

Victorian Civil and Administrative Tribunal Bill

EXPLANATORY MEMORANDUM

PART 1—PRELIMINARY

- Clause 1 states that the purpose of the Bill is to establish a Victorian Civil and Administrative Tribunal.
- Clause 2 sets out the Act's commencement dates. The preliminary provisions contained in Part 1 come into operation upon Royal Assent. The remaining provisions come into operation upon proclamation or on 31 December 1999 if proclamation has not yet occurred.
- Clause 3 sets out definitions of terms used in the Act.
- Clause 4 sets out the various circumstances in which a person will be taken to have made a decision, for the purposes of this Act or another enabling enactment. A decision purporting to have been made under an enactment will be deemed to have been so made even if it was beyond the power of the decision maker. Refusals and failures to make a decision can also constitute decisions. Where the decision is made by the holder of an office, appointment or public service position, and the person ceases to hold that office, appointment or position, the person's successor will be deemed to be the decision maker.
- Clause 5 provides that, where an enabling enactment allows an application to the Tribunal to be made by a person whose interests are affected by a decision, "interests" are not limited to proprietary, economic or financial interests but can be of any kind. Further, interests are included that are either directly or indirectly affected and it does not matter whether another person's interests are also affected.
- Clause 6 provides that a person possesses a document when it is in the person's power, possession or control.
- Clause 7 sets out the extent to which the Act binds the Crown.

PART 2—VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

Division 1—Establishment and Membership

- Clause 8 establishes the Tribunal and requires it to have an official seal.
- Clause 9 provides that the membership of the Tribunal is to be constituted by the President, Vice Presidents, Deputy Presidents, senior members and ordinary members appointed under the Act.
- Clause 10 provides for the appointment of a judge of the Supreme Court as President of the Tribunal for a term of up to 5 years.
- Clause 11 provides for the appointment of one or more judges of the County Court as Vice Presidents of the Tribunal for a term of up to 5 years.
- Clause 12 provides for the appointment of persons who have been admitted to legal practice for at least 5 years as Deputy Presidents for a term of 5 years.
- Clause 13 provides for the appointment of legal practitioners of not less than 5 years' standing or other persons with appropriate specialist knowledge or expertise as senior members of the Tribunal for a term of 5 years.
- Clause 14 provides for the appointment of legal practitioners or other persons with appropriate specialist knowledge or expertise as ordinary members of the Tribunal for a term of 5 years.

Division 2—General Provisions relating to Members

- Clause 15 allows persons to apply to the Minister for appointment as a member of the Tribunal. An applicant may be required to undergo a police check.
- Clause 16 provides that Tribunal members are appointed by the Governor in Council on the Minister's recommendation. Members are eligible for re-appointment and are not subject to the **Public Sector Management Act 1992** in respect of their office as members.
- Clause 17 provides for the payment of remuneration and allowances to Tribunal members other than judicial members.

- Clause 18 prohibits a non-judicial member from engaging in professional practice or employment outside his or her Tribunal duties, without the President's consent.
- Clause 19 requires a Tribunal member who has a conflict of interest in relation to a particular proceeding not to play any role in the proceeding without the consent of all parties. If the member is not the President, the member must disclose the nature of the interest to the President. If the member is the President, the member must disclose the nature of the interest to the Chief Justice.
- Clause 20 allows members to resign their office by delivering a signed letter to the Governor.
- Clause 21 sets out certain circumstances where members' offices become vacant.
- Clause 22 allows the Minister to suspend a non-judicial officer from office, with the President's approval, if the Minister believes that there may be grounds for removal from office. Members remain entitled to their remuneration and allowances during suspension.
- Clause 23 requires the Minister, as soon as practicable, to appoint a person to investigate a suspended member's conduct. Neither the investigator nor the Minister may recommend removal of the member unless satisfied that the member has been convicted of an indictable offence or its equivalent, is incapable of performing or has neglected the member's duties, or is unfit to hold office due to misconduct. The member must be given an opportunity to make written and oral submissions before the Minister can recommend removal to the Governor in Council.
- Clause 24 provides that the Governor in Council may only remove a non-judicial member from office on receiving the Minister's recommendation under the previous section.
- Clause 25 provides that certain technical defects will not invalidate a decision of the Tribunal.

Division 3—Acting Appointments

- Clause 26 provides for the appointment of an acting President by either the Minister or the Governor in Council in various defined circumstances.
- Clause 27 provides for the appointment of an acting Vice President by either the Minister or the Governor in Council in various defined circumstances.
- Clause 28 provides for the appointment of an acting Deputy President by the President in various defined circumstances.
- Clause 29 allows the Chief Justice and Chief Judge respectively to appoint judges of the Supreme Court and County Court as members of panels of judges available to take temporary acting appointments as members of the Tribunal. Appointments as acting members are made by the President, with the appropriate approval from either the Chief Justice or Chief Judge.

