

ADMINISTRATIVE REVIEW TRIBUNAL REGULATIONS 2024

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

in compliance with section 15J of the *Legislation Act 2003*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Administrative Review Tribunal Act 2024* (Act) establishes the Administrative Review Tribunal (Tribunal) as a fit-for-purpose federal administrative review body which will replace the Administrative Appeals Tribunal (AAT). The Act received Royal Assent on 3 June 2024 and has been proclaimed to commence on 14 October 2024.

Section 297 of the Act provides that the Governor-General may make regulations about matters that are required or permitted by the Act to be prescribed by regulations, or necessary or convenient to give effect to the Act.

Section 4 of the *Acts Interpretation Act 1901* (Acts Interpretation Act) provides authority for legislative instruments, including regulations like the *Administrative Review Tribunal Regulations 2024* (Regulations), to be made before the commencement of the relevant enabling legislation. Subsection 4(2) of the Acts Interpretation Act enables the Governor-General to make the Regulations as if the Act has already commenced.

The purpose of the Regulations is to:

- make technical modifications to the Act as it applies to an application for second review of certain social security decisions or a guidance and appeals panel application
- set out requirements for assessment processes for appointments of the President, Non-Judicial Deputy Presidents, senior members, general members, and the Chief Executive Officer and Principal Registrar (Principal Registrar) of the Tribunal, and
- enable the Tribunal to review certain decisions made under Norfolk Island enactments.

Modifications in relation to guidance and appeals panel applications

Subsection 130(7) of the Act provides that regulations may make modifications to the Act as it applies in relation to applications to the guidance and appeals panel. The Regulations provide for the operation of the Act, in relation to the Tribunal's power to dismiss an application in certain circumstances where an application cannot proceed, in guidance and appeals panel applications. The Regulations give the Tribunal a dismissal power in a guidance and appeals panel application where the person who made the application on which the decision of the Tribunal was made (the first review applicant) dies, becomes bankrupt, is wound up or subject to liquidation or administration.

Modifications in relation to second review for certain social security decisions

Paragraph 131E(3)(b) of the Act provides that regulations may prescribe modifications to the Act for the purposes of second review. The Act provides that second review is available for certain social security decisions. The Regulations provide for the operation of the Act, in relation to the Tribunal's power to dismiss an application in certain circumstances where an application cannot proceed, in second review applications. The Regulations give the Tribunal

a dismissal power in a second review application where the person who made the application on which the decision of the Tribunal was made (the first review applicant) dies or becomes bankrupt in some circumstances, and the Tribunal considers the application cannot continue.

Appointments to the Tribunal

Part 8 of the Act establishes a transparent and merit-based process for the appointment of the President, Non-Judicial Deputy Presidents, senior members, general members and the Principal Registrar of the Tribunal.

Under subparagraphs 205(2)(b)(iii), 207(2)(b)(iii), 208(2)(b)(iii) and 227(2)(b)(iii) of the Act, before the Minister makes a recommendation for the appointment of a person, the Minister must be satisfied that the person was assessed, by an assessment panel established by the Minister, as suitable for the appointment, through an assessment process that, among other things, complied with the requirements prescribed by regulations. The Regulations impose a range of requirements for assessment processes. The Regulations set out requirements to publish invitations for applications, the selection criteria for appointments, and the steps which must be taken before an assessment panel can assess an applicant as suitable for appointment. These steps include the assessment panel considering written applications, conducting interviews, and seeking referee reports. The Regulations also set out requirements relating to the composition of assessment panels, and a process for dealing with assessment panel members' conflicts of interest.

Review of decisions under Norfolk Island enactments

Section 297(2) of the Act enables regulations to provide for applications to be made to the Tribunal for the review of decisions made under Norfolk Island enactments, and to provide such procedural modifications as are needed to allow the Tribunal to review those Norfolk Island decisions in a similar way to equivalent reviewable decisions under the Act.

The Regulations identify certain kinds of decisions made under Norfolk Island enactments that are reviewable by the Tribunal, and make minor modifications to the operation of the Act to ensure that the Tribunal can review a decision under a Norfolk Island enactment in a similar way to how it reviews other kinds of reviewable decisions. The Regulations have the same effect as the provisions in the *Administrative Appeals Tribunal Act 1975* and *Administrative Appeals Tribunal Regulation 2015* which enable the AAT to review decisions under Norfolk Island enactments.

CONSULTATION

Targeted consultation was undertaken on the draft regulations between June and July 2024. In particular, the following agencies and organisations were consulted:

- the Department of Social Services, in relation to the modifications relating to the guidance and appeals panel in Part 2 and second review in Part 3
- the Department's Legislation and Policy Interdepartmental Committee, which includes (among other agencies) the Department of the Treasury, the Department of Home Affairs, and the Department of Employment and Workplace Relations, in relation to the modifications relating to the guidance and appeals panel in Part 2
- the Australian Public Service Commission, in relation to the requirements for appointments to the Tribunal in Part 4, and

- the Department of Infrastructure, Transport, Regional Development, Communications and the Arts, in relation to the provisions enabling the review of decisions under Norfolk Island enactments in Part 5.

A number of civil society experts and peak bodies were also consulted in relation to requirements for appointments to the Tribunal in Part 4.

IMPACT ANALYSIS

The Office of Impact Analysis advised that a Regulatory Impact Statement is not required as the Regulations are unlikely to have more than a minor regulatory impact, as the changes will not affect businesses, individuals or community organisations (OBPR22-03440).

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Human rights implications

The Regulations engage the following rights:

- the right to an effective remedy in Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR), and
- the right to a fair and public hearing in Article 14 of the ICCPR.

The right to an effective remedy contained in Article 2(3) of the ICCPR

Article 2(3) of the ICCPR provides that States shall undertake to ensure the right to an effective remedy for any violation of rights or freedoms recognised by the ICCPR. It includes the right to have a remedy determined by competent judicial, administrative or legislative authorities.

The Regulations promote the right to an effective remedy by providing for procedural requirements in the context of second review applications, guidance and appeal panel applications and review of decisions made under Norfolk Island enactments, that facilitate the effective operation of an administrative review tribunal. The Regulations also promote this right by setting out detailed requirements for the merit-based appointment of members to the Tribunal, which promotes the Tribunal's role as an independent body providing review of government decisions which affect the rights and interests of individuals and organisations.

