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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

ADMINISTRATIVE APPEALS TRIBUNAL AMENDMENT BILL 2004

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Philip Ruddock MP)

ADMINISTRATIVE APPEALS TRIBUNAL AMENDMENT BILL 2004

GENERAL OUTLINE

The Administrative Appeals Tribunal Amendment Bill 2004 (the Bill) amends the *Administrative Appeals Tribunal Act 1975* (the AAT Act) and related legislation to improve the capacity of the Administrative Appeals Tribunal (the AAT) to manage its workload and ensure that reviews are conducted as efficiently as possible.

The Bill enacts reforms to the AAT in five key areas. In each area, the purpose behind the reforms is to make the AAT more efficient, flexible and responsive to the environment in which it operates. The reforms reinforce that the primary objective of the AAT is to provide a mechanism for review that is fair, just, economical, informal and quick.

The five key areas of reform are:

(i) AAT procedures

The Bill reforms existing AAT procedures to allow for more efficient conduct of reviews. The President is given the power to issue directions in relation to the operation of the AAT and the conduct of reviews. The provisions relating to disagreements between the members of the AAT hearing a particular matter are rationalised. The Bill also expands the range of alternative dispute resolution processes available to the AAT.

(ii) Removal of restrictive constitution provisions

The Bill removes restrictions contained in the AAT Act and other legislation on how the AAT is to be constituted for the purposes of a particular hearing. As a consequence the President will have greater flexibility in managing the AAT's workload. To ensure that the AAT is constituted by the most appropriate members in each proceeding, the Bill requires the President to have regard to a range of factors such as expertise and experience when determining the constitution of the AAT. The reconstitution provisions have also been simplified.

(iii) Better use of ordinary members

The Bill allows the President to authorise ordinary members to exercise powers currently conferred exclusively on presidential and/or senior members. These powers include granting applications for an extension of time before a hearing has commenced and giving a party leave to inspect documents produced under summons.

(iv) The role of the Federal Court

The Bill introduces an amendment requiring the consent of the President before a question of law may be referred to the Federal Court. The Federal Court will also be given the power to make findings of fact when it conducts appeals from the AAT on questions of law. This power, which applies in limited circumstances, allows the Court to completely dispose of some matters that come before it without needing to remit them to the AAT.

(v) Expansion of the qualification requirements for appointment as President

The Bill expands the range of qualification requirements for appointment as President of the AAT. At present only a Federal Court judge may be appointed as President. The Bill allows for the appointment as President of a current or former judge of any federal court, or a former judge of any State or Territory Supreme Court, or a person who has been enrolled as a legal practitioner in Australia for at least five years. The Bill also removes provisions conferring tenure on any presidential member who is also a judge and allowing for the appointment of Deputy Presidents or senior members with tenure.

The Bill also contains a range of measures that modernise the vocabulary of the AAT Act and insert new headings to enhance the readability and user-friendliness of the Act. Criminal offences in the AAT Act have been re-drafted in the style of the *Criminal Code* and their penalties updated.

FINANCIAL IMPACT

There is no direct financial impact on Government revenue from this Bill.

NOTES ON CLAUSES

Clause 1 – Short Title

This is a formal clause providing for the Bill, once enacted, to be cited as the *Administrative Appeals Tribunal Amendment Act 2004*.

Clause 2 – Commencement

This clause provides for the commencement of the Bill.

Subclause 2(1) provides that each provision of the Bill specified in column 1 of the table incorporated in that subclause commences or is taken to have commenced on the day or at the time specified in column 2 of the table.

Item 1 of the table provides that sections 1 to 3 and anything not covered elsewhere in the table commence on the day the Act receives the Royal Assent.

Item 2 of the table provides that items 1 to 110 of Schedule 1 commence on a single day to be fixed by Proclamation. However, if any of the provisions do not commence within the period of 6 months of the Act receiving Royal Assent, they commence on the first day after the end of that period.

Item 3 of the table provides that item 111 of Schedule 1 commences on the day the Act receives Royal Assent. Item 111 allows for the making of an authorisation pursuant to new subsection 33(4), inserted by item 110, before the commencement of that section. However, such authorisations do not come into operation until item 111 commences.

Item 4 of the table provides that items 112 to 180 of Schedule 1 commence at the same time as the provisions covered by item 2 of the table.

Item 5 of the table provides that item 181 of Schedule 1 commences on the day the Act receives Royal Assent. Item 181 allows for the making of an authorisation pursuant to new section 59A, inserted by item 180, before the commencement of that section. However, such authorisations do not come into operation until item 181 commences.

Item 6 of the table provides that items 182 to 236 of Schedule 1 commence at the same time as the provisions covered by item 2 of the table.

Subclause 2(2) provides that column 3 of the table incorporated in subclause 2(1) is for additional information that does not form part of the Act, and that such additional information in that column may be added to or edited in any published version of the Act.

Clause 3 – Schedule(s)

This is a formal clause providing that each Act specified in a Schedule to the Act is amended or repealed as set out in the applicable items in the Schedule concerned and that any other item in a Schedule has effect according to its terms. Schedule 1 of the Bill amends the *Administrative Appeals Tribunal Act 1975*, the *Archives Act 1983*, the *Commonwealth Electoral Act 1918*, the *Environment Protection and Biodiversity Conservation Act 1999*, the *Federal Proceedings (Costs)*

Act 1981, the Freedom of Information Act 1982, the Insurance Acquisitions and Takeovers Act 1991, the Insurance Act 1973, the Judges' Pensions Act 1968, the Lands Acquisition Act 1989, the Life Insurance Act 1995, the Migration Act 1958, the Military Rehabilitation and Compensation Act 2004, the Narcotic Drugs Act 1967, the Privacy Act 1988, the Safety, Rehabilitation and Compensation Act 1988, the Seafarers Rehabilitation and Compensation Act 1992, the Superannuation Act 1976 and the Trans-Tasman Mutual Recognition Act 1997.

Schedule 1 - Amendments

NOTES ON ITEMS

Amendments to the Administrative Appeals Tribunal Act 1975

Item 1

Item 1 inserts an objects statement into the *Administrative Appeals Tribunal Act 1975* (the AAT Act). The Administrative Appeals Tribunal (the AAT or the Tribunal) was established in 1976 to provide an accessible, informal and relatively cheap means of obtaining independent merits review of Commonwealth administrative decisions. The AAT only reviews decisions over which it is given specific jurisdiction. The AAT decides whether, on the facts before it, the correct or preferable decision has been made in accordance with the applicable law.

It is not intended that the objects statement will be a basis by which a person may seek judicial review of a decision made by the AAT. However, it will serve as an accountability measure by which the AAT can assess its own performance and the AAT's performance may be measured by the Government.

The objects statement is in similar terms to the objects clauses for the Migration Review Tribunal, the National Native Title Tribunal, the Refugee Review Tribunal and the Social Security Appeals Tribunal. All these tribunals share the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

Item 2

Item 2 deletes the definition of "ACT enactment" in subsection 3(1) of the AAT Act. This amendment is consequential to the repeal of section 3A by item 12.

Item 3

This item inserts a definition of "alternative dispute resolution processes" into the AAT Act. Alternative dispute resolution processes are defined generally as procedures and services for the resolution of disputes. By including new processes that will fall within the definition of alternative dispute resolution processes, the item expands the range of these processes that may be conducted under new Division 3 of the Act (see note to item 112). Conferencing and mediation are the only two alternative dispute resolution processes currently available under the AAT Act. Neutral evaluation, case appraisal and conciliation (and other services or processes specified in regulations) will also be available on commencement on this item. Arbitration or court procedures or court services are expressly excluded from the definition.

The National Alternative Dispute Resolution Advisory Council (NADRAC) describes the new processes made available by this item as follows:

Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

Neutral evaluation is a process in which the parties to a dispute present, at an early stage in attempting to resolve the dispute, arguments and evidence to a dispute resolution practitioner. That practitioner makes a determination as to the key issues in dispute, and most effective means of resolving the dispute, without making any determination as to the facts of the dispute.

Case appraisal is a process in which a dispute resolution practitioner (the case appraiser) investigates the dispute and provides advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved.

Conciliation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.

Conferencing is currently used by the AAT as a hybrid alternative dispute resolution process. Any number or combination of alternative dispute resolution processes may be conducted as part of conferencing and it is intended that this practice will continue. Therefore the definition of alternative dispute resolution process clarifies that conferencing is not limited by the inclusion of other processes.

In addition to its alternative dispute resolution role, conferencing is also used as a case management tool. For example, the person conducting a conference may advise the applicant what further evidence may be necessary in order to seek a positive outcome. Integrating the provisions in relation to conferencing with mediation and the new alternative dispute resolution processes is not intended to alter its use in case management.

Item 4

Item 4 inserts a definition of “authorised member” into subsection 3(1) of the AAT Act. This amendment is linked with item 180 which inserts a new section 59A into the AAT Act enabling the President to authorise particular members to exercise certain powers where a provision of the Act allows such a power to be executed by such members. An example of such a power is the holding of a directions hearing under subsection 33(1A) of the AAT Act (as amended). New subsection 3(1) defines “authorised member” as a member who has been authorised by the President under new section 59A for the purposes of the provision in which the expression occurs. See also the note to item 180.

Item 5

Item 5 amends the definition of enactment in subsection 3(1) of the AAT Act by no longer making it subject to section 3A. This amendment is consequential to the repeal of section 3A by item 12.

Item 6

Item 6 amends the definition of “enactment” in subsection 3(1) of the AAT Act. The amended definition will no longer include an ordinance of the Australian Capital Territory. As a consequence, such ordinances can no longer confer jurisdiction on the AAT.

Items 7 and 8

Items 7 and 8 amend the definition of “State” in subsection 3(1) of the AAT Act by omitting the phrase “except in section 16 or 64” and adding the phrase “and the Australian Capital Territory”. The definition currently provides that “State except in sections 16 or 64, includes the Northern Territory”. The amended definition will now provide “State includes the Northern Territory and the Australian Capital Territory”.

Section 16 of the AAT Act is repealed by item 33 of the Bill. Section 64 is amended by item 190 by deleting the phrase “in the ACT and in the Northern Territory” from subsection 64(1). As both Territories will now be included in the definition of State in subsection 3(1), this special reference in subsection 64(1) is no longer necessary and the reference to section 64 in the definition of State needs to be repealed.

See also the notes to items 33 and 190.

Item 9

This item makes a technical amendment to clarify when the definition of “decision” applies. Certain parts of the AAT Act use the term decision to refer to decisions which are not intended to be covered by subsection 3(3). For example, the term decision is used in section 46 to refer to a decision of the Federal Court or the Federal Magistrates Court. Item 9 removes any uncertainty by clarifying that the subsection 3(3) “definition” does not apply to a section of the AAT Act if the contrary intention appears.

Items 10 and 11

Item 10 repeals subsections 3(4) and (5) of the AAT Act which deal with the manner in which documents may be given. However, item 200 inserts new subsections 68AA(1) and (2) which are to the same effect as subsections 3(4) and (5) respectively. It is intended that new subsections 68AA(1) and (2) will have the same operation as subsections 3(4) and (5). See also the note to item 200.

Item 11 is a transitional provision providing that subsections 3(4) and (5) of the AAT Act still apply, despite their repeal by item 10, in relation to any document, statement, notice or other notification posted before the commencement of this item. However, the operation of subsections 3(4) and (5) incorporates references to modernised language for specified words in those subsections. For example, each reference to “furnished” is deemed to include a reference to “given”.

Item 12

Item 12 repeals sections 3A and 3B of the AAT Act. Subsection 3A(1) states that ACT enactments are not enactments for the purposes of the Act. (“ACT enactment” is defined in subsection 3(1) of the Act as meaning ‘an enactment as defined by section 3 of the *Australian Capital Territory (Self-Government) Act 1988*.’) Subsection 3A(1) is redundant because section 22 of the *Acts Interpretation Act 1901* states that a reference to an enactment (a law) in a Commonwealth enactment is not considered to be a reference to enactments (laws) made by the ACT legislature, unless expressly provided. Accordingly, subsection 3A(1) is repealed.

Under section 25 of the Act, for a decision to be reviewable, jurisdiction must be conferred on the AAT by an enactment. Subsections 3A(2) and (3) provide that certain Commonwealth Acts and provisions of Commonwealth Acts, relating to the ACT, are not enactments. The effect of repealing subsections 3A(2) and (3) is that decisions made under those Commonwealth Acts and provisions of Commonwealth Acts will be reviewable by the AAT if jurisdiction is conferred on the AAT in accordance with section 25 of the Act. This brings those Commonwealth Acts into line with other Commonwealth enactments. The proposed amendment does not alter any existing rights of review.

Subsections 3A(4) and (5) clarify that if a Commonwealth Act or Ordinance, or part thereof, was deemed by the Act not to be an enactment, an instrument made under that Act or Ordinance was also not an enactment. As the Commonwealth Parliament could have later conferred jurisdiction on the AAT to review decisions made under such Acts and Ordinances, subsections 3A(4) and 3A(5) are redundant and it is appropriate to repeal them.

Item 12 also deletes section 3B of the Act which provides that a President or a member of the AAT can be appointed to a body or tribunal established by an ACT enactment to review certain administrative decisions. A member of the AAT can not be appointed to be the President (or like position) of such a tribunal or body established by an ACT enactment but the President of the AAT may be appointed to such a position. This provision was inserted at the time of ACT self-government. However, no cross-appointments have ever been made. The repeal of this provision will not prevent cross-appointments, subject to the approval of the Attorney-General. However, such appointments will no longer be expressly provided for in the AAT Act.

Items 13 and 14

In order to make the Act more readable and easier to understand, a number of items insert new headings into the Act. A number of the Parts of the Act are also divided into Divisions.

Item 13 inserts a new Division heading into Part II of the Act: “Division 1 – Establishment of the Tribunal”. Under this new Division, there is one section: section 5. Item 14 inserts a new Division heading into Part II of the Act: “Division 2 – Members of Tribunal”. Under this new Division, there are 13 sections: sections 6, 7, 7A, 8, 9, 10, 10A, 10B, 11, 12, 13, 14 and 15. The insertion of Division headings into Part II is to improve accessibility and readability.

Item 15

This item inserts new qualification requirements for appointment to the position of President of the AAT. Under subsection 7(1) of the AAT Act, only a Federal Court judge can be appointed as President. Under amended subsection 7(1), a person may be appointed as President if he or she is a

current or former judge of a federal court, a former judge of a State or Territory Supreme Court or a legal practitioner who has been enrolled in Australia for more than five years. Section 26 of the *Acts Interpretation Act 1901* defines “federal court” as ‘the High Court or any court created by the Parliament’. Accordingly, the phrase “a judge of a federal court” includes justices of the High Court, the Federal Court and the Family Court, and Federal Magistrates.

The express provision for former judges of the Supreme Court of a State or Territory to be appointed as President is not intended to exclude, by implication, current judges of the Supreme Court of a State or Territory being appointed as President if they meet other qualification requirements (i.e. enrolment as a legal practitioner for more than five years).

This provision is consistent with the qualification requirements for the President of the National Native Title Tribunal.

To clarify which judges are eligible for appointment as President of the AAT, item 16 also proposes to insert a new subsection 7(1A) which states that the definition of “Judge” in subsection 3(1) will not apply to new subsection 7(1). The definition in subsection 3(1) is confined to judges of federal courts.

The item also inserts a new subsection 7(1AA) setting out the qualification requirements for a Deputy President. These remain unchanged from existing requirements. However, to ensure consistency of language and structure within section 7, the existing qualification requirements have been re-drafted in accordance with modern drafting practice.

Items 16 to 20

Items 16 and 18 substitute the word “must” in subsections 7(1B) and 7(2) of the AAT Act for the word “shall”. It is not intended to change the meaning of these subsections as a result of the substitution. The reason for the substitution is to ensure consistency of language within section 7 of the Act. Item 15 changes the terms of subsection 7(1) so that it now uses the word “must” in setting out the requirements for appointment to the office of President of the AAT.

Items 16 and 18 also insert appropriate headings for subsections 7(1B) and 7(2). The insertion of these headings is not intended to change the meaning of these subsections but is intended to enhance the accessibility and readability of the Act.

Item 17 inserts a new paragraph 7(1B)(a) consistent with the structure used for new subsection 7(1). This is not intended to change the meaning of the existing paragraph.

Item 19 inserts a new paragraph 7(2)(a) consistent with the structure used for the new subsection 7(1). The item also inserts an “or” at the end of the paragraph to clarify that the qualifications listed in paragraphs 7(2)(a) to (d) are separate rather than cumulative requirements. These amendments are not intended to change the meaning of the existing paragraph. The item also removes a reference to enrolment as a practitioner of “another federal court” other than the High Court. As only the High Court maintains a roll of practitioners, this reference is redundant.

This item inserts an “or” at the end of paragraph 7(2)(b) of the AAT Act to clarify that the qualifications listed in paragraphs 7(2)(a) to (d) are separate rather than cumulative requirements.

Items 21 and 22

Item 21 repeals subsections 8(1) and 8(2) of the AAT Act. Subsection 8(1) provides that a presidential member who is a judge holds office until the person reaches the age of 70 or the person ceases to be a judge. Subsection 8(2) provides that a Deputy President or a senior member may be appointed to such an office until they reach the ages of 70 or 65 respectively. The repeal of subsections 8(1) and (2) is designed to ensure that all future appointments to the AAT will be for fixed terms only. Tenured appointments will no longer be possible. However, item 22 makes it clear that there is no intention to affect any tenured member appointment made under subsections 8(1) and 8(2) before the commencement of this item.

Item 23

This item inserts a new subsection 8(4) into the AAT Act. The provision is designed to ensure that a judge who is appointed as a presidential member of the AAT will automatically cease to hold his or her appointment to the AAT if they cease to be a Judge. This provision would not alter the existing operation of the Act, as subsection 8(1) includes terms to the same effect. However, with the repeal of subsection 8(1) (see item 21), this requirement is being moved to a new location. It is intended that a presidential member whose appointment automatically ceases as a result of the operation of subsection 8(4) may, if appropriate, be immediately appointed again to the AAT as a non-judicial presidential member, a senior member or a member.