Division 4—Administration

- Clause 30 provides that the President and Vice Presidents are responsible for directing the business, managing the administrative affairs and directing the professional training and development of members of the Tribunal.
- Clause 31 provides for the President to advise the Minister of action that could be taken to improve the disposal of the business of the Tribunal, avoid hearing delays or make the Act or any other enabling enactment more effective.
- Clause 32 provides for the appointment of a principal registrar, a chief executive officer and other registrars and staff to the Tribunal. Subject to the principal registrar's direction, the registrars have all the functions of the principal registrar.
- Clause 33 allows the President and Vice Presidents to delegate any of their functions, other than this power of delegation, to the principal registrar, a member or a class of members of the Tribunal.
- Clause 34 imposes a requirement of secrecy on information acquired in the performance of their functions by Tribunal members, registrars, other staff and persons acting under the Tribunal's authority

about the affairs of other persons. A penalty of up to 60 penalty units can be imposed for a breach of this requirement. Certain exceptions to the secrecy requirement are set out in sub-sections (3), (4) and (5). Further, nothing prohibits the recording or disclosure of things said or done at Tribunal hearings (unless held in private) or of the Tribunal's decisions, orders or reasons.

- Clause 35 extends the secrecy requirement so it also covers persons to whom information covered by section 34(2) has been divulged, together with their employees. These persons are, in turn, prohibited from any further or secondary disclosure of the confidential information. This prohibition does not apply to members of the police force to whom information has been disclosed for the purpose of reporting a suspected offence or assisting in the investigation of a suspected offence.
- Clause 36 imposes further restrictions on the disclosure of information by Tribunal members and the other persons referred to in sections 34(1) and 35. Except for the purposes of the Act or any enabling enactment, they are not required to produce to a court information or documents that have come into their possession in the performance of their Tribunal functions. However, under sub-section (2) specified information can be required to be disclosed to a court if the person who is the subject of the information gives written consent or if the Minister certifies that the disclosure is necessary in the public interest. Under sub-section (3), production of information or a document may also be required in proceedings for an indictable offence, including committals and summary hearings. For the purposes of this section, "court" includes a tribunal and any person who has the power to require the production of documents or answering of questions.
- Clause 37 requires the Tribunal, by 30 September each year, to provide a report to the Minister reviewing the operation of the Tribunal and Rules Committee during the 12 months ending on the preceding 30 June, and containing proposals for improving the operation of the Tribunal, and forecasting its workload, in the next 12 month period.
- Clause 38 permits the Tribunal to sit at any place in Victoria.

PART 3—THE TRIBUNAL—JURISDICTION AND FUNCTIONS

Division 1—Introductory

- Clause 39 provides that this Part sets out the general jurisdiction and functions of the Tribunal and that variations from this Part for certain types of proceedings are set out in Schedule 1.
- Clause 40 confers 2 types of jurisdiction on the Tribunal—original and review.
- Clause 41 defines original jurisdiction as the Tribunal's jurisdiction other than its review jurisdiction.
- Clause 42 defines review jurisdiction as the jurisdiction to review a decision-maker's decision conferred on the Tribunal by or under an enabling enactment. The Tribunal's jurisdiction under section 61 of the **Guardianship and Administration Act 1986** is an original and not a review jurisdiction.

Division 2—Original Jurisdiction

- Clause 43 sets out the ways in which the Tribunal's original jurisdiction can be invoked. These are by application under section 67, referral under section 69 or any other way allowed by the enabling enactment.
- Clause 44 specifies that in exercising its original jurisdiction, the Tribunal has the functions conferred on it by the enabling enactment and this Act, the regulations and the rules.

Division 3—Review Jurisdiction

Subdivision 1—Obtaining reasons for decisions

- Clause 45 allows persons entitled to apply for review of a decision to request the decision-maker to give a written statement of reasons. The request must be made within 28 days of the making of the decision.

Clause 46 requires a decision-maker to give a written statement of reasons as soon as practical, and no later than 28 days or such other period as is specified in the enabling enactment, after receiving the request. Subject to the Act, the statement must set out the reasons for the decision and the findings on material questions of fact, referring to supporting evidence or other material, which led to the decision. The statement must not contain any information or matter to which a Premier's or Attorney-General's certificate applies. If a statement would be false or misleading without the information or matter covered by such a certificate, then the decision maker must advise the person requesting the statement of this and refuse to give the statement. Decisions of the Business Licensing Authority are treated differently.

Clause 47 provides that, where a statement of reasons is not provided in accordance with the previous section, the person requesting the statement may apply to the Tribunal for an order requiring its provision. The applicant must give notice of the application to the decision-maker and the Tribunal may order the provision of a statement of reasons if satisfied that the applicant is entitled to receive it. The Tribunal must not order that a statement of reasons include information or matter which is the subject of a Premier's certificate or order the provision of a statement of reasons that is false or misleading because it does not contain information or matter which is the subject of a Premier's or Attorney-General's certificate. If the President considers that it would not be contrary to the public interest, the President may order that a statement of reasons include information or matter which is the subject of an Attorney-General's certificate. Whether such an inclusion would be contrary to the public interest is a question of law.

Subdivision 2—Jurisdiction of the Tribunal

Clause 48 sets out the ways in which the Tribunal's review jurisdiction can be invoked. These are by application under section 67, referral by a decision-maker under section 69 or any other way allowed by the enabling enactment.