The right to a fair hearing in Article 14 of the ICCPR

Article 14(1) of the ICCPR protects the right that all persons are treated equally before courts and tribunals. It further provides that every person, in the determination of rights and obligations in a suit at law, is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The extent to which Article 14(1) applies to administrative review proceedings (whether such proceedings constitute a 'suit at law') is not fully settled. To the extent it may apply, the Regulations promote the right to a fair hearing.

By setting out requirements for the appointment of members to the Tribunal, the Regulations promote the right to a fair hearing by ensuring that applications to the Tribunal are heard by

people with appropriate skills, experience and independence for providing review. By enabling the review of decisions under Norfolk Island enactments, the Regulations also promote the right to a fair hearing of persons affected by such decisions.

The Regulations clarify the operation of the Tribunal's power to dismiss second review and guidance and appeals panel applications in limited circumstances. To the extent that the Tribunal's power to dismiss proceedings limits an applicant's right to a fair hearing, the limitation is for the legitimate purpose of promoting the proper management and administration of the Tribunal. The limitation is reasonable, necessary and proportionate as it will only enable proceedings to be dismissed where an application cannot continue because the person who is affected by the decision under review has died, become bankrupt, or is wound up or subject to liquidation or administration.

Conclusion

The Regulations are compatible with human rights. The Regulations advance the right to an effective remedy and the right to a fair hearing. To the extent that the Regulations limit any human rights, those limitations are reasonable, necessary and proportionate.

NOTES ON SECTIONS

Part 1 – Preliminary

Section 1 – Name

This section provides that the title of the Regulations is the *Administrative Review Tribunal Regulations 2024* (Regulations).

Section 2 – Commencement

This section provides for the Regulations to commence at the same time as the *Administrative Review Tribunal Act 2024* (Act).

Section 3 – Authority

This section provides that the Regulations are made under the Act.

Section 4 – Definitions

This section defines the following terms.

Act means the *Administrative Review Tribunal Act 2024*.

Norfolk Island decision has the meaning given by section 27.

Qualification requirements means the requirements in:

- for appointment as President – subsection 205(3) of the Act
- for appointment as Non Judicial Deputy President – subsection 207(3) of the Act
- for appointment as senior member – subsection 208(3) of the Act, or
- for appointment as general member – subsection 208(4) of the Act.

Secretary means the Secretary of the Department.

Selection criteria means:

- for appointment as President – the selection criteria mentioned in section 14
- for appointment as Non-Judicial Deputy President, senior member or general member – the selection criteria mentioned in section 15, or
- for appointment as Chief Executive Officer and Principal Registrar – the selection criteria mentioned in section 16.

The note to the section provides that the following terms are defined in the Act and have the same meaning for the purposes of the Regulations:

- eligible social services decision
- guidance and appeals panel application
- President
- second review
- Tribunal.

Part 2 – Guidance and appeals panel

Subsection 130(7) of the Act provides that regulations may prescribe modifications to the Act as it applies in relation to a guidance and appeals panel application. A legislative provision that allows subordinate legislation to modify the effect of a primary Act is known as a Henry VIII clause. Such clauses should be used in very limited circumstances. The regulations made below are necessary and proportionate to ensure that the Act operates as intended in relation to applications before the guidance and appeals panel review. In particular, guidance and appeals panel applications can be made by any party to the review, including the decision-maker. These modifications are necessary to ensure that the Act operates as intended if a person who was not the original applicant for review of the decision applies for review by the guidance and appeals panel (see subsection 130(2) of the Act).

This Part of the Regulations provides for the operation of the Act in relation to the Tribunal's power to dismiss an application, in guidance and appeals panel applications.

Section 5 – Purpose of this Part

This section provides that Part 2 of the Regulations prescribes modifications to the Act as it applies in relation to a guidance and appeals panel application, in accordance with subsection 130(7) of the Act.

Section 6 – Tribunal may dismiss application if first review applicant dies or is bankrupt etc.

This section provides that the Act applies in relation to a guidance and appeals panel application as if a new section 84A were inserted after section 84 of the Act.

New section 84A gives the Tribunal a dismissal power in a guidance and appeals panel application where the person who made the application on which the decision of the Tribunal was made (known as the 'first review applicant') dies, becomes bankrupt, is wound up or subject to liquidation or administration. This dismissal power is similar to the one provided in section 84 of the Act that allows the Tribunal to dismiss an application if the applicant dies, becomes bankrupt, is wound up or subject to liquidation or administration.

Under new section 84A, the Tribunal may dismiss a guidance and appeals panel application where the first review applicant has died or becomes bankrupt (if they are an individual), or where (in the case that the first review applicant is not an individual) the first review applicant is wound up, ceases to exist, or becomes subject to any form or liquidation administration and, because of that circumstance, the Tribunal considers the application cannot continue.

Some proceedings can or should not progress if the first review applicant dies. For example, a review of a decision relating to a licence may not be able to meaningfully progress if the person who has applied for the licence dies or, in the case of a company, ceases to exist. This section enables the Tribunal to dismiss an application in these circumstances.

It is noted that subsection 84(2) of the Act provides an opportunity for certain persons to apply to continue the proceeding. This is necessary because, if the applicant in the proceeding is unable to continue, someone else must be substituted as the applicant for the proceeding to continue. An equivalent provision is not included in the new section 84A because, if the applicant in the guidance and appeals panel proceeding is not the first review applicant, the event mentioned in paragraph (2)(a) of new section 84A will not affect the ability of the

applicant in the guidance and appeals panel proceeding to continue and there is no need for someone else to step in as the applicant. If the proceeding can continue despite the first review applicant having met with the circumstance in paragraph 84A(2)(a) and another person, such as a personal legal representative of the first review applicant, wishes to join the proceeding, the Tribunal could allow them to become a party under subsection 22(1) of the Act. The dismissal power is necessary in case no other party wishes to join the proceeding and there is no need for the proceeding to continue in the absence of the first review applicant.

Part 3 – Second review for certain social security decisions

Paragraph 131E(3)(b) of the Act provides that regulations may prescribe modifications to the Act for the purposes of second review. A legislative provision that allows subordinate legislation to modify the effect of a primary Act is known as a Henry VIII clause. Such clauses should be used in very limited circumstances. The regulations made below are necessary and proportionate to ensure second review operates as intended.

In particular, second review applications can be made by any person whose interests are affected by the Tribunal decision, including the decision-maker. These modifications are necessary to ensure that the Act operates as intended if a person who was not the original applicant for review of the decision applies for second review (see subsection 131D(1) of the Act).

This Part of the Regulations provides for the operation of the Act in relation to the Tribunal's power to dismiss an application, in second review applications.