Item 24

Item 24 repeals subsection 8(5) of the AAT Act. Subsection 8(5) provides that a judge who has attained the age of 70 years shall not be appointed as a member of the AAT. “Judge” is defined in section 3 of the Act to mean:

- a person who is a Judge of a court created by the Parliament, or
- a person who has been given the same designation and status as a Judge of a Court created by Parliament.

The repeal of subsection 8(5) will have a different impact on members of the AAT who are judges, depending on which of the two definitions in subsection 3(1) they meet.

In relation to a person who meets the definition of Judge in subsection 3(1) of the Act by reason that they are a Judge of a court created by Parliament, subsection 8(5) has no operation because of section 72 of the Constitution. Section 72 of the Constitution provides that the maximum age for any justice of any court created by the Parliament is seventy years. Therefore, no person can hold the position of a judge of a court created by Parliament if they are over 70 years of age. Accordingly, subsection 8(5) has no operation to a person who is a Judge of a court created by Parliament.

In relation to a person who has been given the same designation and status as a Judge of a court created by the Parliament, subsection 8(5) has effect because section 72 of the Constitution does not apply. Subsection 8(5) is to be repealed in order to be consistent with the objectives of the *Age Discrimination Act 2004* which aims to remove discrimination on the basis of age in many areas of public life.

Item 25

Item 25 repeals section 8A of the AAT Act. Section 8A was introduced into the Act in 1994 to enable the then President of the AAT to be appointed to the Australian Industrial Relations Commission for a fixed term of five years. Section 8A also enabled that person to be reappointed as President of the AAT after her term with the Australian Industrial Relations Commission ceased. Given that the purpose behind the provision is now spent, it is appropriate to repeal the section.

Item 26

Item 26 amends subsection 10(1) of the AAT Act consequential to the amendments made to subsection 7(1) by item 15. The present subsection 10(1) allows the Governor-General to appoint a judge of the Federal Court of Australia to act as President while the President is absent from duty or from Australia or during a vacancy in the office of President. The requirement for a judge to act in the position reflects the present qualification for the office of President. Item 15 amends the qualification requirements for appointment to the office of President. Accordingly, it is appropriate to amend the qualification requirements for a person to act in the position of President to mirror those set out in new subsection 7(1).

Item 26 inserts an appropriate heading for subsection 10(1). The insertion of this heading is not intended to change the meaning of the subsection but is intended to enhance the readability of the Act.

Items 27 and 28

Item 27 amends subsection 10(2) of the AAT Act by clarifying when and how the Governor-General may appoint a person to act in the position of Deputy President. Amended subsection 10(2) provides that a person appointed to act in the office of Deputy President must be qualified to be appointed to that office under subsection 7(2) of the Act.

The circumstances in which a person may act in the position of Deputy President are dependent on whether they will be acting on a part-time or full-time basis. A person may be appointed to act as a full-time Deputy President if the person who ordinarily occupies that office is absent from duty or from Australia. A person may be appointed to act in the position of part-time Deputy President if the person who ordinarily occupies that office is unavailable to perform the duties of his or her office.

Item 27 also inserts appropriate headings for subsections 10(3) and 10(5). The insertion of these headings is not intended to change the meaning of the subsections but is intended to enhance the readability of the Act.

Item 28 is a transitional provision that ensures that any appointment of a person to the office of Deputy President under subsection 10(2) of the Act made before the commencement of item 27 would have effect as if it was made under the new subsection 10(2).

Item 29

Item 29 amends subsection 10(9) of the AAT Act. The effect of this amendment is to clarify the time at which a person acting as a President, Deputy President or non-presidential member will be taken to have resigned his or her acting appointment to the Tribunal. The person acting as a

President, Deputy President or non-presidential member will be taken to have resigned from his or her appointment the moment his or her resignation is received by the Governor-General unless they state a later date in the resignation. New subsection 10(9) is not intended to change the method by which a member of the Tribunal could have resigned his or her acting appointment under the previous subsection 10(9).

Item 29 also inserts appropriate headings for subsections 10(7), (10) and (11). These headings are not intended to change the meaning of the subsections but are intended to enhance the readability of the Act.

Items 30 and 31

Item 30 repeals subsection 13(8) of the AAT Act consequential to the repeal of section 16 by item 33. Subsection 13(8) provides that a member to whom the *Judges' Pensions Act 1968* applies may, with the approval of the Minister, retire from office on the grounds of disability or infirmity. Section 16 provides that, subject to certain conditions, the Judges' Pensions Act has effect as if a full-time presidential member of the AAT who is appointed with tenure were a judge. As item 33 repeals section 16, subsection 13(8) will also be consequentially repealed.

Item 30 also inserts appropriate headings for subsections 13(1), (2), (7), (9), (10), (11), (12) and (13). These headings are not intended to change the meaning of the subsections but are intended to enhance the readability of the Act.

Item 31 is a transitional provision that ensures that if the Judges' Pensions Act applied to a person before the commencement of item 31, then the repeal of subsection 13(8) by item 25A would have no effect upon that person and the Judges' Pensions Act 1968 would still apply.

Item 32

Item 32 repeals section 15 of the AAT Act and inserts a new provision in similar terms to the replacement of subsection 10(9) by item 29. The effect of the change is to clarify when a member of the AAT will be taken to have resigned from his or her appointment. New section 15 provides that a member will be taken to have resigned from his or her appointment on the day their resignation is received by the Governor-General unless they state a later date in the resignation. New section 15 is not intended to change the method by which a member of the Tribunal could have resigned his or her acting appointment under the current section 15.

Items 33 and 34

Item 33 repeals section 16 of the AAT Act consequential to the repeal of subsection 8(2) by item 21. Section 16 of the Act extends the eligibility for a judicial pension (given under the Judges' Pensions Act) to non-judicial presidential members of the AAT who are appointed as full-time members with tenure under subsection 8(2). The entitlement to a judicial pension will no longer be available to future non-judicial presidential members of the Tribunal.

Item 34 is a transitional provision that provides that section 16 of the Act will still have effect (as if it was not repealed) to any person who is a current or retired non-judicial presidential member of the AAT before the commencement of the item.

Item 35

Item 35 inserts a new Division heading into Part III of the AAT Act: “Division 1 – Divisions of the Tribunal”. Under this new Division, there is one section: section 19. The insertion of Division headings into Part III is to improve accessibility and readability.

Items 36 and 37

Item 36 amends subsection 19(3) of the Act. Subsection 19(3) states that the Governor-General shall assign a non-presidential member to a particular Division or Divisions of the Tribunal in the instrument of appointment. This assignment may be varied by the Governor-General but only with the member’s consent. Amended subsection 19(3) will provide that the Minister administering the AAT Act (currently the Attorney-General) will now assign a non-presidential member to a particular Division or Divisions of the Tribunal. (The Divisions of the Tribunal are set out in subsection 19(2) of the Act.) The Minister can vary the assignment but only with the consent of the member. Item 37 makes it clear that the amendment made by item 36 does not have any effect on an assignment to a particular Division or Divisions made by the Governor-General before the commencement of this item. Additionally, the amendment made by this item is not intended to affect any variance to an assignment to a particular Division or Divisions made before the commencement of this item.

Item 36 also inserts appropriate headings for subsections 19(2) (3A), (3B), (4), (5) and (6) of the AAT Act. The heading to section 19 is also replaced by item 36. The proposed insertion and replacement of these headings is not intended to change the meaning of the subsections but is intended to enhance the readability of the Act.

Item 38

Item 38 inserts a new Division heading into Part III of the AAT Act: “Division 2 – Arrangement of business of the Tribunal”. Under this new Division, there are two sections: sections 20 and 20A. The insertion of Division headings into Part III is to improve accessibility and readability.

Item 39

Item 39 substitutes the phrase “orderly and expeditious” with the phrase “expeditious and efficient” in subsection 20(1). New subsection 20(1) states that the President of the AAT is responsible for ensuring the expeditious and efficient discharge of the business of the Tribunal. It is not intended that the change to subsection 20(1) will result in the President no longer being responsible for the orderly discharge of the business of the Tribunal because an efficient discharge of business encompasses an orderly discharge of business. The change is consistent with the statutory objective to be inserted by item 1.

Items 40 to 42

Item 40 repeals subsections 20(1A), (2) and (3) of the AAT Act and inserts new subsections 20(2), 20(3), 20(4), 20(5) and 20(6) into the Act.

Subsection 20(1A) of the AAT Act grants the President express powers to give directions on a range of matters. With the repeal of subsection 20(1A) of the AAT Act, the President’s power to give directions will be provided under new subsections 20(2) and (4).

New subsection 20(2) retains the express powers granted to the President under paragraphs 20(1A)(d) and (e) of the Act to give directions as to the procedure of the Tribunal both generally and at a particular place. In addition, the new subsection will also broaden the President's power to give directions relating to the operations of the Tribunal and the conduct of reviews. This will ensure that the President has the power to determine the Tribunal's practice and procedure for the conduct of reviews.

New subsection 20(4) retains the express powers of the President granted under paragraphs 20(1A)(a) and (c) of the Act to give directions as to the arrangement of the business of the Tribunal and the places at which the Tribunal may sit. The power to give directions as to the constitution of the Tribunal, which is currently provided in paragraph 20(1A)(b) of the Act, is not included in new section 20. This is because this power is now provided under new subsection 20B(1), inserted by item 44.

New subsections 20(3) and 20(5) clarify that the President's responsibility for ensuring the expeditious and efficient conduct of reviews under new subsection 20(1) is not limited by new subsections 20(2) and 20(4) of the Act, respectively.

New subsection 20(6) clarifies that the President has power to vary or revoke any direction that has been given under new subsections 20(2) and 20(4).

Item 41 is a transitional provision that ensures that any direction given by the President of the AAT under paragraphs 20(1A)(d) or (e) of the AAT Act before the commencement of item 41 will have effect as if the direction was given under the new subsection 20(2).

Item 42 is a transitional provision that ensures that any direction given by the President of the AAT under paragraphs 20(1A)(a) or (c) of the AAT Act before the commencement of item 42 will have effect as if the direction was given under new subsection 20(4).

Item 43

Item 43 inserts a new section 20A into the AAT Act. New section 20A is identical to the current section 24 of the Act which is repealed by item 70. The provision is to be moved to a new location within the Act to enhance the Act's readability and accessibility. Refer also to the note to item 70.

Items 44 and 45

Item 44 inserts a new Division heading into Part III of the AAT Act: "Division 3 – Constitution and reconstitution of the Tribunal". Under this new Division, there are twelve sections: 20B, 21, 21AA, 21A, 22, 23, 23A, 23C, 23D, 23E, 23F and 23G of the Act. The insertion of Division headings into Part III is to improve accessibility and readability.

Item 44 inserts new section 20B into the Act. New subsection 20B(1) is identical to current paragraph 20(1A)(b) of the Act which will be repealed by item 40. This paragraph provides that the President may direct which member or members of the Tribunal are to constitute the Tribunal for the purposes of a particular proceeding. The relocation of this paragraph is intended to enhance the Act's readability and accessibility.

New subsection 20B(2) gives the President power to revoke a direction and give a further direction under new subsection 20B(1). New subsection 20B(2) has the same intent as the current paragraph

20(2)(a) of the Act, which is repealed by item 40, but has been reworded and simplified to enhance the Act's readability and accessibility.

Item 45 is a transitional provision that ensures that any direction given by the President of the AAT under paragraph 20(1A)(b) or subsection 20(2) of the Act before the commencement of item 45 will have effect as if the direction were made under the new subsection 20B(1) of the amended Act. Paragraph 20(1A)(a) and subsection 20(2) of the Act are repealed by item 40.

Items 46 and 47

Item 47 repeals subsection 21(1AB) of the AAT Act. This subsection stipulates that if the AAT is constituted by more than one member, at least one of the members must be a presidential member or a senior member. The repeal of subsection 20(1AB) of the Act increases the range of members who may constitute the AAT in multi-member reviews. This allows the AAT to make greater use of the skill base of its membership.

Item 46 deletes the reference to subsection 21(1AB) from subsection 21(1) of the Act. This amendment is consequential to the repeal of subsection 21(1AB) by item 47.

Item 46 also inserts appropriate headings for subsections 21(1AAA) and (1) of the Act. The insertion of headings is not intended to change the meaning of the subsections but is intended to enhance the readability of the Act.

Item 48

Item 48 amends subsection 21(1A) of the AAT Act so that it will make reference to new subsection 34D(1) rather than subsection 34A(4) of the Act. Subsection 34A(4) of the Act is repealed by item 112. New subsection 34D(1) has the same intent as subsection 34A(4) of the Act but has been reworded and simplified to enhance the Act's readability and accessibility.

Items 49 to 51

Item 49 amends subsection 21(1A) of the AAT Act to expand the powers that may be exercised under that provision to include subsections 41(2) and (3) of the Act. Subsection 21(1A) of the Act sets out who shall constitute the Tribunal for the exercise of specified powers. Who may exercise these powers varies depending on whether the hearing of the relevant proceeding has commenced or not. Subsections 41(1) and (2) of the Act provide for the staying of decisions to which a proceeding relates. The power to stay proceedings is consistent with other powers exercisable under subsection 21(1A) of the Act and it is appropriate that a mechanism be available to allow for it to be exercised prior to the commencement of a hearing to minimise the harm to an applicant caused by an adverse decision.

Item 50 amends paragraph 21(1A)(a) of the Act to simplify the provisions for the exercise of powers by the Tribunal prior to the commencement of a hearing. Paragraph 21(1A)(a) of the Act designates the members who may exercise specified powers under the Act where the hearing in relation to a proceeding has not commenced. Currently, the member who may exercise these powers is dependent on a complicated range of factors. The amendments simplify these arrangements by providing that a presidential member or an authorised member may exercise the specific powers referred to in subsection 21(1A) of the Act where a proceeding has not commenced. Item 180 inserts a new section 59A, which provides for the appointment of authorised members.

Item 51 is a transitional provision that provides that the amendment made to paragraph 21(1A)(a) of the Act by item 50 would not apply to any proceeding where the Tribunal has been constituted by one or more members immediately before the commencement of item 51.

Items 52 to 54

Item 52 amends subsection 21(2) of the AAT Act to substitute the first occurring instance of the word “shall” in subsection 21(2) of the Act with the word “should”.

Item 53 provides that the second occurring instance of the word “shall” in subsection 21(2) be substituted with the phrase “may, if the President directs under section 20B”. At present subsection 21(2) of the Act states that the Tribunal shall be constituted with a single presidential member if the parties submit a notice, before the hearing has commenced, agreeing that the matter should be dealt with by that member. The effect of the amendments made by this item and item 44 will be to make the constitution of the Tribunal with a presidential member in these circumstances discretionary. Accordingly, under new subsection 21(2) of the Act, the President may or may not constitute the Tribunal with a presidential member under new subsection 20B if the parties submit a notice agreeing that the matter should be dealt with by that particular type of member.

Item 54 is a transitional provision that provides that if the Tribunal was constituted by a particular member under subsection 21(2) of the AAT Act before the commencement of this item, it will have effect as if the Tribunal had been constituted in accordance with a direction given under section 20B of the Act. Item 54 further ensures that the transitional operation of subsection 21(2) of the Act will not prevent reconstitution of the Tribunal.

Items 55 and 56

Item 55 repeals subsections 21(3) and (4) of the AAT Act. The repeal of subsection 21(3) of the Act is consequential to the amendments to paragraph 21(1A)(a) of the Act made by item 50. Subsection 21(3) of the Act clarifies under what circumstances the President can, for the purposes of subparagraph 21(1A)(a)(i) of the Act, authorise a senior member to exercise the powers referred to in subsection 21(1A) of the Act. As new subparagraph 21(1A)(a)(i) enables a presidential member or an authorised member (including a senior member who is an authorised member) to exercise the powers referred to in subsection 21(1A) of the Act, subsection 21(3) of the Act is now redundant.

The repeal of subsection 21(4) of the Act is also consequential to the amendment to paragraph 21(1A)(a) of the Act by item 50. Subsection 21(4) of the Act clarifies that the President can vary or revoke a direction given under subsection 21(3) of the Act at any time. As noted above, subsection 21(3) of the Act is redundant and, consequently, for the same reasons subsection 21(4) of the Act is also redundant.

Item 55 also inserts appropriate headings for subsections 21AA(1), (2) (3), (4), (5) and (6) of the Act. The insertion of headings is not intended to change the meaning of the subsections but is intended to enhance the readability of the Act.

Item 56 is a transitional provision that ensures that the repeal of subsections 21(3) and (4) of the AAT Act by item 55 does not apply to any proceeding where the Tribunal has been constituted by one or more members immediately before the commencement of item 56.

Item 57

Item 57 replaces the phrase “furnish him or her with” in subsections 21A(2) with the phrase “give him or her”. It is not intended that the meaning of this subsection would change as a result of the substitution. This change modernises the vocabulary within the Act to make the Act more accessible and readable.

Item 57 also inserts appropriate headings for subsections 21A(1AA) and (1). The heading to section 21A is also amended. These amendments are not intended to change the meaning of the subsections but are intended to enhance the readability of the Act.

Item 58 and 59

Item 58 amends subsection 21A(3) of the AAT Act to clarify the way in which the Tribunal may be reconstituted. This is done by substituting references to a variation to the constitution of the Tribunal with references to reconstitution of the Tribunal. This ensures that the language used in the provision is consistent with new sections 23 and 23A to be inserted by item 66. The amendment clarifies that the Tribunal may be reconstituted by: adding one or more members, removing one or more members, or substituting one or more members (or any combination of these).

Item 59 is a transitional provision that provides that the amendment made to subsection 21A(3) of the AAT Act by item 58 would not affect the continuity of a direction given by the President under that subsection before the commencement of item 59.