- Clause 49 requires a decision-maker whose decision is being reviewed by the Tribunal to lodge with the Tribunal copies of various specified documents, including any statement of reasons and documents which the decision-maker considers are relevant to the review. These copies must be lodged within 28 days after either the decision-maker received notice of the application or the decision-maker referred the decision to the Tribunal. The Tribunal also has the power to require by notice the lodging of copies of any additional documents which it considers relevant and copies of an additional statement of reasons, if it considers the initial statement to be inadequate. This section prevails over any rule of law relating to privilege or public interest in relation to the production of documents.
- Clause 50 provides that, unless the enabling enactment or an order of the Tribunal provides otherwise, the initiating of a review does not result in the original decision being stayed. It continues to have effect and, where enforcement mechanisms are available, it continues to be enforceable. The power to order a stay is exercisable by the presiding member of the Tribunal. The Tribunal does not have to give a person whose interests may be affected an opportunity to be heard and it may require an undertaking as to costs and damages and make provision for the lifting of the order if specified conditions are not met. The Tribunal may assess any costs or damages which are the subject of an undertaking.
- Clause 51 specifies that in exercising its review jurisdiction, the Tribunal has all the functions of the decision-maker, together with the functions conferred on it by the enabling enactment and this Act, the regulations and the rules. The types of orders which the Tribunal may make are also set out. In most cases, the decision of the Tribunal will be deemed to be the decision of the decision-maker and will be deemed to have had effect from the time when the initial decision-maker's decision had effect.
- Clause 52 restricts the jurisdiction of the Supreme, County and Magistrates' Courts to hear or determine planning matters where the Tribunal has jurisdiction to deal with those matters. However, if the relevant Court considers that there are special circumstances, it may order that this restriction not apply to the proceeding.

Subdivision 3—Matters of Privilege and Policy

- Clause 53 allows the Premier to certify that the disclosure of particular information or the particular contents of a document would involve disclosure of the deliberations of Cabinet or a Cabinet committee and would therefore be contrary to the public interest. The Tribunal must ensure that such information or documents are not disclosed to anyone other than the Tribunal member(s) dealing with the particular proceeding and that such documents are returned when the Tribunal no longer requires them.
- Clause 54 allows the Attorney-General to certify that the disclosure of particular information or the particular contents of a document would be contrary to the public interest because of crown privilege. The Tribunal must ensure that such information or documents are not disclosed to anyone other than the Tribunal member(s) dealing with the particular proceeding and that such documents are returned when the Tribunal no longer requires them. However the Tribunal, with the consent of the President, may allow access to such information or documents to a party or the party's representative on any conditions the Tribunal thinks fit.
- Clause 55 provides that persons are not required to give evidence before the Tribunal which would involve disclosing information or matters which are the subject of a Premier's or Attorney-General's certificate. However, the President may order a person to answer a question which would involve disclosing the subject matter of an Attorney-General's certificate, if the President considers that for the person to answer the question would not be contrary to the public interest. Whether this would be contrary to the public interest is a question of law.
- Clause 56 excludes, in proceedings for review, the rules of law relating to public interest regarding disclosure of information or the contents of documents in legal proceedings, except to the extent they are set out in the Act.
- Clause 57 allows the relevant Minister to certify that at the time a decision was made, which decision is now the subject of review, a statement of policy existed which applied to decisions of that kind. If the Tribunal is given such a certificate in a particular proceeding for review, then it must apply the statement of

policy, if the applicant was or should have been aware of the policy and if the documents lodged with the Tribunal by the decision-maker include a statement that the decision-maker relied on the statement in making the decision. The Tribunal does not have to apply the statement of policy if it was outside power.

PART 4—THE TRIBUNAL—GENERAL PROCEDURE

Division 1—Introduction

Clause 58 states that the Tribunal's general procedure is to be found in this Part and that variations from the general procedure are to be found in Schedule 1.

Division 2—Parties

- Clause 59 lists the various persons who can be a party to a proceeding. A decision-maker who makes a decision as the holder of a particular appointment, office or public service position is to be described in any proceeding relating to that decision by the person's official title.
- Clause 60 allows the Tribunal to order the joinder of additional parties to a proceeding.
- Clause 61 provides that unincorporated associations cannot be made parties to a proceeding. However, the Tribunal can allow a member of an association, or a non-member authorised by the association, to make submissions on its behalf. In the case of a non-member, the Tribunal may require the person to produce a certificate of authorisation signed by the president, secretary or other similar officer of the association.
- Clause 62 provides that, in any proceeding, a party may appear personally or be represented by any person permitted by the Tribunal, or may be represented by a professional advocate in the circumstances set out in sub-section (1)(b) and (2). Further provision is also made in relation to representation of bodies corporate and children. Where a party is unrepresented, the Tribunal may appoint someone to represent that party and the Tribunal may also require a person, who is not a professional advocate, seeking to represent a party to produce a certificate of

authority from the party. The section contains a definition of the term "professional advocate".

- Clause 63 permits any party to be assisted by an interpreter or other person who can make the proceeding intelligible to the party, unless the Tribunal directs otherwise.

Division 3—Constitution of Tribunal

- Clause 64 provides that, subject to the rules, the Tribunal is to be constituted by between 1 and 5 members. At least one member must be a legal practitioner. The constitution of the Tribunal in each proceeding is decided by the President.

- Clause 65 sets out which Tribunal member shall preside in different circumstances.

- Clause 66 provides that where the Tribunal is constituted by an even number of members and opinion is equally divided, the presiding member shall have the casting vote.

Division 4—Preliminary procedure

- Clause 67 sets out the procedure for making an application to the Tribunal. The form, content, accompanying documents and manner of lodgement will be specified in the rules. Verification of an application by statutory declaration may also be required. Two or more persons may make a joint application and the principal registrar is required on request to assist a person in formulating an application.