Section 7 – Purpose of this Part

This section provides that Part 3 of the Regulations prescribes modifications to the Act as it applies in relation to second review proceedings, in accordance with paragraph 131E(3)(b) of the Act.

Section 8 – Tribunal may dismiss application if first review applicant dies or is bankrupt

This section provides that the Act applies in relation to a guidance and appeals panel application as if a new section 84B were inserted after section 84 of the Act.

New section 84B gives the Tribunal a dismissal power in a second review application where the person who made the application on which the decision of the Tribunal was made (known as the 'the first review applicant') dies or becomes bankrupt in some circumstances, and the Tribunal considers the application cannot continue. This dismissal power is similar to the one provided in section 84 of the Act that allows the Tribunal to dismiss an application in certain circumstances if the applicant dies, becomes bankrupt, is wound up or subject to liquidation or administration.

It is noted that subsection 84(2) of the Act provides an opportunity for certain persons to be able to apply to continue the proceeding. This is necessary because, if the applicant in the proceeding is unable to continue, someone else must be substituted as the applicant for the proceeding to continue. An equivalent provision is not included in new section 84B because, if the applicant in the second review proceeding is not the first review applicant and the death or bankruptcy of the first review applicant will not affect the ability of the applicant in the second review proceeding to continue. If the proceeding can continue despite the first review

applicant having died or become bankrupt and another person, such as a personal legal representative of the first review applicant, wishes to join the proceeding, the Tribunal could allow them to become a party under subsection 22(1) of the Act. The dismissal power is necessary in case no other party wishes to join the proceeding and there is no need for the proceeding to continue in the absence of the first review applicant.

New section 84B only applies in circumstances where the first review applicant has become bankrupt (if the eligible social services decision is made under the *Child Support (Registration and Collection) Act 1988* or the *Student Assistance Act 1973*) or has died. It does not apply in other circumstances where section 84 of the Act may apply. This is because social security decisions only apply to natural persons. Further, while many social security entitlements are inalienable (and therefore not subject to bankruptcy proceedings in accordance with the *Social Security (Administration) Act 1999*), social security decisions made under the *Child Support (Registration and Collection) Act 1988* and *Student Assistance Act 1973* may be subject to bankruptcy processes. Therefore, if the first review applicant becomes bankrupt, the Tribunal would need to consider whether the matter can continue, and, if not, dismiss the application. The conditions prescribed in section 84 of the Act (other than death and bankruptcy in circumstances provided above) do not affect second review proceedings.

Part 4 – Appointment of members and Principal Registrar

Part 4 of the Regulation sets out the requirements for assessment processes conducted by assessment panels for appointments of the President, Non-Judicial Deputy Presidents, senior members, general members and the Chief Executive Officer and Principal Registrar (Principal Registrar) of the Tribunal.

Sections 205, 206, 207, 208, 209 and 227 of the Act establish a transparent and merit-based process for making appointments to these roles. In summary, the process under the Act involves the following:

- appointments are made by the Governor-General on the recommendation of the Minister
- before recommending an appointment, the Minister must be satisfied that the applicant was assessed, by an assessment panel, as suitable for the appointment, through an assessment process that was ‘merit-based’ (as defined in section 4 of the Act), included public advertising of the position, and complied with the requirements prescribed by the regulations
- the Minister must establish one or more assessment panels for the purposes of assessing whether candidates are suitable for appointment
- applicants must meet certain qualification requirements to be eligible for appointment as a Non-Judicial Deputy President, senior member or general member, and
- before the Minister makes a recommendation for a member’s appointment, the Minister must seek and take into account the advice of the President on whether the appointment would meet the operational needs of the Tribunal, the financial capacity of the Tribunal for the appointment, and the effect of the appointment on the ratio of members at each level. Before the Minister makes a recommendation for the Principal Registrar’s appointment, the Minister must obtain the agreement of the President.

The definition of ‘merit-based’ in section 4 of the Act requires, in relation to an assessment process for appointment to the Tribunal, that:

- an assessment is made of the comparative suitability of the candidates for the duties of the office, using a competitive selection process
- the assessment is based on the relationship between the candidates' skills, expertise, experience and knowledge and the skills, expertise, experience and knowledge required for the duties of the office, and
- the assessment takes into account the need for a diversity of skills, expertise, lived experience and knowledge within the Tribunal.

Part 4 of the Regulations expands on the Act's requirements. It sets out, among other things:

- requirements for the Department to publish invitations for applications and to make key information available to potential candidates
- requirements for the composition of assessment panels
- the steps which must be taken before an assessment panel can assess an applicant as suitable for appointment, such as the assessment panel considering a written application, conducting an interview, and seeking referee reports
- the selection criteria for each role
- the matters that must be included in an assessment panel's report to the Minister on the outcome of an assessment process, and
- a requirement for panel members to disclose potential conflicts of interest relating to their assessment of an applicant, and a process for managing any conflicts of interest that may affect their capacity to make an unbiased assessment.

The requirements imposed by Part 4 provide further specificity to the independent, merit-based and transparent assessment processes required under the Act. It also ensures consistency in the approach taken by separate assessment panels.

The requirements in Part 4 are similar to, and expand upon, the process for appointments to the Administrative Appeals Tribunal (AAT) set out in the Guidelines for Appointments to the AAT published in December 2022.

Division 1 – Assessment process

Section 9 – Requirements for assessment process

This section sets out, for the purposes of subparagraphs 205(2)(b)(iii), 207(2)(b)(iii), 208(2)(b)(iii) and 227(2)(b)(iii) of the Act, requirements for assessment processes for appointments of the President, Non-Judicial Deputy Presidents, senior members, general members and the Principal Registrar. The Minister must not recommend an applicant for appointment unless the Minister is satisfied that the person was assessed as suitable by an assessment panel through an assessment process that complies with these requirements.

This section identifies the key requirements that must be met, and subsequent provisions in Division 1 expand on some of the requirements.

Requirements to advertise opportunities to apply for appointment

Paragraphs (1)(a), (b) and (c) impose requirements for advertising opportunities to apply for appointment, namely that:

- the Department must publish an invitation for applications for the appointment, in accordance with section 10

- applications must be open for at least 2 weeks after the invitation for applications is published on the Department’s website and
- the Department must make certain key information available to potential applicants, in accordance with section 11.

Appointments cannot be made unless these things have occurred. These requirements enhance the transparency of the appointments process and ensure that a wide cohort of potential applicants are made aware of the roles and given a reasonable amount of time to apply.

