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Administrative Review Tribunal Bill 2023 [Provisions] and related bills

[1] My submission is in respect of the inquiry into the proposed abolition of the Administrative Appeals Tribunal (***AAT***) and its replacement by the new Administrative Review Tribunal (***ART***) body via the *Administrative Review Tribunal Bill* 2023 (***ART Bill***) and related bills that are before this committee.

[2] For the reasons set out in this submission, the ART Bill has significant flaws, including constitutional flaws, which warrant a broad rethinking of what the ART Bill is trying to achieve. The AAT is now almost 50 years old and the ART Bill represents a rushed and, in some areas, unwise attempt to reform a decades-old system of merits review, particularly given the amalgamation of various federal tribunals into the one AAT by the *Tribunals Amalgamation Act* 2015 (CTH) (***Amalgamation***).

[3] None of this submission is a criticism of any tribunal or any officeholder, past or present, but simply a submission on the merits of the legislative foundations of both the current AAT and the proposed replacement ART.

[4] My *curriculum vitae* is attached to this submission. I am a Senior Member of the AAT and joined the tribunal in May 2022. More importantly, for the purposes of this submission, I am a Barrister who practices in constitutional law and public law, as well as a lecturer and examiner in Australian constitutional law. I was one of the Counsel Assisting the statutory review of the AAT (post-Amalgamation) conducted by the Hon. I.D.F. Callinan AC KC in 2018-2019.

Today's Tribunal: Origins

[5] During the Callinan review in 2018-2019, barely five years ago, the past and future of the AAT, amid its successful Amalgamation, was the subject of many submissions from those citizens and interested groups with grievances as regards the Commonwealth Government's decision-making in areas as diverse, for example, as Veterans, Welfare, Disability, Taxation, and Migration/Protection. The view of many interested parties was that Amalgamation had been a success, or at least Amalgamation had

improved, what had been a difficult set of prior administrative law arrangements with different federal tribunals.[1]

[6] As committee members would be well aware, the almost 50-year-old AAT provides often distressed applicants, where they believe the Commonwealth government has unjustly denied their claim or engaged in dubious executive action, with an independent, inexpensive, and fresh, review, and, where their case is made out, a remedy – and without the need for costly lawyers and time-consuming litigation. The AAT was created by the *Administrative Appeals Tribunal Act* 1975 (CTH) (***AAT Act***) to be an enduring executive body that conducts merits review of applications made by persons dissatisfied with a reviewable decision made under federal law.

[7] The impetus for the AAT's creation arose from thinking across the common law world, especially after World War II[2], given the growth of the power of the state in both of its 'welfare' and 'warfare' spheres. The response to this thinking was inquiries, like that of the Franks Committee[3] in the United Kingdom that inquired into British administrative law bodies, and sought to provide accessible and affordable non-curial mechanisms for citizens to challenge the administrative decisions of an ever larger, and more remote, bureaucratic state.[4] The Franks Committee view was that, "*... statutory tribunals are an integral part of the machinery of justice in the state and not merely administrative devices for the disposing of claims and arguments conveniently*", adding the need for such statutory tribunals to be "*open, impartial, and fair*".[5]

[8] In Australia, in October 1968, the Attorney-General for the Commonwealth, Sir Nigel Bowen, established an Administrative Review Committee under the future Sir John Kerr QC, to consider the jurisdiction and procedures for administrative review, and the desirability of legislation similar to the United Kingdom's *Tribunals and Inquiries Act* 1958 (UK), which resulted from the Franks Committee. The report of the Kerr committee of August 1971 said this[6]:

> "*It is generally accepted that this complex pattern of rules as to appropriate courts, principles and remedies*

1 Hon. IDF Callinan AC KC, Report on the Statutory Review of the Tribunals Amalgamation Act 2015, 19 December 2018, at chapter 6.

