



# **Defence Act 1903**

## **Act No. 20 of 1903 as amended**

This compilation was prepared on 5 August 2009 taking into account amendments up to Act No. 70 of 2009.

The text of any of those amendments not in force on that date is appended in the Notes section.

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section.

Prepared by the Office of Legislative Drafting and Publishing, Attorney-General's Department, Canberra

## **Extract of the Defence Act 1903**

### **Sections 58F To 58Y**

#### **Division 2 - The Defence Force Remuneration Tribunal**

#### **Division 3 - The Defence Force Advocate**

## Division 2—The Defence Force Remuneration Tribunal

### 58F Interpretation

In this Division, unless the contrary intention appears:

**Commission** means the Australian Industrial Relations Commission established by section 8 of the *Workplace Relations Act 1996*.

**Defence Force Advocate** means the Defence Force Advocate appointed under section 58S.

**Fair Work Australia** means the body established by section 575 of the *Fair Work Act 2009*.

**FWA** means Fair Work Australia.

**member of the Tribunal** means a member of the Tribunal appointed under section 58G, and includes the President.

**President** means the President of the Tribunal appointed under section 58G.

**relevant allowances**, in relation to a member, means allowances by way of remuneration payable to the member and, without limiting the generality of the foregoing, includes any allowance payable to the member:

- (a) in respect of the service of the member on a ship or aircraft;
- (b) as general compensation for the disadvantages of rendering naval, military or air force service;
- (c) in respect of particular skills or qualifications possessed by the member; or
- (d) as compensation for the hazardous nature of the duties that the member is required to perform or for the conditions under which the member is required to perform his or her duties.

**Remuneration Tribunal** means the Remuneration Tribunal established by subsection 4(1) of the *Remuneration Tribunal Act 1973*.

**salary** includes pay.

**single member** means a member of the Tribunal specified in a direction made under subsection 58KA(1).

**Tribunal** means the Defence Force Remuneration Tribunal established by section 58G.

### 58G Establishment of Defence Force Remuneration Tribunal

- (1) There is established by this section a Defence Force Remuneration Tribunal.
- (2) The Tribunal shall consist of:
  - (a) a President;
  - (b) a person who is experienced in industrial relations matters; and
  - (c) a person who was, but is no longer, a member of the Permanent Forces (although the person may be a member of the Reserves).

Note: The Permanent Forces are made up of the Permanent Navy, the Regular Army and the Permanent Air Force which are established respectively by the *Naval Defence Act 1910*, this Act and the *Air Force Act 1923*. Those Acts also establish the Naval Reserve, the Army Reserve and the Air Force Reserve, which together make up the Reserves.

- (3) The members of the Tribunal shall be appointed by the Governor-General on a part-time basis.

- (4) The person appointed as President shall be a Deputy President of FWA.
- (5) A person must not be appointed as a member of the Tribunal if he or she has, at any time during the year preceding the appointment, been a member of the Permanent Forces.
- (6) The performance of the duties and functions and the exercise of the powers of the Tribunal are not affected by reason only of there being one vacancy in the membership of the Tribunal.