- Clause 68 requires an applicant to pay a prescribed fee for making an application. Where a joint application is being made, the principal registrar may require each applicant to pay the full fee for an application. Where the fee is not paid when the application is lodged, the application is deemed not to have been made until the fee is paid or waived or reduced (and the reduced fee paid). However, any limitation period is suspended while a request for the waiver or reduction of a fee is being considered.

- Clause 69 provides that where an enabling enactment allows the referral of a matter to the Tribunal, the referral is to be in accordance with the enabling enactment and the rules.

- Clause 70 requires an applicant to pay a prescribed fee for a referral to the Tribunal. If the fee is not paid, the Tribunal may refuse to continue with the referred proceeding.
- Clause 71 allows the principal registrar, subject to the rules, to reject an application on the specified grounds set out in sub-section (1). The principal registrar must advise the applicant that the applicant may require the principal registrar to refer the application to the Tribunal for review of the rejection. The provisions of the Act regarding reviews contained in Division 3 of Part 3 do not apply to reviews of rejection by the principal registrar. There is no fee for such a referral for review. The Tribunal must then either uphold the rejection or order the acceptance of the application. Alternatively, instead of rejecting an application, the principal registrar may refer it to the Tribunal for decision as to whether to reject the application on the grounds set out in sub-section (1).
- Clause 72 requires an applicant to serve a copy of the application or referral, within the time set by the rules, on each other party and on any other person who under the Act, the enabling enactment or the rules, or the direction of the Tribunal is entitled to notice of the proceeding. The applicant does not have to serve copies of these documents if the principal registrar attends to service or if a presidential member makes an order dispensing with the service requirements. A presidential member can only dispense with service if satisfied that the applicant has made all reasonable attempts at service and has been unsuccessful or that the making and hearing of the application or referral without notice to a person would not cause injustice.
- Clause 73 allows the Attorney-General to intervene on behalf of the State in a proceeding at any time. The Director of the Office of Fair Trading and Business Affairs may intervene in a proceeding under any enabling enactment that is administered by the Minister who administers the **Fair Trading Act 1985**. The Tribunal may also at any time give leave to any person to intervene on such conditions as the Tribunal thinks fit.
- Clause 74 allows an applicant to withdraw an application or referral, with the leave of the Tribunal. The applicant must then notify all other parties of the withdrawal and the Tribunal may make a costs order against the applicant. The principal registrar may

refund the application fee paid by the applicant. The applicant is stopped from making a further application or requesting a referral in relation to the same facts and circumstances except by leave of the Tribunal.

- Clause 75 allows the Tribunal to summarily dismiss or strike out a proceeding if it considers it frivolous, vexatious, misconceived, lacking in substance or an abuse of process. This question is a question of law. The Tribunal may also order the applicant to pay compensation to any other party for costs, losses or inconvenience resulting from the proceeding. These powers can be exercised by the Tribunal as constituted for the proceeding or by a presidential member.
- Clause 76 allows the Tribunal at any time to summarily dismiss or strike out a proceeding for want of prosecution. This power can be exercised by the Tribunal as constituted for the proceeding or by a presidential member.
- Clause 77 allows a judicial member of the Tribunal at any time to strike out all or any part of a proceeding (other than a proceeding for review) if it considers that the subject-matter would be more appropriately dealt with by another tribunal, court, body or person. If the Tribunal considers it appropriate, the Tribunal may refer the matter to the relevant tribunal, court, body or person.
- Clause 78 gives the Tribunal powers to deal with the conduct of a proceeding by a party to the disadvantage of another party. The presiding member may make an order for costs under section 109 or, if the offending party is the applicant, dismiss or strike out the proceeding, or, if the party is not the applicant, determine the proceeding in favour of the applicant as against that particular party or strike that party out of the proceeding.
- Clause 79 allows a party to apply to the Tribunal for an order at any time that another party to the proceeding give security for costs. The Tribunal can order that the proceeding as against the party seeking security be stayed until the security is given and dismissed if the security is not given within the time specified. The power to make these orders is exercisable by the presiding member or a presidential member.

- Clause 80 allows the Tribunal, constituted by any member, to give directions at any time or do whatever is necessary for the expeditious and fair hearing and determination of a proceeding. The Tribunal may give directions requiring a party to produce a document or provide information for a review proceeding, despite anything to the contrary in section 106(1) or any rule of law of privilege or public interest relating to the production of documents.
- Clause 81 allows the Tribunal, on the application of a party to the proceeding, to order a person who is not a party and who is likely to have in his or her possession a relevant document to produce the document within a specified time. This power can be exercised any member of the Tribunal.
- Clause 82 allows the Tribunal to consolidate 2 or more applications or referrals dealing with the same or related facts and circumstances into one proceeding or direct them to be heard at the same time. The power to consolidate is exercisable by a presidential member and the power to direct the proceedings to be heard at the same time is exercisable by any member. Evidence given in a consolidated proceeding is admissible in relation to all the applications or referrals which were consolidated.

Division 5—Compulsory Conferences, mediation and settlement

- Clause 83 allows the Tribunal or principal registrar to require the parties to attend one or more compulsory conferences before the proceeding is heard. A compulsory conference is to be presided over by a Tribunal member or the principal registrar. The functions of a compulsory conference are to identify and clarify issues in dispute, promote settlement, identify questions of fact and law, and allow the giving of directions. Notice of a conference must be given to the parties and conferences will usually be held in private. Subject to the Act and rules, the person presiding decides the procedure at each conference.
- Clause 84 allows the Tribunal to require a party to attend a compulsory conference personally or by a representative who has authority to settle.

