

2003

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

CONSUMER AND TRADER TRIBUNAL BILL 2003

EXPLANATORY MEMORANDUM

Circulated by authority of the  
Attorney General  
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## **CONSUMER AND TRADER TRIBUNAL BILL 2003**

### **Outline**

The Consumer and Trader Tribunal Bill 2003 (the Bill) establishes the Consumer and Trader Tribunal. The Tribunal will replace the existing Agents Board and the five dispute resolution bodies for the security industry. The Tribunal will have the jurisdiction conferred on it by the Security Industry Bill 2002 and the Agents Bill 2003. The Tribunal will hear disciplinary matters and appeals against licensing and registration decisions related to real estate, stock and station, business, travel and employment agents and the security industry.

There are a number of benefits in consolidating the Agents Board and the five dispute resolution committees for the security industry into one Tribunal. The benefits include:

- improved, standardised and streamlined tribunal processes;
- standardisation of the appointment process of tribunal members;
- people who have particular expertise can be called upon when required, as there is no limit to the number of people who can be appointed to the tribunal;
- greater flexibility for the hearing of matters and disputes for these industries, as the tribunal procedure can vary according to the complexity of the matter. For example, decisions in simple matters can be made by submission, rather than formal hearings. In addition, tribunal matters can be heard by one member or a number of members depending on the complexity of the matter;
- greater efficiency than was achievable with the existing dispute resolution bodies. For example, the Agents Board currently sits with seven members, whereas this Bill would allow matters to be heard by one member or a number of members, depending on the complexity of the matter; and
- matters can be dealt with more quickly, as the Tribunal could be constituted by one member and hear security and agents' matters on the same day, rather than waiting for sufficient agents or security matters to warrant a formal sitting.

This Bill also provides a framework for the jurisdiction of the Tribunal to be expanded at some later time. The Tribunal could be expanded to handle consumer complaints and review licensing decisions for other industries. This would avoid the duplication of existing dispute resolution functions and would ensure that there is consistency in dispute resolution processes.

The Consumer and Trader Tribunal Bill 2003 is based on the Tribunal provisions in the *Residential Tenancies Act 1997* and the *Administrative Appeals Tribunal Act 1989*.

Part 1 of the Bill deals with preliminary matters such as commencement of the Act and alerts readers to the objects of the Act which are:

- to review decisions by decision-makers under Acts which confer jurisdiction on this Tribunal;
- to make decisions about disciplinary action to be taken against licensees, where jurisdiction is conferred on this Tribunal;

- to ensure that the Tribunal is accessible;
- to ensure that the Tribunal proceedings are as simple, quick, inexpensive and as informal as each case demands; and
- to ensure that the decisions of the Tribunal are fair.

Part 2 of the Bill deals with the constitution of the Tribunal. The Tribunal will consist of a president, deputy presidents for each Division and a panel of members. The president can select members from the panel to hear matters. Matters can be heard by one member, the President, a Deputy President or a number of members. This will depend on the complexity of the matter, the availability of members and the relevant skills of the members.

Part 3 of the Bill provides for applications to be made to the Tribunal. Applications for a review of a licensing decision or for disciplinary action to be taken against a party must be in writing and must include a statement of reasons for making the application. Applications for review of a licensing decision must be made within 60 days of the licensing decision being made. This Part also allows preliminary conferences to be held to help prepare parties for hearings and to assist in narrowing the issues.

Part 4 of the Bill sets out the Tribunal procedures. The procedures of the Tribunal are to be as simple, quick and inexpensive as is consistent with achieving justice. The Tribunal must make a thorough examination of all matters relevant to a case and ensure that each party is given a reasonable opportunity to present their case. Like the Administrative Appeals Tribunal and the Essential Services Consumer Council this Tribunal will not be bound by the rules of evidence in considering matters.

Part 4 of the Bill permits parties to appear before the Tribunal in person or be represented by another person, including a lawyer. This Part also permits parties to give evidence by phone or by electronic means.

Part 5 of the Bill sets out the powers of the Tribunal and the matters that the Tribunal must consider in making a decision.