### **58H Functions and powers of Tribunal**

- (1) The functions of the Tribunal are to inquire into and determine, in accordance with this section, the matters referred to in subsection (2).
- (2) The Tribunal shall, as provided for by this section:
  - (a) inquire into and determine the salaries and relevant allowances to be paid to members; and
  - (b) inquire into and make determinations in respect of prescribed matters that have been referred to the Tribunal.
- (3) The Minister or, subject to subsection (4), the Secretary or the Chief of the Defence Force may, by notice in writing given to the President, refer a prescribed matter to the Tribunal.
- (4) The Secretary or the Chief of the Defence Force shall not, without the approval in writing of the Minister, refer a prescribed matter to the Tribunal pursuant to subsection (3) if:
  - (a) at any time during the preceding 12 months, the Minister has made a determination under section 58B that relates, in whole or in part, to that matter; or
  - (b) the Secretary or the Chief of the Defence Force is aware that, at any time during the preceding 12 months, submissions have been made to the Minister requesting the Minister to make a determination that relates, in whole or in part, to that matter and the Minister has not made such a determination.
- (5) The Tribunal shall, within 2 years of the commencement of this section or within such shorter period as the Minister, by notice in writing given to the President, determines, inquire into and make a determination in respect of the salaries and relevant allowances to be paid to members.
- (6) Where a determination of the Tribunal in respect of the salaries and relevant allowances to be paid to members is in force, the Tribunal shall inquire into and make a further determination in respect of those salaries and allowances:
  - (a) within 2 years of the first-mentioned determination taking effect; or
  - (b) if the Minister, by notice in writing given to the President, requests the Tribunal to make a further determination in respect of those salaries and allowances within a shorter period of the first-mentioned determination taking effect—within that shorter period.
- (7) A determination of the Tribunal shall be in writing and shall take effect, or shall be deemed to have taken effect, on such day as the Tribunal specifies for the purpose in the determination.
- (8) The Tribunal shall not specify as the day on which a determination of the Tribunal takes effect a day earlier than the day on which the determination is made in any case where, if the determination so took effect:
  - (a) the rights of a person (other than the Commonwealth) which existed immediately before the last-mentioned day would be affected in a manner prejudicial to that person; or
  - (b) liabilities would be imposed on a person (other than the Commonwealth) in respect of anything done or omitted to be done before that last-mentioned day;

and where, in a determination of the Tribunal, any provision is made in contravention of this subsection, that provision shall be of no effect.

- (9) The President shall give a copy of each determination made by the Tribunal to the Minister, to the Secretary and to the Chief of the Defence Force.
- (10) Where the Tribunal has made a determination (not being a determination made pursuant to subsection (12)), the Minister, the Secretary or the Chief of the Defence Force may, by notice in writing given to the President within 28 days of the determination being made, request the Tribunal to reconsider the determination.
- (11) A notice of request under subsection (10) shall set out the grounds on which the reconsideration is being sought.
- (12) As soon as practicable after a request is made under subsection (10) for reconsideration of a determination, the Tribunal shall reconsider the determination and shall make a further determination affirming, varying or replacing the first-mentioned determination.
- (13) The Minister shall cause a copy of each determination of the Tribunal to be laid before each House of the Parliament within 15 sitting days of that House after the determination is received by the Minister.
- (14) Any regulation made under this Act, the *Air Force Act 1923* or the *Naval Defence Act 1910*, and any determination made under section 58B of this Act, has no effect to the extent that it is inconsistent with any determination of the Tribunal.
- (15) In this section, *prescribed matter* means a matter in relation to which the Minister may make determinations under section 58B, not being a matter referred to in paragraph (2)(a).

#### **58HA Hearings in relation to discriminatory determinations**

- (1) If a determination is referred to the Tribunal under section 46PY of the *Australian Human Rights Commission Act 1986*, the Tribunal must hold a hearing to review the determination.
- (2) Unless the hearing takes place before a single member of the Tribunal, subsections 58K(1) to (6) apply to the hearing as if it were a meeting of the Tribunal.
- (3) The Tribunal must decide whether or not the hearing is to be held in public.
- (4) If the Tribunal decides that the hearing is not to be held in public, then, subject to subsection (5) and subsections 58K(9) and 58KB(5), the Tribunal may decide the people who may be present.
- (5) The Sex Discrimination Commissioner is entitled to notice of, and to be present at, the hearing and may make submissions to the Tribunal.
- (6) In this section:

*determination* includes a variation to a determination.

*Tribunal* includes a single member conducting the Tribunal's business under a direction under subsection 58KA(1).

#### **58HB Review of discriminatory determinations**

- (1) If:
  - (a) a determination has been referred to the Tribunal under section 46PY of the *Australian Human Rights Commission Act 1986*; and
  - (b) the Tribunal considers that the determination is a discriminatory determination;

the Tribunal must take the necessary action to remove the discrimination, by setting aside the determination, setting aside terms of the determination or varying the determination.

(2) In this section:

**determination** has the same meaning as in section 58HA.

**discriminatory determination** means a determination that:

- (a) has been referred to the Tribunal under section 46PY of the *Australian Human Rights Commission Act 1986*; and
- (b) requires a person to do an act that would be unlawful under Part II of the *Sex Discrimination Act 1984* except for the fact that the act would be done in direct compliance with the determination.

**Tribunal** has the same meaning as in section 58HA.

(3) For the purposes of the definition of **discriminatory determination** in subsection (2), the fact that an act is done in direct compliance with the determination does not of itself mean that the act is reasonable.