Steps that must be taken before an assessment panel can assess an applicant as suitable for appointment

Paragraph (1)(d) sets out the steps that an assessment panel must take before assessing a person as suitable for appointment. The assessment panel must not assess an applicant as suitable unless the following steps have occurred in relation to the applicant:

- the person applies for the appointment
- the assessment panel shortlists the person for interview based on the person’s application
- the panel interviews the person
- the panel seeks at least one referee report in relation to the person
- the panel assesses the person against the selection criteria for the appointment.

In relation to an appointment as a Non-Judicial Deputy President, an assessment panel is required to undertake an additional step. Subparagraph (1)(d)(ii) provides that the assessment panel must consider whether the person could meet the requirement in paragraph 207(3)(a) of the Act. This is the requirement that the person is enrolled as a legal practitioner and has been enrolled for at least 10 years. A person must not be appointed unless they meet this requirement. Whether or not an applicant meets, or could meet, this objective criterion is a matter which an assessment panel may consider when determining whether to progress the applicant through the process (for example, to shortlist them for interview) and to assess the applicant as suitable for appointment.

In addition, under subparagraph (1)(d)(vi), if the person has applied to be a Non-Judicial Deputy President, senior member or general member, and the person *is* a member of the Tribunal, the panel is required to seek a referee report from another member of the Tribunal with appropriate seniority and knowledge of the applicant’s work. This requirement ensures that, where possible, the assessment panel has the benefit of a current perspective on the person’s performance in the same role or a closely-related role. The requirement is that the panel must *seek* the referee report, rather than that the panel must *obtain* the report, in recognition of the fact that an appropriate referee may not always be available. This could include, for example:

- if the person commenced as a member only very recently, such that it is too early for another member of appropriate seniority to have formed a view on their performance, or
- if the most appropriate member to provide a referee report is an applicant in the same assessment process, and may therefore have a conflict of interest in providing a referee report.

An assessment panel is not required to undertake all of the steps listed under paragraph (1)(d) in relation to every applicant. For example, an assessment panel would not be required to interview an applicant if the panel has not shortlisted the person because, based on the person's application, the person would clearly not be suitable for appointment. However, before an assessment panel can assess an applicant as suitable for appointment, all of these steps must have occurred.

Paragraph (1)(e) provides that the assessment panel must give the Minister a report on the outcome of the assessment process, in accordance with Division 2. See the explanation of section 12 below.

The requirements under subsection (1) ensure that each person assessed as suitable for appointment has been considered through an assessment process that is rigorous and merit-based. It would not be possible for a person to be assessed as suitable, and appointed, without the person submitting an application, and the assessment panel interviewing the person, seeking referee reports and considering the person against the selection criteria. The requirements also ensure that each assessment process is conducted consistently, which is important given the volume of Tribunal members, and the need to regularly recruit to meet the needs to the Tribunal.

Timeframe for making appointments

Subsection (2) provides that an assessment process in relation to an appointment must be completed within 18 months before the appointment. This has the effect that, once an assessment process has concluded and the assessment panel has given its report to the Minister, there is an 18-month period in which a person assessed as suitable through that assessment process may be appointed. This ensures that the Minister is given a reasonable, but not indefinite, amount of time to recommend appointments of applicants following a finding that they are suitable for appointment.

Section 10 – Invitations for applications to be published

This section sets out the manner in which invitations for applications for an appointment must be published, for the purposes of paragraph 9(1)(a) above.

An invitation for applications for an appointment must be published for at least 2 weeks on the Department's website, and in at least one other way accessible to the public. The note under section 10 explains that publication in another way accessible to the public could include publication in national media, on the APSJobs website or on another publicly accessible website.

These are minimum requirements, and do not prevent invitations from being advertised for a longer period of time or through additional means. For example, in practice, invitations could also be advertised through targeted channels likely to reach potential applicants from particular locations or with particular experience or skills.

Section 11 – Information to be available to potential applicants

This section identifies the information that the Department must make available to potential applicants, for the purposes of paragraph 9(1)(c). This requirement ensures that appointment processes are transparent, and that potential applicants can have access to detailed information about the opportunities available and the process by which applications will be considered.

Paragraph (a) refers to selection criteria for the appointment. This includes the relevant selection criteria set out in Division 2, as well as any additional selection criteria the Minister considers appropriate for the appointment for the purposes of paragraphs 15(d) or 16(d).

Paragraph (b) refers to the qualification requirements for the appointment. The ‘qualification requirements’ are defined in the Regulations as the requirements imposed by the following provisions of the Act:

- for appointment as President – subsection 205(3)
- for appointment as Non-Judicial Deputy President – subsection 207(3)
- for appointment as senior member – subsection 208(3)
- for appointment as general member – subsection 208(4).

Paragraph (c) refers to information about remuneration for the appointment. This could include information about the remuneration for the role as specified in the relevant Remuneration Tribunal determination.

Paragraph (d) refers to information about the assessment process for the appointment. This could include information about the steps and requirements for the assessment process as set out in the Regulations.

Subparagraph (e)(i) refers to information about the code of conduct. This is the code of conduct for members created by the President under section 201 of the Act, setting out clear expectations for behaviour within the Tribunal.

Subparagraph (e)(ii) refers to information about the performance standard. This is the performance standard for members created by the President under section 202 of the Act, setting out clear expectations relating to member performance.

Section 11 imposes minimum requirements, and does not prevent the Department from making available to potential applicants additional information on other matters if the Department considers that would be appropriate or useful.

The Regulations do not prescribe the manner in which the Department must make this information available. There is flexibility for the Department to make this information available in the manner it considers most appropriate or effective. The Note under the paragraph explains, by way of example, that the Department may make the information available to potential application on its website.

Section 12 – Assessment panel reports

This section identifies the matters that an assessment panel must, or may, include in the report it gives to the Minister on the outcome of the assessment process it has undertaken, as required by paragraph 9(1)(e). These requirements ensure that an assessment panel’s report clearly identifies, and explains, the panel’s assessment as to which applicants are suitable for appointment. Providing information of this kind in panel reports ensures there is a comprehensive record of the assessment process, and may assist in demonstrating to the Minister that the assessment process was merit-based.

Matters that must be included in assessment panel reports

Subsection (1) identifies the requirements for reports for the appointment of the President. The report must set out the outcome of the assessment process, including by identifying:

- the applicants who were interviewed, and
- the applicants interviewed who were assessed by the panel as suitable for the appointment, and the reason for that outcome.