Item 60

This item inserts a note below subsection 21A(4) to clarify that a reconstituted Tribunal can have regard to the record of any proceeding of the Tribunal as previously constituted in accordance with new section 23D. See also notes to items 61 and 66.

Item 61

Item 61 repeals subsection 21A(6) of the AAT Act. Subsection 21A(6) of the Act clarifies that if the Tribunal is reconstituted under subsection 21A(3) of the Act, the reconstituted Tribunal could have regard to any record of the proceeding of the Tribunal, as previously constituted, including evidence taken during the proceeding. This provision will be made redundant by new section 23D, to be inserted by item 66. New section 23D will have the same operation as the current subsection 21A(6) of the Act but will apply to all cases where the Tribunal has been reconstituted. For further explanation as to the new section 23D see note to item 66.

Items 62 to 65

Item 62 amends subsection 22(2) of the AAT Act by deleting references in the subsection to variation of the constitution under subsection 20(2) or section 21A of the Act and substituting references to the new reconstitution provisions: subsections 20B(2), 23(3) and 23(4) and section 23A. The item also substitutes the reference to varying the constitution of the Tribunal with a reference to reconstituting the Tribunal. The change in terminology is consistent with that used in new sections 23 and 23A, inserted by item 66. The reference to subsection 20(2) of the Act is omitted as that subsection is repealed by item 40.

Item 62 also inserts appropriate headings for subsections 22(1AA), (1) and (2) of the Act. The insertion of headings is not intended to change the meaning of the subsections but is intended to enhance the readability of the Act.

Item 63 amends subsection 22(2) of the AAT Act by omitting the words “or in a case to which paragraph 23(1)(a) applies” consequential to the repeal of paragraph 23(1)(a) by item 66.

Item 64 further amends subsection 22(2) of the AAT Act by omitting the phrase “or as constituted by the remaining member or members, as the case may be”. This phrase is no longer necessary because it refers directly to the circumstances set out in paragraph 23(1)(a) of the Act. As noted above, this paragraph is repealed by the Bill, and consequently, any direct reference to the paragraph may be deleted.

Item 65 is a transitional provision that provides that the amendments made to subsection 22(2) of the AAT Act by items 62, 63 and 64 would not affect the continuity of a direction that was given under that subsection before the commencement of item 65.

Item 66

This item repeals sections 23, 23A and 23B of the AAT Act and inserts seven new sections into the Act: new sections 23, 23A, 23B, 23C, 23D, 23E and 23F.

Section 23 of the Act currently provides for the event that a member of the Tribunal for a proceeding that has commenced ceases to be available. Section 23A provides a mechanism for the resolution of disagreements where the Tribunal is constituted by two members only. Section 23B provides that where a proceeding is reheard, the Tribunal may have regard to the record of the previous proceeding.

The new provisions simplify and rationalise the procedures set out in sections 23, 23A and 23B.

New section 23 facilitates the reconstitution of the Tribunal in the event that one member becomes unavailable. New subsection 23(1) provides that the new section 23 would have no application in relation to a proceeding in the Security Appeals Division.

New subsection 23(2) sets out two thresholds to the application of the new section. First, new paragraph 23(2)(a) provides that new section 23 only applies where the hearing of a proceeding has commenced or is completed. Secondly, new paragraph 23(2)(b) provides that new section 23 only applies if a member who constitutes, or one of the members who constitute, the Tribunal becomes unavailable. A member will become an unavailable member where:

- he or she stops being a member
- he or she is not available for the purposes of the proceeding, or
- he or she is directed by the President not to continue to take part in the proceeding.

New subsection 23(3) provides that if the unavailable member was the only person who constituted the Tribunal, the President must direct another member or members to constitute the Tribunal for the purposes of completing the proceeding.

New subsection 23(4) applies where a member of a multi-member Tribunal becomes unavailable. In these circumstances, the President must do one of two things. Under new paragraph 23(4)(a), the

President can direct the remaining member or members to constitute the Tribunal for the purposes of completing the proceeding. In the alternative, the President may, under new paragraph 23(4)(b), direct a member or members to constitute the Tribunal for the purposes of completing the proceeding. New subsection 23(5) clarifies that if the President takes the latter option, the members may be the remaining member or members of the Tribunal.

New subsection 23(6) clarifies that if a member stops being a member, and later becomes a member again, they would be taken to be another member for the purposes of the new section. This provision has been inserted to cover circumstances where there is a break between the expiry of a member's term of appointment and his or her reappointment. If there is a break in a member's appointment, he or she would be considered to be unavailable and, therefore, the President would have to reconstitute the Tribunal under new subsection 23(3) or (4).

New subsection 23(7) provides that if the President reconstitutes the Tribunal under new subsection 23(3) or (4), the Tribunal as reconstituted must continue the proceeding. This provision clarifies that a reconstituted tribunal must continue the proceeding which may or may not include a further hearing or a rehearing of the matter.

New subsection 23(8) clarifies that the President is not to reconstitute the Tribunal under new subsections 23(3) or 23(4) if the Tribunal has made a decision on the proceeding in accordance with subsection 43(1) of the Act. This new subsection is intended to prevent the President from reconstituting the Tribunal under new subsections 23(3) or (4) in order to reach a different decision on a matter.

New subsection 23(9) prevents the President from issuing a direction that a member not continue to take part in the proceeding under new subparagraph 23(2)(b)(iii) unless the President is satisfied it is in the interests of justice and he or she has consulted the member. New subsection 23(9) is designed to discourage the President from directing a member not to take part in a proceeding for reasons other than those that would be in the interests of justice.

Examples of directions given under new subparagraph 23(2)(b)(iii) that would be in the interests of justice include:

- where the member has a conflict of interest in the proceeding, or
- where the member has made a public statement that could prejudice the impartiality of the proceeding.

The requirement for the President to consult with the members concerned before directing them not to take part in the proceeding is intended to ensure that the process is procedurally fair and the member concerned can offer a response to the President's proposed reasons for removing them from a constituted Tribunal.

New subsection 23(10) limits the President's power to give directions under new subsections 23(3) or (4) unless he or she has consulted all the parties to the proceeding. This new subsection is designed to ensure that the process of reconstitution is procedurally fair.

New subsection 23(11) limits the President's ability to issue a direction that reconstitutes a multi-member tribunal with all new members under new paragraph 23(4)(b). The President may only do so if they are satisfied that it is in the interests of justice and they have consulted the remaining member or members concerned.

Examples of directions under new paragraph 23(4)(b), resulting in the remaining member or members not reconstituting the Tribunal, that would be in the interests of justice include:

- where the reconstituted Tribunal would have collective expertise and knowledge that would enable them to deal with the matter better than the remaining member or members, or
- where the Tribunal is reconstituted with one member who has the collective expertise and knowledge of the remaining member or members to enable them to deal with the matter.

The requirement for the President to consult with the member or members concerned before directing them not to take part in the proceeding is intended to ensure that the process is procedurally fair and the member or members concerned can give a response to the President's proposed reasons for removing them from a constituted tribunal.

New section 23A enables the President to reconstitute the Tribunal to achieve the expeditious and efficient conduct of proceeding. New subsection 23A(1) provides that the new section 23A would have no application in relation to a proceeding in the Security Appeals Division.

New subsection 23A(2) allows the President to reconstitute the Tribunal if he or she is of the opinion that the reconstitution is in the interests of achieving the expeditious and efficient conduct of the proceeding by: adding one or more members, removing one or more members, or substituting one or more members (or any combination of these).

Examples of reconstitution of the Tribunal being in the interests of an expeditious and efficient conduct of the review include:

- the addition of one member who has knowledge and expertise in relation to the matters to which the proceeding relates
- the substitution of one member with another who has greater knowledge or expertise in relation to the matters to which the proceeding relates
- the removal of one member from a constituted Tribunal of two members where the matter is not complex and can be resolved without the need for an expert member.

New subsection 23A(3) provides that if the President reconstitutes the Tribunal under new subsection 23A(2), the Tribunal as reconstituted must continue the proceeding. This proposed provision clarifies that the reconstituted tribunal must continue the proceeding which may or may not include a further hearing or a rehearing of the matter.

New subsection 23A(4) clarifies that the President is not to reconstitute the Tribunal under new subsection 23A(4) if the Tribunal has made a decision on the proceeding in accordance with subsection 43(1). This new subsection is intended to prevent the President from reconstituting the Tribunal under new subsection 23A(2) in order to reach a different decision on the matter.

New subsection 23A(5) limits the President's power to give directions under new subsection 23A(2) unless he or she has consulted all the parties to the proceeding. This provision is designed to ensure that the process of reconstitution is procedurally fair and the parties would be given an opportunity to comment on the President's proposed reconstitution of the Tribunal.

New section 23B sets out the matters the President must have regard to in constituting the Tribunal under section 20B or reconstituting the Tribunal under sections 23 or 23A. These matters are:

- **the degree of public importance or complexity of the matters to which that proceeding relates** – examples of matters of public importance might include appeals against decisions arising under the *Corporations Act 2001*. Complex matters might include those arising under the *Customs Act 1901* or proceedings in the Taxation Appeals Division.
- **the status of the position or office held by the person who made the decision that is to be reviewed by the Tribunal** – it would be expected that if the decision-maker was the Minister or the Secretary (not delegated) the Tribunal would be constituted by a senior member (or higher) or two ordinary members (or more). In proceedings where the decision-maker was an ordinary departmental officer, it would be expected that the Tribunal would be constituted by an ordinary member.
- **the degree to which the matters to which that proceeding relates concern the security, defence or international relations of Australia** – an example of such matters would include the review of decisions to refuse or cancel a passport under the *Passports Act 1938*.
- **the degree of financial importance of the matters to which the proceeding relates** – examples of matters where financial importance would be a relevant factor in deciding who to constitute the Tribunal include those matters relating to taxation, primary industry or insurance.
- **if that proceeding relates to the review of a decision made in the exercise of powers conferred by a particular enactment - the purpose of the object underlying the enactment (whether or not that purpose is expressly stated)** – an example of this factor would be that the President would have regard to the purpose of the *Customs Act 1901* in deciding who would constitute the Tribunal in relation to the review of a decision made under that Act.
- **the degree to which it is desirable for any or all of the persons who are to constitute the Tribunal to have knowledge, expertise or experience in relation to matters to which the proceeding relates** – an example of proceedings where knowledge, expertise or experience in relation to matters to which the proceeding relates may be desirable are those within the Taxation Appeals Division which may require actuarial knowledge, expertise or experience.
- **any notice given under subsection 21(2) by the parties to the proceeding** – all the parties to a proceeding may lodge a notice under subsection 21(2) of the Act requesting the President to constitute the Tribunal with a presidential member alone. Under this provision, as amended by items 52 and 53, the President may accede to this request at his or her discretion.
- **such other matters that the President thinks are relevant.**

Subsection 23C(2) provides that no direction can be given in relation to the constitution of the Tribunal unless the member or members who constitute the reconstituted Tribunal could have constituted the Tribunal for the purposes of the proceeding if the proceeding had commenced immediately before the direction was given. Subsection 23C(1) provides that the section does not apply in the Security Appeals Division.

Certain provisions in other enactments impose restrictions on the constitution of the Tribunal. New subsection 23C(2) ensures that these restrictions must be complied with if the Tribunal is

reconstituted under section 23 and 23A. As an example, if a particular Act specifies that a particular proceeding must be heard by a senior member, if the Tribunal is so constituted, the President must reconstitute the same proceeding with a senior member.

New subsection 23D(1) provides that section 23D does not apply to proceeding in the Security Appeals Division.

New subsection 23D(2) provides that if the Tribunal has been reconstituted under section 23 or 23A, the Tribunal can have regard to the record of the proceeding that was taken by the Tribunal as previously constituted. This would include the record of any evidence taken by the previously constituted Tribunal. A record of the proceeding may also include any documents submitted by any party to the proceeding. New subsection 23D(3) provides that the new subsection 23D(2) does not apply in a case where the Tribunal is reconstituted following an order by the Federal Court or Federal Magistrates Court remitting a case to be heard and decided again.

New section 23E provides a method for the constitution of the Tribunal for the review of a decision by the Registrar, a District Registrar or a Deputy Registrar taxing any costs ordered by the Tribunal to be paid by a party to another proceeding. Review of taxing of costs is allowed under section 69A of the Act. Such a proceeding is referred to as a “taxing review proceeding” in new sections 23E and 23F. The proceeding from where the original disagreement over the taxing of costs arose is referred to as the “substantive proceeding” in those sections.

New subsection 23E(1) provides that new section 23E does not apply to a proceeding in the Security Appeals Division. New paragraph 23E(2)(a) provides that if the Tribunal was constituted by a single member in the substantive proceeding then, for the purposes of the taxing review proceeding, the Tribunal is to be constituted by that same member. New paragraph 23E(2)(b) provides that if the substantive proceeding was constituted by two or three members, then for the purposes of the taxing review proceeding, the Tribunal is to be constituted by the member who presided in the substantive proceeding. Subsection 22(1) of the Act sets out which member is to preside in a particular proceeding.

New section 23F enables a Tribunal constituted for the purposes of a taxing review proceeding to be reconstituted in the event that the member who originally constituted the Tribunal for the purposes of the taxing review proceeding or the presiding member becomes unavailable. New paragraph 23F(1)(a) provides that new section 23F only applies if :

- in the case where the Tribunal was constituted for the purposes of the substantive proceeding by a single member and that member becomes unavailable, or
- in the case where the Tribunal was constituted for the purposes of the substantive proceeding by two or three members and the member who presided becomes unavailable.

Consistent with new section 23, a member is taken to be unavailable for the purposes of section 23F if:

- he or she stops being a member
- he or she is not available for the purposes of the proceeding, or
- he or she is directed by the President not to continue to take part in the proceeding.

New subsection 23F(2) provides that if the Tribunal was constituted for the purposes of the substantive proceeding by a single member and that member becomes unavailable, then the President must direct another member to constitute the Tribunal for the purposes of the taxing review proceeding.

New subsection 23F(3) provides that if the Tribunal was constituted for the purposes of the substantive proceeding by two or three members and the member that presided becomes unavailable, then the President must either:

- direct the remaining member, or one of the remaining members, to constitute the Tribunal for the purposes of the taxing review proceeding, or
- direct another member to constitute the Tribunal for the purposes of the taxing review proceeding.

New subsection 23F(4) clarifies that if a member stops being a member, and later becomes a member again, they would be taken to be another member. This provision has been inserted to cover circumstances where there is a break between the expiry of a member's term of appointment and his or her reappointment. If there is a break in a member's appointment, they would be considered to be unavailable and therefore the President would have to reconstitute the Tribunal under subsection 23F(2) or (3).

New subsection 23F(5) prevents the President from issuing a direction under subparagraph 23F(1)(a)(iii) or (b)(iii) that a member not take part in a taxing review proceeding unless the President is satisfied that it is in the interests of justice. New subsection 23F(6) also prevents the President from issuing a direction under new paragraph 23F(3)(b) that another member constitute the Tribunal unless the President is satisfied it is in the interests of justice. These provisions are designed to discourage the President from directing a member not to take part in a proceeding for reasons other than those that would be in the interests of justice.

Examples of directions given under new subparagraphs 23F(1)(a)(iii) and (b)(iii) or new paragraph 23F(3)(b) that would be in the interests of justice include circumstances where:

- the member has a conflict of interest in the proceeding, or
- the member has made a public statement that could prejudice the impartiality of the proceeding.

Item 67 is a transitional provision clarifying the operation of reconstitutions made by the Tribunal under paragraph 23(1)(a) of the AAT Act immediately before the commencement of item 67. Subitems 67(1) and (2) of the Act provide that a reconstitution made by the Tribunal pursuant to current paragraph 23(1)(a) of the Act is deemed to have been constituted in accordance with a direction given under new subsection 20B(1) of the Act. Subitem 67(3) clarifies that if a reconstitution of the Tribunal under paragraph 23(1)(a) of the Act is deemed to be a constitution under new subsection 20B(1) by virtue of subitem 67(2), the President is not prevented from reconstituting the Tribunal at a later date.

Item 68 clarifies that new subsection 23D applies in relation to a reconstitution of the Tribunal whether the reconstitution took place before or after the commencement of item 68.

Item 69 is a transitional provision that provides that if the Tribunal had been constituted immediately prior to the commencement of item 69 for the purposes of reviewing a taxing of costs decision, new sections 23E and 23F of the Act do not apply to that proceeding.

Item 70

Item 70 repeals section 24 of the AAT Act. Section 24 of the Act provides that sittings of the Tribunal shall be held as required at the places at which the Registries of the Tribunal are established but that the Tribunal may sit at any place in Australia or in an external Territory. New section 20A inserted by item 43 will be identical to section 24 of the Act. This section has been moved to a new location within the Act to enhance its readability and accessibility. See also the note to item 43.

Item 71

Item 71 repeals section 24H of the AAT Act and inserts a new section 24H into the Act. This change is to clarify at what point in time a Registrar will be taken to have resigned his or her appointment to the Tribunal. A Registrar will be taken to have resigned from his or her appointment on the day his or her resignation is received by the Governor-General unless they state a later date in the resignation. New section 24H is not intended to change the method by which a Registrar could have resigned his or her appointment under section 24H of the Act. This amendment is consistent with those provided for in items 29 and 32.

Item 72

Item 72 inserts a new Division heading into Part IV of the AAT Act: “Division 1 – Applications for review of decisions”. Under this new Division, there will be 10 sections: sections 25, 26, 27, 27AA, 27A, 27B, 28, 29, 29A and 29B. The dividing up of Part IV of the Act into seven Divisions will enhance the readability and accessibility of the Act.

Item 73

Item 73 inserts a new subsection 25(4A) into the AAT Act. New subsection 25(4A) clarifies that the Tribunal will have the power to determine the scope of the review of a decision. The Tribunal will be able to do this by limiting the questions of fact, the evidence and the issues that it considers.