Part 6 provides for parties to appeal Tribunal decisions to the Supreme Court. Appeals can only be made on a question of law and with the leave of the Supreme Court. This enables the Supreme Court to assess whether the appeal is on a question of law and will enable the Court to dispose of vexatious appeals. If leave to appeal is not granted by the Supreme Court the parties can appeal to the Appeals Court.

Part 7 of the Bill deals with enforcement of Tribunal decisions and sets out a number of offences, such as providing the Tribunal with false or misleading information or obstructing or hindering the Tribunal.

Part 8 of the Bill protects Tribunal members from incurring liability for acts honestly done in the carrying out of their functions. This Part also provides that information from a preliminary conference cannot be used against a party in criminal proceedings or in a civil proceeding.

Part 9 deals with transitional matters. Part 9 provides that the existing members of the Agents Board will sit as Tribunal members until their appointments lapse in 2005.

## Clause Notes

**Clause 1 – Name of Act** – states the title of the Act, which is the Consumer and Trader Tribunal Act 2003.

**Clause 2 – Commencement** – states that the Act commences on a day fixed by the Minister by notice.

**Clause 3 – Dictionary** – provides that the dictionary at the end of the Act is part of the Act. The dictionary defines key words and expressions used in the Act, and includes references to other words and expressions defined in other parts of the Act or in other legislation.

**Clause 4 – Notes** – provides that notes included in this Act are only explanatory.

**Clause 5 – Offences against Act – application of Criminal Code etc** – provides that other legislation applies in regard to the offences against this Act. For example chapter 2 of the Criminal Code applies to offences in this Act. This clause increases awareness of the Criminal Code and alerts the reader to the fact that chapter 2 of the Criminal Code, setting out the general principles of criminal responsibility, applies to this Act.

**Clause 6 – Objects of Act** – sets out the objects of the Act. The objects are:

- to establish a Consumer and Trader Tribunal, which will review decisions by decision-makers under the Act which confer jurisdiction on this Tribunal and make decisions about disciplinary action to be taken against licensees, where jurisdiction is conferred on this Tribunal;
- to ensure that the Tribunal is accessible;
- to ensure that the Tribunal proceedings are as simple, quick, inexpensive and as informal as each case demands; and
- to ensure that the decisions of the Tribunal are fair.

**Clause 7 – Establishment of Tribunal** – provides that the Consumer and Trader Tribunal is established. The Tribunal consists of a general division and any other divisions established by the Regulations.

**Clause 8 – Constitution of Tribunal** – provides that the Tribunal can be comprised in three different ways. The Tribunal can be comprised of the president of the Tribunal sitting alone, the president and members of the Tribunal panel appointed by the president sitting or by a member or members of the Tribunal panel appointed by the president with one member being appointed the presiding member.

The constitution of the Tribunal will vary according to the nature and complexity of the matters being heard. The president of the Tribunal determines the constitution of the Tribunal. The dictionary defines “president” as including the deputy president for matters involving the deputy president’s division of the Tribunal.

**Clause 9 – Appointment of president** – provides for the appointment of the president of the Tribunal. The Executive appoints the president. The president must have been a lawyer for at least five years.

The president can be appointed for up to five years.

**Clause 10 – Appointment of deputy president** – provides for the appointment of deputy presidents of the Tribunal. The Executive appoints deputy presidents. Deputy presidents must have the experience or expertise to qualify the person to exercise the functions of deputy president.

Only one deputy president can be appointed for each division of the Tribunal.

Deputy presidents can be appointed for up to three years.

**Clause 11 – Appointment of Tribunal panel** – provides for the appointment of people to the Tribunal panel. The Executive appoints members of the Tribunal panel. The Executive must be satisfied that the members to be appointed have the experience or expertise to qualify them to be a member of the Tribunal panel.

Appointments to the Tribunal panel can be for any period not exceeding three years.

Members of the Tribunal panel can be appointed by the president under section 8 to hear matters.

**Clause 12 – Appointment of Tribunal registrar** – provides for the appointment of a Tribunal registrar. The Chief Executive appoints a public servant to be the registrar.

The registrar may delegate any of their functions to a public servant.

**Clause 13 – Appointment of deputy Tribunal registrars** - provides for the appointment of deputy Tribunal registrars. The Chief Executive appoints the deputy registrars.