Unlike reports for appointments of other members, the report for the appointment of the President is not required to identify the applicants who were interviewed and assessed as not suitable for the appointment, and the reasons for that outcome. This reflects that there are sensitivities that may be associated with an assessment process for the appointment of the President, given the possibility of sitting judges applying for appointment.

Subsection (2) identifies the requirements for reports for the appointment of Non-Judicial Deputy Presidents, senior members, general members, and the Principal Registrar. The report must set out the outcome of the assessment process, including by identifying the applicants who were interviewed. For applicants interviewed who were assessed by the panel as suitable for the appointment, the report must identify those applicants and the reasons for that outcome. If any person who is part of the panel did not support the assessment of the applicant as suitable, the report must identify the person's reasons for not supporting that assessment. This reflects the possibility that one person who is part of the panel may not support the assessment of an applicant as suitable, given the requirement in section 24 that an assessment panel may assess an applicant as suitable if at least 2 of the 3 persons who are part of the panel support the assessment.

For applicants interviewed who were assessed by the assessment panel as not suitable for the appointment, the report must identify those applicants and the reasons for that outcome. Subsections (1) and (2) impose minimum requirements. It would be possible for an assessment panel to include additional information on other matters, as the panel considers appropriate.

Additional matters that may be included in assessment panel reports

Subsection (3) specifies an additional matter that may be included in a report relating to an assessment process for the appointment Non-Judicial Deputy Presidents, senior members and general members. A report may include information on whether the panel considers that an applicant assessed by the panel as suitable for the appointment could meet the qualification requirements for the appointment. The definition of the term 'qualification requirements' is explained above.

Under the Act, the question of whether an applicant meets the relevant qualification requirements is a matter to be decided by the Minister before recommending the applicant for appointment. It is not a matter for the assessment panel to decide. Whether or not an applicant satisfies the qualification requirements is not relevant to the panel's assessment of whether an applicant is suitable for appointment. The exception, explained above, is that an assessment panel may consider whether an applicant for appointment as a Non-Judicial Deputy President could meet the qualification requirements in paragraph 207(3)(a) of the Act.

Nonetheless, it is appropriate to enable an assessment panel to offer its opinion, in its report, on whether an applicant assessed as suitable *could* meet the qualification requirements. This advice could inform (but is not determinative of) the Minister's decision as to whether the applicant actually does meet the qualification requirements.

Section 13 – List of persons on assessment panel to be published

This section provides that, within 28 days after an assessment panel gives the Minister its report, the Department must publish on its website the names of the persons who were part of the panel. This includes any persons who were part of the assessment panel but were replaced part way through the assessment process in accordance with section 26. This requirement enhances the transparency of assessment processes by ensuring that the identity of assessment panel members is publicly disclosed.

Division 2 – Selection Criteria

Division 2 sets out the selection criteria for appointments. Under subparagraph (1)(d)(vii), an assessment panel must consider an applicant against the relevant selection criteria for the appointment before it can assess the applicant as suitable for the appointment.

The selection criteria reflect the key personal and professional attributes that would enable a person to effectively serve as the President, a Non-Judicial Deputy President, a senior member, a general member, or the Principal Registrar.

The requirement for an assessment panel to consider applicants against these selection criteria contributes to ensuring that the panel's assessment process is merit-based, and in particular, that the panel's assessment is based on the relationship between applicants' skills, expertise, experience and knowledge and the skills, expertise, experience and knowledge required for the duties of the role.

Section 14 – Selection criteria – President

This section identifies the selection criteria for the appointment of the President.

Paragraph (a) provides that a criterion is suitability for appointment as a Judge of the Federal Court, if the applicant is not a Judge of the Federal Court. This reflects the requirement in subsection 205(3) of the Act that a person must not be appointed as the President unless the person is a Judge of the Federal Court. If a person is not a Judge of the Federal Court but applies for appointment as the President, it would, in practice, be open to the Minister to recommend the appointment of the person as President, and for the government to also appoint the person as a Judge of the Federal Court so that the person meets this requirement. Paragraph (a) has the effect that, if an applicant is *not* a Judge of the Federal Court, the assessment panel must consider whether the person would be suitable for appointment to that role. This ensures the assessment panel can consider if the applicant would bring the necessary independence, experience, seniority, intellectual rigour and leadership skills to both the Tribunal and the Federal Court. This criterion is not relevant, and does not apply, to an applicant who is a Judge of the Federal Court at the time of applying for appointment as the President.

Paragraph (b) provides that a criterion is that the person has outstanding expertise in, and experience in the practice of, administrative law. This reflects the President's role as an intellectual leader of the Tribunal, and in presiding over Tribunal proceedings involving complex, significant and sensitive matters.

Paragraph (c) provides that a criterion is a commitment to, and ability to support, the objective in section 9 of the Act. Section 9 provides that the objective of the Tribunal is to provide an independent mechanism of review that:

- is fair and just

- ensures that applications to the Tribunal are resolved as quickly, and with as little formality and expense, as a proper consideration of the matters before the Tribunal permits
- is accessible and responsive to the diverse needs of parties to proceedings
- improves the transparency and quality of government decision making, and
- promotes public trust and confidence in the Tribunal.

This criterion is consistent with the President’s function, under paragraph 193(e) of the Act, of ensuring that the Tribunal continually pursues the objective in section 9.

Paragraph (d) provides that a criterion is that the person has a demonstrated understanding of the diverse needs of parties to proceedings. This criterion emphasises the important role of the President in leading a Tribunal which engages with a broad range of people who may require additional and tailored support to meaningfully participate in Tribunal processes.

Paragraph (e) provides that a criterion is that the person possesses leadership and management skills, including the following:

- ability to lead the Tribunal, with a focus on high quality performance, financial sustainability and innovation
- ability to inspire and support members and staff members, and
- commitment to providing a diverse, safe and respectful workplace.

This criterion reflects the wide range of leadership and management functions conferred on the President.

Section 15 – Selection criteria – Non-Judicial Deputy Presidents, senior members and general members

This section sets out the selection criteria for the appointment of Non-Judicial Deputy Presidents, senior members and general members.

Paragraph (a) provides that a criterion is commitment to, and ability to support, the objective in section 9 of the Act. This recognises the role that all members play in pursuing the Tribunal’s objective.

Paragraph (b) provides for the following selection criteria, at appropriate levels for the appointment:

- decision-making and reasoning skills
- ability to conduct hearings and other Tribunal case events
- writing and communication skills
- ability to be responsive to the diverse needs of parties to proceedings
- professionalism, independence, integrity and collegiality
- productivity, diligence and resilience, and
- understanding of, and commitment to, diverse, safe and respectful workplaces.