Parties often call upon the Tribunal to consider and/or make determinations on evidence or issues of law and fact that are not relevant to the decision that is under review. New subsection 25(4A) enables the Tribunal to dismiss a party’s request for the consideration of, and/or determination on, evidence or issues of law and fact which are not relevant. It is not intended that this section will allow the Tribunal to limit its own jurisdiction conferred by the Act or other legislation. For example, if the consideration of a legal issue is a threshold to the Tribunal affirming, varying or setting aside a decision, new subsection 25(4A) is not intended to give the Tribunal power to dismiss the consideration of such an issue.

Item 73 also inserts appropriate headings for subsections 25(1), 25(3A), 25(4) and 25(5) of the Act. The insertion of headings is not intended to change the meaning of the subsections but is intended to enhance the readability of the Act.

Item 74

Item 74 repeals subsections 25(6) and (6A) of the AAT Act and inserts a new subsection 25(6) into the Act. Paragraph 25(6)(a) of the Act provides that an enactment that confers jurisdiction on the AAT to hear a matter may limit a non-presidential member's participation in, or exercise of powers in, such a matter. Paragraph 25(6)(b) of the Act provides that an enactment that confers jurisdiction may exclude, add to or modify the operation of specified provisions within the Act.

New subsection 25(6) will keep the substantive operation of paragraph 25(6)(b) of the Act but will remove from the specified provisions those relating to the constitution and reconstitution of the Tribunal. Accordingly, an enactment that confers jurisdiction will be able to add to, exclude, limit or modify the following sections and subsections within the Act: sections 27, 29, 32, 33, 35, 41(1), 43(1) and 43(2). This amendment is consistent with the removal of restrictive constitution provisions in the AAT Act and other legislation.

Item 75

Item 75 amends paragraph 25(7)(e) of the AAT Act by deleting the phrase "or another member authorised by the President" and substituting "or an authorised member". Paragraph 25(7)(e) of the Act enables the President to authorise a member to be the person that will be taken to have made a decision for the purposes of the Act if the person who made the decision no longer holds or performs the office or appointment under which that person made the decision. Item 180 inserts a new section 59A that enables the President to authorise a member to be an authorised member for the purposes of one or more specified provisions of the Act. The power under paragraph 25(7)(e) of the Act is one such provision. Accordingly there is no longer a need to provide an additional power for the President to authorise a member to do something (or to be taken to have done something) within specific provisions of the Act such as paragraph 25(7)(e) of the Act. See also the note to item 180.

Item 75 also inserts an appropriate heading for subsection 25(7) of the Act. The insertion of this heading is not intended to change the meaning of the subsection but is intended to enhance the readability of the Act.

Item 76

Item 76 repeals subsections 25(8), (9), (10), (11) and (12) of the AAT Act. Subsection 25(8) of the Act allows for the making of regulations to provide that applications may be made to the AAT for review of decisions made in the exercise of powers conferred by a Northern Territory enactment. Subsections 25(9)-(12) of the Act explain how such regulations will operate for the purposes of the Act and what effect a Northern Territory enactment will have on such regulations.

These provisions were originally inserted into the Act to assist the implementation of self-government in the Northern Territory. However, as the current policy of the Government is for

the Territories to review decisions made under their own enactments, it is appropriate to repeal these provisions.

Items 77 to 82

Items 77 to 82 replace the words and phrases “furnish”, “furnished” or “furnished with” in subsections 28(1), (1AA), (1AB), (1AC) of the AAT Act with the word “give” or relevant variants. It is not intended that the meaning of these subsections will change as a result of these substitutions. These changes are made to modernise the vocabulary within the Act.

Item 77 inserts appropriate headings for subsections 28(1) and (1AAA) of the Act. Item 78 inserts an appropriate heading for subsection 28(1AA) of the Act. Item 81 inserts an appropriate heading for subsection 28(1A) of the Act. The insertion of these headings is not intended to change the meaning of the subsections but is intended to enhance the readability of the Act.

Item 83

Item 83 replaces the phrase “the following provisions of this section have effect” in subsection 28(2) of the AAT Act with the phrase “subsections (3) and (3A)”. This amendment clarifies which subsections of section 28 of the Act have effect if the circumstances referred to in subsection 28(2) of the Act arise.

Item 83 inserts an appropriate heading for subsection 28(2) of the Act. This proposal is not intended to change the meaning of the subsection but is intended to enhance the readability of the Act.

Item 84

Item 84 replaces the word “furnish” in paragraph 28(3)(b) of the AAT Act with the word “give”. It is not intended that the meaning of this subsection will change as a result of the substitution.

Item 85

Item 85 replaces the word “furnished” wherever it appears in subparagraph 28(3A)(a)(ii) of the AAT Act with the word “given”. It is not intended that the meaning of this subparagraph will change as a result of the substitutions. This change is made to modernise the vocabulary within the Act.

Item 86

Item 86 replaces the word “furnishing” in subparagraph 28(3A)(a)(ii) of the AAT Act with the word “giving”. It is not intended that the meaning of this subparagraph will change as a result of the substitution. This change is made to modernise the vocabulary within the Act.

Item 87 to 89

Items 87 to 89 replace the words “furnish” and “furnished” in subsections 28(4) and (5) and paragraph 29(1)(d) of the AAT Act with the words “give” or “given” as appropriate. It is not intended that the meaning of these subsections will change as a result of these substitutions. These changes are made to modernise the vocabulary within the Act.

Item 87 also inserts appropriate headings for subsections 28(4) and 28(5) of the Act. The insertion of these headings is not intended to change the meaning of the subsections but is intended to enhance the readability of the Act.

Item 90

Item 90 adds a note at the end of subsection 29(1) of the AAT Act. The note makes reference to paragraph 33(1)(c) of the Act which provides that the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such a manner that it thinks appropriate. This note clarifies that the Tribunal is not limited by the applicant’s statement of reasons submitted to the Tribunal in accordance with subsection 29(1) of the Act.

Item 91

Item 91 replaces the word “furnish” in subsection 29(1A) of the AAT Act with the word “provide”. It is not intended that the meaning of this subsection will change as a result of the substitution. This change is made to modernise the vocabulary within the Act.

Item 91 inserts an appropriate heading for subsection 29(1A) of the Act. It is not intended that the meaning of the subsection will change but it is intended to enhance the readability of the Act.

Item 92

Item 92 replaces the word “served” wherever it appears in subsection 29(1A) of the AAT Act with the word “given”. It is not intended that the meaning of this subsection will change as a result of the substitutions. This change has been made to modernise the vocabulary within the Act.

Item 93

Item 93 replaces the phrase “for service” in subsection 29(1A) of the AAT Act with the phrase “at which such documents may be given”. It is not intended that the meaning of this subsection will change as a result of the substitution. This change is made to modernise the vocabulary within the Act.

Item 94

Item 94 replaces the word “furnished” in subsection 29(1A) of the AAT Act with the word “provided”. It is not intended that the meaning of this subsection will change as a result of the substitution. This change is made to modernise the vocabulary within the Act.

Item 95

Under paragraph 29(1)(c) of the AAT Act, an applicant must include a statement of reasons with their application for review of a decision (unless their application is one covered by paragraphs 29(1)(ca) or (cb)). Item 95 inserts a new subsection 29(1B) into the Act. New subsection 29(1B) enables the Tribunal to obtain a further statement of reasons from the applicant if the Tribunal is of the opinion that the statement provided with the application does not assist the Tribunal in identifying why the applicant (or applicants) believes the decision is not the correct or preferable decision.

This provision is made to overcome the practise of applicants submitting in their statement of reasons that there was ‘error in fact and law’ without further substantiation, particularly where the applicant has legal representation. Such a statement does not assist the Tribunal in identifying why the applicant believes the decision under review was incorrect.

Where the Tribunal requests a further statement under new subsection 29(1B), paragraph 29(1)(c) of the Act would be taken to have been satisfied for the purposes of determining if a valid application has been lodged. That is, the request of a further statement by the Tribunal under new subsection 29(1B) does not mean that the original application did not contain a statement of reasons for the purposes of that subsection. Accordingly if the application has met the other requirements for a valid application in subsection 29(1) of the Act, the application would not be found to be invalid for failure to comply with paragraph 29(1)(c) of the Act.

There is no specific provision setting out the sanction for non-compliance with a request made by the Tribunal under new subsection 29(1B). The provision is intended to encourage applicants to make more detailed statements so as to assist the Tribunal to resolve matters as early as possible. It is not intended to disadvantage applicants with few resources.

Item 96

Item 96 replaces the word “furnished” wherever it appears in subsection 29(2) of the AAT Act with the word “given”. It is not intended that the meaning of this subsection will change as a result of the substitutions. This change is made to modernise the vocabulary within the Act.

Item 96 inserts an appropriate heading for subsection 29(2) of the Act. This heading is not intended to change the meaning of the subsection but is intended to enhance the readability of the Act.

Item 97

Item 97 replaces the word “furnish” in subparagraph 29(2)(b)(ii) of the AAT Act with the word “give”. It is not intended that the meaning of this subparagraph will change as a result of the substitution. This change has been made to modernise the vocabulary within the Act.

Item 98

Item 98 replaces the word “furnished” wherever it appears in subsection 29(3) of the AAT Act with the word “given”. It is not intended that the meaning of this subsection will change as a result of the substitutions. This change has been made to modernise the vocabulary within the Act.

Item 98 inserts appropriate headings for subsections 29(3) and (4) of the Act. The insertion of these headings is not intended to change the meaning of the subsections but is intended to enhance the readability of the Act.

Item 99

Item 99 amends subsection 29(7) of the AAT Act by clarifying that the Tribunal may only extend the time for the making of an application where it is satisfied that it is reasonable in all the circumstances to do so. This amendment reflects the current practice of the Tribunal and there is no intention to undermine the Tribunal’s existing ability to reinstate applications.

Item 99 inserts an appropriate heading for subsection 29(7) of the Act. The insertion of this heading is not intended to change the meaning of the subsection but is intended to enhance the readability of the Act.

Item 100

Item 100 is a transitional provision that provides that any extension of time granted by the Tribunal under subsection 29(7) of the AAT Act before the commencement of item 100 will still have effect as if the amendment to subsection 29(7) of the Act in item 99 never took effect.

Item 101

Item 101 replaces the phrase “serve notice of the application on” in subsection 29(9) of the AAT Act with the phrase “give notice of the application to”. It is not intended that the meaning of this subsection will change as a result of the substitution. This change is made to modernise the vocabulary within the Act.

Item 102

Item 102 replaces the phrase “on whom a notice is served” in subsection 29(10) of the AAT Act with the phrase “to whom a notice is given”. It is not intended that the meaning of this subsection will change as a result of the substitution. This change is made to modernise the vocabulary within the Act.

Item 103

Item 103 replaces the phrase “served on” in subsection 29(11) of the AAT Act with the phrase “given to”. It is not intended that the meaning of this subsection will change as a result of the substitution. This change is made to modernise the vocabulary within the Act.

Item 103 also inserts an appropriate heading for subsection 29(11) of the Act. The insertion of this heading is not intended to change the meaning of the subsection but is intended to enhance the readability of the Act.

Item 104

Item 104 inserts a new Division heading into Part IV of the AAT Act: “Division 2 – Parties and procedure”. Under this new Division, there are five sections: sections 30, 30A, 31, 32 and 33.

Item 105

Item 105 inserts a note at the end of subsection 30(1) of the AAT Act. This note clarifies that, despite the list of persons in subsection 30(1) of the Act that may be parties to a proceeding, other subsections within the Act deem the Commonwealth Attorney-General and State Attorneys-General to be parties to certain proceedings.

Item 105 also inserts appropriate headings for subsections 30(1AA), (1), (1A) and (2) of the Act. These headings are not intended to change the meaning of the subsections but are intended to enhance the readability of the Act.

Item 106

Item 106 inserts a new subsection 33(1AA) into the AAT Act. This new section imposes an ongoing obligation on the person who made the decision that is under review to use his or her best endeavours to assist the Tribunal to make its decision. This provision is consistent with model litigant obligations under the Legal Services Directions issued by the Attorney-General. It is intended to educate decision-makers about their obligations and encourage them to make every effort to assist the Tribunal in its work.

This provision is not intended to impose on the decision-maker any responsibilities or obligations which are the responsibilities and obligations of the applicant.

Item 107

Item 107 repeals current subsection 33(1A) of the AAT Act and substitutes a new subsection 33(1A). Subsection 33(1A) of the Act empowers the President to authorise a member to hold a directions hearing. New subsection 33(1A) provides that the President or an authorised member may hold a directions hearing in relation to a proceeding. This amendment takes account of the insertion of new section 59A by item 180. New section 59A enables the President to authorise a member to be an authorised member for the purposes of one or more specified provisions of the Act. The holding of directions hearings under the new subsection 33(1A) is one such provision. Accordingly there is no longer a need to provide an additional power for the President to authorise a member to hold a directions hearing under subsection 33(1A) as the President is able to authorise the member to do so under new section 59A.

Item 108

Item 108 amends paragraph 33(2)(a) of the AAT Act in two ways. At present, under paragraph 33(2)(a) of the Act directions as to the procedure to be followed at or in connection with the hearing of a proceeding that has not commenced may be issued by:

- the President, or
- a person holding a directions hearing in relation to a proceeding, or
- a member authorised by the President to give directions for the purposes of the paragraph.

The first amendment takes account of the insertion of new section 59A by item 180. New section 59A enables the President to authorise a member to be an authorised member for the purposes of one or more specified provisions of the Act. The issuing of directions as to procedure under paragraph 33(2)(a) of the Act is one such provision. Accordingly there is no longer a need to provide an additional power for the President to authorise a member to issue directions as to procedure under paragraph 33(2)(a) of the Act as the President is able to authorise the member to do so under new section 59A.

The second amendment expands the range of persons who may issue directions as to procedure to include authorised Conference Registrars. This amendment takes account of the amendments made to subsections 33(4) and (5) of the Act by item 110. Subsections 33(4) and (5) of the Act, as amended, will enable the President to authorise a Conference Registrar to be an authorised Conference Registrar for the purposes of paragraph 33(2)(a) of the Act. This amendment expands the range of people available to issue directions as to procedures.

Item 108 also inserts appropriate headings for subsections 33(2) and (2A) of the Act. The insertion of these headings is not intended to change the meaning of the subsections but is intended to enhance the readability of the Act.

Item 109

Item 109 amends subsection 33(3) of the AAT Act by inserting “or Conference Registrar” after “member”. Subsection 33(3) of the Act allows a member to revoke a direction made under section 33 of the Act if that member was so empowered to give such a direction. New subsection 33(3) takes account of the fact that as directions may now be issued by Conference Registrars under new paragraph 33(2)(a), a Conference Registrar should also be able to vary or revoke directions under new subsection 33(3).

Item 109 also inserts an appropriate heading for subsection 33(3) of the Act. The insertion of this heading is intended to change the meaning of the subsection but is intended to enhance the readability of the Act.

Item 110

Item 110 repeals subsections 33(4) and (5) of the AAT Act and inserts new subsections 33(4), (5), (6) and (7). Subsection 33(4) of the Act currently provides that an authorisation given by the President under subsection 33(2) of the Act to enable a member to give directions as to procedure may be of a general or particular nature. Subsection 33(5) of the Act allows the President to revoke or vary any such authorisation made under section 33 of the Act. As the power of the President to

authorise members to be authorised members for the purposes of one or more specified provisions of the Act, including the giving of directions under section 33 of the Act, is provided for in new section 59A, subsection 33(4) of the Act is no longer necessary. Similarly, as the President’s power to revoke authorisations is also contained in new section 59A, subsection 33(5) of the Act is also unnecessary.

New subsection 33(4) allows the President to authorise Conference Registrars to be authorised Conference Registrars for the purpose of giving directions as to procedure under paragraph 33(2)(a) of the Act as amended. This amendment reflects the fact that Conference Registrars are usually responsible for procedural matters, such as the setting of a timetable for the lodging of documents and; therefore, should be able to issue directions (if duly authorised) on such matters without needing to refer the matter back to a member for a directions hearing.

New subsection 33(5) allows the President to make authorisations under subsection 33(4) which are of a general or particular nature. The President would be able to vary or revoke an authorisation under new subsection 33(6). For clarification reasons, new subsection 33(7) contains definitions of “authorised Conference Registrar” and “reviewable decisions” which are specific to section 33 as amended.

Item 111

Item 111 provides that the power of the President to authorise a Conference Registrar to be an authorised Conference Registrar under new subsection 33(4) is a power to make an instrument of an administrative character for the purposes of section 4 of the *Acts Interpretation Act 1901*.

This means that an authorisation may be made pursuant to new subsection 33(4) before the commencement of item 111. However, any such authorisation will not come into operation until item 111 commences.

Item 112

Item 112 repeals sections 34 and 34A of the AAT Act and inserts new sections 34, 34A, 34B, 34C, 34D, 34E, 34F, 34G and 34H. These new sections will form a part of new Division 3 which deals with alternative dispute resolution processes.

New section 34 provides that Division 3 does not apply to proceedings in the Security Appeals Division.

New subsection 34A(1) provides that where an application has been made for review of a decision, the President may:

- direct the holding of a conference of the parties or their representatives in relation to the proceeding, any part of the proceeding or any matter arising out of the proceeding, or
- direct that the proceeding, any part of the proceeding, or any matter arising out of the proceeding be referred for a particular alternative dispute resolution process (other than conferencing).

New subsection 34A(2) empowers the President to issue a direction ordering the holding of conferences in proceedings for the review of certain kinds of decisions. For example, the President can issue a direction specifying that conferences should be held in relation to the review of

decisions made under the *Dairy Produce Act 1986*. Similarly, new subsection 34A(3) empowers the President to issue a direction ordering the holding of a particular alternative dispute resolution process (other than conferencing) in proceedings for the review of certain kinds of decisions. For example, the President can order that all proceedings that review decisions made under the *Safety, Rehabilitation and Compensation Act 1988* be referred for mediation.