### **58J Reports by Tribunal**

- (1) The Minister may, by notice in writing given to the President, request the Tribunal to inquire into and report to the Minister on a matter specified in the notice, being a matter in relation to which the Tribunal may make a determination pursuant to section 58H.
- (2) When a request is made under subsection (1), the Tribunal shall inquire into the matter concerned and give to the Minister a report in writing on that matter.

### **58K Procedure of Tribunal**

- (1) The President shall convene such meetings of the Tribunal as he or she considers necessary for the efficient performance of its functions.
- (2) Meetings of the Tribunal shall be held at such places as the President determines.
- (3) The President shall preside at all meetings of the Tribunal at which he or she is present.
- (4) If the President is not present at a meeting of the Tribunal, another member of the Tribunal nominated by the President shall preside at the meeting.
- (5) The Tribunal shall keep records of its meetings.
- (6) At a meeting of the Tribunal:
  - (a) 2 members of the Tribunal constitute a quorum;
  - (b) all questions shall be decided by a majority of votes of the members of the Tribunal present and voting; and
  - (c) the member of the Tribunal presiding has a deliberative vote and, in the event of an equality of votes, also has a casting vote.
- (7) The Tribunal shall, in making a determination, have regard to:
  - (a) any decision of, or principles established by, FWA that is or are relevant to the making of the determination; or
  - (b) if FWA has not yet made any such decision or established any such principles, any decision of, or principles established by, the Commission that is or are relevant to the making of the determination.
- (8) In the performance of the functions of the Tribunal:

- (a) the Tribunal may regulate the conduct of its proceedings as it thinks fit and is not bound to act in a formal manner; and
  - (b) the Tribunal may inform itself on any matter in such manner as it thinks fit and is not bound by the rules of evidence.
- (9) The Defence Force Advocate and a person representing the Commonwealth are entitled to be present, and to make submissions to the Tribunal, during any proceedings before the Tribunal.
- (10) Where the Tribunal thinks that a person or body should be heard in relation to a matter that is being, or is to be, considered by the Tribunal, the Tribunal may permit the person or body to be present, and to make submissions to the Tribunal, during proceedings before the Tribunal in relation to that matter.

#### **58KA Single member may conduct Tribunal's business**

- (1) Subject to subsection (2), the President may:
- (a) if a person referred to in subsection 58K(9) requests the President to do so and the President considers it appropriate; or
  - (b) in any case, on the Chairman's initiative;
- direct, in writing, that a member of the Tribunal specified in the direction is to conduct the Tribunal's business in relation to any matter that is specified in the direction, being a matter that is being, or is to be, dealt with by the Tribunal.
- (2) The President must not, in a direction made under subsection (1), direct that a single member is to deal with a request made under subsection 58KC(1).
- (3) The President may, at any time, in writing, terminate a direction made under subsection (1).
- (4) Where a single member is conducting the Tribunal's business in relation to a matter:
- (a) the single member may exercise any powers or perform any functions of the Tribunal in relation to that matter; and
  - (b) any act of the single member in relation to that matter is taken to be an act of the Tribunal.
- (5) In this section, a reference to a matter that is being, or is to be, dealt with by the Tribunal includes a reference to any part of such a matter.

#### **58KB Procedure where single member is conducting Tribunal's business**

- (1) Where a single member is conducting the Tribunal's business:
- (a) section 58K does not apply to the single member's conduct of such business; and
  - (b) the following provisions apply.
- (2) The single member may conduct such proceedings relating to the matter to which the direction relates as he or she considers necessary.
- (3) In the conduct of the Tribunal's business:
- (a) the single member is not bound to act in a formal manner; and
  - (b) the single member may inform himself or herself on any matter in such manner as he or she thinks fit and is not bound by the rules of evidence.
- (4) The single member must, in making a determination, have regard to:
- (a) any decision of, or principles established by, FWA that is or are relevant to the making of the determination; or

- (b) if FWA has not yet made any such decision or established any such principles, any decision of, or principles established by, the Commission that is or are relevant to the making of the determination.
- (5) The Defence Force Advocate and a person representing the Commonwealth are entitled to be present, and to make submissions to the single member, during any proceedings conducted by the single member.
- (6) Where the single member thinks that a person or body should be heard in relation to a matter that is being, or is to be, considered by him or her, the single member may permit the person or body to be present, and to make submissions to the single member, during proceedings conducted by the single member in relation to that matter.