An assessment panel must consider an applicant against these criteria, at an appropriate level for the appointment the applicant has sought. This reflects that different standards for these criteria may be expected for different levels of membership. For example, a superior standard of decision-making and reasoning skills applicable to an administrative law context may be

expected of a Non-Judicial Deputy President, compared to a senior member or general member, having regard to the nature and functions of the roles.

Paragraph (c) provides that a criterion for appointment as a Non-Judicial Deputy President or senior member is leadership and management skills, at an appropriate level for the appointment. This reflects that Non-Judicial Deputy Presidents and senior members have a range of leadership and management responsibilities.

Paragraph (d) gives the Minister an ability to specify other selection criteria that the Minister considers appropriate for an appointment. The criteria must be relevant to the operational needs of the Tribunal, and the Minister must consult with the President before specifying the criteria. This ability ensures that applications can be sought, and appointments can be made, having regard to the specific needs of the Tribunal from time to time. For example, if the Minister were to consider there is a need for additional senior members with expertise in a particular subject matter, the Minister could provide that an additional selection criterion for a particular round of appointments of senior members is expertise in that subject matter.

The condition that any additional criteria must be relevant to the operational needs of the Tribunal ensures that Minister cannot specify additional criteria relating to other, unrelated considerations. The requirement for the Minister to consult with the President also ensures that any additional criteria are informed by the views of the President, who is well-placed to understand the operational needs of the Tribunal.

Although any criteria specified under paragraph (d) would not appear in the Regulations, the requirement in paragraph 11(a) for the Department to make information about the selection criteria available to potential candidates ensures there would be transparency about whether there are additional selection criteria for a particular appointment process.

A specification made by the Minister under paragraph 15(d) is not a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003* (Legislation Act), as it is not of a legislative character.

Section 16 – Selection criteria – Chief Executive Officer and Principal Registrar

This section sets out the selection criteria for the appointment of the Principal Registrar. The selection criteria reflect the diverse leadership, management and corporate responsibilities of the Principal Registrar.

Paragraph (a) provides that a selection criterion is leadership, including the following:

- ability to set a strategic direction and inspire people to work towards it
- high standard of personal integrity and commitment to organisational integrity and accountability
- commitment to fostering a strong organisational culture and a diverse, safe and respectful workplace
- ability to identify and respond to possible challenges and opportunities, and
- high level of judgement.

Paragraph (b) provides that a selection criterion is management skills, including the following:

- ability to lead a large and complex organisation and achieve results within appropriate frameworks across diverse functions

- understanding of best practice organisational governance
- extensive experience in public administration and strong knowledge of the obligations of agency heads under the *Public Governance, Performance and Accountability Act 2013* and the *Public Service Act 1999*
- ability to foster strong working relationships, including with members.

Paragraph (c) provides that a criterion is a commitment to accessible administrative review of decisions made under legislation, including the following:

- understanding of the work of the Tribunal and the administrative review process or capacity to quickly develop that understanding
- commitment to the objective in section 9 of the Act
- understanding of the diverse needs of parties to proceedings.

Paragraph (d) gives the Minister an ability to specify other selection criteria that the Minister considers appropriate for an appointment. The criteria must be relevant to the operational needs of the Tribunal, and the Minister must consult with the President before specifying the criteria. See the explanation above about the equivalent ability for the Minister to identify other selection criteria for the appointment of members under paragraph 15(d). A specification made by the Minister under paragraph (d) is not a legislative instrument within the meaning of subsection 8(1) of the Legislation Act, as it is not of a legislative character.

Division 3 – Assessment Panels

Subdivision A – Composition of assessment panels

Subdivision A of Division 3 sets out the requirements for the composition of assessment panels. These provisions are made for the purposes of paragraph 209(3)(b) of the Act, which enables the regulations to provide for the composition of assessment panels.

The requirements under Subdivision A are intended to ensure that an assessment panel is composed of individuals with appropriate experience and knowledge to assess the suitability of applicants for appointment to the Tribunal. The requirements provide for an appropriate range of perspectives to be represented on an assessment panel and that there is consistency in the composition of separate selection panels.

- An assessment panel must consist of 3 individuals. For all assessment panels, the first panel member is the Secretary, or a person they nominate. This is appropriate given that the Tribunal falls within the portfolio responsibilities of the Secretary's Department.

The second panel member varies depending on the appointment.

- For the appointment of the President, the second panel member is the Chief Justice of the Federal Court, or a person they nominate. This is appropriate, given that the President will be a Judge of the Federal Court.
- For the appointment of a Non-Judicial Deputy President, senior member or general member, the second panel member is the President or a person they nominate. This is appropriate given the President's leadership role and their function of managing the performance and conduct of members.
- For the appointment of the Principal Registrar, the second panel member is the President or a person they nominate. This reflects the close working relationship

between the President and the Principal Registrar. It is also consistent with the requirement in paragraph 227(2)(c) of the Act that, before the Minister makes a recommendation for the appointment of the Principal Registrar, the Minister must obtain the agreement of the President to the appointment.

The ability for the Secretary, Chief Justice or President to nominate a person as a member of an assessment panel recognises that, if it is not possible or appropriate for them to participate personally in a particular assessment process, it is nonetheless important for their interests to be represented on the assessment panel.

For all panels, the third assessment panel member is a person nominated by the Minister.

The Secretary, Chief Justice, President and Minister have discretion as to whom they nominate to participate in an assessment panel. This enables nominations to take into account factors such as the nature of the appointment, the need for balance and diversity among panel members, and the desirability of particular expertise, experience or perspectives being represented on the assessment panel. The exception is that a person may not be nominated if the person is a staff member employed under *Members of Parliament (Staff) Act 1984* (MOP(S) Act). This is consistent with the exclusion of Ministers' staff from selection panels for the appointment of Commonwealth statutory officeholders under the Government's Merit and Transparency Policy.

Section 17 – Assessment panels – President

This section has the effect that an assessment panel established in relation to the appointment of the President must be composed of the Secretary or a person they nominate (who shall be the chair of the panel), the Chief Justice of the Federal Court or a person they nominate, and a person nominated by the Minister.

Section 18 – Assessment panels – Non-Judicial Deputy President, senior member or general member

This section has the effect that an assessment panel established in relation to the appointment of Non-Judicial Deputy Presidents, senior members or general members must be composed of the Secretary or a person they nominate (who shall be the chair of the panel), the President or a person they nominate, and a person nominated by the Minister.