New paragraph 34A(4)(a) clarifies that if the President has directed the holding of a conference or another alternative dispute resolution process under new subsection 34A(1), he or she may make another direction under new paragraphs 34A(1)(a) or (b), regardless of whether a direction was given previously under those paragraphs. For example, if the President directs the holding of a conference in relation to a particular proceeding under new paragraph 34A(1)(a), this does not prevent the President from directing the holding of another conference or a particular alternative dispute resolution process, such as a mediation.

Similarly, new paragraph 34A(4)(a) clarifies that if the President has directed a conference or another alternative dispute resolution process is to be held in relation to the review of certain proceedings under new subsections 34A(2) and (3), the President is not prevented from directing a particular proceeding, which would fall within the class of proceedings in new subsection 34A(2) or (3), to a different alternative dispute resolution process. For example, if the President has directed that a conference is to be held for proceedings which review decisions made under the *Safety, Rehabilitation and Compensation Act 1988*, the President is not prevented from directing a particular proceeding for review of a decision made under that Act to a case appraisal.

New subsection 34A(5) requires parties to an alternative dispute resolution process to act in good faith. However, no sanction applies to a party who does not act in good faith in an alternative dispute resolution process. The provision is intended to educate parties about the importance of alternative dispute resolution processes and encourage them to participate fully in such processes. For decision-makers, the provision is consistent with model litigant obligations under the Legal Services Directions issued by the Attorney-General.

New section 34B substantially replicates current subsection 34A(1A) of the Act. New subsection 34B(1) provides that new section 34B applies only to proceedings before the Small Taxation Claims Tribunal. New subsection 34B(2) provides that the Registrar, a District Registrar or a Deputy Registrar must give to an applicant a copy of a statement setting out the alternative dispute resolution processes that are available. New paragraph 34B(2)(a) provides that if the proceeding relates to an application to which subparagraph 24AC(1)(a)(i), paragraph 24AC(1)(aa) or 24AC(1)(b) of the Act applies, the Registrar, a District Registrar or a Deputy Registrar must give the applicant the statement when the application is made. New paragraph 34B(2)(b) provides that if the proceeding relates to an application to which subparagraph 24AC(1)(a)(i) of the Act applies, the Registrar, a District Registrar or a Deputy Registrar must give the applicant a statement setting out what alternative dispute resolution processes are available at the time the applicant notifies the Tribunal of the amount of tax in dispute.

New subsection 34B(3) provides that if the Tribunal considers that it may assist the resolution of the dispute if the proceeding, any part of the proceeding, or any matter arising out of the proceeding were dealt with by an alternative dispute resolution process, the Tribunal must direct that the proceeding, part of the proceeding or any matter arising out of the proceeding be referred for:

- the holding of a conference, or

- another alternative dispute resolution process.

There are two substantial changes between the current subsection 34A(1A) and the new section 34B. First, the current provision only allows the Tribunal to direct the holding of a mediation while the new provision allows the Tribunal to direct the holding of a mediation, conference and the new alternative dispute resolution processes (see also note to item 3). Secondly, the current provision requires the consent of the parties before a matter can be referred to mediation. However, the new provision does not require the Tribunal to obtain the consent of the parties before the matter is referred to an alternative dispute resolution process.

New subsection 34B(4) requires parties to an alternative dispute resolution process to act in good faith. However, no sanction applies to a party who does not act in good faith in an alternative dispute resolution process. The provision is intended to educate parties about the importance of alternative dispute resolution processes and encourage them to participate fully in such processes. For decision-makers, the provision is consistent with model litigant obligations under the Legal Services Directions issued by the Attorney-General.

New subsection 34C(1) gives the President power to give directions about alternative dispute resolution processes. New subsection 34C(2) allows the President to give directions under subsection 34C(1) in relation to:

- the procedure to be followed in the conduct of an alternative dispute resolution process
- the person who is to conduct an alternative dispute resolution process, and
- the procedure to be followed when an alternative dispute resolution process ends.

However, new subsection 34C(3) clarifies that the President's power to issue directions in relation to the matters specified in new subsection 34C(2) does not limit the President's general power conferred by subsection 34C(1). New subsection 34C(4) allows the President to vary or revoke any direction that was given under new subsection 34C(1).

New subsection 34C(5) clarifies that a person is not entitled to conduct an alternative dispute resolution process unless the person is:

- a member – the President, a Deputy President, a member who is a judge, a senior member, or any other member
- an officer of the Tribunal – the Registrar, a District Registrar, a Conference Registrar or a Deputy Registrar, or
- a person engaged under section 34H – new section 34H will allow the Registrar to engage persons with suitable qualifications and experience to conduct alternative dispute resolution processes.

This subsection ensures that only persons with the appropriate qualifications and experience in alternative dispute resolution or the Tribunal's procedures will be entitled to conduct such processes.

New section 34D enables parties to a proceeding to give effect to an agreement reached in an alternative dispute resolution process. New paragraph 34D(1)(a) allows parties to give effect to an agreement if it relates to the proceeding, any part of the proceeding, or a matter arising out of the proceeding.

Preconditions on the Tribunal’s power to give effect to an agreement will be listed in new paragraphs 34D(1)(b), (c) and (d). These are:

- the terms of the agreement are reduced to writing
- the agreement is signed by or on behalf of the parties concerned
- the agreement is lodged with the Tribunal
- a seven day “cooling-off” period has passed after the lodging of the agreement
- no party has lodged a written notice withdrawing from the agreement during the seven day “cooling-off” period, and
- the Tribunal is satisfied that a decision in the terms of the agreement or consistent with those terms would be within the powers of the Tribunal. This precondition will ensure that the Tribunal only exercises powers that are within its jurisdiction. For example, if there was a dispute over the amount of compensation in the review of a matter under the *Safety, Rehabilitation and Compensation Act 1989*, the Tribunal cannot give effect to an agreement if the agreement gave the applicant an amount of compensation above that prescribed by that Act.

Once these preconditions have been satisfied, the Tribunal may give effect to the agreement pursuant to new subsections 34D(2) and (3).

If the agreement relates to the terms of the decision in the proceeding, new subsection 34D(2) allows the Tribunal to give effect to that decision without holding a hearing. If the agreement relates to part of the proceeding, new paragraph 34D(3)(a) allows the Tribunal to give effect to the agreement without dealing with that part any further. Similarly, if the agreement relates to a matter arising out of a proceeding, new paragraph 34D(3)(b) allows the Tribunal to give effect to the agreement without dealing with that matter any further.

New section 34E concerns the admissibility of evidence tendered during an alternative dispute resolution process. The general rule is stated in new subsection 34E(1) and the exceptions to that rule are stated in new subsections 34E(2) and (3).

New subsection 34E(1) provides that evidence of anything said, or any act done, at an alternative dispute resolution process under this Division is not admissible:

- in any court – this includes any federal court, any Supreme Court of a State or Territory, or any other inferior court of a State or Territory
- in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory to hear evidence – for example, proceedings before the Australian Industrial Relations Commission or any proceedings before any other statutory tribunal (such as the Victorian Civil and Administrative Tribunal) or body (such as the Australian Competition and Consumer Commission), or
- in any proceeding before a person authorised by the consent of the parties to hear evidence – for example, an arbitration before any State statutory body or tribunal.

The meaning of “evidence of anything said or any Act done” in new subsection 34E(1) is intended to be broad and would include any document proffered during an alternative dispute resolution process.

New subsection 34E(2) contains the first exception, providing that the general rule set out in subsection (1) does not apply to any evidence that parties to a proceeding (in the Tribunal) agree should be admissible in the hearing.

The second exception in new subsection 34E(3) provides that the general rule in new subsection 34E(1) does not apply to prevent the admission of a case appraisal report or neutral evaluation report prepared by a person conducting an alternative dispute resolution process. However, the exception would not apply if a party to the proceeding notifies the Tribunal before the hearing that they do not want the report admitted in evidence.

New section 34F relates to the eligibility of a person conducting an alternative dispute resolution process to sit as a member of the Tribunal. It provides that a member is not entitled to be a member of a Tribunal constituted for the purposes of the proceeding if:

- the member conducted an alternative dispute resolution process in relation to the proceeding, and
- any party to the proceeding notifies the Tribunal before the hearing that they do not want the member to participate in the hearing.

It is often desirable that a member who has conducted an alternative dispute resolution process hear a matter, particularly if the matter is being heard in a remote location.

New section 34G enables the person conducting an alternative dispute resolution process to permit a party to participate by telephone, closed-circuit television, or any other means of communication. Other means of communication is intended to include any efficient means of conveying information that may become available for use in the Tribunal.

New subsection 34H(1) enables the Registrar to engage, on behalf of the Commonwealth, a person to conduct one or more kinds of alternative dispute resolution processes. New subsection 34H(2) provides that the Registrar must not engage a person under new subsection 34H(1) unless the Registrar is satisfied, having regard to the persons qualifications or experience, that the person is a suitable person to conduct the relevant kind or kinds of alternative dispute resolution processes available under the Act. This subsection is intended to ensure that the Registrar engages persons with suitable qualifications and experience. Suitable qualifications might include graduate or post graduate studies in alternative dispute processes as part of a course at university or other higher education body. Suitable experience might include previous practice of alternative dispute resolution processes privately or through the Family Court of Australia or the Federal Magistrates Court.

Items 113 to 120

Items 113 to 120 are transitional provisions that operate in relation to the conduct of conferences and mediation under current Part IV of the AAT Act.

Item 113 and 114 apply to any direction given under subsection 34A(1) of the AAT Act. Subsection 34A(1) of the Act is repealed by item 112. If a direction was still in force immediately before the commencement of this item, it has effect as if it was given under new paragraph 34A(1)(a). The item does not apply to any part of a direction that identifies the person who is to preside over a conference or who is to be the mediator.

Item 115 applies to any direction given under subparagraph 34A(1A)(b)(ii) of the AAT Act. Subparagraph 34A(1A)(b)(ii) of the Act is repealed by item 112. If a direction was still in force immediately before the commencement of this item, it has effect as if it were given under new paragraph 34B(3)(e). The item does not apply to any part of a direction that identifies the person who is to be the mediator.

Item 116 applies to any direction given under subsection 34(2) of the AAT Act. Subsection 34(2) of the Act is repealed by item 112. If a direction was still in force immediately before the commencement of this item, it has effect as if it were given under new subsection 34A(2).

Item 117 applies to any conference (initiated under section 34) or mediation (initiated under section 34A) that was not completed before the commencement of this item.

Paragraph 117(2)(a) provides that a conference or mediation not completed is taken to be a conference or mediation under new Division 3 of Part IV of the Act (inserted by item 112). Paragraph 117(2)(b) provides that in the case of an uncompleted conference, the person presiding at the conference is taken to have been directed under the new subsection 34C(1) to conduct that conference. Paragraph 117(2)(c) provides that in the case of an uncompleted mediation, the mediator will be taken to have been directed under new subsection 34C(1) to conduct that mediation.

Item 118 applies to an agreement reached in the course of a mediation (initiated under subsection 34A(1) or (2) of the AAT Act) immediately before the commencement of this item. If the Tribunal had not exercised its powers under subsection 34A(5) or (6) of the Act in respect of the agreement, the agreement may be given effect as if it were an agreement made under the new paragraph 34D(1)(a).

In practical terms, this would mean that the Tribunal is not able to give immediate effect to the agreement. The parties (or their representatives) need to go through the procedural steps identified in new paragraphs 34D(1)(b) to (d).

Item 119 applies to anything said, or any act done, immediately before the commencement of this item in the course of a conference or a mediation.

Subitem 117(2) provides that a conference or mediation begun immediately before item 117 commences is taken to be a conference or mediation under the new Division 3 of Part IV of the Act. Subsection 34(3) of the AAT Act provides that unless the parties agree, evidence of anything said or done at a conference is not admissible in the hearing of a proceeding. Subsection 34A(7) of the Act provides, amongst other matters, that anything said or done in the course of a mediation is not admissible in the hearing of the proceeding or in any court proceeding. Item 112 repeals subsections 34(3) and 34A(7) of the Act. Item 119 clarifies that despite the repeal of subsections 34(3) and 34A(7) of the Act, those subsections continue to apply to anything said, or any act done, before the commencement of this item, at a conference or mediation.

Subitem 120(1) applies to a conference that was begun and not completed immediately before the commencement of this item. Subsection 34(4) of the AAT Act is repealed by item 112. Subitem 120(1) provides that despite the repeal of this subsection, the subsection will continue to apply in relation to a conference that was completed before the commencement of this item.

Subitem 120(2) applies to any mediation that was completed immediately before the commencement of item 120. Subsection 34A(8) of the AAT Act is repealed by item 112. Subitem

120(2) provides that despite the repeal of subsection 34A(8) of the Act that subsection will continue to apply in relation to a mediation that was completed before the commencement of this item. However, where subsection 34A(8) of the Act continues to apply, a reference in the subsection to 34A(5) or (6) of the Act is taken to be reference to new subsections 34D(2) or (3).

Items 121 and 122

Item 121 inserts a new Division heading into Part IV of the AAT Act: “Division 4 – Hearings and evidence”. Under this new Division, there are 16 sections: sections 34J, 35, 35AA, 35A, 36, 36A, 36B, 36C, 36D, 37, 38, 38A, 39, 39A and 39B.

Item 122

Item 122 renumbers section 34B of the AAT Act as 34J. This takes account of the insertion of new section 34B by item 112. Item 122 also inserts appropriate headings for subsections 35(1AA), (1) and (2) of the Act. These headings are not intended to change the meaning of the subsections but are intended to enhance the readability of the Act.

Item 123

Item 123 amends subsection 35A(1) of the AAT Act. Section 35A of the Act allows the Tribunal to hold certain parts of a proceeding by way of telephone, closed-circuit television or any other means of communication. Item 112 inserts a new section 34G which states that a person may hold an alternative dispute resolution process by way of telephone, closed-circuit television or any other means of communication. Item 123 removes the reference in subsection 35A(1) of the Act to those parts of a proceeding that fall within the definition of an alternative dispute resolution process in light of new section 34G.

Item 123 also inserts appropriate headings for subsections 36(1AA), (1), (2), (3), (3A), (4), 36A(1AA), (1), (2), (2A), 36B(1AA), (1), (2), (3), (4) and (5) of the Act. These headings are not intended to change the meaning of the subsections but are intended to enhance the readability of the Act.

Items 124 and 125

Item 124 amends paragraph 37(1)(b) of the AAT Act by omitting the phrase “considered by the person to be”. Paragraph 37(1)(b) of the Act states, in part, that the person who made the decision that is under review must give to the Tribunal every other document (or part thereof) that is in the person’s possession and is considered by the person to be relevant to the review of the decision by the Tribunal.

Presently, paragraph 37(1)(b) of the Act holds that a decision-maker can refuse to give the Tribunal a document in his or her possession on the basis that, in his or her subjective opinion, the document is not relevant to the decision that is under review. It is intended that under new paragraph 37(1)(b) of the Act, a decision-maker must give the Tribunal a document in his or her possession if a hypothetical decision-maker would consider that the document is relevant to the decision that is under review. In other words, the test for a document’s relevance to the review of a decision is changed from a subjective one based on the views of the decision-maker to a test that is objective.

Item 124 also inserts appropriate headings for subsections 36C(1AA), (1), (2), (3), 36D(1AA), (1), (2), (3), (4), (5), (6), (7), 37(1AAA), (1) and (1AB) of the Act. The intention is to enhance the readability of the Act rather than to change the meaning of these subsections.

Item 125 is a transitional provision that clarifies that if a person complied with paragraph 37(1)(b) of the AAT Act before the commencement of this item, the amendment made to that paragraph by item 124 would not apply in relation to the proceeding.

Item 126

Item 126 replaces the phrase “serves a copy of the application for the direction on” in subparagraph 37(1AF)(b)(ii) of the AAT Act with the phrase “gives a copy of the application for the direction to”. It is not intended that the meaning of this subsection will change as a result of the substitution. This change is made to modernise the vocabulary within the Act.

Item 126 inserts appropriate headings for subsections 37(1AE), (1AF), (1A) and (1B) of the Act. The intention is to enhance the readability of the Act rather than to change the meaning of these subsections.

Item 127

Item 127 replaces the phrase “served on” in subsection 37(2) of the AAT Act with the phrase “given to”. It is not intended that the meaning of this subsection will change as a result of the substitution. This change is made to modernise the vocabulary within the Act.

Item 127 inserts an appropriate heading for subsection 37(2). The intention is to enhance the readability of the Act rather than to change the meaning of the subsection.

Items 128 and 129

Item 128 replaces the word “prescribed” in subsection 37(2) of the AAT Act with the word “specified”. Currently, regulations can be made under subsection 37(4) of the Act to prescribe the number of copies that a decision-maker must provide when the Tribunal requests a particular document or documents under subsection 37(2) of the Act. The amendment enables the Tribunal to specify in each case how many copies of a document or documents are required when they issue a notice under subsection 37(2) of the Act.

Item 129 is a transitional provision that provides that the amendment made by item 128 does not apply to a notice issued under subsection 37(2) of the AAT Act before commencement of this item.

Item 130

Item 130 replaces the phrase “on whom such a notice is served” in subsection 37(2) of the AAT Act with the phrase “to whom such a notice is given”. It is not intended that the meaning of this subsection will change as a result of the substitution. This change has been made to modernise the vocabulary within the Act.

Item 130 inserts an appropriate heading for subsection 37(3) of the AAT Act. The insertion of the heading is not intended to change the meaning of the subsection but is intended to enhance the readability of the Act.

Item 131

Item 131 repeals subsection 37(4) of the AAT Act. Currently, regulations can be made under subsection 37(4) of the Act to prescribe the number of copies of a document or documents that a decision-maker must provide when the Tribunal issues a notice under subsection 37(2) of the Act. Subsection 37(2) of the Act, as amended by item 128, enables the Tribunal to specify the number of documents required. Accordingly, subsection 37(4) of the Act is redundant.

