

Administrative Decisions Tribunal Amendment Bill 2008

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are as follows:

- (a) to amend the Administrative Decisions Tribunal Act 1997 (the **Principal Act**) so as:
 - (i) to give effect to certain recommendations made as a consequence of a review carried out under section 147 of the Principal Act (the **statutory review**), and
 - (ii) to make other amendments in connection with the constitution, functions and procedure of the Administrative Decisions Tribunal (the **Tribunal**) and in the nature of statute law revision,
- (b) to make consequential and other amendments in the nature of law revision to the Administrative Decisions Tribunal (General) Regulation 2004 and Administrative Decisions Tribunal Rules (Transitional) Regulation 1998,
- (c) to repeal the Administrative Decisions Tribunal Legislation Further Amendment Act 1998 and Administrative Decisions Tribunal Rules (Transitional) Regulation 1998,
- (d) to amend the Anti-Discrimination Act 1977:
 - (i) to increase the maximum amount that the Tribunal may award under that Act as compensatory damages from \$40,000 to \$100,000, and
 - (ii) to enable the President of the Anti-Discrimination Board (instead of the Minister) to grant exemptions from the operation of that Act and to enable applications to be made to the Tribunal for reviews of such exemption decisions, and
 - (iii) to omit certain procedural provisions relating to the Tribunal that duplicate procedural provisions already contained in the Principal Act,
- (e) to amend the Building Professionals Act 2005 to remove any right to appeal certain decisions of the Tribunal to an Appeal Panel and to provide instead for such appeals to be made directly to the Supreme Court,
- (f) to amend the Anti-Discrimination Regulation 2004 and the Explosives Act 2003 to make amendments that are consequential on the amendment of the Anti-Discrimination Act 1977 and the Principal Act,
- (g) to amend the Supreme Court Act 1970 to assign to the Court of Appeal any appeals from decisions of an Appeal Panel of the Tribunal and the referral of questions of law by the Tribunal for the Supreme Court's opinion. The amendments made to the Principal Act by this Bill that arise from the statutory review deal with the following matters:
 - (a) the joinder of persons who are not parties to proceedings in the Tribunal,
 - (b) the continued participation of members or assessors of the Tribunal who preside over unsuccessful preliminary conferences for proceedings in the formal determination of the proceedings,
 - (c) the powers of the Registrar of the Tribunal with respect to the issue of a summons to attend and give evidence or produce documents or other things and the granting of access to things produced pursuant to such a summons,
 - (d) the expansion of the circumstances to which the Tribunal may have regard in awarding costs in proceedings before it,

(e) the simplification of the process for the making of the rules of the Tribunal by its Rule Committee.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act.

Clause 3 is a formal provision that gives effect to the amendments to the Principal Act set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments made to other Acts and Regulations

Clause 5 repeals the following legislation:

(a) the *Administrative Decisions Tribunal Legislation Further Amendment Act 1998*,

(b) the *Administrative Decisions Tribunal Rules (Transitional) Regulation 1998*.

Clause 6 provides for the repeal of the proposed Act after all the amendments and repeals effected by the proposed Act have commenced. Once these amendments and repeals have commenced, the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments or repeals made by that Act.

Schedule 1 Amendment of Administrative Decisions Tribunal Act 1997

Decisions involving conduct

Section 6 (1) (a)–(f) of the Principal Act defines the term **decision** to include a number of specified kinds of conduct. Section 6 (1) (g) provides that the term also includes doing or refusing to do any other act or thing.

Schedule 1 [1] amends section 8 of the Principal Act to confirm that a reviewable decision may involve an administrator engaging, or refusing to engage, in conduct if an enactment confers jurisdiction on the Tribunal to review the conduct or refusal. For example, the Tribunal currently has jurisdiction to review certain conduct of a public sector agency under section 55 of the *Privacy and Personal Information Protection Act 1998*.