**Clause 14 – Ending appointments** – provides that the Executive may end Tribunal members and panel members appointment for:

- Misbehaviour; or
- Physical or mental incapacity which affects the exercise of the person's functions.

The *Legislation Act 2001* covers the ending of appointments of the registrar and deputy registrars.

**Clause 15 – What applications may be made?** – provides that the Tribunal has jurisdiction to:

- review decisions; and
- decide on the disciplinary action to be imposed on persons licensed or registered under Acts.

The Tribunal only has jurisdiction where jurisdiction is conferred on the Tribunal by another piece of legislation. The initial jurisdiction of the Tribunal is conferred on it under the Agents Bill 2003 and the Security Industry Bill 2002.

**Clause 16 – Acts providing for application for review** – provides Acts conferring jurisdiction on the Tribunal to review decisions must specify:

- the persons whose decisions can be reviewed;
- the decisions that can be reviewed; and
- conditions that apply to applications.

**Clause 17 – Making an application** – provides that applications to the Tribunal must:

- be in writing;
- contain a statement of reasons for making the application;
- contain the details prescribed in the regulations;
- be given to the registrar; and
- if the application is for a review of a decision, then the application must be made within 60 days of the decision.

**Clause 18 – Help with applications etc** – provides that the registrar may give a person making an application the help the registrar considers appropriate.

**Clause 19 – Withdrawal of application** – provides that an applicant may withdraw an application at any time by giving written notice to the registrar or Tribunal. This clause requires the registrar of the Tribunal to notify the other party to the application of the withdrawal.

**Clause 20 – Preliminary conferences** – provides that the registrar may require the parties to an application to attend a preliminary conference. A preliminary conference may assist in the narrowing of issues for the hearing and may assist the parties in preparing for a Tribunal hearing.

This clause also provides that the registrar may make inquiries or require further information from a party. The inquiries that a registrar can make include talking to the consumer who made a complaint to which an application for disciplinary action relates.

**Clause 21 – Principles about Tribunal procedures** – provides that the procedures of the Tribunal are to be as simple, quick and inexpensive as is consistent with achieving justice.

**Clause 22 – Natural justice** – provides that the Tribunal must observe natural justice. Natural justice requires decision-makers to act fairly, in good faith, without bias and must give each party the opportunity to state their case.

**Clause 23 – Procedure generally** – provides that the Tribunal may decide its own procedure if no procedure is prescribed by this Act. The procedure must be as informal as possible.

**Clause 24 – Arrangement of business** – provides that the president is responsible for ensuring the orderly and prompt discharge of Tribunal business. The president may give directions about the arrangement of Tribunal business and the procedure of the Tribunal.

**Clause 25 – Time and place of proceedings** – provides that the Tribunal is to sit at the times and places that the president decides.

**Clause 26 – Laws of evidence** – provides that the Tribunal is not required to apply the laws of evidence, subject to the requirement that the Tribunal comply with principles of natural justice.

The exclusion of the laws of evidence is in line with the exclusion of the laws of evidence for the Administrative Appeals Tribunal, the Essential Services Consumer Council and the Residential Tenancies Tribunal.

**Clause 27 – Tribunal may inform itself** – provides that the Tribunal may inform itself in any way it considers appropriate, subject to the requirement that the Tribunal comply with principles of natural justice.

**Clause 28 – Parties** – provides that the parties to a Tribunal hearing, for a review of a decision, are the applicant and the decision-maker. This clause provides that the parties to a Tribunal hearing, for an application for disciplinary action, are the Commissioner for Fair Trading and the licensee to whom the application relates.

This clause also provides that the Tribunal may join additional parties to a proceeding where the Tribunal considers it appropriate.

**Clause 29 – Representation** – provides that a person appearing at a hearing may be represented by a lawyer or another person.

**Clause 30 – Appearance by corporation** – provides that a corporation may appear before the Tribunal by a Director or an authorised officer.

**Clause 31 – Hearings** – provides that the Tribunal must hear each application made to it, unless the application is frivolous or vexatious.

This clause also provides that Tribunal hearings must be in public unless there are exceptional circumstances that justify the hearing being closed. Exceptional circumstances may include a matter that relates to national security.