### **58KC Review of action etc. of single member**

- (1) Where:
  - (a) a single member is conducting the Tribunal's business in relation to a matter; and
  - (b) in dealing with the matter, the single member exercises a power or performs a function of the Tribunal;the Minister, the Secretary or the Chief of the Defence Force may, by notice in writing given to the President within 28 days after the single member has completed his or her conduct of that business, request the Tribunal to reconsider the exercise of the power or performance of the function.
- (2) The notice must specify the exercise of the power or the performance of the function requested to be reconsidered and the grounds for seeking the reconsideration.
- (3) As soon as practicable after the request is made, the Tribunal must:
  - (a) reconsider the exercise of the power or performance of the function specified in the request; and
  - (b) make a determination affirming, varying or replacing anything done by the single member in exercising that power or performing that function.

### **58KD Determinations giving effect to agreement between the parties**

The Tribunal may, in making a determination, give effect to any agreement reached between the Minister, acting on behalf of the Commonwealth, and the Chief of the Defence Force, acting on behalf of the members of the Australian Defence Force, in relation to a matter to which the determination relates.

### **58L Terms and tenure of office**

- (1) Subject to this Division, a member of the Tribunal holds office for such period, not exceeding 5 years, as is specified in his or her instrument of appointment, but is eligible for re-appointment.
- (2) A person must not continue to hold office as a member of the Tribunal if:
  - (a) he or she becomes a member of the Permanent Forces (although he or she may become a member of the Reserves); or
  - (b) he or she becomes the Defence Force Advocate; or
  - (c) in the case of the President, he or she ceases to be a Deputy President of FWA.

Note: The Permanent Forces are made up of the Permanent Navy, the Regular Army and the Permanent Air Force which are established respectively by the *Naval Defence Act 1910*, this Act and the *Air Force Act 1923*. Those Acts also establish the Naval Reserve, the Army Reserve and the Air Force Reserve, which together make up the Reserves.

### **58M Resignation**

A member of the Tribunal may resign his or her office by writing signed by him or her and delivered to the Governor-General.

### **58N Termination of appointment**

The Governor-General may terminate the appointment of a member of the Tribunal by reason of misbehaviour or physical or mental incapacity.

### **58P Acting appointments**

- (1) The Minister may appoint a person to act as a member (including the President) of the Tribunal:
  - (a) during a vacancy in the office of that member; or
  - (b) during any period, or during all periods, when that member is absent from duty or from Australia or is, for any other reason (including the reason that, in the case of a member not being the President, he or she is acting as President), unable to perform the duties of his or her office;but a person appointed to act during a vacancy shall not continue so to act for more than 12 months.
- (2) While a person is acting as President or as a member of the Tribunal other than the President, the person has and may exercise all the powers, and shall perform all the functions, of the President or that member, as the case may be.
- (3) An appointment of a person under subsection (1) may be expressed to have effect only in such circumstances as are specified in the instrument of appointment.
- (4) The Minister may:
  - (a) determine the terms and conditions of appointment, including fees and allowances, of a person acting as a member of the Tribunal; and
  - (b) terminate such an appointment at any time.
- (5) Where a person is acting as a member of the Tribunal in accordance with paragraph (1)(b) and that office becomes vacant while that person is so acting, then, subject to subsection (3), that person may continue so to act until the Minister otherwise directs, the vacancy is filled or a period of 12 months from the date on which the vacancy occurred expires, whichever first happens.
- (6) The appointment of a person to act as a member of the Tribunal ceases to have effect if the person resigns his or her appointment by writing signed by him or her and delivered to the Minister.
- (7) The validity of anything done by a person purporting to act under this section shall not be called in question on the ground that the occasion for his or her appointment had not arisen, that there was a defect or irregularity in or in connection with his or her appointment, that the appointment had ceased to have effect or that the occasion for the person to act had not arisen or had ceased.
- (8) A reference in section 58H, 58J, 58K, 58KA, 58KC or 58U to the President or to a member of the Tribunal shall be read as including a reference to a person acting as the President or as a member of the Tribunal, as the case may be.

