 10 - After section 23

85. Item 10 inserts new sections 23A and 23B which will deal with the situation where a 2 member Tribunal fails to agree. New section 23A will provide that where the 2 members fail to agree the matter will be reheard by a Tribunal constituted in accordance with a direction of the President.
86. The costs of the rehearing will be dealt with under the *Federal Proceedings (Costs) Act 1981*. The *Federal Proceedings (Costs) Act 1981* is consequentially amended by Items 37 - 42 of Schedule 2 to provide that an applicant is entitled to a costs certificate in those circumstances. Under that Act the Attorney-General may authorise payment in relation to the costs certificate. These provisions will also apply to the costs of a rehearing under section 23.
87. New section 23B will provide that the record of, and evidence given in, the first proceeding may be taken into account at the rehearing.

Deputy Registrars and staff of the Tribunal

Items 11 -15 - Sections 24N and 24P

88. Items 11 - 14 of Schedule 2 amend section 24N to provide that the officers of the Tribunal comprise the Registrar, District Registrars, Conference Registrars and Deputy Registrars. These amendments reflect the administrative practices of the Tribunal under which much of the work is decentralised and is undertaken by District Registrars.
89. Item 12 inserts new subsections 24N(1A) and (1B) which will provide for the new office of Conference Registrar. New subsection 24N(1A) will provide that Conference Registrars are to be appointed by the President. New subsection 24N(1B) will allow a person who is appointed as a District Registrar, Conference Registrar or Deputy Registrar to be appointed to another of those offices without affecting the other appointment.
90. Items 13 - 15 of Schedule 2 make consequential amendments to sections 24N and 24P to refer to District Registrars and Conference Registrars as necessary. District Registrars and Conference Registrars will be appointed or employed under the *Public Service Act 1922* and have such powers and functions as are given by the Act or by the President.
91. The District Registrar is the member of staff of the Tribunal who is in charge of a District Registry. The Tribunal has registries in all capital cities and in Parramatta, NSW.

92. Conferences may be held in relation to an application under section 34 of the Act. They are an important part of the Tribunal's review process. Conference Registrars will conduct conferences under section 34 of the Act. The establishment of statutory appointments for conference registrars will enhance the independence of the conference process.

Restriction on powers of decision-maker after application for review is made

Item 16 - After section 25

93. Item 16 of Schedule 2 inserts new section 26 which will clarify the powers of a decision-maker after a decision has been referred to the Tribunal. This will remove any doubts as to the powers of decision-makers to vary a decision which has been referred to the Tribunal and will set out the circumstances in which a decision-maker may vary a decision. Those circumstances are where a variation is :
- specifically authorised by statute; or
 - the parties and the Tribunal consent.
94. Subsection 26 (2) will provide that the Tribunal may alter the decision by varying the decision, setting aside the decision, or setting aside the decision and substituting a decision.

Item 17 - Subsection 29(11)

95. Item 17 makes a consequential amendment to subsection 29(11) to insert a reference to District Registrars .

Circumstances in which hearing may be dispensed with

Item 18 - After section 34A

96. Item 18 of Schedule 2 inserts new subsection 34B which will provide for the Tribunal to make a decision 'on the papers'. Currently an application cannot be determined without a hearing.
97. New section 34B will allow the Tribunal, where the parties consent, to dispense with a hearing if the issue or issues are suitable for determination in the absence of the parties.

Item 19 - Subsection 36D(5)

98. Item 19 of Schedule 2 makes consequential amendments to subsection 36D(5) to insert references to District Registrars and Conference Registrars.