Constitution of Tribunal for interlocutory functions

Schedule 1 [3] and [4] amend section 24A of the Principal Act to enable the Tribunal to be constituted by a single presidential or judicial member (as appropriate) in relation to the exercise of interlocutory functions without the need for the President or Divisional Head to formally assign the member for that purpose in each case.

Schedule 1 [5] amends section 24A to confer a power on the President, or relevant Divisional Head (subject to any direction of the President), to give directions as to the members who are to constitute the Tribunal for interlocutory matters. The power to be conferred is comparable to the power conferred in relation to non-interlocutory matters by section 22 of the Principal Act.

Tabling of annual reports

Schedule 1 [6] amends section 26 of the Principal Act to enable the Minister to table an annual report of the Tribunal in a House of Parliament even when the House is not sitting.

Dispensing with certain requirements for written applications

Schedule 1 [9] and [10] amend section 44 of the Principal Act to enable the Tribunal to dispense with the requirement that late applications for original decisions be in writing.

Schedule 1 [14] and [15] amend section 57 of the Principal Act to enable the Tribunal to dispense with the requirement that late applications for the review of reviewable decisions be in writing.

Internal reviews

Schedule 1 [12] amends section 53 of the Principal Act to require an administrator to notify a person seeking an internal review under that section of the result of the review within 21 days after the application for internal review is lodged or such other period as may be agreed.

Schedule 1 [17] amends section 58 of the Principal Act to require an administrator to lodge with the Tribunal a copy of any statement of reasons for a decision in an internal review conducted under section 53 of that Act in respect of a reviewable decision that is the subject of an application for review to the Tribunal.

Applications for reviews of reviewable decisions

Schedule 1 [13] substitutes section 55 of the Principal Act to clarify the period within which an application for a review of a reviewable decision is to be made to the Tribunal having regard to whether or not an internal review is available in relation to the decision. **Schedule 1 [16]** makes a consequential amendment to section 57.

Joinder of parties

Schedule 1 [18] amends section 67 of the Principal Act to enable the Tribunal to join a person as a party to proceedings before it (other than proceedings for an internal appeal) if the Tribunal considers that the person ought to have been joined as a party or is a person whose joinder is necessary to the determination of all matters in dispute in the proceedings.

Representation of parties

Schedule 1 [19] and [20] amend section 71 of the Principal Act to require an agent of a party in proceedings before the Tribunal who is not an Australian legal practitioner to obtain leave from the Tribunal to represent the party in the proceedings. An Australian legal practitioner engaged to represent a party will be entitled to appear in proceedings before the Tribunal without the need to obtain leave. **Schedule 1 [21]** makes an amendment to section 71 that is consequential on the substitution of section 71 (2).

Dismissal of proceedings for failure to appear or prosecute proceedings

Schedule 1 [22] amends section 73 of the Principal Act to expand the circumstances in which the Tribunal may dismiss proceedings to include where an applicant fails to appear or where the Tribunal considers that there has been a want of prosecution of the proceedings. The amendment also enables the Tribunal to reinstate proceedings that have been dismissed because of an applicant's failure to appear if the Tribunal considers that there is a reasonable explanation for that failure.

Taking into account the interests of certain vulnerable persons in approved settlements

Currently, sections 74, 86 and 105 of the Principal Act provide that the Tribunal, a member or an assessor (as the case may be) may not exercise a power under those sections to approve or give effect to a settlement (a **settlement power**) unless satisfied that it is in the best interests of the person whose interests are considered by the Tribunal, member or assessor to be paramount.

Schedule 1 [32] inserts a section 86A in the Principal Act to enable (but not require) the Tribunal, member or assessor (as the case requires) to take into account, when exercising a settlement power, the interests of vulnerable persons who may be directly affected by the exercise of the power. The proposed section defines a **vulnerable person** to be:

(a) a minor, or

(b) a person who is totally or partially incapable of representing his or her interests in proceedings before the Tribunal because the person is intellectually, physically, psychologically or sensorily disabled, of advanced age, a mentally incapacitated person or otherwise disabled.