## 58Q Fees and allowances

- (1) A member of the Tribunal shall be paid such fees and allowances as the Remuneration Tribunal determines.
- (2) The appointment of the holder of a prescribed office as a member of the Tribunal, or service by the holder of a prescribed office as such a member, does not affect his or her tenure of that prescribed office or his or her rank, title, status, precedence, salary, annual or other allowances or other rights or privileges as the holder of that prescribed office and, for all purposes, his or her service as a member of the Tribunal shall be taken to be service as the holder of the prescribed office.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.
- (4) In this section, ***prescribed office*** means an office, appointment or other employment which is referred to in subsection 7(11) of the *Remuneration Tribunals Act 1973* as an office, appointment or other employment on a full-time basis or a judicial office referred to in subsection 7(12) of that Act.

## **Division 3—The Defence Force Advocate**

### **58R Interpretation**

In this Division, unless the contrary intention appears:

*Advocate* means the Defence Force Advocate appointed under section 58S.

*Remuneration Tribunal* means the Remuneration Tribunal established by subsection 4(1) of the *Remuneration Tribunal Act 1973*.

*Tribunal* means the Defence Force Remuneration Tribunal established by section 58G.

### **58S Defence Force Advocate**

- (1) There shall be a Defence Force Advocate, who shall be appointed by the Minister on a part-time basis.
- (2) The person appointed as the Advocate shall be a person who:
  - (a) is experienced in industrial relations matters; and
  - (b) has a knowledge of the nature of service in the Defence Force.
- (3) In making an appointment under subsection (1), the Minister shall have regard to any recommendations made by the Chief of the Defence Force.

### **58T Functions of Advocate**

The functions of the Advocate are:

- (a) to advise the Chief of the Defence Force in relation to matters that have been, or may be, referred to the Tribunal by the Chief of the Defence Force pursuant to subsection 58H(3);
- (b) to prepare submissions to be made to the Tribunal on behalf of the Defence Force concerning any matter that is being considered by the Tribunal; and
- (c) to represent the Defence Force in proceedings before the Tribunal.

### **58U Tenure and terms of office**

- (1) Subject to this Division, the Advocate holds office for 3 years, but is eligible for re-appointment.
- (2) A person shall not continue to hold the office of Advocate if he becomes a member of the Tribunal.

### **58V Resignation**

The Advocate may resign his office by writing signed by him and delivered to the Minister.

### **58W Termination of appointment**

The Minister may terminate the appointment of the Advocate by reason of misbehaviour or physical or mental incapacity.

### **58X Acting Defence Force Advocate**

- (1) The Minister may appoint a person to act as the Advocate:

- (a) during a vacancy in the office of the Advocate; or
  - (b) during any period, or during all periods, when the Advocate is absent from duty or from Australia or is, for any other reason, unable to perform the duties of his office; but a person appointed to act during a vacancy shall not continue so to act for more than 12 months.
- (2) While a person is acting as the Advocate, he has and may exercise all the powers, and shall perform all the functions, of the Advocate.
  - (3) An appointment of a person under subsection (1) may be expressed to have effect only in such circumstances as are specified in the instrument of appointment.
  - (4) The Minister may:
    - (a) determine the terms and conditions of appointment, including remuneration and allowances, of a person acting as the Advocate; and
    - (b) terminate such an appointment at any time.
  - (5) Where a person is acting as the Advocate in accordance with paragraph (1)(b) and the office becomes vacant while that person is so acting, then, subject to subsection (3), that person may continue so to act until the Minister otherwise directs, the vacancy is filled or a period of 12 months from the date on which the vacancy occurred expires, whichever first happens.
  - (6) The appointment of a person to act as the Advocate ceases to have effect if he resigns his appointment by writing signed by him and delivered to the Minister.
  - (7) The validity of anything done by a person purporting to act under this section shall not be called in question on the ground that the occasion for his appointment had not arisen, that there was a defect or irregularity in or in connection with his appointment, that the appointment had ceased to have effect or that the occasion for him to act had not arisen or had ceased.

### **58Y Fees and allowances**

- (1) The Defence Force Advocate shall be paid such fees and allowances as the Remuneration Tribunal determines.
- (2) This section has effect subject to the *Remuneration Tribunal Act 1973*.