Lodging of material documents

Item 20 - Subsection 37(1)

99. Section 37 of the Act provides for the decision-maker to lodge copies of documents, which set out the reasons for the decision and related documents, with the Tribunal. Item 24 of Schedule 2 amends section 37 to clarify the procedure where a claim for confidentiality is made under section 35 of the Act, limit the number of copies of documents required in certain circumstances and provide for an extension of time for lodging documents.
100. Existing subsection 37(1) will be deleted. New subsection 37(1) will provide that two copies of the relevant documents are to be lodged with the Tribunal within 28 days or within such further period as the Tribunal allows. New subsection (1AA) will provide that further copies may be lodged with the Tribunal as required. These provisions will ensure that additional copies of statements are only requested when necessary.
101. The preparation of a full statement of reasons may not always be necessary, and in certain cases may unduly delay progress of the matter. If the decision under review is fully and clearly stated in an existing document or documents, the purpose of a section 37 statement can be fulfilled by providing a copy of those documents. New subsections 37(1AB) and (1AC) will allow the President to accept a copy of the document or documents setting out the decision, with the power to direct lodgment of a full statement of reasons at a later date.
102. New subsection 37(1AD) will provide that where a statement of reasons has already been provided under section 28 it is unnecessary for an additional statement of reasons to be prepared under section 37. Copies of the section 28 statement of reasons will be required to be lodged with the Tribunal.
103. New subsection 37(1AE) will provide that the decision-maker is required to serve one copy of the statement of reasons on each other party to the proceeding.
104. New subsection 37(1AF) will provide that a decision-maker who lodges an application for confidentiality under section 35 shall lodge with the Tribunal and serve on the other parties a statement that excludes the documents which are the subject of the claim of confidentiality.
105. New subsection 37(1AG) will provide that where an application for confidentiality is made and subsection 37(1AF) applies the decision-maker will still be required to lodge all the other section 37 documents.

Item 21 - Subsection 40(1A)

106. Item 21 of Schedule 2 makes a consequential amendment to subsection 40(1A) to insert a reference to a District Registrar.

Power to remit matters to decision-maker for further consideration

Item 22 - After section 42C

107. The Tribunal does not have the power to order that a matter be remitted the decision-maker for further consideration unless it sets aside the decision under subparagraph 43(c)(ii) of the Act. This can result in matters proceeding to a hearing even where the parties agree that the decision-maker should review the decision.
108. Item 22 of Schedule 2 inserts new section 42D which will provide that the Tribunal has the power to order that a matter may be remitted to the decision-maker for further consideration at any stage of the proceedings. Where a decision is remitted the decision-maker may affirm, vary, or set aside the decision and make a new decision in substitution for the decision set aside.
109. New subsections 42D(3) and (4) will provide that where a decision is varied, or a new decision is substituted, the applicant may proceed with the application for review in respect of the varied or new decision or withdraw the application.

Item 23 - Subsection 43(4)

110. Item 23 of Schedule 2 makes a consequential amendment to subsection 43(4) to insert a reference to a District Registrar.

Operation and implementation of a decision that is subject to appeal

Item 24 - After subsection 43(5B)

111. Item 24 of Schedule 2 amends section 43 by inserting new subsection 43(5C). New subsection 43(5C) will provide that where the Tribunal has made an order staying the decision under review which has remained in force until the Tribunal's decision, unless the Tribunal or the Federal Court otherwise directs, that decision does not come into effect until the time for an appeal to the Federal Court has expired or the appeal is determined.
112. This amendment will resolve the problem of the Tribunal having exhausted its powers, or being functus officio, once its decision has been given.

Correction of errors in decisions or statement of reasons

Item 25 - Before section 43A

113. Item 25 of Schedule 2 inserts new section 43AA which will provide the Tribunal with the express power to correct an obvious error in the text of the decision or in a written statement of reasons. New subsection 43AA(3) provides examples of obvious errors, such as a clerical or typographical error or an inconsistency between the decision and the statement of reasons.

Item 26 - After subsection 44(2A)

114. Item 26 of Schedule 2 amends section 44 by inserting new subsection 44(2B). New subsection 44(2B) will consequentially amend section 44 to give the Federal Court a discretion, in the interests of justice, to extend the time in which an appeal may be lodged where the written statement of reasons contains reasons that were not in the oral statement or the text is altered under new section 43AA.

Officers of the Tribunal

Item 27 - Section 65

115. Item 27 of Schedule 2 repeals existing section 65 and substitutes a new section 65. The amendment will simplify the existing provision as well as extending it to apply to Conference Registrars and District Registrars as well as the Registrar and Deputy Registrars. The extension is done by the revised definition of officer of the Tribunal at Item 3.