2 See the speech, "Overview of Tribunals Scene Australia", given by Justice Garry Downes AM, then President of the AAT, on 05 April 2006.

3 *The Committee on Administrative Tribunals and Enquiries* chaired by Sir Oliver Franks OM GCMG and which reported in 1957 (Franks Committee) on key aspects of British administrative law.

4 Hon. IDF Callinan AC KC, *Report on the Statutory Review of the Tribunals Amalgamation Act* 2015, 19 December 2018, at chapter 4.

5 Cited by Hillaire Barnett, *Constitutional and Administrative Law* (12th Edition) (London, UK: Routledge, 2017) at 707.

6 Hon. IDF Callinan AC KC, *Report on the Statutory Review of the Tribunals Amalgamation Act* 2015, 19 December 2018, excerpted at [4.4].

> *is both unwieldy and unnecessary. The pattern is not fully understood by most lawyers; the lawman tends to find the technicalities not merely incomprehensible but quite absurd. A case can be lost or won on the basis of choice of remedy and the non-lawyer can never appreciate why this should be so. The basic fault of the entire structure is, however, that review cannot as a general rule, in the absence of special statutory provisions, be obtained 'on the merits' – and this is usually what the aggrieved citizen is seeking.*"

Legislative Purposes

[9] The general purpose of the AAT is to receive, hear, and determine, afresh, on the material placed before the Tribunal, an applicant's appeal against a decision made under Commonwealth law. Any application to the AAT, even where an applicant has not attended their own hearing, is a proceeding *de novo* and not an appeal in the sense of an appeal to any court.

[10] When the AAT comes to make its decision, the tribunal member is in the place of the original decision maker, with the power to affirm, vary, or set aside, and decide in substitution or remit a decision under review with the Tribunal's directions or recommendations: s 43(1) of the AAT Act. The Federal Court said this of the Tribunal's task[7]:

> *The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether the decision was the correct or preferable one on the material before the Tribunal.*

It goes without saying that no two cases are the same and that each case must be judged, independently, according to its own facts and on its own merits, such that this activity is truly one of '*merits review*'. It is important to repeat that the AAT here takes on the role of determining what was the correct or preferable decision on the whole of the material that has been filed with or presented to the tribunal in this case.

[11] The current AAT has, therefore, the freedom to decide a case, on its merits, and a member with carriage of the case has considerable authority to run the matter in a manner tailored to the facts and circumstances of the application. A member has the freedom to run any case in a manner that will be most fair and most just in the peculiar circumstances of any applicant's case, particularly given the different origins of applicants, and

7 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589 per Bowen CJ and Deane J.

their needs and their claims, and, sensitive to the trauma they may have suffered. This is especially so in Migration/Protection cases where applicants may be victims of violent crimes, including sexual assaults, in their countries of nationality. Many applicants are from jurisdictions where you cannot seek an unbiased and afresh review of any government decision, or, if you can, it is purely formulaic, with the notional reviewer bound to support the regime, whether because they are themselves regime functionaries or because they have been bribed or coerced. The sheer prospect, for many foreign-born applicants, of visiting a government tribunal to plead one's case is a terrifying one. It is essential, then, that any applicant and their case be run fairly and safely, so that, even if they fail in their application, they feel they have been given every chance to make their case and treated fairly. In this and like case management respects, it is hard to overstate how varied is the caseload for any individual member in the different divisions of the AAT, and how necessary it is that a tribunal member is free, without threat of bureaucratic interference or managerialist supervision, to customise each case's management and hearing (especially in cases of disability, language barriers, or gender/sexuality issues).