Schedule 1 [23], [29], [30], [31] and [40] make consequential amendments to sections 74, 86 and 105 in order to remove the current mandatory best interests test.

Further participation of members presiding over preliminary conferences

Schedule 1 [24] amends section 74 of the Principal Act to enable a member or assessor of the Tribunal who presides over an unsuccessful preliminary conference in respect of proceedings to continue to participate in the formal determination of the proceedings unless a party to the proceedings objects and can demonstrate that the further participation of the member or assessor is likely to prejudice the party's case. Currently, section 74 provides that a member or assessor presiding over such a preliminary conference is not eligible to be a member or assessor in the formal determination of the proceedings simply because a party has objected to his or her further participation.

References of questions of law to the Supreme Court by Tribunal at first instance

Schedule 1 [25] inserts a new section 79A in the Principal Act to enable the Tribunal at first instance to refer a question of law to the Supreme Court for its opinion if the President of the Tribunal consents to the question being referred. Currently, questions of law may be referred to the Supreme Court only by an Appeal Panel of the Tribunal hearing an internal or external appeal.

Summons to attend to give evidence or produce things

Schedule 1 [26] and [27] amend section 84 of the Principal Act to confirm that the Registrar of the Tribunal has a discretion as to whether to issue a summons, on the application of a party to proceedings, for a person to attend and give evidence or to attend and produce documents or other things.

Schedule 1 [28] amends section 84 of the Principal Act to confirm that the Registrar may give directions as to access to documents or other things produced pursuant to a summons to which no objection has been made.

Costs

Schedule 1 [33] amends section 88 of the Principal Act:

(a) to confirm that parties are to bear their own costs unless the Tribunal awards costs to a particular party, and

(b) to enable the Tribunal to award costs in proceedings before it having regard to an expanded set of circumstances.

Currently, section 88 (1) provides that costs may be awarded only if the Tribunal is satisfied that there are special circumstances. The new provisions are based largely on the provisions of section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* of Victoria.

Process for the making of rules of the Tribunal

The following amendments are made to the Principal Act in order to simplify the process by which the Rule Committee of the Tribunal may make rules of the Tribunal:

(a) the removal of the requirement that the Rule Committee may make rules relating specially to a Division of the Tribunal only on the recommendation of the Subcommittee for the Division established under section 97 (see **Schedule 1 [34]**),

(b) the removal of the exhibition and consultation procedure in section 98 so as to place the Tribunal in the same position as other tribunals with rule-making powers (see **Schedule 1 [36]**).

Proposed clause 44 to be inserted in Schedule 5 to the Principal Act by **Schedule 1 [58]** provides for the abolition of all of the Subcommittees of the Rule Committee established under section 97 when that section is repealed by **Schedule 1 [35]**.

Proposed section 5 (2) of the proposed Act repeals the *Administrative Decisions Tribunal Rules (Transitional) Regulation 1998*. Schedule 1 to that Regulation currently contains the interim rules of the Tribunal. Proposed clause 45 to be inserted in Schedule 5 to the Principal Act by **Schedule 1 [58]** provides for the interim rules to be treated as if they were rules made by the Rule Committee so they may be renamed, amended and repealed by the Rule Committee using the new simplified process for rule-making. Rules of the Tribunal are statutory rules for the purposes of Part 6 of the *Interpretation Act 1987*. Accordingly, such rules will continue to be subject to the procedural requirements of that Part (including the tabling and disallowance provisions).

Selection of mediators and neutral evaluators

Schedule 1 [38] amends section 102 of the Principal Act to remove the requirement that the parties to proceedings must agree on who is to be the mediator or neutral evaluator in the proceedings before the Tribunal can refer the proceedings for mediation or neutral evaluation. However, the amendment does not affect the current requirement that the parties agree to their proceedings being referred to mediation or neutral evaluation. **Schedule 1 [37]** makes a consequential amendment to section 102.