Item 132

Item 132 inserts a new Division heading into Part IV of the AAT Act: “Division 5 – Procedural powers of Tribunal”. Under this new Division, there are seven sections: 40, 41, 42, 42A, 42B, 42C and 42D.

Item 132 inserts appropriate headings for subsections 39A(1), (2), (3), (4), (5), (6), (8), (11), (12), (18), 36B(1), (2), (3), (5), (6), (7), (8), (9), (10) and (11) of the Act. These headings are not intended to change the meaning of the subsections but are intended to enhance the readability of the Act.

Items 133 to 135

Item 133 amends subsection 40(1C) of the AAT Act by substituting the phrase “or a senior member” with the phrase “a senior member, or an authorised member”. Subsection 40(1C) of the Act provides that a presidential member or a senior member may authorise a person to refuse to comply with a summons issued under subsection 40(1C). Item 180 inserts a new section 59A into the Act that enables the President to authorise a member to be an authorised member for the purposes of one or more specified provisions of the Act. New subsection 40(1C) of the Act reflects this by conferring power on an authorised member (in addition to a presidential member or a senior member) to allow a person to refuse to comply with a summons issued under section 40(1C).

Item 134 amends subsection 40(1C) of the AAT Act by substituting the last occurring phrase “or a senior member” with the phrase “a senior member or an authorised member”. This amendment is made for the same reasons identified in the note on item 133.

Item 134 inserts an appropriate heading for subsection 40(1A) of the Act. The insertion of this heading is not intended to change the meaning of the subsection but is intended to enhance the readability of the Act.

Item 135 amends subsection 40(1D) of the AAT Act by adding authorised member to the types of members who may give a party leave to inspect a document produced under a summons. Current subsection 40(1D) of the Act only allows a presidential or senior member to exercise such a function.

Items 136 to 138

Item 136 amends subsection 40(1E) of the AAT Act by substituting the phrase “of the hearing or directions, as the case may be,” with “specified in the summons”. Subsection 40(1E) of the Act currently provides that if a person is named in a summons for the production of a book, document or thing and the summons was issued before the date of the hearing or the directions hearing, the person may comply with the summons by producing the book, document or thing to the Registry.

This section does not apply if the Tribunal directs otherwise or the person summoned is required to give evidence at the hearing.

New subsection 40(1E) of the AAT Act no longer includes the condition that the summons be issued before the date of the hearing or the directions hearing. Accordingly, if a person is issued with a summons for the production of a book, document or thing, the person may comply with the summons by returning the book, document or thing to the Tribunal before the date specified. The new subsection does not apply if the Tribunal directs otherwise or the person summoned is required to give evidence at the hearing.

Item 137 amends subsection 40(1E) of the AAT Act by substituting the phrase “that hearing” with “the hearing concerned”. Item 136 amends subsection 40(1E) of the Act by removing the condition that a summons be issued before the date of a hearing or directions hearing. The phrase “that hearing” in subsection 40(1E) of the Act refers to the date of the hearing or directions hearing. As this reference is to be removed by item 136, reference will be made to “the hearing concerned”.

Item 137 inserts an appropriate heading for subsection 40(2) of the Act. This heading is not intended to change the meaning of the subsection but is intended to enhance the readability of the Act.

Item 138 clarifies that the amendments made to subsection 40(1E) of the Act by items 136 and 137 do not apply to any summons issued by the Tribunal before the commencement of this item.

Item 139 and 140

Item 139 amends subsection 40(7) of the AAT Act to take account of the insertion into the Act of new alternative dispute resolution processes (see note to item 3). Accordingly, subsection 40(7) of the Act will no longer refer to just a conference or mediation but will refer to alternative dispute resolution processes generally. (Alternative dispute resolution processes as referred to in new subsection 3(1) will encompass conferencing and mediation).

Item 139 also inserts appropriate headings for subsections 40(4), (5) and (7) of the Act. The insertion of these headings is not intended to change the meaning of the subsections but are intended to enhance the readability of the Act.

Item 140 amends subsection 40(7) of the AAT Act by substituting the phrase “conference, or mediator” with “person conducting the alternative dispute resolution process”. As in item 139, the amendment is made to take account of the insertion into the Act of new alternative dispute resolution processes. See also the note to item 3.

Items 141 to 148

Items 141 to 148 amend section 41 of the AAT Act by omitting references to presidential member.

Items 141 to 143 amend subsections 41(2) and (3) of the AAT Act by omitting the phrase “or a presidential member” wherever it occurs. The current subsection 41(2) of the Act allows a presidential member or the Tribunal to order a stay on proceedings or a stay on the operation and implementation of a decision that is under review. Subsection 21(1A) of the Act, as amended by item 49, sets out who constitutes the Tribunal for the purposes of exercising the powers under subsections 41(2) and (3) of the Act. Accordingly, specific references to “presidential member” in these provisions are redundant.

Item 144 is a transitional provision that clarifies that if an order was made by a presidential member under subsections 41(2) and (3) of the Act immediately before the commencement of this item and, the order was in force before the commencement of the item, the order will be deemed to have been made under new subsection 41(2) or (3) of the Act (as the case may be). In other words, if an order was made by the Tribunal under new subsection 41(2) or 41(3) of the Act before or after the commencement of items 141, 142 and 143, the order will still have effect if it was made by a presidential member.

Items 145 to 148 are consequential to the amendments in items 141 to 143 and remove redundant references to “presidential member” in subsections 41(4) and (5) of the Act.

Item 149

Item 149 replaces the phrase “served on” in subsection 41(5) of the AAT Act with the phrase “given to”. It is not intended that the meaning of this subsection will change as a result of the substitution. This change is made to modernise the vocabulary within the Act.

Item 150

Item 150 repeals subsections 41(7) and 41(8) from the AAT Act. Subsection 41(7) of the Act empowers the President to authorise a senior member, either generally or in specific circumstances, to exercise powers under subsections 41(2), 41(3), 41(4) and 41(5) of the Act. Subsection 41(8) of the Act allows the President to revoke or vary any authorisation made under subsection 41(7) of the Act. As subsections 41(2), (3), (4) and (5) of the Act are amended by items 141 to 149, subsection 41(7) and 41(8) of the Act are redundant. This is because the person who may exercise the powers referred to in subsections 41(2), (3), (4) and (5) of the Act is the Tribunal as identified by new subsection 21(1A) (see note to item 50).

Item 151 to 152

Item 151 repeals existing section 42 of the AAT Act and inserts a new section 42. New section 42 sets out how the Tribunal resolves disagreements in multi-member tribunals.

New subsection 42(1) provides that if a Tribunal is constituted by two or more members and they do not agree about any matter arising in the proceeding, the view of the presiding member will prevail. (Subsection 22(1) sets out the member who presides in a proceeding.) The phrase “any matter arising in the proceeding” includes directions to be made by the Tribunal at a directions hearing and the ultimate decision as to the outcome of the review before the Tribunal.

New subsection 42(2) provides for the resolution of disagreements between a Tribunal constituted by three members. The new subsection applies to disagreements about any matter arising in a proceeding apart from disagreements about a question of law. New paragraph 42(2)(d) provides that if there is a disagreement and two members hold the same opinion, that view prevails. New paragraph 42(2)(e) provides that if all three members have different opinions, the view of the presiding member prevails.

New subsection 42(3) applies where there is a disagreement about a question of law and the Tribunal is constituted by three members. If there is such a disagreement, the view of the presiding member prevails.

New subsection 42(4) clarifies that a reference to a question of law in new section 42 includes a reference to a question of whether a particular question is one of law.

Item 152 provides that section 42 of the AAT Act, as amended, does not apply to a proceeding where the Tribunal had already been constituted by one of more members before the commencement of the item.

Items 153 to 155

Item 153 amends subsection 42A(2) of the AAT Act by substituting the phrase “, a conference mentioned in section 34, or a mediation under section 34A” with “or an alternative dispute resolution process under Division 3”. As in items 139 and 140, the amendment has been made to take account of the insertion into the AAT Act of new alternative dispute resolution processes (see note to item 3).

Item 153 inserts appropriate headings for subsections 42A(1), (1A) and (2) of the AAT Act. It is not intended that the meaning of the subsections will change but the amendments will enhance the readability of the Act.

Item 154 omits the words “conference, mediation” from subsection 42A(3) of the Act consequential to the insertion of new subsection 42A(3A) by item 155. Item 155 inserts a new subsection 42A(3A) into the Act. New subsection 42A(3A) provides that a person or his or her representative is taken to have appeared in an aspect of a proceeding referred to in subsection 42A(2) of the Act if they were invited to do so by telephone, closed circuit television, or any other means of communication.

Item 155 inserts an appropriate heading for subsection 42A(4) of the Act. The intention is to enhance the readability of the Act rather than to change the meaning of the subsection.

Item 156

Item 156 amends subsection 42A(5) of the AAT Act by allowing an authorised member to dismiss an application on the basis that the applicant has failed within a reasonable time to proceed with the application or comply with a direction by the Tribunal in relation to the proceeding. Item 180 inserts a new section 59A into the Act enabling the President to authorise a member to be an authorised member for the purposes of a one or more specified provision of the Act. The power given by subsection 42A(5) of the Act is one such provision.

Item 156 inserts appropriate headings for subsections 42A(5), (6), (7) and (8) of the AAT Act. The intention is to enhance the readability of the Act rather than to change the meaning of the subsections.

Item 157

Item 157 amends paragraph 42C(1)(a) of the AAT Act to take account of the insertion of new alternative dispute resolution processes in Division 3 of the Act. The reference to “a mediation under section 34A” is replaced with a reference to “an alternative dispute resolution process under Division 3”. Agreements reached in the course of an alternative dispute resolution process are excluded from the operation of section 42C of the Act.

Item 158

Item 158 amends subsection 42C(2) of the AAT Act by inserting “an agreement as” after the words “reached is”. The amendment clarifies, rather than changes, the meaning of the provision.

Item 159

Item 159 adds a note to the end of subsection 42D(2) of the AAT Act referring to time limits for complying that would be inserted into the Act by item 160 (new subsection 42D(5)). This item also inserts an appropriate heading for subsection 42D(2) of the Act.

Items 160 and 161

Item 160 inserts new subsections 42D(5), (6) and (7) into the AAT Act. Subsection 42D(1) of the Act allows the Tribunal to remit a matter to the person who made the decision (the decision-maker) at any stage of the proceeding for reconsideration. Under subsection 42D(2) of the Act, the decision-maker is empowered to affirm the decision, vary the decision or set aside the decision and make a new decision in substitution for the decision set aside. New subsection 42D(5) provides that the decision-maker must reconsider the decision and, affirm, vary or set aside the decision within one of the following time limits:

- if the Tribunal specified a period when remitting the decision – that period, or
- if the Tribunal did not specify a time period, the period would be 28 days beginning on the day the decision was remitted to the decision-maker.

New subsection 42D(6) provides that the Tribunal can extend the time period applicable under new subsection 42D(5) on application by the decision-maker.

New subsection 42D(7) provides that if the decision-maker fails to vary, affirm or set aside the decision with the time period specified in new subsection 42D(5), the person will be taken to have affirmed the decision. New subsection 42D(8) provides that where the decision-maker affirms the decision, the proceeding resumes.

Item 161 is a transitional provision providing that new subsections 42D(5), (6), (7) and (8) will only apply in relation to matters remitted to a decision-maker under subsection 42D(1) after the commencement of this item.

Item 162

Item 162 inserts a new Division heading into Part IV of the AAT Act called “Division 6 – Tribunal’s decision on review”. Under this new Division, there is one sections 43.

Items 163 to 165

Item 163 replaces the phrase “served on” in subsection 43(2A) of the AAT Act with the phrase “given to”. The meaning of this subsection will not change as a result of the substitution. Item 164 replaces the word “furnish” wherever it appears in subsection 43(2A) with the word “give”.

Item 165 replaces the phrase “served on” in subsection 43(3) with the phrase “given to”. These changes modernise the vocabulary within the Act.

Item 163 also inserts appropriate headings for subsections 43(1) and (2) of the Act and replaces the heading to section 43. Item 165 inserts appropriate headings for subsections 43(3), (4), (5A) and (6) of the Act. The intention is to enhance the readability of the Act rather than to change the meaning of the provisions.

Item 166

Item 166 inserts a new Division heading into Part IV of the AAT Act: “Division 7 – Miscellaneous”. Under this new Division, there will be three sections: section 43AAA, 43AA and 43A. The insertion of Division headings into Part IV is to improve accessibility and readability.

Item 166 inserts appropriate headings for subsections 43AAA(1), (2), (3), (4), (6) and (7) of the Act. The insertion of these headings is not intended to change the meaning of the subsections but is intended to enhance the readability of the Act.

Item 167

Item 167 replaces the word “furnished” wherever it appears in section 43A of the AAT Act with the word “given”. It is not intended that the meaning of this section will change as a result of the substitutions. This change is made to modernise the vocabulary within the Act.

Item 167 also inserts appropriate headings for subsections 43AA(1), (3) and (4) of the Act. These headings are not intended to change the meaning of the subsections but are intended to enhance the readability of the Act.

Items 168 to 170

Item 168 omits the phrase “or of the Australian Capital Territory” from paragraph 43B(1)(b) of the AAT Act. Paragraph 43B(1)(b) provides that Part IVA of the Act applies in relation to a proceeding that was before the Tribunal under a power conferred to it by or under a law of a State or of the Australian Capital Territory. This amendment is consequential to the amendment to the definition of “State” by item 8. Item 8 amends the definition of “State” in subsection 3(1) of the AAT Act by adding the phrase “and the Australian Capital Territory”. This will mean the definition of “State” will not only include the states of Australia but also the Australian Capital Territory and the Northern Territory. Therefore, the amendment made by item 168 does not change the effect of paragraph 43B(1)(b). See also the note to item 8.

Item 168 also omits the reference to the AAT Act in the heading above section 43B. Item 169 deletes the first occurring phrase “or of the Australian Capital Territory” from subsection 43B(2). Item 170 deletes the phrase “or of the Australian Capital Territory, as the case requires” from subsection 43B(2). These amendments are consequential to the amendment of the definition of “State” in subsection 3(1) by item 8. See also the note to item 8.

Item 171

Item 171 replaces the word “furnished” in paragraph 44(2A)(a) of the AAT Act with the word “given” of the AAT Act. The meaning of this subsection will not change as a result of the substitution. This change is made to modernise the vocabulary within the Act.

Item 171 inserts appropriate headings for subsections 44(1), (2), (2A), (3) and (4) of the Act. These headings are not intended to change the meaning of the subsections but are intended to enhance the readability of the AAT Act.

Item 172

Item 172 amends subsection 44(6) by inserting new paragraphs 44(6)(a) and 44(6)(b) into the AAT Act after the word “again”. Subsection 44(6) is concerned with the remittal of matters to the Tribunal by the Federal Court following an appeal on a question of law. New paragraph 44(6)(a) replicates the existing words that appear after “again” in subsection 44(6). New paragraph 44(6)(b) provides that the Tribunal may, for the purposes of the proceeding, have regard to any record of the proceeding before the Tribunal prior to an appeal (including a record of any evidence taken in the proceeding), regardless of whether the Tribunal is reconstituted for the hearing. However, the Tribunal may only have regard to the record of the proceeding if it would be consistent with the directions of the Court.

Item 172 inserts an appropriate heading for subsection 44(6) of the AAT Act. The insertion of this heading is not intended to change the meaning of the subsection but is intended to enhance the readability of the Act.

Item 173 to 175

Item 173 inserts new subsections 44(7), (8), (9) and (10) into the AAT Act. New subsection 44(7) provides that the Federal Court of Australia will be able to make findings of fact where a decision of the Tribunal is appealed to the Court under subsection 44(1). However, new paragraphs 44(7)(a) and 44(7)(b) set out conditions on the Court’s ability to make such findings.

Paragraph 44(7)(a) places a significant limitation on the Court’s power to make findings of fact by providing that it can only do so if they are consistent with those made by the Tribunal. This limitation is intended to ensure that the Court does not re-open factual matters that have already been settled by the Tribunal. However, the Court can make findings of fact overriding those of the Tribunal where the Tribunal’s findings are the result of an error of law. Moreover, the Court will be able to make findings of fact where the Tribunal did not make any findings in relation to relevant facts. It is also important to note that these amendments do not in any way alter the grounds on which an appeal may be made to the Court from a Tribunal decision. Appeals will continue to lie to the Court on questions of law only.

Paragraph 44(7)(b) provides that the Court can make findings of fact if it appears to the Court that it is convenient to do so, having regard to the following considerations:

- the extent (if any) to which it is necessary for the fact to be found
- the means by which those facts might be established
- the expeditious and efficient resolution of the whole of the matter to which the proceeding before the Tribunal relates
- the relative expense to the parties of the Court, rather than the Tribunal, making findings of fact
- the relative delay to the parties of the Court, rather than the Tribunal, making findings of fact
- whether any of the parties considers that it is appropriate for the Court, rather than the Tribunal to make findings of fact, and

- such other matters (if any) as the Court considers relevant.

New subsection 44(8) provides that the Court may have regard to evidence in the proceeding before the Tribunal and receive further evidence for the purposes of making findings of fact under new subsection 44(7).

These amendments are not intended to reduce the Tribunal's role as the primary finder of fact in review proceedings. Rather, it is intended to allow the Federal Court to dispose of appropriate matters completely rather than remitting them to the Tribunal for the further taking of evidence. The amendments are not intended to bring about far-reaching changes to the administrative law system, but rather will improve the efficiency of the review process and provide for more immediate outcomes in a small but significant number of proceedings.

Item 174 inserts new subsections 44AA(11) and (12). New subsection 44AA(11) provides that new subsections 44(7), (8) and (9) will apply to an appeal to the Federal Court of Australia (under subsection 44(1) of the AAT Act) that is transferred to the Federal Magistrates Court. This will mean that the Federal Magistrates Court will also be able to make findings of fact within the limitations imposed by new subsections 44(7) and 44(8).