**Clause 32 – Procedure in absence of party** – provides that if a party fails to appear or send a representative to a hearing then the Tribunal may:

- order that the application be set down for a hearing at another time;
- order that stated other steps be taken before the hearing proceeds;
- adjourn the proceedings;
- dismiss the application, if the party is the applicant; or
- proceed with the hearing in the absence of a party.

**Clause 33 – Witnesses** – provides that the Tribunal, a presiding member, the Registrar or a Deputy Registrar may summons a person to give evidence and/or produce a document or thing. A summons is complied with if the document or thing is delivered to the registrar before the date specified in the summons.

A summons must be in writing and must be served on the person.

This clause provides that it is an offence for a person to fail to comply with a summons. The maximum penalty for this offence is 50 penalty units and/or six months imprisonment.

This is a strict liability offence. Section 23 of the Criminal Code provides that if a law that creates an offence provides that the offence is one of strict liability, there are no fault elements for any of the physical elements of the offence. Essentially this means that conduct alone is sufficient to make the defendant culpable.

However, under the Criminal Code, all strict liability offences will have a specific defence of mistake of fact. Clause 23(3) of the Criminal Code makes it clear that other defences may still be available for use in strict liability offences.

**Clause 34 – Taking part by telephone etc** – provides that people may take part in a preliminary conference or a hearing by telephone, closed-circuit television or other means of communication.

**Clause 35 – Amendments** – provides that the Tribunal may order that a document in the hearing be amended or give leave to a party to amend their documents.

**Clause 36 – Costs** – provides that the parties to a hearing must bear their own costs unless the Tribunal orders otherwise. The Tribunal can order that a party pay another parties' costs if the party has caused unreasonable delay or obstruction.

**Clause 37 – Disclosure of interests by members** – provides for members (or proposed members) of the Tribunal to disclose any interest, direct or indirect, financial or otherwise, that could conflict with the exercise of the member's functions.

The member must tell the parties to the proceedings about the interest and unless each party to the proceedings consents, must not participate in the proceedings.

If the president becomes aware that a person is or is to be a Tribunal member and has a conflict of interest then the president can either:

- direct the person not to take part or continue to take part in the proceedings; or
- cause the interest of the person to be disclosed to the parties to the proceeding.

**Clause 38 – Adjournment of proceedings** – provides that the Tribunal may adjourn a matter at any time and in the way and on the terms the Tribunal considers appropriate.

**Clause 39 – Decisions by majority or president** – provides that Tribunal decisions are made by the majority of the votes of the Tribunal members. If the votes of Tribunal members are equally divided, then the decision of the president or the presiding member is the decision of the Tribunal.

**Clause 40 – Application to extend time or amend orders** - provides that the Tribunal may on application extend the time for compliance with a Tribunal order or amend an interim order. The Tribunal may only extend the time for compliance or amend an order if the Tribunal is constituted by the President or the President and other members.

**Clause 41 – Decision without hearing** – provides procedures for the Tribunal to make a decision without a hearing. The Tribunal must give each party to the proceedings written notice that the Tribunal proposes to make a decision without a hearing and allowing parties to give representations about the proposal. The representations must be made within 21 days after the notice is given.

The Tribunal must consider the representations from the parties. The Tribunal can make a decision without a hearing if the Tribunal is satisfied that it is in the public interest not to conduct an inquiry and the Tribunal is satisfied that it has sufficient information to make an informed decision on the application.

The Tribunal may consider that a hearing is unnecessary where the application is for disciplinary action and the licensee has admitted the matter raised in the application.

**Clause 42 – Review of decisions on application** - provides that if the Tribunal is reviewing a decision on application then the Tribunal may exercise the powers and discretions conferred by the relevant Act on the person who made the decision. The Tribunal can:

- affirm the decision under review;
- vary the decision under review; or
- set aside the decision under review and substitute a new decision or remit the matter for reconsideration in accordance with directions of the Tribunal.

**Clause 43 – Orders for disciplinary application** – provides that if the Tribunal is considering an application for disciplinary action then the Tribunal may make an order for disciplinary action if satisfied on reasonable grounds that grounds for disciplinary action against the person exist.