[12] Historically, the AAT resulted from this period of unusually wise and mature legislative creativity in respect of devising executive bodies that could meet pressing societal needs in ways that lay citizens could understand and utilise – without the need for the complexities and costs of courts and lawyers. One of the many reasons for the AAT's creation was to avoid '*death by lawyers*' in what may otherwise quickly become a nebulous system of administrative law review. This applied as much to avoiding a mandate that tribunal members be lawyers only, too. Merits review, done afresh and on the facts and materials of the case, is a skill that many people can acquire from years of diligence and investigative curiosity in many different fields and professions. The idea that a mere legal qualification, which can see its holder go an entire career without conducting an examination or trial, is sufficient qualification to sit upon a tribunal is, frankly, the antithesis of what the modern development of administrative review is supposed to achieve. To this end, the *AAT Act* was a product of plain English drafting and is mercifully intelligible to interested lay people who either must administer it or who wish to rely on it in relation to their appeal against an adverse decision made under Commonwealth law. It would ordinarily be hard to conceive of a law creating a successor tribunal or body in 2024 that would be drafted with such succinctness and clarity for the average citizen.

Constitutional Foundations of Administrative Law Review

[13] Constitutionally, the nature of the AAT (and kindred executive review bodies) is that they sit under the executive government (in Chapter II) but

between executive decision-makers and the courts (in Chapter III), in what is best termed as a '*chapter two point five*' existence.

[14] Given this position, tribunal members must be independent, in form and in substance, so as to be able to conduct fresh and fearless merits review, with all the obligations to extend procedural fairness in the manner of a judge but with an inquisitor's freedom to go beyond the limits and technicalities of adversarial litigation to wherever the facts of a case might lead.

[15] It is something of a defect in the intellectual culture of Anglophone common law jurisdictions that we struggle to site administrative law bodies into formalised and independent structures, instead tending to dismiss these bodies as additional layers of '*bureaucracy*' to be managed like any other part of the public service. The mature approach would be to accept that the conduct of fresh merits reviews by bodies like the AAT – sitting between decision-makers and courts – has been and is a vital link in the relationship between a citizen and their government. In other words, a citizen's right to pursue fresh merits review of government decisions by a tribunal is a fundamental aspect of their ongoing relationship as citizens with the executive government. Tribunals like the AAT have become specialised juridical bodies[8] which review not just individual decisions but, through a now very well-developed *corpus* of decisions, do come to redress harms and set norms for both how the executive government operates and the processes by which their decisions should be made.[9] Any changes to these bodies should be undertaken slowly, with great deliberation, bearing in mind the Chestertonian wisdom that one does not knock down a wall without first understanding why it was erected. In 1987, this was noted of the AAT's crucial role in Commonwealth administrative review by the then operating Administrative Review Council[10]:

> "*Before the AAT came into being the legislation of the Commonwealth Parliament had established over the years a considerable number of review tribunals, each limited to a particular area of decision making. There were, for example, Taxation Boards of Review to conduct review on the merits in the taxation area, the Commonwealth Employees Compensation Tribunal to review compensation determinations and, in the repatriation area, War Pensions Entitlement Appeals Tribunals and*

8 Any public organization or branch of government responsible for the administration of justice or the enforcement of laws.

9 John H. Jackson, The Varied Policies of International Juridical Bodies- Reflections on Theory and Practice, 25 *Michigan Journal of International Law* 869 (2004) at 872-873.

10 Hon. IDF Callinan AC KC, *Report on the Statutory Review of the Tribunals Amalgamation Act* 2015, 19 December 2018, excerpted at [4.12].

> *Assessment Appeal Tribunals. These tribunals had not, however, developed in a coordinated fashion. A fundamental purpose of the creation of the AAT was to centralise the review functions being performed by these tribunals in a single body, with a view both to providing effective, independent and visible review of all appropriate decisions and to ensuring consistency of review standards across all jurisdictions.*"

The Constitutional Problems

[16] With this in mind, it is important to note, again, that this Tribunal operates as an executive body under Chapter II of the Constitution – and is not a Court, which operates under Chapter III of the Constitution. That is, the proceedings before this Tribunal are, generally, inquisitorial of an applicant's case – and not adversarial as between plaintiff and defendant parties in a traditional court trial.[11] There was an ongoing problem with the AAT that carries over to the new ART, which is that the President of these Chapter II review bodies must be a Chapter III judge: see AAT Act s.7(1) and the new ART Bill s.205(3). Noting this inaptness is no criticism of any of the eminent judges who have served or serve as the President of the AAT.