New subsection 44AA(12) clarifies that the jurisdiction of the Federal Magistrates Court set out in subsection 44AA(8) will include the jurisdiction to make findings of fact under new subsection 44(7).

Item 173 also inserts appropriate headings for subsections 44AA(1), (4), (7), (8), (9), (10), 44A(1) and (2) of the Act. The insertion of these headings is not intended to change the meaning of the subsections but is intended to enhance the readability of the Act.

Item 175 clarifies that the amendments made to sections 44 and 44AA by items 173 and 174 will only apply in relation to an appeal made under subsection 44(1) of the AAT Act after the commencement of this item.

Items 176 and 177

Item 176 repeals paragraphs 45(1)(a) and (b) of the AAT Act and inserts a new paragraph 45(1)(a). Current paragraphs 45(1)(a) and (b) prescribe the type of member that may authorise the referral of a question of law to the Federal Court of Australia. New paragraph 45(1)(a) provides that a question of law can only be referred to the Federal Court of Australia with the concurrence of the President of the Tribunal. Such a provision will ensure that questions of law are only referred to the Federal Court in exceptional circumstances that justify the guidance of the Court. Referrals to the Federal Court can be costly for the parties concerned and also add to the time taken for the Tribunal to reach its ultimate decision in a proceeding.

Item 176 also inserts appropriate headings for subsections 46(1) and (2). The insertion of these headings is not intended to change the meaning of the subsections but is intended to enhance the readability of the AAT Act.

Item 177 clarifies that the amendment made to subsection 45(1) of the AAT Act by item 176 will only apply in relation to questions of law referred to the Federal Court of Australia after the commencement of this item.

Item 178

Item 178 repeals section 54 of the AAT Act and inserts a new section 54. The effect of the change is to clarify at what point in time an appointed member will be taken to have resigned his or her appointment to the Tribunal. New section 54 provides that an appointed member will be taken to have resigned from his or her appointment on the day his or her resignation is received by the Governor-General unless they state a later date in the resignation. This is consistent with amendments made by items 29 and 32. New section 54 is not intended to change the method by which an appointed member of the Tribunal can resign his or her appointment under the current section 54 of the AAT Act.

Item 178 also inserts appropriate headings for subsections 52(1), (2), 56(2), (4), (5), (7), (8), (9) and (10) of the Act. The insertion of these headings is not intended to change the meaning of the subsections but is intended to enhance the readability of the AAT Act.

Item 179

Item 179 replaces the word “furnish” in subsection 58(1) of the AAT Act with the word “give”. It is not intended that the meaning of this subsection will change as a result of the substitution. This change has been made to modernise the vocabulary within the Act.

Item 180

Item 180 inserts a new section 59A into the AAT Act. New section 59A allows the President to authorise a particular member to exercise a power (or powers) under a specified provision (or specified provisions). The member who is authorised will be known as an authorised member (see definition in new subsection 3(1) inserted by item 4). New subsection 59A(2) allows the President to make the authorisation or authorisations that are general or limited to:

- a particular reviewable decision or particular reviewable decisions
- a particular class or classes of reviewable decisions
- a particular proceeding or particular proceedings, or
- a particular class or classes of proceedings.

(New subsection 59A(4) provides a definition of reviewable decision for the purposes of new section 59A. A reviewable decision means a decision in respect of which an application to the Tribunal for review has been, or may be, made.)

Any authorisation may be varied or revoked under new subsection 59A(3).

The President is able to authorise a member to exercise powers under the following provisions of the AAT Act (as amended): paragraphs 21(1A)(a) and 25(7)(e), subsection 33(1A), paragraph 33(2)(a) and subsections 40(1C) and (1D) of the Act.

Item 181

Item 181 provides that the power of the President to make an authorisation under new section 59A is a power to make an instrument of an administrative character for the purposes of section 4 of the *Acts Interpretation Act 1901*.

This means that an authorisation may be made pursuant to new subsection 59A before the commencement of item 180. However, any such authorisation will not come into operation until item 181 commences.

Items 182 to 184

Items 182 and 183 amend subsection 60(1A) of the AAT Act consequential to the changes made to Division 3 of Part IV of the Act. Division 3 of Part IV of the Act expands the range of alternative dispute resolution processes a person may have recourse to beyond mediation and conferencing. Items 182 and 183 replace references to a “mediator” with references to an “alternative dispute resolution facilitator”. Subsection 60(1A), as amended, has the effect of affording the same protection and immunity to a person conducting an alternative dispute resolution process as that enjoyed by a Justice of the High Court.

Item 182 also inserts appropriate headings for subsections 60(1), (1A) and (2) of the Act and amends the heading for section 60 of the Act. The insertion and amendment of these headings is not intended to change the meaning of the provisions but is intended to enhance the readability of the Act.

Item 184 is a transitional provision that clarifies that any act done or omitted to be done by a mediator, in the performance of his or her duties as a mediator under this Act, before the commencement of this item, will be afforded the same protection and immunity as a Justice of the High Court of Australia as if subsection 60(1A) of the Act was never amended.

Items 185 and 186

Item 185 inserts new subsections 60(1B) and 60(1C) into the AAT Act. New subsection 60(1B) will afford the same immunity and protection as a Judge of the High Court to a Registrar, a District Registrar or Deputy Registrar in performing the duties of those offices under sections 40 or 69A of the Act. Subsection 60(1) of the Act affords members of the Tribunal the same immunity and protection as a Judge of the High Court in the performance of his or her duties as a member. The Registrar, District Registrars and Deputy Registrar are required to perform the duties of members under sections 40 and 69A of the Act. Accordingly, they will be afforded the same immunity and protection in the performance of their duties under these provisions.

New subsection 60(1C) will afford the same immunity and protection as a Judge of the High Court to a Conference Registrar in the performance of the duties of the office under new paragraph 33(2)(a). Subsection 60(1) of the Act affords members of the Tribunal the same immunity and protection as a Judge of the High Court in the performance of his or her duties as a member. Conference Registrars will be required to perform the duties of members under new paragraph 33(2)(a). Accordingly, Conference Registrars will be afforded the same immunity and protection in the performance of their duties under that provision.

Item 186 adds a definition of alternative dispute resolution facilitator for the purposes of section 60 of the Act (as amended). Alternative dispute resolution facilitator means a person who presides or performs any other function, in relation to the conduct of an alternative dispute resolution process, under Division 3 of Part IV.

Item 186 also inserts an appropriate heading for subsection 60(3) of the Act. The insertion of this heading is not intended to change the meaning of the subsection but is intended to enhance the readability of the Act.

Item 187 to 189

Item 187 repeals sections 61, 62 and 62A of the AAT Act and inserts re-drafted versions of these sections. Item 189 repeals section 63 and inserts a re-drafted version of that section.

Section 61 of the Act makes it an offence to fail to comply with a summons to appear before the Tribunal or to produce a book, document or things to the Tribunal. Section 62 of the Act makes it an offence for a person to refuse or fail to be sworn in, to refuse or fail to answer questions or to refuse or fail to produce a document that the person was required to produce under a summons. Section 62A of the Act makes it an offence for a person to give false or misleading evidence. Section 63 of the Act makes it an offence for a person to insult a member, interrupt proceedings of the Tribunal, create or take part in a disturbance near where the Tribunal is sitting, or do anything that would constitute contempt of court (if the Tribunal were a court of record).

New sections 61, 62, 62A and 63 are based on the corresponding existing sections but are redrafted in the style of the *Criminal Code*. The new sections separate the physical and fault elements of each offence. The new sections also increase the penalties for each offence from \$1000 or 3 months imprisonment to 30 penalty units (under section 4AA of the *Crimes Act 1914*, 30 penalty units is equal to \$3300) or imprisonment for six months or both. A court is given the discretion to impose a monetary penalty or a term of imprisonment or both. At present a Court can choose either a monetary penalty or imprisonment. The increase in the term of imprisonment in these offences is consistent with Commonwealth criminal policy, as expressed in guidelines issued by the Minister for Justice and Customs (*A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*), that if imprisonment is an appropriate penalty for an offence, a term of at least 6 months should be specified. These guidelines also set out the appropriate ratio between a fine and a term of imprisonment. This ratio is 5 penalty units to each 1 month of imprisonment. The penalties in new sections 61, 62, 62A and 63 conform to this ratio.

Notes after new subsections 61(2), 61(4), 62(2), 62(4) and 62(6) clarify that a defendant bears the evidential burden in relation to these subsections and makes reference to subsection 13.3(3) of the *Criminal Code* (evidential burden of proof - defence).

Item 188 amends section 62B to take account of the insertion of new alternative dispute resolution processes in Division 3 of the Act. New section 62B provides that new sections 61, 62, and 62A (as amended) apply in relation to a directions hearing or an alternative dispute resolution process as if it were a proceeding before the Tribunal.

Item 190

Item 190 amends subsection 64(1) of the AAT Act by omitting references to the Australian Capital Territory and the Northern Territory. Subsection 64(1) of the Act provides for the establishment of at least one Registry in each State, in the Australian Capital Territory and in the Northern Territory. The specific reference to the Australian Capital Territory and the Northern Territory is no longer necessary in subsection 64(1) of the Act because item 8 of the Bill amends the definition of "State" in subsection 3(1) of the Act to include the Australian Capital Territory. Therefore the reference to

“State” in subsection 64(1) of the Act includes the States of Australia, the Northern Territory and the Australian Capital Territory.

Item 191

Item 191 replaces the word “furnished” in subsection 66(2) of the AAT Act with the word “given”. It is not intended that the meaning of this subsection will change as a result of the substitution. This change is made to modernise the vocabulary within the Act.

Item 191 also inserts appropriate headings for subsections 66(1), (2), (3) and (4) of the Act. The insertion of these headings is not intended to change the meaning of these subsections but is intended to enhance the readability of the Act.

Item 192 to 197

Item 192 provides that the phrase “to appear as a witness before the Tribunal” in subsection 67(1) of the AAT Act is substituted by the phrase “under this Act”. Item 193 provides that the word “attendance” in subsection 67(1) of the Act will be substituted by the phrase “compliance with the summons”. Item 194 amends paragraph 67(2)(a) of the Act by substituting the word “witness” with the word “person”. Item 195 amends paragraph 67(2)(a) of the Act by removing the phrase “other than the person who made the decision subject to the review”. Item 196 amends subsection 67(3) by substituting the word “witness” with the word “person”.

The purpose of these amendments is to extend the entitlement to be paid fees and allowances for expenses to any person who is summoned by the Tribunal under subsection 40(1A) of the Act and not just those persons who are summoned to attend the hearing as a witness. Subsection 67(1) of the Act provides that a person who is summoned to appear as a witness before the Tribunal is entitled to be paid fees and allowances for his or her attendance. Under subsection 40(1A) of the Act, the Tribunal is able to summons a person to appear before the Tribunal to give evidence, to give evidence and produce books, documents or things or to only produce books, documents and things. Subsection 40(1E) of the Act provides that a person who is summoned to produce a book, document or thing is not required, unless the Tribunal otherwise directs, to attend the hearing unless they are also required to give evidence at the hearing. Such persons may instead produce the documents at the Registry. This amendment to subsection 67(1) of the Act is intended to extend the entitlement to fees and allowances for expenses to any person who is summoned by the Tribunal under subsection 40(1A) of the Act and not just those persons who are summoned to appear as a witness before the Tribunal.

Item 193 amends the heading to section 67 of the Act by substituting the phrase “compliance with summons” for the word “attendance”. This change has been made to reflect broadening of the obligation to pay fees and allowances for expenses to all persons who are required to comply with summons issued by the Tribunal, not just those summoned to appear as a witness.

Under current subsection 67(3) of the AAT Act, the Tribunal may, in its discretion, order that fees and allowance payable to a witness under paragraph 67(2)(a) shall be paid, in whole or in part, by the Commonwealth. Item 196 amends this subsection by replacing the word “witness” with “person” to reflect the expansion of the obligation in subsection 67(1) of the Act. The discretion on the Tribunal in subsection 67(3) of the Act is broad. An example of a situation where the Tribunal

might exercise its discretion and order the Commonwealth to pay costs instead of a party would be where the payment of such costs would cause the party financial hardship.

Item 197 provides that the obligation to pay fees and allowances for compliance with a summons under subsection 67(1) of the Act, as amended, will only apply to a summons issued after the commencement of this item. However, the obligation imposed on parties and the Commonwealth to pay fees and allowances for expenses to persons requested to appear as a witness before the Tribunal under current subsection 67(1) of the Act will still apply to summons issued before the commencement of this item.

Item 198

Item 198 omits the phrase “served on or” wherever it occurs in section 67A of the AAT Act. This change is not intended to change the effect of the section and has been made to enhance the readability of the Act by the removal of superfluous wording.

Item 199

Item 199 provides that the phrase “on or to whom notices may be served” in subsection 67A(b) of the AAT Act will be substituted with the phrase “to whom notices may be”. It is not intended that the meaning of the subsection will change as a result of the substitution. This change has been made to modernise the vocabulary within the Act.

Item 200

Item 200 inserts new section 68AA into the AAT Act. New subsections 68AA(1) and (2) are modernised versions of subsections 3(4) and (5) of the AAT Act (respectively). The modernised versions will replace archaic language such as “furnish” and “serve” with the word “give”. Subsections 3(4) and (5) have been deleted by item 10 and new subsections 68AA(1) and (2) are not intended to operate differently from the deleted subsections.

New subsection 68AA(3) provides that if a document, statement, notice or other notification is given by means of an electronic communication (as defined within the *Electronic Transactions Act 1999*), it will be taken to have been given on the day it is dispatched. New subsection 68AA(4) clarifies that new subsection 68AA(4) will operate despite provisions within the Electronic Transactions Act providing otherwise.

Item 201

Item 201 is a transitional provision that applies to any act or thing done before the commencement of this item, and which was done on the basis that a particular provision of the AAT Act referred to the terms “furnish” or “serve” (or one of their derivatives). Subitem 201(2) provides that after the commencement of item 201, an act or thing done will be taken to have been done as if the provision had referred to the term “give” (or one of its appropriate derivatives). Subitem 201(3) clarifies this item has been inserted for the avoidance of doubt.

Item 202

Item 202 allows the Governor-General to make regulations in relation to transitional matters arising out of amendments made by any of the items in Schedule 1. This item has been inserted as a

precautionary measure so that any possible uncertainty as to the operation of new or repealed provisions can be alleviated by the making of regulations.

Amendments to the *Archives Act 1983*

Item 203

Item 203 amends the *Archives Act 1983* by replacing any references to subsection 42(1) of the AAT Act with references to subsection 42(3) of that Act.

Section 48 of the Archives Act provides that in an application for a proceeding under subsection 46(1) of the Archives Act, subsection 42(1) of the AAT Act applies as if that subsection had been omitted and substituted with subsection 48(1) of the Archives Act. Item 151 amends section 42 by repealing the current section and substituting a new more comprehensive section 42. New subsection 42(3) will have substantially the same operation as current subsection 42(1) which is repealed by item 151. Therefore all references to subsection 42(1) of the AAT Act in section 48 of the Archives Act need to be substituted with a reference to new subsection 42(3).

Items 204 and 205

Item 204 amends subsection 48(1) of the Archives Act by removing the phrase “(including the question whether a particular question is one of law)”.

Subsection 48(1) of the Archives Act sets out the manner in which the AAT constituted by three presidential members is to decide questions of law and clarifies that a question of law includes the question whether a particular question is one of law. Item 151 of the Bill inserts into the AAT Act new subsection 42(4) which also clarifies that a question of law covers the question whether a particular question is one of law. As clarification of what constitutes a question of law is covered by new subsection 42(4), of the Bill it is unnecessary for section 48(1) of the Archives Act to provide clarification on this issue as well.

Item 205 is a transitional provision that provides that the amendments made to section 48 of the Archives Act by items 203 and 204 do not apply to proceedings where the Tribunal has been constituted by one or more members immediately before the commencement of this item.

Amendments to the *Commonwealth Electoral Act 1918*

Item 206

Item 206 repeals subsection 141(6) of the *Commonwealth Electoral Act 1918* and inserts a new subsection 141(6) into that Act.

Subsection 141(6) currently provides that when the Tribunal is reviewing certain decisions under subsection 141(1) of the Commonwealth Electoral Act, the Tribunal is to be constituted by three Presidential members who are judges of the Federal Court of Australia. New subsection 141(6) provides that where the Tribunal is reviewing such decisions the Tribunal is to be constituted by three members at least one of whom is a judge of the Federal Court of Australia. The requirement for at least one member of the Tribunal to be a judge of the Federal Court recognises the fact that as the Chairperson of the Electoral Commission is required to be a judge of the Federal Court it is appropriate that his or her decisions are reviewed by at least one member who is of equal standing and two other members. The requirement that not all members of the Tribunal must be judges of

the Federal Court will give the President of the AAT greater flexibility in constituting the Tribunal and managing its workload.

Item 206 inserts a new subsection 141(6A) into the Commonwealth Electoral Act. This subsection clarifies that subsection 21(1AA) of the AAT Act, which provides that the AAT cannot be constituted by more than one presidential member who is a judge, does not apply to applications for review made under subsection 141(5) of the Commonwealth Electoral Act. This allows the Tribunal hearing a matter listed under subsection 141(1) of the Commonwealth Electoral Act to be constituted by more than one judge in appropriate circumstances.

Amendments to the *Environment Protection and Biodiversity Conservation Act 1999*

Item 207

Item 207 repeals subsection 303GJ(2) of the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act). Subsection 303GJ(2) of the EPBC Act provides that the President of the AAT is to ensure that the Tribunal is constituted by persons who have special knowledge or skill in relation to environmental matters for the purpose of reviewing certain decisions. New section 23B of the AAT Act (inserted by item 66) requires the President, when constituting the Tribunal for the purposes of a proceeding, to have regard to the degree to which it is desirable for all or any of the persons who are to constitute the Tribunal to have knowledge, expertise or experience in relation to the matters to which the proceeding relates. See also the note to item 66. Accordingly, subsection 303GJ(2) of the EPBC Act is now redundant.