Application of confidentiality provisions of other Acts

Item 28 - After section 66

116. Item 28 of Schedule 2 inserts new section 66A. New section 66A will provide that the confidentiality provisions of other Acts apply to officers of the Tribunal. This amendment will clarify the uncertainty as to whether, without any order of the Tribunal, a confidentiality provision in another Act applies to protect an officer or member of the Tribunal.

Lodging of documents

Item 29 - Subsection 68(1)

117. Item 29 of Schedule 2 makes an amendment to section 68 to clarify that documents are to be lodged at a registry of the Tribunal rather than at the office of a Registrar or Deputy Registrar.

Calculation of short periods of time

Item 30 - After section 68

118. Item 30 of Schedule 2 inserts new section 68A. There is currently no provision in the Act dealing with the reckoning of time, although section 36 of the *Acts Interpretation Act 1901* provides some guidance. New section 68A will provide that where the period of time for doing anything is less than 7 days, time shall not run on days when the registry in which the application was first lodged is closed.

Procedure for taxing costs

Item 31 - After section 69

119. Item 31 of Schedule 2 inserts new section 69A. New section 69A will provide a mechanism for determining costs where the Tribunal awards costs under the Act or any other Act. New subsection 69A(1) will provide that where the parties are unable to agree on the amount of costs, the President may direct the Tribunal to tax or settle the amount of costs, or direct that the costs be taxed by the Registrar, a District Registrar or a Deputy Registrar.
120. New subsection 69A(2) will provide for a party to apply to the Tribunal for a review of the amount taxed by the Registrar, a District Registrar or a Deputy Registrar.
121. New subsection 69A(3) will set out the Tribunal's powers on a review in similar terms to subsection 43(1).
122. New subsection 69A(4) will provide for an amount of costs ordered by the Tribunal to be paid to a party to be recoverable as a debt due to that party. This will allow the debt to be recovered in a court which has jurisdiction and overcomes the Tribunal's inability to enforce such an order itself.

Regulation making powers

Item 32 - After subparagraph 70(2)(a)(i)

123. Item 32 of Schedule 2 amends the regulation making power of section 70 of the Act. Item 32 will insert new subparagraph (ia) which will provide that the regulations may prescribe fees in relation to a taxation of costs. This will allow the recommendation of the Review, that a fee of \$5 for each \$100 or part thereof, for a taxation of costs to be implemented.

Amendment of the *Estate Duty Assessment Act 1914*

Item 33 - Subsection 48A(4)

124. Item 33 of Schedule 2 makes a consequential amendment of the *Estate Duty Assessment Act 1914* to insert a reference to a District Registrar. See Items 11 - 14 which refer to the office of District Registrar.

Amendments of the *Federal Court of Australia Act 1976*

Item 34 - Section 53A

125. Item 34 of Schedule 2 inserts new subsection 53A(2) in the Act.
126. New subsection 53A(2) will provide that the Rules of Court may make provision for the registration of awards made in an arbitration.

Power of arbitrator to refer question of law to the Court

Item 35 - After section 53A

127. Item 35 of Schedule 2 inserts new sections 53AA and 53AB in the Act. New subsection 53AA will provide for the power of an arbitrator to refer a question of law to the Court.
128. New subsection 53AA(1) will provide for questions of law to be referred to the Court where a matter has been referred to arbitration but there has not been an award made in respect of the arbitration. In such situations when a party to the arbitration has requested the arbitrator to apply to the Court for leave to refer to the Court the question of law arising in the arbitration, the arbitrator may apply to the Court or a Judge for leave to refer the question.
129. New subsection 53AA(2) will provide that where the Chief Justice considers that an application for leave is of sufficient importance to justify the giving of a direction, the Chief Justice may direct that the jurisdiction is to be exercised by the Full Court.
130. New subsection 53AA(3) will provide that the Court must not grant leave unless it is satisfied that the determination of the question of law, before an award has been made in the arbitration, might result in substantial savings to the parties to the arbitration.
131. New subsection 53AB will provide for the application to the Court for review of the award on a question of law.
132. New subsection 53AB(1) will provide that where a matter has been referred to an arbitrator and the arbitrator has made an award which has

been registered by the Court, a party to the award may apply to the Court for a review, on a question of law, of the award.

