



Australian Government
Office of the Australian Information Commissioner

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Submission to the Inquiry on the Administrative Review Tribunal Bill 2023 [Provisions] and related bills

Dear Committee

The Office of the Australian Information Commissioner (OAIC) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee's Inquiry on the Administrative Review Tribunal Bill 2023 (ART Bill), Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 and Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) Bill 2024. The OAIC's comments are limited to matters directly relevant to its jurisdiction.

The OAIC is an independent Commonwealth regulator within the Attorney-General's portfolio, established to bring together three functions: privacy functions (protecting the privacy of individuals under the *Privacy Act 1988* (Cth) and other legislation), freedom of information (FOI) functions (access to information held by the Commonwealth Government in accordance with the *Freedom of Information Act 1982* (Cth) (FOI Act)), and information management functions (as set out in the *Australian Information Commissioner Act 2010* (Cth)).

Re-establishment of Administrative Review Council

We note and support the proposed re-establishment of the Administrative Review Council at Part 9 of the ART Bill. The Council's proposed functions will include monitoring the integrity of the Commonwealth administrative review system, inquiring into and reporting on systemic challenges in administrative law, publishing guidance, and supporting the education and training of Commonwealth officials in relation to administrative decision-making and the administrative law system.¹

The Bill provides that the Australian Information Commissioner will be an ex officio member of the Council, alongside the President of the Administrative Review Tribunal (ART) and

¹ Administrative Review Tribunal Bill 2023, clause 249.

Commonwealth Ombudsman, with additional members to be appointed by the Governor-General.²

We are supportive of the Information Commissioner's membership of the Council. We agree that the re-establishment of the Council provides an opportunity for greater reflection on and consideration of new trends and systemic challenges facing Australia's administrative law system, as well as improving the quality of future administrative decision-making.³ The Information Commissioner's administrative decision-making functions ensures they are well equipped to contribute to this important work.

Administrative Review Tribunal fees

We note that the ART Bill provides that the Minister has the power to make rules, including in relation to fees payable in respect of applications to the ART.⁴ We support this approach in the Bill, which will give the Minister a broad discretion to develop an appropriate and flexible fee structure for the ART, taking into account the wide range of scenarios in which applications will be made to the ART.

In this regard, we note that under section 54W(b) of the FOI Act, the Information Commissioner may decide not to undertake, or not to continue to undertake, an Information Commissioner Review (IC Review) if the Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision is considered by the Administrative Appeals Tribunal (AAT).⁵ Circumstances in which the Commissioner may exercise this discretion include where the matter is of a level of complexity that would be more appropriately handled through the AAT, where there is an apparent inconsistency between earlier IC review decisions and AAT decisions, or where the FOI request under review was made to, or decided by, the Information Commissioner or their delegate.⁶

Given that there is no cost for an IC Review matter in the OAIC, compared with the significant application fee for FOI applications to the AAT,⁷ we consider that it would further the objects of the FOI Act if a fee waiver were able to be granted for applications to the ART, in circumstances where the applicant has sought an IC Review but the Information Commissioner considers it is appropriate to exercise her discretion under section 54W(b).⁸

² Administrative Review Tribunal Bill 2023, clause 247.

³ Attorney-General's Department, *Administrative Review Reform: Issues Paper*, April 2023, p. 22; Explanatory Memorandum, Administrative Review Tribunal Bill 2023, p. 219.

⁴ Administrative Review Tribunal Bill 2023, clauses 295 and 296.

⁵ The Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 amends the definition of Tribunal under the FOI Act (at s 4(1)) to mean the Administrative Review Tribunal rather than the AAT (Schedule 4, item 81).

⁶ OAIC, '[Freedom of Information Guidelines – Part 10: Review by Information Commissioner](#)' at 10.88, last accessed 5 March 2024. In the last financial year 2022/23, the Information Commissioner exercised this discretion in 6 per cent of her IC review decisions.

⁷ The current fee is \$1082: Administrative Appeals Tribunal (AAT), '[Fees](#)', AAT website, last accessed 5 March 2024.

⁸ Freedom of Information Act 1982, s 3(4): 'The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.'

The OAIC is currently engaging with the Attorney-General's Department in relation to this matter and the ongoing development of the Minister's rules.

Yours sincerely

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Freedom of Information Commissioner

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