Submission by Assistant Professor Narelle Bedford to the Senate Legal and Constitutional Affairs Committee on the Administrative Review Tribunal Bill 2023 [Provisions] and related bills

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Introductory comments

1. I welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee on the Administrative Review Tribunal Bill 2023 (ART Bill) and related bills.

2. This submission is intended to be made public.

3. I am currently an Assistant Professor in the Faculty of Law at Bond University, where I research and teach in the field of administrative law. Prior to becoming an academic, my professional career experience was in administrative law. Therefore, I have professional expertise in the subject matter of this inquiry. My comments and recommendations below are based on my expertise in administrative law issues.

Generally about merits review and the objectives of the new ART – Parts 1 & 2 of the ART Bill 2023

4. I wish to commence this submission by stressing the importance of merits review as part of the Australian administrative justice system. It vindicates the imperative identified in the Kerr Report that individuals want the opportunity to have government decisions reviewed on their merits. Therefore, I agree with he submission of the Law Council of Australia that there should be express reference to the term 'merits review' in the Bills. At the least, I propose that clause 9 should read 'The Tribunal must pursue the objective of providing an independent mechanism of merits review that: …' but there may be other opportunities for further references to merits review elsewhere in the Bill.

5. The concept of a modern Commonwealth review tribunal was comprehensively considered and proposed by the Administrative Review Council (ARC) in its *Better*

Decisions: Review of Commonwealth Merits Review Tribunals (1995 Report No 39). This report remains informative, and the contributions made by the ARC to administrative law, and merits review in the federal tribunal, are significant. It is heartening that the ARC is to be reinvigorated. I have publicly recorded my arguments supporting this important institution on 21 May 2021 https://www.auspublaw.org/blog/2021/05/the-kerr-reports-vision-for-the-administrative-review-council/. Therefore, the long title of the Bill should read The long title of the ART Bill should be amended to: "A Bill to establish an Administrative Review Tribunal and an Administrative Review Council and provide for merits review of administrative decisions, and for related purposes".

6. At the outset, I question whether the AAT needs to be abolished and re-established, as the proposed changes could be implemented by amending the AAT legislation. Notwithstanding these concerns, I will address specific matters in the Bill to create the ART.

7. The proposed new objectives of the ART are suitable. In particular I support the objective that the tribunal should operate 'with as little formality'. The concept of little formality could also be expressed as informality. Informality in a tribunal context should be understood flexibly with individual tribunal members encouraged to exercise their statutory discretion to control proceedings and be adaptive to the facts in each individual dispute to calibrate the level of informality best suited.

8. With respect to the objective of promoting public trust and confidence in the decision-making of the Tribunal, it is essential to bear in mind the central role that will

be performed by the ART in upholding accountability over government decision-making. It is part of our system of checks and balances. The ART will itself be subject to the checks and balances of the court system. Assiduous care should be taken to monitor the rate of ART decisions that are overturned by the federal courts and High Court when taken on appeal. These statistics will be available on the public record in the ART's annual reports. This important evidence-based fact can be used to confirm whether the ART is undertaking its role in accordance with law and that the public should be confident and have trust in the ART.

9. Similar to provisions found in the constitutive legislation for state and territory combined jurisdiction tribunals, there should be a clause inserted into the Bill mandating an independent review of the ART after a period of five years from when it commences operation.

10. Likewise, similar to provisions found in the constitutive legislation for state and territory combined jurisdiction tribunals, there should be a clause inserted into the Bill conferring on the ART an express discretionary power to award costs. This provision should expressly state that the starting point is the ART should operate as a no costs jurisdiction. Further guidance on this issue can be found in my article 'The Winner Takes it all: Legal Costs as a Mechanism of Control in Public Law' (2018) 30(1) *Bond Law Review* 119.

Specific comments on the ART Bill

11. I support the inclusion of clause 15 specifying when an organisation's interests are affected, as it is crucial to acknowledge the value of the ART as an independent forum. The ART will facilitate access to justice by conducting merits review of government decisions and thereby permitting ordinary people to have their voice heard as their matter is reviewed by an independent, expert body. The availability of independent review in and of itself increases public confidence in government decision-making, as by being subject to scrutiny it shows the government's commitment to transparency.