[17] As the High Court has noted, the detachment of a judge to serve in an executive function does hazard the separation of the judiciary from the executive, a vital constitutional safeguard[12], and the maintenance of public confidence in the judiciary.[13] The constitutional problems raised by the requirement that a tribunal president be a serving judge should be plainly obvious.

[18] More specifically, here are clear examples of this conflict of Chapter II and Chapter III in the new ART Bill:

A. the President (a serving Chapter III judge) is, as a matter of a common-sense interpretation of s.193(g), (k) and (l), obligated to defend the new ART in public fora and against attacks, especially ill-informed attacks by parliamentarians, as well as by, for example, the Attorney-General of the day. It is unbecoming to have a Chapter III judge being required to publicly defend a Chapter II tribunal, especially in circumstances where other Chapter III judges are or will be reviewing the work done by the old/new tribunal.

B. the ART Bill provides numerous instances where the President (a serving Chapter III judge) works, in effect, as the 'Human Resources

11 *Abebe v Commonwealth* (1999) 197 CLR 510 at 576 [187] per Gummow and Hayne JJ.
12 *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 540-541 per Viscount Simonds.
13 *Wilson v Minister (Hindmarsh Island Bridge case)* (1996) 189 CLR 1.

Manager' for a Chapter II executive body and for the relevant Minister by:

i. monitoring the work of members, setting performance standards for members, and investigating members: ss.200-204;

ii. determining leave arrangements for members: s.215(3) and (4);

iii. notifying the Minister of the President's own reasonable beliefs that there are grounds for terminating a non-judicial member: s.222; and

iv. becoming a penultimate defendant for litigation in Chapter III courts before the Commonwealth succeeds to that role: s.244.

C. the President (a serving Chapter III judge) is to determine what should be the content of the work of the guidance and appeals panel that would become part of this Chapter II body (Part 5 especially s.122);

D. the President (a serving Chapter III judge) presides over an executive tribunal which will be giving advisory opinions (per s.288) on matters or questions referred to it under Commonwealth legislation and/or instruments. Quite apart from the grave risk that the Tribunal becomes an '*outside counsel*' for government on legislative issues – a legal advisory resource which, used once, will be used again, draining scarce tribunal resources – the High Court has long held that advisory opinions are not fit subjects for the Chapter III courts to which any President belongs in their judicial capacity.[14]

E. the President (a serving Chapter III judge) will delegate executive functions or powers that are conferred by the ART Bill to members of the new ART Tribunal. Similarly, the President may authorise the performance and exercise of the functions and powers of the new ART Tribunal: Part 11, Division 4.

The President of the AAT/ART holds the most critical office in Australia's system of federal executive tribunals. The President should, perhaps, be a retired judge or even an eminent former member of the tribunal, of which there have been many – or perhaps someone whose eminence was earned in another field. However, the constitutional incongruity of having Chapter III judges preside over a critical Chapter II tribunal should be ended, for the good of both the executive government and the courts. Australia's written and entrenched federal constitution has, for 123 years,

14 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

separated the executive branch from the judicial branch of the national government which the Constitution establishes. We should, in reforming old or introducing new tribunals, respect the crucial constitutional demarcation between the executive officers of Chapter II and the judicial officers of Chapter III.