Section 19 – Assessment panels – Chief Executive Officer and Principal Registrar

This section has the effect that that an assessment panel established in relation to the appointment of the Principal Registrar must be composed of the Secretary or a person they nominate (who shall be the chair of the panel), the President or a person they nominate, and a person nominated by the Minister.

Section 20 – Assessment panels – no employees under the *Members of Parliament (Staff) Act 1984*

This section provides that a person must not be part of an assessment panel if the person is employed under the MOP(S) Act. The MOP(S) Act provides for the employment of staff by Commonwealth parliamentarians. This means the Minister, Secretary, President or Chief Justice could not nominate a person who is employed under the MOP(S) Act to be an assessment panel member.

Subdivision B – Operation of assessment panels

Section 21 – Assessment panels – conflict of interests

This section sets out a process for dealing with conflicts of interest of assessment panel members other than the Secretary. It is made for the purposes of paragraph 209(3)(c) of the Act, which enables the regulations to provide for the operation and procedures of assessment panels.

It is fundamental to the integrity of the merit-based appointments process for assessment panel members' conflicts of interest to be disclosed and managed transparently and appropriately. This section ensures that assessment panel members are required to disclose any potential or actual conflicts of interest, and that an assessment panel member does not participate in the assessment of an applicant if it would not be appropriate for them to do so.

Subsection (2) provides that, if a panel member (other than the Secretary) who is part of an assessment panel for an appointment has an interest that conflicts or could conflict with the person's participation in the assessment process, the person must disclose the nature of the interest to the Secretary. This is an ongoing obligation that requires an assessment panel member to declare any interests as they are identified throughout an assessment process. Subsection (3) clarifies that this requirement does not limit any other obligation of the panel member.

Subsections (4) and (5) set out two ways in which conflicts of interest may be managed:

- First, if an assessment panel member considers that they have a conflict of interest that could materially affect their capacity to make an unbiased assessment of an applicant for the appointment, they may choose not to participate in the assessment of the applicant.
- Second, if the Secretary, having considered the assessment panel member's disclosure of interests, considers that the panel member has a conflict of interest that would materially affect the person's capacity to make an unbiased assessment of an applicant for the appointment, the Secretary may direct the person not to participate in the assessment of the applicant.

A direction made under subsection (5) is not a legislative instrument within the meaning of subsection 8(1) of the Legislation Act, as it is not of a legislative character.

Section 22 – Delegation

This section clarifies that the Secretary may delegate to a Senior Executive Service (SES) employee, or acting SES employee, their functions or powers under section 21. This includes the function (under subsection 21(2)) of receiving disclosures of interests from other assessment panel members, and the power (under subsection 21(5)) to direct a panel member not to participate in the assessment of an applicant.

This delegation power supports the efficient function of assessment processes. It is appropriate to delegate these powers and functions to SES employees or acting SES employees, as employees at this level have the necessary skills, judgment and responsibility to perform and exercise these powers and functions, and to support the integrity of an assessment process.

Subsection (2) provides that the delegate must comply with the written directions of the Secretary in performing a delegated function or exercising a delegated power. This is appropriate because it ensures that the functions or powers delegated to the Secretary are exercised properly and in accordance with the views of the Secretary.

A delegation under subsection (1), and a direction under subsection (2), is not a legislative instrument, in accordance with item 1 of the table in section 6 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

Section 23 – Assessment panels – conflict of interests for Secretary

This section sets out the processes for dealing with conflicts of interest of the Secretary, if the Secretary is an assessment panel member. It has the same effect as section 21, except that:

- the person to whom the Secretary must disclose their interests is the Minister, and
- it is the Minister who may direct the Secretary not to participate in the assessment of an applicant.

A direction under subsection (5) is not a legislative instrument within the meaning of subsection 8(1) of the Legislation Act, as it is not of a legislative character.

Section 24 – Assessment panels – majority decisions

This section provides that an assessment panel may only assess an applicant as suitable for appointment if at least 2 of the persons who are part of the panel support the assessment.

This requirement applies regardless of how many persons who are part of the panel participate in the assessment of a candidate. For example, if all 3 persons who are part of the panel participate in the assessment of an applicant, the applicant may be assessed as suitable if at least 2 of the 3 persons on the panel support this assessment. If only 2 persons who are part of the panel participate in the assessment of an application – because, for example, the third person chooses or is directed under sections 21 or 23 not to participate in the assessment – the applicant may only be assessed as suitable if both persons agree.

Section 25 – Assessment panels not subject to direction by the Minister

Subsection (1) provides that assessment panel members for an appointment are not subject to direction by the Minister in relation to the panel's assessment of whether or not a person is suitable for the appointment.

This ensures that assessment panels operate independently, that an assessment process is merit-based, and that the outcome of an assessment process is determined exclusively by the panel's own assessment of applicants, in accordance with the requirements set out in the Regulations.

Subsection (2) clarifies that this requirement is subject to subsection 23(5) (which enables the Minister to direct the Secretary not to participate in the assessment of an applicant) and section 26 (which enables the Minister to replace a person on an assessment panel in certain circumstances).

Section 26 – Assessment panels – replacement of persons

This section provides a mechanism for a person who is part of an assessment panel to be replaced if the person is no longer available to participate in the assessment. For example, a

person who is part of an assessment panel may withdraw part way through an assessment process, because they are no longer available to participate.

Subsection (2) identifies the circumstance in which a person who is part of an assessment panel (referred to as the ‘original panellist’) cannot, for any reason, participate or continue to participate in the assessment process for an appointment. In that circumstance, the Minister may determine that a different person is part of the panel in place of the original panellist. A determination made under subsection (2) is not a legislative instrument within the meaning of subsection 8(1) of the Legislation Act, as it is not of a legislative character.

Subsection (3) provides that if the Minister makes a determination of this kind, the panel must continue the assessment process. Subsection (4) clarifies that, if the panel has done any thing in relation to the assessment process before the original panellist is replaced, the panel is not required to do that thing again. This ensures that the replacement of a person does not require the assessment panel to start an assessment process again or repeat steps that have already been undertaken. The assessment panel can continue with the remaining steps of the assessment process.

The requirements for the composition of an assessment panel under sections 17, 18, 19 and 20 continue to apply in relation to the assessment panel. That is, the Minister can only replace an original panellist with a person of the same ‘kind’ as the original panellist. For example, if the original panellist is the Secretary or a person nominated by the Secretary, the Minister must replace that person with another person nominated by the Secretary.