12. Public understanding of the ART should recognise that merits review was designed to have a normative impact on public administration and decision-making. This means that the ART will has a broader role beyond conducting individual reviews. This benefit is achieved by the ART reviewing government decisions and providing guidance to decision-makers on the interpretation of statutes and the application of legislation and policies to facts. These ART decisions would then be followed by future decision-makers so it will in turn lead to improved government decision-making. Any assessment of whether the ART has public trust and confidence must include recognition of this key role of the ART and not be unbalanced by reflections on individual reviews.

13. The AAT's role in enhancing good government, often referred to as a normative role was carefully considered in the AAT decision by Justice Thomas and Deputy President McCabe in *RBPK and Innovation and Science Australia* [2018] AATA 1404 (10 May 2018). At paragraph 12 they stated that 'Overlaying all that is the need for the Tribunal to adequately perform the unique role cast for it in Australia's system of administrative law: the Tribunal must be an advocate for good government, a function it discharges by modelling good decision-making behaviour in individual cases'.

14. Additional statements on this vital role performed by the AAT can be found in *JWTT and Commissioner of Taxation* [2017] AATA 1612 (3 October 2017). At paragraph 14, the AAT explained that 'The Tribunal is also an independent generalist decision-maker informed by its expertise in good government. That means the Tribunal's findings of fact and analysis of the law might be quite different from the original decision-maker. Indeed, the possibility of that occurring underlines the point of merits review'.

15. Historical guidance on the topic of tribunal efficiency can be found in Justice Brennan's address and associated article titled 'The Future of Public Law: the Australian Administrative Appeals Tribunal' (1977-1980) 4 *Otago Law Review* 286. This is complemented by Justice Mason's article on 'Administrative Review: The Experience of the First Twelve Years' (1988-1989) 18 *Federal Law Review* 122.

16. The ability of the ART to function optimally will be tied to the ongoing commitment of suitable funding. Funding in this context is taken to incorporate both financial and staffing/Member appointments. The issue of appointment of members is relevant in this context and more broadly for the efficient operation of the ART. I note the monologue prepared by Professor O'Connor on *Tribunal Independence* published by the Australian Institute of Judicial Administration in 2014. I support and endorse her analysis.

17. It concerns me that there are many existing AAT members whose appointments are due to expire on 30 June 2024, but it is apparent that the new ART may not be established by this date. Urgent measures should be taken to ensure the continuity and institutional confidence of these members.

18. I note there is an existing determination of the Remuneration Tribunal which applies to all statutory office holders which permits a 12 month salary payment to be made in the event of earlier termination. For the integrity and independence of all statutory office holders, not just tribunal members, this determination must be adhered to. Any

purported attempt to reduce the payment period must be resisted for the sake of the stability of the entire system of statutory office holders. There has been media speculation that the period of payment for non-reappointed AAT members may be reduced to 4 months. This is bad public policy.

19. While the improvement regarding appointment of Members are welcomed, I remain concerned that there is an over-ride power vested in the Attorney-General to potentially not follow the advice of the independent recruitment panel. As the justification for the creation for the ART is enhanced independence from political interference, I submit this over-ride power is unnecessary.

20. I am concerned that some of the powers conferred on the President, especially in regard to giving directions to members, in the ART Bill go beyond those exercised by Chief Justices in courts. The position of President is not subject to political accountability in the same manner as the Attorney-General and these powers may be inconsistent with the president's concurrent appointment as a justice of the Federal Court.

21. I raise the issue of Member's powers to direct the business of the AAT currently conferred by section 17K(6) of the AAT Act. Any diminution of this power, or transference of it to public servants (such as the Principal Registrar) should be resisted as inappropriate. Members need to be independent of not only the original decision-maker but also other member so the Australian Public Service.

22. The creation of the Guidance and Appeal panel, with the abolition of the second tier of review raises complex issues. These issues include the requirement for leave to be granted to access this body, and whether there is an obligation under either the

common law for reasons to ensure procedural fairness or as a result of judicial review processes. There are some appeal panels in state and territory combined-jurisdiction tribunals which could be examined to inform these considerations.

Concluding comments

I am available and willing to participate in any public hearings should that be of assistance. My preferred location would be Brisbane.

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