Tomorrow's ART: Obvious Problems

[19] There are obvious problems with the new ART Bill in addition to the constitutional issues outlined above:

A. *The litigation guardian* (s.67) is a provision that is fraught with grave danger in these ways:

i. there is no limitation in s.67 as to the use of or boundaries of a litigation guardian. There is no confinement of the question of the litigation guardian's role to any classes of cases. Instead, the litigation guardian is an office whose necessity may become agitated only by an unsuccessful applicant in their later appeal. It is easy to imagine the many circumstances in which any ART members' failure to appoint such a litigation guardian for an applicant supplies grounds for future appeals, particularly in migration and protection matters, where many applicants will say, in retrospect, that they did not understand the nature and consequences of the proceedings, or were unable to give proper instructions or conduct the case (s.67(1)-(2)). A disappointed applicant may also say, on appeal, that their case suffered from conflicts between their representative and their litigation guardian (s.67(4)), which the tribunal failed to note or manage. On any common-sense view of the provision, the litigation guardian will be an inevitable source of delays for the swift resolution of ART cases;

ii. in the alterative to (i) above: if the litigation guardian is genuinely intended to play an active role in ART cases, then any prudent litigation guardian will require specific legislative protections or otherwise an indemnity against any and all future liability for acts done within the scope of their authority;

iii. the hopelessly vague concept of a litigation guardian having duties to discern what is the "*personal and social wellbeing*" of a party (s.67(7)-(8)) to a case – when wellbeing itself may be viewed quite differently during the proceedings from after the proceedings – needs much

further refinement and precision, or risks adding to the already grave problems risked by (i) above;

iv. should the litigation guardian, particularly if a family member, have a perceived or real conflict of interest with that of the applicant, to whom can the litigation guardian go for advice? Does the litigation guardian approach the tribunal hearing and seek advice from the presiding member hearing the case? Is that presiding ART member then to conduct an inquiry or *voir dire* into the litigation guardian and/or any potential replacements?; and

v. is the litigation guardian to be competent to determine whether their applicant should appeal any decision to either the new ART guidance and appeals panel or to the federal courts – and in either case can the litigation guardian seek legal or other advice, and, if so, who will pay for that advice? Will there be the executive tribunal equivalent of a Suitors Fund or some other fund to compensate/indemnify the litigation guardian(s) for their time and for the intellectual, human, and financial, costs of their discharge of this office? Has anyone thought any of this through?

The creation of the office of litigation guardian appears motivated by good intentions. However, as with all such paths paved by such good intentions to unpleasant places, the harms and torpor that will be, potentially, caused by the inception of the litigation guardian will be immense. The section is poorly drafted and without sensible limitations. There is also an absence of any statutory protection and immunity, or potential source of financial assistance, for litigation guardians of the kind that exist for members: cf ss.293 and 294. Overall, this is a very poorly (and one suspects hastily) drafted innovation. The Parliament risks this provision becoming either a source of much nuisance via appeals or a dead-letter as no sane person would consent to becoming a litigation guardian – or perhaps both, given what retrospective claims may be arguable by a disappointed applicant.

B. *The guidance and appeals panel* (***Panel***) (Part 5): as with the litigation guardian, so too the Panel may have made some sense in isolation from the circumstances in which the tribunal will operate, but this new Panel us unwise for a tribunal conducting merits review afresh. As a matter of common sense, any new panel sited within an existing merits review body will simply risk imposing needless rigidities, noting that rigidities are the enemy of the quick, just, and informal, resolution of any case. The instigation of an appeal panel to provide precedents and ‘guidance’ – again, however well intended and however well

supervised by any tribunal president – will see, inevitably, the 'judicialising' of what is an entirely separate and case-focused form of administrative review. At a certain point in time, it needs to be accepted, per what I say above at [15], that what executive tribunals do is different from what courts do, despite any superficial similarities. Put simply, an administrative review body exercising executive power to conduct fresh merits review to make the preferable decision, is distinct, entirely, from a trial court exercising judicial power and bound by an appellate court hierarchy, rules of form and evidence, and pleadings – and trying to meld these very different tasks risks sending a functional merits review tribunal out to become lost in a jurisdictional '*no man's land*'. Worse, it risks chilling the independence of tribunal members whose office demands of them that they decide the cases before them, rather than worry about future adverse criticism of their decisions by the Panel – and any consequences this may have for their future re-appointment to the ART.