- Clause 85 provides that evidence of anything said or done in the course of a compulsory conference is not admissible in any hearing in the proceeding. However, such evidence can be given if all parties agree or if the evidence is only of directions given at the conference (or the reasons for the directions) or if the evidence is relevant to a proceeding for an offence relating to giving false or misleading information or relevant to proceedings for contempt or for an adverse determination due to the absence of a party from a properly convened compulsory conference.
- Clause 86 allows a party who attended or was represented at a compulsory conference to object to the Tribunal member who presided at the conference also hearing the proceeding, whether with or without others. Such an objection must be made before or at commencement of the hearing. Once the objection is made, the member must take no further part in the proceeding.
- Clause 87 provides that where a party fails to attend a compulsory conference, the conference may proceed in the party's absence. If a Tribunal member is presiding and all the attending parties agree, the Tribunal may also strike the absent party out of the proceeding or decide the proceeding against the party and make any other appropriate orders.
- Clause 88 allows the Tribunal or principal registrar to refer all or part of a proceeding to mediation by a nominated person. Referral does not require the consent of the parties and the principal registrar must give notice of the mediation to each party. The parties must pay a prescribed fee for the mediation and the Tribunal may refuse to continue with a proceeding if the fee is not paid. Where a Tribunal member acts as mediator, the member cannot subsequently hear the proceeding.
- Clause 89 allows the Tribunal to require a party to attend a mediation personally or by a representative who has authority to settle.
- Clause 90 requires the mediator to notify the Tribunal if the proceeding settles at mediation.
- Clause 91 provides that a mediator must notify the principal registrar when a mediation has been unsuccessful.

Clause 92 provides that evidence of things said or done in the course of mediation are inadmissible in any hearing in the proceeding, unless all the parties consent.

Clause 93 provides that if the parties settle the proceeding at any time, the Tribunal, constituted by any member including a member acting as mediator, may make any orders necessary to give effect to the settlement. If the settlement occurs at a compulsory conference presided over by the principal registrar, the principal registrar may make any necessary orders.

Division 6—Referral to experts

Clause 94 allows the Tribunal to call in experts to advise it in respect of any matter in a proceeding. The parties must pay the costs of the expert in proportions decided by the Tribunal.

Clause 95 allows the Tribunal to refer any question in a proceeding to a special referee either to decide the question or to give an opinion with respect to it. The parties must pay the costs of the special referee in proportions decided by the Tribunal.

Clause 96 allows the Tribunal, with the President's consent, to refer a question of law in a proceeding to the Trial Division of the Supreme Court or the Court of Appeal. Until the question has been decided, the Tribunal must not make a determination to which the question is relevant. Once the decision has been made, the Tribunal must not proceed in a manner or make a determination inconsistent with the opinion which has been given on the question.

Division 7—Hearings

Clause 97 requires the Tribunal to act fairly and according to the substantial merits in all proceedings.

Clause 98 requires the Tribunal to abide by the rules of natural justice, except insofar as the Act or an enabling enactment authorises a departure from them. It is not bound by the rules of evidence and may inform itself on any matter as it sees fit. It may admit the contents of a document into evidence even though service or other requirements of the rules, for instance relating to time limits, have not been complied with. The Tribunal is required to

conduct each proceeding with the minimum formality and technicality, and with as much speed as the Act and enabling enactment and a proper consideration of the matters before it permit. Subject to the Act, the regulations and the rules, the Tribunal may regulate its own procedure.

- Clause 99 requires the principal registrar to give notice of hearings to each party and to each other person entitled to notice under the Act, the enabling enactment, the rules or a direction of the Tribunal. The hearing may be held in the absence of any party who has been given notice but who fails to attend.
- Clause 100 allows the Tribunal to conduct all or part of any proceeding by telephone or video conference or using any other system of telecommunication. With the consent of the parties, the Tribunal may conduct all or part of a proceeding entirely on the papers, without any physical appearances or oral evidence being required.
- Clause 101 requires all hearings to be held in public, subject to any other provisions of the Act or directions of the Tribunal. The presiding member of the Tribunal may prohibit publication of evidence, documents or the identity of witnesses, if he or she considers this is necessary to avoid endangering national security or the physical safety of a person, or to protect the contents of a Premier's or Attorney-General's certificate, the administration or interests of justice, or public decency.
- Clause 102 requires the Tribunal to allow parties a reasonable opportunity to call evidence, examine witnesses and make submissions. However, the Tribunal may refuse to allow a party to call particular evidence if it considers that there is already sufficient evidence of that matter before the Tribunal. Evidence may be given orally or in writing and the Tribunal may require it to be given on oath or affidavit. Tribunal members may administer an oath or take an affirmation.
- Clause 103 allows a presiding member to authorise a person, who may not be a member of the Tribunal, to take evidence on its behalf in any proceeding. The Tribunal may authorise the person to take evidence outside Victoria. The person has all the powers of a Tribunal member in relation to the taking of evidence and of a

presiding member in relation to failing to give evidence. Such evidence is deemed to be given to the Tribunal in Victoria.