Part 5 – Norfolk Island

Part 5 enables the Tribunal to review certain decisions made under Norfolk Island enactments.

Subsection 297(2) of the Act enables regulations to provide for applications to be made to the Tribunal for the review of decisions made under Norfolk Island enactments, and to provide such procedural modifications as are needed to allow the Tribunal to review those Norfolk Island decisions in a similar way to equivalent reviewable decisions under the Act.

‘Norfolk Island enactment’ is defined in section 4 of the Act as an enactment (within the meaning of the *Norfolk Island Act 1979* (Norfolk Island Act)), or an instrument (including rules, regulations or by-laws) made under such an enactment, and includes a Norfolk Island enactment as amended by another Norfolk Island enactment.

Part 5 has the same effect as the relevant provisions of the *Administrative Appeals Tribunal Act 1975* and Part 3 of the *Administrative Appeals Tribunal Regulation 2015* (AAT Regulations), that enable the AAT to review certain decisions made under Norfolk Island enactments. However, Part 5 consolidates the relevant provisions in one location, and is framed around the concepts and language used in the Act.

Section 27 – Review of decisions under Norfolk Island enactments

Section 27 is made for the purposes of paragraph 297(2)(a) of the Act.

This section provides that an application may be made to the Tribunal, in accordance with section 17 of the Act, for review of a decision made in the exercise of powers conferred by a Norfolk Island enactment mentioned in the table. A decision of this kind is referred to as a ‘Norfolk Island decision’.

The table sets out a list of the Norfolk Island decisions that may be reviewed by the Tribunal. It is based on the table previously specified in section 9 of the AAT Regulations, but has been updated to correct some references and remove redundant items.

The Norfolk Island decisions listed in the table are ‘reviewable decisions’ within the meaning of that term in subsection 12(1) of the Act, because a legislative instrument (in this case, the Regulations) provides for an application to be made to the Tribunal for review of the decisions. Accordingly, a person whose interests are affected by a Norfolk Island decision may apply to the Tribunal for review of the decision, in accordance with subsection 17(1) of the Act. The Tribunal would be able to deal with the application, and review the decision, in the usual manner set out in the Act.

Section 28 – Modification of operation of Act

Section 28 makes a number of modifications to the operation of the Act that are necessary to ensure the Tribunal can review a Norfolk Island decision in a similar way to equivalent reviewable decisions under the Act.

References to instruments

The Act includes some provisions that refer to things being dealt with in ‘Acts or instruments’ under which reviewable decisions are made. To ensure that the Act operates in the same way for reviews of Norfolk Island decisions as it does for other reviewable decisions, it is necessary to clarify that the provisions referring to things done under ‘Acts or instruments’ also cover, where relevant, things done under Norfolk Island enactments. Section 28 has this effect.

Subsection (1) explains the kinds of references that are relevant. It identifies circumstances where:

- the Act (or an instrument made under the Act) applies a rule (within the ordinary meaning of that word)
- the rule includes a reference to an ‘instrument made under the Act’ (however described)
- the rule applies differently in relation to a Norfolk Island decision from the way the rule would ordinarily apply in relation to a decision made under an instrument made under an Act, and
- the reason for the difference is that the reference to an ‘instrument made under an Act’ does not include a reference to a Norfolk Island enactment.

Subsection (2) has the effect that, where those circumstances exist, the Act (or an instrument made under it) applies, in relation to the Norfolk Island decision, as if the reference in the rule to an ‘instrument made under an Act’ included a reference to a Norfolk Island enactment. This means that the provision that contains the reference would operate the same way in relation to Norfolk Island enactments as it would for other kinds of instruments made under an Act.

Two examples are given under subsection (2). The first example refers to section 16 of the Act, which makes a rule about when a person may apply to the Tribunal in relation to a reviewable decision that is a decision of a person *not* to do a thing. The rule is that, if an instrument provides for a quantified period in which the person must do the thing, and the person does not do the thing within the period, the person is taken to have decided not to do the thing. A person can therefore make an application to the Tribunal for review of the

decision. The effect of subsection (2) is that the reference in section 16 of the Act to ‘an instrument’ is taken to include a reference to a Norfolk Island enactment. It extends the rule applied by section 16 to Norfolk Island enactments for Norfolk Island decisions. That is, if a Norfolk Island enactment provides a quantified timeframe for a person to do a thing, but the person does not do the thing, the person will be taken to have decided not to do the thing.

The second example refers to section 54 of the Act, which confers on the Tribunal, for the purposes of reviewing a decision, all of the powers conferred on a decision-maker by an instrument made under an Act. Subsection (2) has the effect that the reference to ‘an instrument made under an Act’ includes a reference to a Norfolk Island enactment. This ensures that the Tribunal, when reviewing a Norfolk Island decision, can exercise powers and functions that are conferred on the decision-maker by the relevant Norfolk Island enactment.

Subsection (3) clarifies that subsection (2) applies whether or not the rule explicitly refers to a decision. Although some provisions in the Act apply rules that expressly refer to a decision (such as section 16 of the Act, as explained in the example above), there are some provisions that relate to decisions without explicitly referring to a ‘decision’. Subsection (3) ensures that subsection (2) can operate flexibly to cover rules of both kinds.

For example, subsection 113(4) of the Act provides that the Tribunal’s power to publish its decisions and reasons is subject to an exception in circumstances where disclosure of information would be prohibited or restricted by or under the Act, another Act or an instrument made under the Act. Although subsection 113(4) itself does not explicitly refer to a decision of the Tribunal, in the context of the whole of section 113 it is clear that subsection 113(4) is a rule relating to decisions of the Tribunal. The effect of subsection 28(3) of the Regulations is to extend this rule to cover prohibitions or restrictions on the disclosure of information by or under a Norfolk Island enactment.

References to the Secretary

Subsection (4) provides that subsection 291(2) of the Act applies, in relation to a Norfolk Island decision, as if a reference to the Secretary of the Department were a reference to the Secretary of the Department administered by the Minister who administers the Norfolk Island Act.

Subsection 291(2) of the Act provides that, if the Tribunal or a person is permitted or required under the Act to give a document or thing in relation to a decision to the decision-maker for the decision, they may instead give the document or thing to the Secretary of the Department administered by the Minister who administers the Act or instrument under which the decision is made. The effect of subsection (4) is that if the Tribunal or a person is permitted or required to give a document or thing in relation to a Norfolk Island decision to the decision-maker, they may instead give the document to the Secretary of the Department administered by the Minister who administers the Norfolk Island Act.