Costs of mediations and neutral evaluations

Schedule 1 [39] amends section 104 of the Principal Act to enable the Tribunal to decide to bear the costs of a mediation or neutral evaluation instead of the parties to proceedings. Currently, such costs must be borne by the parties.

Time for lodging appeals

Schedule 1 [41] amends section 113 of the Principal Act to provide that a party may appeal an appealable decision of the Tribunal to an Appeal Panel of the Tribunal within 28 days after the Tribunal gives the party oral reasons or written reasons for its decision (whichever is the later). The amendment recognises that reasons for decisions of the Tribunal that are appealable to an Appeal Panel are sometimes given orally instead of in writing.

Remittal of case on appeal to Appeal Panel

Schedule 1 [42] amends section 114 of the Principal Act to confirm that an Appeal Panel of the Tribunal hearing an internal appeal may remit part of a case for reconsideration by the Tribunal at first instance.

Schedule 1 [43] makes a comparable amendment to section 118C of the Principal Act in relation to external appeals made to an Appeal Panel of the Tribunal.

Fees

Schedule 1 [44] amends section 145 of the Principal Act to expand the power of the Governor to make regulations that prescribe fees in relation to proceedings in, or the provision of certain services by or on behalf of, the Tribunal. The expanded regulation-making power is comparable to the power conferred on the Governor in relation to courts. The amendment also transfers to the Principal Act certain exclusions from the requirement to pay fees that are currently contained in the *Administrative Decisions Tribunal (General) Regulation 2004*.

Constitution of Legal Services Division

Schedule 1 [47] amends clause 1 of Part 3 of Schedule 2 to the Principal Act to require:

- (a) at least one Deputy President (other than the Divisional Head) to be assigned to the Legal Services Division, but only after the Minister has consulted with the Bar Council and the Law Society Council concerning the assignment, and
- (b) at least one non-presidential judicial member who is a current, retired or acting eligible judicial officer to be assigned to the Division.

Schedule 1 [50] amends clause 5 of Part 3 of Schedule 2 to the Principal Act to insert a definition of **eligible judicial officer**. The term is defined to mean any of the following:

- (a) a Judge of the Supreme Court,
- (b) a Judge of the District Court,
- (c) a judicial officer of any other court or tribunal having an equivalent status (for the purposes of Part 9 of the *Constitution Act 1902*) to the Supreme Court or District Court.

Schedule 1 [49] amends clause 4 of Part 3 of Schedule 2 to the Principal Act to enable a senior judicial member of the Legal Services Division to participate in and preside over certain disciplinary proceedings allocated to the Division. **Schedule 1 [50]** amends clause 5 of Part 3 of Schedule 2 to the Principal Act to insert a definition of **senior judicial member**. The term is defined to mean any of the following members of the Division:

- (a) the Divisional Head,
- (b) a Deputy President assigned to the Division in accordance with new process mentioned above,
- (c) a non-presidential judicial member who is a current, retired or acting eligible judicial officer.

Completion of unfinished matters by former members and members ceasing to have certain qualifications

Schedule 1 [54] substitutes clause 8A of Schedule 3 to the Principal Act to enable a member or former member to complete unfinished matters even if he or she ceases to have a qualification (other than for certain disciplinary reasons) that is required by Schedule 2 in order to deal with the matter. The substituted clause will also continue to enable a former member whose period of appointment has expired to complete unfinished matters.

Statute law revision

The following amendments to the Principal Act are in the nature of statute law revision:

- (a) amendments relating to the omission of charts from the Act (see **Schedule 1 [2], [8] and [11]**),
- (b) amendments to update references to repealed or renamed Acts and to relocated provisions of Acts (see **Schedule 1 [7], [45], [46], [52], [53], [55] and [56]**),

(c) amendments to omit certain spent provisions (see **Schedule 1 [48] and [51]**).