Clause 104 allows the principal registrar to issue a summons to give evidence and produce documents. A witness summons may be issued at the request of a party or on the principal registrar's or Tribunal's own initiative. A witness who is summoned is entitled to prescribed fees and allowances or, if none have been prescribed, to those fixed by the Tribunal. The fees and allowances are to be paid by the party who requested the summons or, if it was the Tribunal who wanted the summons issued, by the parties in proportions to be fixed by the Tribunal.

Clause 105 provides that the rule against self-incrimination does not apply in relation to answering questions or producing documents. However, if the person claims, before answering a question or producing a document, that the answer or document might tend to incriminate them, then the answer or document is not admissible in any criminal proceedings other than proceedings for perjury in relation to the answer.

Clause 106 excuses a person from answering a question or producing a document if the person could not be required to do so in the Supreme Court. However, this is subject to the provisions of sections 80(3) and 105. The Tribunal may require the production of a document so that it can determine whether it is a document whose production the Tribunal has the power to compel.

Clause 107 provides that any question of law in a proceeding must be decided by a presiding member who is a judicial member or, if there is no judicial member, a legal practitioner. Where the constitution of the Tribunal in a proceeding does not include either a judicial member or legal practitioner, the Tribunal is to be reconstituted, for this purpose only, to include a judicial or legal practitioner member who will then decide the question. For the purposes of this section, questions of law include questions of mixed law and fact.

Clause 108 allows a party at any time during a hearing to request that the Tribunal be reconstituted. The President or member may also at any time during a hearing give the parties notice that he or she seeks reconstitution of the Tribunal. The Tribunal as presently

constituted must then allow the parties to make submissions. If it decides in favour of reconstitution then the President must reconstitute the Tribunal. If it decides against reconstitution, then a party may require the matter be referred to the President for a reconsideration. A reconstituted Tribunal may have regard to any record, including evidence, of the proceeding before the previously constituted Tribunal.

Division 8—Costs

- Clause 109 provides that usually each party is to bear their own costs of a proceeding. However, at any time, the Tribunal may order a party to pay all or part of another party's costs. It may only do so if it is satisfied that this is fair, having regard to a variety of factors set out in sub-section (3). If the Tribunal considers that a party's representative is responsible for conducting the proceeding so as to disadvantage another party or unreasonably prolong it, the representative, after being given an opportunity to be heard, may be ordered to compensate another party for any costs unnecessarily incurred. If a costs order is made before the end of a proceeding, the Tribunal may refuse to continue with the proceeding until the order is complied with.
- Clause 110 allows the Tribunal to order an intervener to pay an amount as compensation for all or part of the costs reasonably incurred by a party as a result of the intervention. Where the intervener is the Attorney-General or the Director, any such amount is to be ordered to be paid by the State.
- Clause 111 provides that where the Tribunal makes an order for costs, it may either fix the amount itself or order that the costs be assessed or settled by the principal registrar.
- Clause 112 provides that where a party has made a written offer to settle a proceeding (other than a proceeding for review) and the offer is not accepted, and the Tribunal subsequently considers that the orders made in the proceeding are no more favourable to the rejecting party than the offer would have been, unless the Tribunal orders otherwise the party who made the offer is entitled to an order that the other party pay all of the offering party's costs since the offer was made.

Clause 113 allows an offer to be made with or without prejudice. More than one offer can be made and an offer must specify when any money which is offered will be paid.

Clause 114 requires that an offer must be open for a specified time of at least 14 days or until immediately before the Tribunal makes its order, whichever is the shorter period. During that period it can only be withdrawn by leave of the Tribunal. Acceptance of an offer must be by way of a written notice. A party may accept an offer even if the party has made a counter-offer.

Clause 115 provides that where an offer is accepted but the offering party does not perform their obligations under the offer, the Tribunal may, at the accepting party's request, make an order giving effect to the offer or make an order giving the accepting party all or part of what they asked for in their application or counterclaim or, if the offering party was the applicant, dismiss the proceeding.

Division 9—Orders

Clause 116 requires that an order must be in writing and authenticated in accordance with the rules. The Tribunal must either give a copy of any order which it makes to each party in the proceeding and to each person entitled to notice of the proceeding or of the order, or direct a party to give a copy of the order to the other parties and persons. The Tribunal may also direct the principal registrar or a party to give a copy of the order to any other person. The Tribunal must advise the Business Licensing Authority of an order which affects the licensing or registration of a person by the Authority.

Clause 117 requires the Tribunal to give reasons for any order, except an interim order, within 60 days of the order or such other time as is specified by the rules or the President. If the Tribunal only gives oral reasons, a party has 14 days in which to request written reasons, which must then be provided within 45 days of the request. The 45 day period may be extended by the President, who must give reasons for the extension. Written reasons must include the Tribunal's findings on material questions of fact. Reasons form part of an order.

Clause 118 provides that an order comes into effect either immediately after it is made or at a later time if specified in the order. This is subject to another order of the Tribunal staying the first order pending an appeal or to an order of the Supreme Court.

Clause 119 allows the Tribunal to correct mistakes in an order, either of its own initiative or on application by a party.

Clause 120 allows a person who neither appeared nor was represented at a hearing to apply to the Tribunal for the review of an order made at the hearing. The Tribunal may hear and determine the application if satisfied that the applicant had a reasonable excuse and may order that the order be revoked or varied. The provisions of the Act regarding reviews contained in Division 3 of Part 3 do not apply to reviews under this section.