In considering what disciplinary action to take the Tribunal must consider the following:

- whether the licensee took reasonable steps to avoid the action that is grounds for disciplinary action;
- whether disciplinary action has been taken against the licensee for a similar act;
- whether the licensee has taken steps to mitigate the effect of the contravention;
- the impact of the contravention on any consumer;
- the likelihood that the licensee will act in a way that is grounds for disciplinary action in the future; and
- whether the Commissioner for Fair Trading has applied for particular disciplinary action.

The Tribunal may consider any other relevant matter.

**Clause 44— Other actions by tribunal** – provides that the Tribunal can:

- refuse to hear matters that are frivolous or vexatious;
- order a party to pay costs, where the other party has incurred extra costs due to their unreasonable delay or obstruction;
- hear the application jointly with another application that arises from the same or similar facts; or
- with the consent of the President, amend or set aside a Tribunal order.

**Clause 45 – Interim orders** - provides for the Tribunal to make interim orders. Interim orders may be made where it is necessary to protect the party applying for the order from disadvantage or suffering harm. The Tribunal may make any order it considers appropriate to protect the position of the party that applied for the order.

**Clause 46 –Other disciplinary action** – provides the orders that the Tribunal can make when satisfied that there are grounds for disciplinary action. The Tribunal can make any order prescribed under the relevant legislation. For example, the Security Industry Bill 2003 provides that the Tribunal can suspend or cancel a licence. In addition, the Tribunal can:

- order the person to pay an amount to the Territory or to someone else, such as a consumer;
- reprimand the person;
- order the person to give a written undertaking;
- place one or more conditions on the person’s licence or registration; or
- give the person directions.

**Clause 47 – Kinds of directions** – provides that the directions that the Tribunal can issue include a direction that a person comply with a requirement of the Act or a condition on the licence. Directions must state the period within which the licensee is to comply with the direction.

This clause also provides that the Tribunal can extend the period for compliance with a direction.

**Clause 48 – Notice of orders** – provides that the Tribunal must give each party to a hearing written notice setting out the terms of an order made. The notice must be given to each party within seven days of the Tribunal making the order.

**Clause 49 – Statement of reasons** – provides that a party to a hearing can, within fourteen days of an order being made, request the Tribunal to provide a statement of reasons for making the order. If requested, within fourteen days, the Tribunal must give the party a written statement of reasons for making the order.

**Clause 50 – Referral of questions of law** – provides that the Tribunal can refer questions of law that raise an issue of public importance to the Supreme Court.

**Clause 51 – Appeals from decisions of Tribunal** - provides that a party to a Tribunal hearing may, with the leave of the Supreme Court, appeal the decision. An appeal can only consider a question of law.

The Supreme Court can affirm or set aside the Tribunal decision, can make a costs order or can remit the case, with directions, to be reheard by the Tribunal. The Supreme Court can make any other order the court considers appropriate.

An appeal must be commenced within 28 days of the order being given to the party, or if a statement of reasons for the decision has been requested, 28 days after the statement is received.

**Clause 52 – Contravention of requirement to take oath** – provides that a person commits an offence if required to take an oath or affirmation and the person does not take the oath or affirmation. The maximum penalty for this offence is 50 penalty units and/or six months imprisonment.

**Clause 53 – Failure to comply** – provides that a party to a hearing must not, without reasonable excuse, fail to comply with a Tribunal order or direction.

If a person fails to comply with a Tribunal order or direction then the Tribunal can order the person to pay a stated amount, not larger than an amount prescribed in the Regulations.

**Clause 54 – Orders for payment of amounts** – provides that if the Tribunal orders a licensee to pay an amount, then the Tribunal must tell the licensee about the effect of clause 55. Clause 55 provides that a failure to pay the amount results in the licence being cancelled.

**Clause 55 – Non-payment of amounts ordered to be paid** – provides that a failure to pay the amount ordered in clause 54, by the due date, can result in the licence or registration automatically being cancelled.

This clause also provides that the Tribunal can extend the due date for a payment.

**Clause 56 – Obstruction and hindering** – provides that it is an offence for a person to obstruct or hinder the Tribunal, a Tribunal member or the registrar, in the exercise of their functions. The maximum penalty for this offence is 50 penalty units and/or six months imprisonment.

This is a strict liability offence. Section 23 of the Criminal Code provides that if a law that creates an offence provides that the offence is one of strict liability, there are no fault elements for any of the physical elements of the offence. Essentially this means that conduct alone is sufficient to make the defendant culpable.