Savings and transitional provisions

Schedule 1 [57] amends clause 1 of Schedule 5 to the Principal Act to enable the Governor to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 1 [58] inserts a new Part in Schedule 5 to the Principal Act containing provisions of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 2 Amendment of other Acts and Regulations

Administrative Decisions Tribunal (General) Regulation 2004

Schedule 2.1 makes the following amendments to the Administrative Decisions Tribunal (General) Regulation 2004:

- (a) Part 4 (Rules of the Tribunal) of the Regulation is repealed as a consequence of the repeal of section 98 of the Principal Act by the proposed Act,
- (b) two spent provisions of the Regulation are repealed,
- (c) other amendments are made that are consequential on amendments made to the Principal Act by the proposed Act.

Administrative Decisions Tribunal Rules (Transitional) Regulation 1998

Schedule 2.2 makes amendments to the *Administrative Decisions Tribunal Rules (Transitional) Regulation 1998* that are consequential on amendments made to the Principal Act by the proposed Act (including the amendments that require the rules in Schedule 1 to the Regulation to be treated as if they were rules made by the Rule Committee of the Tribunal).

Anti-Discrimination Act 1977 No 48 and Anti-Discrimination Regulation 2004

Schedule 2.3 makes the following amendments to the *Anti-Discrimination Act 1977*:

- (a) section 98 (Rights of appearance and representation) of the Act is amended so as to enable section 71 of the Principal Act to apply in relation to the matter of the representation of parties,
- (b) section 107 (Dismissal of proceedings) of the Act is repealed so as to enable the Tribunal to rely on its general dismissal powers under section 73 (5) of the Principal Act,
- (c) section 108 (Order or other decision of Tribunal) of the Act is amended to increase the maximum amount that the Tribunal may award under that Act as compensatory damages from \$40,000 to \$100,000,
- (d) section 110 (Costs) of the Act is substituted so as to enable the Tribunal to rely on its general power to award costs under section 88 of the Principal Act,
- (e) section 126 of the Act is substituted so as to enable the President of the Anti-Discrimination Board (instead of the Minister) to grant exemptions from the operation of that Act and to enable applications to be made to the Tribunal for reviews of such exemption decisions,
- (f) Schedule 1 to the Act is amended to make provision for matters of a savings or transitional nature consequent on these amendments.

Schedule 2.4 makes amendments to the *Anti-Discrimination Regulation 2004* that are consequential on the substitution of section 126 of the Act.

Building Professionals Act 2005 No 115

Schedule 2.5 makes the following amendments to the *Building Professionals Act 2005*:

- (a) section 36 of the Act is repealed and a Part 3A is inserted so as to remove any right to appeal certain decisions of the Tribunal to an Appeal Panel and to provide instead for such appeals to be made directly to the Supreme Court,
- (b) Schedule 2 to the Act is amended to make provision for matters of a savings or transitional nature consequent on these amendments. The amendments to be made will place appeal rights from decisions of the Tribunal in relation to building professionals on an equal footing with the appeal rights of other professionals such as architects and surveyors.

Explosives Act 2003 No 39

Schedule 2.6 makes an amendment to the *Explosives Act 2003* that is consequential on the substitution of section 55 of the Principal Act by the proposed Act (see, in particular, the terms of the new section 55 (1) (d) of the Principal Act).

Supreme Court Act 1970 No 52

Schedule 2.7 makes the following amendments to the *Supreme Court Act 1970*:

- (a) section 48 of the Act is amended to assign to the Court of Appeal any appeals from decisions of an Appeal Panel of the Tribunal and the referral of questions of law by the Tribunal for the Supreme Court's opinion,
- (b) the Fourth Schedule to the Act is amended to make provision for matters of a savings or transitional nature consequent on these amendments.