C. *The President as a Chapter III judge*: please see my comments above in relation to the Panel but especially in the light of what I say regarding what work merits review tribunals do as bodies situated between the executive government and the courts (at [15] above).

Suggested Path Forward

[20] The AAT, as it is now, is the result of many decades of agitation by persons of all political persuasions who were and are concerned that both citizens and non-citizens be able to have effective and truly independent review of what they believe are unfair government decisions.

[21] The Callinan review's evaluation of the AAT's efficient and effective work of merits review, post Amalgamation, seldom appealed successfully to the federal courts – and vindicated by the Robodebt royal commission – reflected the AAT's value in Australia's particular system of federal government. At the same time, the Callinan review also warned against a culture of "*managerialism and bureaucratisation*" impeding the work of merits review in Australia, especially that done by Tribunals such as the AAT.[15] That warning must not go unheeded.

[22] Since the AAT commenced almost 50 years ago, a now large body of law and practice has built up around the AAT. It would be a grave mistake to recklessly undo all that has been achieved, especially given the flaws identified in the current ART Bill. A mistake of hasty change would undo what the Amalgamation sought to achieve in the AAT's now many jurisdictions, whose principal laws are already needlessly Byzantine in their complexity for the lay citizen. The AAT has been the one ready

15 Hon. IDF Callinan AC KC, *Report on the Statutory Review of the Tribunals Amalgamation Act* 2015, 19 December 2018, excerpted at [10.38].

means for holding the executive government to account and the new ART structure seems likely to introduce rigidities without reforms. It may be that simply amending the current AAT Act is a more prudent means of achieving whatever changes may be desired to improve Australia's system of merits review of executive decisions.

[23] So much of the ART Bill makes problems of managerialism and bureaucratisation worse, not better, in contradiction of what the Callinan review had intended. The essence of merits review is both fresh and independent review of individual cases, to be determined on their merits, by a reviewing authority who is without fear of sanction and reprimand by those placed elsewhere in the tribunal's organisational pyramid. The ART Bill instead imposes an ominously named 'guidance' panel, as well as modes for reminding members of the need to conform to managerialist expectations. In a real sense, where an AAT member is empowered to be an independent reviewer of each distinct case, an ART member risks becoming little more than another public servant with a stack of papers on their desk and elusive KPIs to fulfil.

[24] In structural terms, moreover, the spectre of the continued use of a Chapter III judge to preside over what is a Chapter II merits review body – should alarm any sensible person. Quite apart from issues of obvious constitutional validity, who honestly thinks this arrangement is flattering to either merits review or to judicial independence?

[25] Disputes between the citizen and the state that come for merits review should be determined by persons and processes in which the citizen can feel confident that they have been treated always fairly by processes that – in both their form and their substance – are at arm's length from the government of the day.

[26] If there is a concern about the AAT's membership, from time to time, and there is a desire to, swiftly, appoint or remove individual persons considered unsuitable to serve as tribunal members, then simply amend Part I of the current AAT Act.

[27] There is no worse way to upend our coherent system of federal administrative review, post-Amalgamation, than to replace what already works with a constitutionally flawed and ill-thought-out replacement body, which is, in places, the product of obviously rushed rather than reflective thinking. Tribunals should not be lightly, or, as here, clumsily, tampered with or done away with, given the enormity of their caseload in 2024, and the ready and accessible means they offer to aggrieved citizens and others of inexpensive and thorough redress.

[28] I am prepared to speak further to this submission before a hearing of this Senate Committee if I am invited to do so. My *curriculum vitae* is attached to this submission.

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Graham Alfred Frederick Connolly, *Curriculum Vitae*, 07 March 2024