Amendments to the *Federal Proceedings (Costs) Act 1981*

Items 208 and 209

Item 208 amends subsection 10A(1) of the *Federal Proceedings (Costs) Act 1981* (the FPC Act) by removing the reference to section 23A of the AAT Act. Section 10A of the FPC Act provides for the AAT to grant a costs certificate to a party where a decision of the AAT has to be reheard because of the operation of section 23 or 23A of the AAT Act. Section 23A currently provides that where the AAT is constituted by two members for the purposes of a proceeding and those members do not agree on the decision to be made in the proceeding, the proceeding is to be reheard. Item 66 repeals section 23A of the AAT Act. Item 151 inserts new section 42 which sets out how disagreements will be resolved. In relation to proceedings heard before two members, new section 42 provides that where those members do not agree about any matter arising in the proceedings the view of the presiding member prevails. As section 23A is being repealed, the reference to that section in subsection 10A(1) of the FPC Act is redundant. As a matter will not be required to be reheard under new section 42 it is not necessary to substitute a reference to that provision.

Item 209 provides that the amendments made to subsection 10A(1) of the FPC Act by item 208 do not apply in relation to a rehearing that began before the commencement of this item.

Amendments to the *Freedom of Information Act 1982*

Item 210

Item 210 amends section 58D of the *Freedom of Information Act 1982* (the FOI Act) by replacing any references to subsection 42(1) of the AAT Act with references to subsection 42(3).

Section 58D of the FOI Act provides that in an application for a proceeding referred to in subsection 58B(1) of the FOI Act, subsection 42(1) of the AAT Act applies as if that subsection had been omitted and substituted with the provision set out in section 58D of the FOI Act. Item 151 amends section 42 by repealing the current section and substituting a new more comprehensive section 42. New subsection 42(3) will have substantially the same operation as current subsection 42(1) which is to be repealed under item 151. Therefore all references to subsection 42(1) of the AAT Act in section 58D of the FOI Act need to be substituted with a reference to the new subsection 42(3) of the AAT Act.

Item 211

Item 211 amends section 58D of the FOI Act by removing the phrase “(including the question whether a particular question is one of law)”.

Section 58D of the FOI Act sets out the manner in which the AAT, when constituted in accordance with subsection 58B(2) of the FOI Act by three presidential members, is to decide questions of law. The section also clarifies that a question of law includes the question whether a particular question is one of law. Item 151 of the Bill inserts into the AAT Act a new subsection 42(4) which also clarifies that a question of law covers the question whether a particular question is one of law. As clarification of what constitutes a question of law is covered in new subsection 42(4) it is unnecessary for section 58D of the FOI Act to provide clarification on this issue as well.

Item 212

Item 212 provides that the amendments to section 58D made by items 210 and 211 do not apply to a proceeding where the Tribunal was constituted for the purposes of the proceeding by one or more members immediately before the commencement of this item.

Item 213

Item 213 amends section 64 of the FOI Act by inserting a new subsection 64(1A).

Section 37 of the AAT Act requires an agency to produce to the Tribunal all documents within its possession or control that are relevant to the review. Once an agency has fulfilled its obligation under section 37 of the Act, it is not required to lodge a document which is claimed to be exempt under the FOI Act. However section 64 of the FOI Act provides that the Tribunal can order the production for inspection of a document that is claimed to be exempt, but only for the purpose of deciding whether the document is an exempt document. If upon inspection the Tribunal is satisfied that the document is an exempt document the Tribunal must return the document without permitting any person other than a member of the Tribunal as constituted for the purposes of the proceeding, or a member of the staff of the Tribunal in the course of the performance of his or her duties as a member of that staff, to have access to, or disclose the contents of, the document.

New subsection 64(1A) provides that if an agency voluntarily produces an exempt document to the Tribunal then the Tribunal is prohibited from disclosing the documents to any person other than a member of the Tribunal as constituted for the purposes of the proceeding, or a member of the staff of the Tribunal in the course of the performance of his or her duties as a member of that staff. This amendment clarifies that the AAT is obliged to protect documents that are claimed to be exempt from further disclosure where they have been produced voluntarily or under a section 64(1) order. The object of new subsection 64(1A) is to encourage the voluntary production of documents to the

AAT by agencies. Voluntary production will improve the efficiency of the AAT by speeding up proceedings rather than requiring the AAT in all cases to make an order for production.

Item 214

Item 214 amends section 64 of the FOI Act by inserting a new subsection 64(4A). The operation of section 64 of the FOI Act generally means the AAT cannot order the production of a document before the commencement of a hearing. This reduces the ability of the Tribunal to resolve disputes before a hearing because the AAT does not have access to relevant documents (unless the agency provides them to the AAT voluntarily prior to the hearing). New subsection 64(4A) clarifies that the AAT may require the production of a document claimed to be exempt at any time after the date at which the agency is required to lodge the documents with the AAT pursuant to section 37 of the AAT Act. This enables the Tribunal to require the production of the exempt documents in order to ascertain the issues that need to be decided about the documents.

Items 215 to 217

Items 214 to 216 amend subsection 64(5), (6) and (8) of the FOI Act respectively, consequential to the insertion of new subsection 64(1A) by item 213.

Amendments to the *Insurance Acquisitions and Takeovers Act 1991*

Item 218

Item 218 repeals subsection 67(4) of the *Insurance Acquisitions and Takeovers Act 1991*. Subsection 67(4) provides the President of the AAT must ensure that each non-presidential member who constitutes the Tribunal for the conduct of a reviewable decision has special knowledge or skill in relation to life insurance business or insurance business. This requirement is rendered redundant by new section 23B of the AAT Act (inserted by item 66). New section 23B of the AAT Act requires the President to have regard to the degree to which it is desirable to for all or any of the persons who are to constitute the Tribunal to have knowledge, expertise or experience in relation to the matters to which the proceeding relates. See also the note to item 66.

Amendments to the *Insurance Act 1973*

Item 219

Item 219 repeals subsections 63(10) and (11) of the *Insurance Act 1973*.

Subsection 63(10) provides that where an application is made to the AAT for review of a decision made by the Australia Prudential Regulation Authority or the Treasurer, the Tribunal is to be constituted by a presidential member and two non-presidential members. Subsection 63(11) provides that the President must ensure that each non-presidential member is a person who, in the opinion of the President, has special knowledge or skill in relation to insurance business.

The repeal of subsection 63(10) provides the President with greater flexibility in constituting the Tribunal as he or she is no longer be required to appoint a presidential member for every proceeding. As new section 23B of the AAT Act, which is inserted by item 66 of the Bill, requires the President to have regard to the status of the person or office held by the person who made the original decision and the complexity of the matters in constituting the Tribunal, the Tribunal will

continue to be constituted by persons who have the competence to handle the matters to which subsection 63(10) refers.

Subsection 63(11) is being repealed as the requirement for non-presidential members to have special knowledge and skill will be covered in new section 23B of the AAT Act. See also note to item 66.

Item 220

Item 220 substitutes the phrase “the Administrative Appeals Tribunal” for “the Tribunal” wherever it occurs in subsections 63(12), (13) and (14) of the Insurance Act. This amendment removes any confusion as to which tribunal these subsections are referring to. (The Insurance Act includes provisions relating to the Superannuation Complaints Tribunal.) There is no intention to change the meaning of the subsections.

Amendments to the *Judges’ Pensions Act 1968*

Item 221

Item 221 amends subsection 4(1) of the *Judges’ Pensions Act 1968* by removing the reference to section 16 of the AAT Act in the definition of “period of exempt service” and substituting a reference to repealed section 16 of the AAT Act. This amendment is consequential to the repeal of section 16 by item 33.

The wording of item 221 indicates that repealed section 16 will continue to apply to certain persons because of the transitional operation of item 34. For further explanation on the repeal of section 16, see notes to items 33 and 34.

Amendments to the *Land Acquisitions Act 1989*

Items 222 and 223

Item 222 repeals section 32 of the *Lands Acquisitions Act 1989*. Section 32 requires that if a Tribunal member considers that an application for review of a pre-acquisition declaration by the Minister is frivolous or vexatious, the application can be dismissed if the presiding member is a presidential member. If the presiding member is not a presidential member, they may adjourn the hearing, so that it can be resumed with a presidential member presiding, who can then dismiss the appeal. The repeal of this section gives the AAT greater flexibility to deal with matters efficiently and is consistent with the Bill’s objective to remove restrictive constitution provisions.

The repeal of section 32 of the Lands Acquisitions Act will not remove the power of the Tribunal to dismiss a frivolous or vexatious application for review of a pre-acquisition declaration under the Lands Acquisitions Act, as the Tribunal has a general power under paragraph 42(B)(1)(a) of the AAT Act to dismiss an application on the grounds that it is frivolous or vexatious.

Item 223 amends subsection 131(2) of the Lands Acquisitions Act by replacing the reference to section 32 of the Lands Acquisitions Act with a reference to paragraph 42B(1)(a) of the AAT Act. This amendment is consequential to the repeal of section 32 by item 222. Paragraph 42B(1)(a) gives the Tribunal a general power to dismiss an application on the grounds that it is frivolous and vexatious and therefore will be inserted into subsection 131(2) instead.

Amendments to the *Life Insurance Act 1989*

Item 224

Item 224 repeals subsections 237(1) and (2) of the *Life Insurance Act 1995*. Subsection 237(1) provides that the Tribunal is to be constituted by a presidential member and two non-presidential members for purposes of a review of a reviewable decision. Subsection 237(2) provides that the President must ensure that each non-presidential member is a person who, in the opinion of the President, has special knowledge or skill in relation to life insurance business.

The repeal of subsection 237(1) provides the President with greater flexibility in constituting the Tribunal and is consistent with the policy of removing restrictive constitution arrangements. As new section 23B of the AAT Act, which is inserted by item 66, requires the President to have regard to the status of the person or office held by the person who made the original decision and the complexity of the matters in constituting the Tribunal, the Tribunal will continue to be constituted by persons who have the competence to handle the matters to which subsection 237(1) refers despite its repeal.

Subsection 237(2) is repealed as the requirement for non-presidential members to have special knowledge and skill is covered in new section 23B of the AAT Act. New section 23B (inserted by item 66) requires the President to have regard to the degree to which it is desirable for all or any of the persons who are to constitute the Tribunal to have knowledge, expertise or experience in relation to the matters to which the proceeding relates. See also the note to item 66.

Item 225

Item 225 substitutes the phrase “the Administrative Appeals Tribunal” for “the Tribunal” wherever it occurs in subsections 237(3), (4) and (5) of the *Life Insurance Act*. This amendment removes any confusion as to which tribunal these subsections are referring to. (The *Life Insurance Act* includes provisions relating to the Superannuation Complaints Tribunal.) It is not intended that the meaning of the subsections will change.

Amendments to the *Migration Act 1958*

Item 226

Item 226 amends subsection 500(5) of the *Migration Act 1958* by repealing subsection 500(5) and substituting it with a new subsection 500(5). Subsection 500(5) of the *Migration Act* provides that the Tribunal must be constituted by a presidential member alone when conducting a review of certain decisions made by the Minister. The new subsection 500(5) of the *Migration Act* does not require the Tribunal to be constituted by a presidential member alone. However, it inserts a number of matters that the President must have regard to when constituting the Tribunal for the review of certain decisions under the *Migration Act*. These matters include the degree to which matters under review concern the security, defence or international relations of Australia and the degree of public importance of the matters. The President is not permitted to have regard to any other factors except for those listed in new subsection 500(5).

The removal of the requirement for the Tribunal to be constituted by a presidential member alone provides the President with greater flexibility in constituting the Tribunal and is consistent with the policy of removing restrictive constitution arrangements. The inclusion of a list of matters which

the President must consider when constituting the Tribunal to review certain decisions under the Migration Act ensures the most appropriate members constitute the Tribunal in these cases.

Amendments to the *Military Rehabilitation and Compensation Act 2004*

Item 227

Item 227 amends section 355 of the *Military Rehabilitation and Compensation Act 2004* (the MRC Act) by substituting the reference in table item 1 to section 24 of the AAT Act with new section 20A of the AAT Act. Item 43 inserts a new section 20A into the AAT Act which is identical to the current section 24 of the AAT Act, which is repealed by item 70. Accordingly, section 355 of the MRC Act will now refer to new section 20A. It is not intended that the meaning of section 355 of the MRC Act will change.

Amendments to the *Narcotic Drugs Act 1967*

Item 228

Item 228 repeals subsection 14A(2) of the *Narcotic Drugs Act 1967*. Subsection 14A(2) provides that in the review of specified decisions made under the Narcotic Drugs Act, the Tribunal is to be constituted by a presidential member alone. The removal of this requirement provides the President with greater flexibility in constituting the Tribunal and is consistent with the policy of removing restrictive constitution arrangements.

Amendments to the *Privacy Act 1988*

Item 229

Item 229 repeals subsections 61(3) and (4) of the *Privacy Act 1988*. Subsection 61(3) provides that in relation to an application made by a person under subsection 61(1) of the Privacy Act, the Tribunal is to be constituted by a presidential member who is a judge and two other members (who are not judges). Subsection 61(4) of the Privacy Act provides that the terms used in subsection 61(3) have the same meaning as those used in the AAT Act. The repeal of subsection 63(1) is consistent with the policy of giving the President greater flexibility in managing the workload of the Tribunal by removing restrictive constitution requirements. The repeal of subsection 61(4) is consequential to the repeal of subsection 61(3).

Amendments to the *Safety, Rehabilitation and Compensation Act 1988*

Items 230 and 231

Item 230 repeals subsection 65(2) of the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act). Subsection 65(2) of the SRC Act modifies the operation of subsection 21(1A) of the AAT Act to the effect that the reference to a presidential member in subsection 21(1A) includes a senior non-presidential member authorised by the President to exercise the powers referred to under subsection 21(1A). As item 50 inserts a new paragraph 21(1A)(a) into the AAT Act, which allows a presidential or authorised member to exercise powers under subsection 21(1A), subsection 65(2) of the SRC Act is now redundant.

Item 231 amends subsection 65(3) of the SRC Act by substituting the reference to section 24 of the AAT Act with a reference to new section 20A of the AAT Act. Item 43 inserts a new section 20A into the Act which is identical to the current section 24 of the Act. Section 24 is repealed by item 70. Accordingly, subsection 65(3) of the SRC Act will now refer to new section 20A. It is not intended that the meaning of subsection 65(3) of the SRC Act will change.

Amendments to the *Seafarers Rehabilitation and Compensation Act 1992*

Item 232

Item 232 amends subsection 89(2) of the *Seafarers Rehabilitation and Compensation Act 1992* by substituting the reference to section 24 of the AAT Act with new section 20A of the AAT Act. Item 43 inserts a new section 20A into the Act which is identical to the current section 24 of the Act, which is to be repealed by item 70. Accordingly, subsection 89(2) of the Seafarers Rehabilitation and Compensation Act will now refer to new section 20A. It is not intended that the meaning of subsection 89(2) of the Seafarers Rehabilitation and Compensation Act will change.

Amendments to the *Superannuation Act 1976*

Items 233 and 234

Item 234 repeals subsections 154(7) and (8) of the *Superannuation Act 1976*. Subsection 154(7) provides that in relation to an application made by a person under subsection 154(6) of the Superannuation Act, the Tribunal must be constituted by either a presidential member and two non-presidential members (of whom at least one is an eligible employee or a pensioner) or three non-presidential members (of whom at least one is an eligible employee or a pensioner and at least one who is a senior member). Subsection 154(8) of the Superannuation Act defines “eligible employee” and “pensioner” for the purposes of subsection 154(7). The repeal of subsection 154(7) of the Superannuation Act is consistent with the policy to give the President greater flexibility in managing the workload of the Tribunal by removing restrictive constitution requirements. The repeal of subsection 154(8) is a consequence of the repeal of subsection 154(7) as the definitions provided in that subsection are no longer required.

Item 233 amends the definition of “pensioner” in subsection 3(1) of the Superannuation Act consequential to the repeal of subsection 154(7) by item 234.

Amendments to the *Trans-Tasman Mutual Recognition Act 1997*

Item 235

Item 235 amends subsection 35(3) of the *Trans-Tasman Mutual Recognition Act 1997* by substituting the reference to paragraph 20(1A)(b) of the Act with a reference to new subsection 20B(1) of the Act. Item 44 of the Bill inserts new subsection 20B(1) into the AAT Act. New subsection 20B(1) replicates the wording of paragraph 20(1A)(b) which is to be repealed by Item 40. Accordingly, subsection 35(3) of the Trans-Tasman Mutual Recognition Act will now refer to new section 20B(1). It is not intended that the meaning of subsection 35(3) of the Trans-Tasman Mutual Recognition Act will change.

Item 236

Item 236 amends subsection 35(5) of the Trans-Tasman Mutual Recognition Act by repealing the subsection and substituting it with a new subsection 35(5). Subsection 35(5) of the Trans-Tasman Mutual Recognition Act provides that for the purpose of reviewing decisions under subsection 33(1) of the Trans-Tasman Mutual Recognition Act, a reference to a member in Part III, IIIA, IV and VI of the AAT Act includes a person directed under subsection 35(3) of the Trans-Tasman Act. Subsection 35(3) of the Trans-Tasman Mutual Recognition Act sets out certain persons that the President of the AAT may direct to constitute the Tribunal for review of decisions under subsection 33(1). The amendment to subsection 25(5) is consequential to the changes being made to the AAT Act which allows the President to appoint authorised members to exercise certain powers under that Act (item 180). The amendment to subsection 35(5) of the Trans-Tasman Mutual Recognition Act ensures that those people directed under subsection 35(3) of that Act are authorised members for the purpose of certain parts of the AAT Act.