However, under the Criminal Code, all strict liability offences will have a specific defence of mistake of fact. Clause 23(3) of the Criminal Code makes it clear that other defences may still be available for use in strict liability offences.

**Clause 57 – False or misleading information** – provides that it is an offence to provide the Tribunal, the registrar or deputy registrar with information that the person knows is false or misleading in a material particular. It is also an offence to provide the Tribunal, the registrar or deputy registrar with information that the person knows omits something that makes the information false or misleading in a material particular.

The maximum penalty for this offence is 200 penalty units and/or two years imprisonment.

**Clause 58 – False or misleading documents** – provides that it is an offence to provide the Tribunal, the registrar or deputy registrar with a document that is false or misleading in a material particular. The maximum penalty for this offence is 200 penalty units and/or two years imprisonment.

This clause provides that it is not an offence for a document to be produced which is accompanied by a written statement saying that the document is false or misleading and the material particular that is effected.

**Clause 59 – Secrecy** – provides that it is an offence for a person to disclose or make a record of protected information other than in the exercise of a function under this Act or another Territory law. It is also an offence for a person to produce to anyone a document given under this Act other than in the exercise of a function under this Act or another Territory law. The maximum penalty for this offence is 50 penalty units and/or six months imprisonment.

It is a defence to this offence that the information was divulged or communicated with the consent of the person from whom the information was obtained or the information was divulged to a person administering a corresponding law of a local jurisdiction or to a law enforcement authority.

**Clause 60 – Protection of members etc** – provides that a civil proceeding does not lie against:

- a Tribunal member;
- the registrar;
- a deputy registrar;
- a person acting under the direction or authority of the Tribunal;
- a person taking part in a proceeding; or
- a public servant providing administrative assistance to the Tribunal

because of an act done, or omitted to be done honestly in the exercise of a function under this Act.

**Clause 61 – Admissibility of evidence** – provides that evidence given before the registrar during a preliminary conference is not admissible in criminal proceedings. Evidence from a preliminary conference is also not admissible in civil proceedings under this Act.

**Clause 62 – Approved forms** – provides that the president may approve in writing any necessary forms. This clause also stipulates that where there is an approved form it must be used.

An approved form is a notifiable instrument under the *Legislation Act 2001*.

**Clause 63 – Determination of fees** – provides that the Minister may determine fees for this Act.

**Clause 64 – Regulation-making power** – provides the power for the Executive to make any necessary regulations for the purposes of this Act.

The regulations may make provision in relation to preliminary conferences, giving notice to parties before a Tribunal hearing, record-keeping and Tribunal practice and procedures.

**Clause 65 – Definitions for pt 9** - provides definitions for part 9 of the Act dealing with transitional matters.

**Clause 66 – Agents board members** – provides that the members of the Agents Board are taken to be members of the Tribunal panel, until the day the persons appointment to the Agents Board would have expired.

**Clause 67 – Agents board chairperson** – provides that the chairperson of the Agents Board is taken to be the deputy president of the general division of the Tribunal, until the day the persons appointment to the Agents Board would have expired.

**Clause 68 – Court Security Act 2001 dictionary, definition of court, new paragraph (ea)** – amends the *Court Security Act 2001* to provide that the Act applies to the Consumer and Trader Tribunal.

**Clause 69 – Legislation Act, dictionary, part 1, new definition of consumer and trader tribunal** – amends the *Legislation Act 2001* to provide a definition “consumer and trader tribunal”.

**Clause 70 – Modification of pt 9’s operation** - provides that the Regulations may modify the transitional provisions of this Act. The Regulations cannot make changes of a policy nature or changes to the Act which are more than savings or transitional matters.

Provisions of this kind have been included in several recent pieces of legislation, including the *Road Transport (Public Passenger Services) Act 2001*, the *Race and Sports Bookmaking Act 2001*, the *Legislation Act 2001*, the *Civil Law (Wrongs) Act 2002* and the *Food Act 2001*.

This clause expires two years after the Act commences.

**Clause 71 – Expiry of pt 9** – provides that Part 9 dealing with transitional matters expires two years after the commencement of the Act.