Clause 121 provides for the enforcement of monetary orders made by the Tribunal. Orders may be filed with a court having the jurisdiction to enforce a debt of an equivalent amount. The copy of the order filed must be certified by the Tribunal as a true copy and accompanied by an affidavit from the person deposing to the amount unpaid under the order. The order will then be enforceable as an order of that court. No charge can be made for filing the documents.

Clause 122 provides for the enforcement of non-monetary orders in the Supreme Court. A certified copy of the order, an affidavit of non-compliance and a certificate from a judicial member stating that the order is appropriate for filing in the Supreme Court must be filed. The order will then be enforceable as an order of the Supreme Court. No charge can be made for filing the documents.

Division 10—General powers

Clause 123 allows judicial members of the Tribunal to grant an injunction, and both judicial and legal practitioner members to grant an interim injunction subject to any condition in the rules, in any proceeding if it is just and convenient. In the case of an interim injunction, the Tribunal does not have to give a person whose interests may be affected an opportunity to be heard and may require an undertaking as to costs or damages and make provision for the lifting of the injunction if specified conditions

are not met. The Tribunal may assess any costs or damages which are the subject of an undertaking.

Clause 124 allows judicial members of the Tribunal to make a declaration instead of or in addition to any other orders made in a proceeding.

Clause 125 provides that an enabling enactment may provide for the Tribunal to give advisory opinions on any matter or question referred to it.

Clause 126 allows the Tribunal to extend any time limit under an enabling enactment for the commencement of a proceeding. The rules may permit the Tribunal also to extend or abridge most time limits or waive compliance with most procedural requirements. This can be done even though the time for compliance expired before the application for extension or waiver was made. However, the Tribunal may not extend or abridge time or waive compliance if this would cause a prejudice or damage which cannot be remedied by costs or damages.

Clause 127 allows the Tribunal at any time to order a document in a proceeding to be amended.

Clause 128 allows the Tribunal to retain documents produced to it in a proceeding for a reasonable period and to make copies. A copy of such a document certified by a Tribunal member to be a true copy is admissible in evidence, as if it were the original, before any court, tribunal or person acting judicially. The Tribunal may similarly retain for a reasonable period any non-documentary exhibit or thing produced to it.

Clause 129 allows the Tribunal, if the presiding member considers it desirable, to enter and inspect any land or building, or to authorise a staff member or other person to do so to prepare a report to the Tribunal, or to order an occupier to give a witness reasonable access. If the occupier is not a party, then the Tribunal or authorised staff member or authorised person may only obtain entry with the occupier's consent or after the giving of 2 days' notice. This power of entry may be exercised at any reasonable time. Entry by the Tribunal must be exercised by all of the members together unless the presiding member directs otherwise. Obstructing or hindering a person who is exercising

a power of entry or refusing access to such a person will expose the person doing so to a penalty of up to 6 month's imprisonment and/or a fine of up to 60 penalty units.

Clause 130 provides that the Tribunal's power to make an order or other decision includes a power to make the order or decision subject to any conditions or further orders. Without being exhaustive, these conditions or further orders may relate to adjournments, costs and the giving of notice or undertakings.

Clause 131 provides that a procedural order or direction may be varied or revoked by any Tribunal member empowered to do so under the Act or the rules.

Clause 132 allows the principal registrar to waive or, if the regulations permit, reduce fees on financial hardship or other prescribed grounds. However, if costs are awarded against a person who has had a fee waived or reduced, that fee becomes payable in full. That person will not be allowed, without leave of the Tribunal, to continue with the existing procedure or bring a fresh proceeding until the fee is paid.

Division 11—Offences

Clause 133 sets out penalties for non-compliance with a non-monetary order of the Tribunal. However, if a person was not first given an opportunity to be heard, this provision only applies if the person is then served personally with a certified copy of the order and a copy of this section or, if the Tribunal is satisfied that personal service is not possible or appropriate, by such other method of service as is specified by the Tribunal.

Clause 134 sets out penalties for failure by a person, who has been properly served with a witness summons, to attend the Tribunal until released from attendance or to produce a required document. A judicial member may also direct the apprehension of such a person and such a direction must be obeyed and executed by a member of the police force.

Clause 135 sets out penalties for the refusal by a witness, without reasonable excuse, to be sworn in, make an affirmation or answer a question that the presiding member requires to be answered.

Clause 136 sets out penalties for the giving of false or misleading information.

Clause 137 sets out various categories of behaviour that constitute contempt of the Tribunal. The section also sets out the mechanism for dealing with persons alleged to be guilty of contempt, including a power to direct the arrest of the person. If the Tribunal finds a person guilty of contempt it may impose a prison term of up to 5 years and/or a fine of up to \$100 000 in the case of a natural person and \$500 000 for a corporation. The Tribunal may accept an apology for a contempt and remit any punishment in part or in whole. Section 46 of the **Public Prosecutions Act 1994** applies to a contempt of the Tribunal to the same extent that it would to a contempt of the Supreme Court.

Clause 138 provides that a person may, with the leave of the Court of Appeal, appeal against a punishment imposed by the Tribunal for contempt. An order imposing a punishment for contempt is stayed for 14 days or until any appeal is determined. The Court of Appeal does not have the power to extend the time for applying for leave to appeal.

Clause 139 provides that a person cannot be punished more than once for an act or omission for which the person could be charged both with an offence and with contempt under the Act.