133. New subsection 53AB(2) will provide that a party to an award may apply to the Court for a review, on a question of law, of the award.
134. New subsection 53AB(3) will provide that where the Chief Justice considers that an application for review is of sufficient importance to justify the giving of a direction, the Chief Justice may direct that the jurisdiction is to be exercised by the Full Court.
135. New subsection 53AB(4) will provide that the Court may determine the question of law and make such orders as it thinks appropriate.
136. New subsection 53AB(5) will provide that a party to an arbitration can apply to the Court or a Judge for an order that the costs of the arbitration be taxed.
137. New subsection 53AB(6) will provide that the person who makes an application for taxation of costs is not liable to pay more than the amount of costs as taxed.

Item 36 - After section 54(1)

138. Item 36 of Schedule 2 inserts new subsection 54(1A) in the Act. New subsection 54(1A) will provide that subsection 54(1) does not apply to an award made in an arbitration unless the award has been registered with the Court.

Amendments of the Federal Proceedings (Costs) Act 1981

Items 37 - 42

139. Items 37 to 42 of Schedule 2 make consequential amendments of the *Federal Proceedings (Costs) Act 1981*. These amendments will ensure that where a matter is reheard by the Administrative Appeals Tribunal under sections 23 or 23A of the Administrative Appeals Tribunal Act an applicant is entitled to a costs certificate under the Federal Proceedings (Costs) Act. The Attorney-General will be able to authorise payment in relation to a costs certificate up to a maximum amount of \$2,000. See item 10 which inserts section 23A.

Amendment of the *Fringe Benefits Tax Assessment Act 1986*

Item 43 - Subsection 133(4)

140. Item 43 of Schedule 2 makes a consequential amendment of the *Fringe Benefits Tax Assessment Act 1986* to insert a reference to a District Registrar. See Items 11 - 14 which refer to the office of District Registrar.

Amendment of the *Income Tax Assessment Act 1936*

Item 44 - Subsection 265(4)

141. Item 44 of Schedule 2 makes a consequential amendment of the *Income Tax Assessment Act 1936* to insert a reference to a District Registrar. See Items 11 - 14 which refer to the office of District Registrar.

Amendment of the *Judiciary Act 1901*

Item 45 - Subsection 77F(3)

142. Item 45 of Schedule 2 repeals section 77F(3) of the Act. Section 77F(3) confers a personal power on the Chief Justice of the High Court to issue commissions to persons authorising them to administer oaths and affirmations for the purposes of proceedings in the High Court. The exercise of this power ceased in 1972. Section 77G enables the Court to issue such commissions.
143. In addition the High Court Rules and the Evidence Act together allow for affidavit evidence to be taken by a broad class of persons without the need for special commissions.

Amendment of the *Pay-roll Tax Assessment Act 1941*

Item 46 - Subsection 70(4)

144. Item 46 of Schedule 2 makes a consequential amendment of the *Pay-roll Tax Assessment Act 1941* to insert a reference to a District Registrar. See Items 11 - 14 which refer to the office of District Registrar.

Amendment of the *Pay-roll Tax (Territories) Assessment Act 1971*

Item 47 - Subsection 69(4)

145. Item 47 of Schedule 2 makes a consequential amendment of the *Pay-roll Tax (Territories) Assessment Act 1971* to insert a reference to a District Registrar. See items 11 - 14 which refer to the office of District Registrar.

Amendment of the *Safety, Rehabilitation and Compensation Act 1988*

Items 48 - 49

146. Items 47 and 48 of Schedule 2 make consequential amendments of the *Safety, Rehabilitation and Compensation Act 1988* to insert reference to a District Registrar and to provide that for the purposes of section 69A the responsible authority is a party to the proceeding. See Items 11 - 14 which refer to the office of District Registrar and Item 31 which inserts section 69A.

SCHEDULE 3

Additional amendments of the *Administrative Appeals Tribunal Act 1975*

Items 1 - 4

147. Items 1 - 4 of Schedule 3 remove gender-specific language from the *Administrative Appeals Tribunal Act 1975*.