Division 12—Service of documents

Clause 140 sets out various provisions regarding service of documents on individuals, companies and incorporated associations. The rules may also provide for other permitted methods of service.

Clause 141 specifies when a document will be taken to have been served in relation to various methods of service. References to business days do not include Saturdays, Sundays or public holidays.

Division 13—General

Clause 142 requires all courts to take judicial notice of the Tribunal's seal, the signature of past or present Tribunal members or registrars and the fact that each such person actually held that position. A court must presume that the Tribunal's seal was properly affixed until the contrary is proved.

Clause 143 gives the same immunity to Tribunal members, parties, parties' representatives and witnesses as their Supreme Court equivalents have. A mediator who is not a member of the Tribunal, experts, special referees and persons taking evidence on behalf of the Tribunal all have the same immunity as a Tribunal member. All registrars have the same immunity as the Taxing Master of the Supreme Court in their assessment of bills of costs, and the same immunity as a Tribunal member in their exercising the powers of the Tribunal under the Act or enabling enactment, in rejecting applications and in relation to compulsory conferences.

Clause 144 requires the principal registrar to keep a register of proceedings complying with the rules. The register must be available for inspection whenever the principal registry is open. Parties may inspect relevant parts of the register for free and other persons may be charged a fee for inspection or copies.

Clause 145 provides that a certificate purporting to be signed by a registrar about any matter relating to the contents of the register is admissible as evidence of the matter certified. Subject to certain specified restrictions, the principal registrar must supply such a certificate upon request and the payment of any prescribed fee.

Clause 146 requires the principal registrar to keep documents in a proceeding for 5 years after the final determination of the proceeding. Subject to certain specified restrictions, a party may inspect the file of its own proceeding without charge and any other person may inspect the file and obtain copies on paying the prescribed fee, if any.

Clause 147 allows the Tribunal to publish reports or bulletins of important or typical determinations and orders for the guidance of persons wishing to bring proceedings.

PART 5—APPEALS FROM THE TRIBUNAL

Clause 148 provides for appeals from an order of the Tribunal to either the Court of Appeal or the Trial Division of the Supreme Court, depending on whether or not the Tribunal included the President or a Vice President. Leave to appeal from the appellate court is required and appeals are limited to questions of law. Applications for leave to appeal must be brought in accordance

with the rules of the Supreme Court and within 28 days of the order. The appeal must then be brought within 14 days of leave being granted. Where the Tribunal has given oral reasons for the order and written reasons have been requested, the time for applying for leave will not begin to run until the written reasons are provided. The appellate court may extend the time for bringing the appeal. The appellant must notify the principal registrar of the appeal. In addition to making orders dealing with the order appealed against, if the appellate court remits the proceeding for rehearing by the Tribunal, then it must also give directions as to how the Tribunal should be constituted for the rehearing.

Clause 149 allows the Tribunal to stay the operation of any of its orders pending appeal. It may impose conditions on the stay.

PART 6—RULES COMMITTEE

Division 1—Establishment of Rules Committee

Clause 150 establishes a Rules Committee of the Tribunal.

Clause 151 provides that the Rules Committee is to develop rules of practice and procedure and practice notes, to direct the education of Tribunal members relating to those rules and practice notes, and to perform any other functions conferred by the President.

Clause 152 specifies who the members of the Rules Committee are to be.

Clause 153 provides that members of the Rules Committee, other than the President and Vice-Presidents, are appointed by the Governor in Council, who also fixes the remuneration and allowances of those who are not Tribunal members. Their usual term is 5 years. They are eligible for reappointment and are not subject to the **Public Sector Management Act 1992**.

Division 2—Procedure of Rules Committee

Clause 154 sets out in order of precedence who is to preside at meetings of the Rules Committee.

Clause 155 requires a quorum of 4 members at meetings and, where a vote is tied, gives the presiding member a casting vote. Accurate

minutes of meetings must be kept but the Rules Committee is otherwise allowed to regulate its own meetings.

Clause 156 provides that decisions of the Rules Committee are not invalidated merely because of a vacancy in the office of a member or a defect or irregularity in a member's appointment.

Division 3—Exercise of powers

Clause 157 gives the Rules Committee the power to make rules regulating practice and procedure, including rules required or permitted by or necessary to give effect to the Act. Schedule 2 sets out a non-exclusive list of matters which can be the subject of rules. Rules made by the Rules Committee can be disallowed by Parliament.

Clause 158 gives the Rules Committee the power to issue practice notes relating to practice and procedure and requires that a copy of each be given to the Minister as soon as practicable.

PART 7—MISCELLANEOUS

Clause 159 provides that a provision of an enabling enactment will prevail to the extent that it is inconsistent with any provision of the Act, the regulations or the rules.

Clause 160 states that it is the intention of section 52 to alter or vary section 85 of the **Constitution Act 1975**.

Clause 161 allows the Governor in Council to make regulations with respect to certain fees and any thing required or permitted by the Act to be prescribed by regulation or necessary to be prescribed to give effect to the Act. Regulations may differentiate in their application to persons, things and fees in a variety of specified ways.

SCHEDULES

Schedule 1 sets out variations from the provisions of Parts 3 and 4 for proceedings under certain enactments. It is divided into Parts for ease of reference.

Schedule 2 sets out a non-exhaustive list of matters that may be the subject of rules.

