



Law Council
OF AUSTRALIA

Office of the President

9 May 2024

Senator Nita Green
Chair
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Chair

Administrative Review Tribunal Bill 2023 [Provisions] and related bills

1. The Law Council of Australia appreciated the opportunity to appear at the public hearing held on Friday, 3 May 2024 to assist the Senate Legal and Constitutional Affairs Legislation **Committee** with its inquiry into the Administrative Review Tribunal Bill 2023 (Cth) (the **ART Bill**) and related bills.
2. The Law Council provided a supplementary submission on 6 May 2024, elaborating upon our response at the hearing with respect to natural justice in migration and refugee matters. For the benefit of the Committee, we address a separate significant matter below.
3. During the Law Council's appearance, Senator Shoebridge asked:

*One of the witnesses we had at the last hearing raised concerns about potential constitutional problems with having the President [of the Administrative Review Tribunal] be a Chapter III judge as well as having substantial administrative powers, both in the role of President and quite extended administrative powers under the structure of this Bill but also be undertaking the administrative decision-making. Has the Law Council considered that aspect at all?*¹

4. As you will recall, we referred the Committee to the decision in *Drake v Minister for Immigration and Ethnic Affairs* [1979],² where, at page 64, Bowen CJ and Deane J said in respect of the Administrative Appeals Tribunal (**AAT**):³

There is nothing in the Constitution which precludes a Justice of ... any ... court created by the Parliament under Chapter III of the Constitution from, in his [sic] personal capacity, being appointed to an office involving the performance of administrative or executive functions including functions which are quasi-judicial in their nature.

¹ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 3 May 2024 (Senator David Shoebridge) 7-8.

² FCA 39; 24 ALR 577; 2 ALD 60; 46 FLR 409.

³ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 3 May 2024 (Peter Woulfe, Law Council of Australia) 8.

5. We also emphasised that, while holding the position of a Judge of the Federal Court of Australia is the required antecedent qualification for appointment as President of the Administrative Review Tribunal,⁴ once an individual commences as President, they will be acting in their personal capacity, rather than as a Judge.⁵
6. Given that the question raised fundamental issues about the constitutional validity of the ART Bills, we would like to take this opportunity to expand upon our response.
7. The Full Court of the Federal Court of Australia considered this issue in *Hussain v Minister for Foreign Affairs* [2008] FCAFC 128; (2008) 169 FCR 241.⁶ At [64], Weinberg, Bennett and Edmonds JJ observed:

That Ch III judges can validly be appointed to exercise certain non-judicial functions has also been authoritatively settled, although the practical application of this principle is less certain. What is clear is that the appointment of judges to the Tribunal falls within its scope.

In their reasons for decision, Weinberg, Bennett and Edmonds JJ (the Full Court) summarised several relevant authorities,⁷ then concluded (at [67]):

These cases establish definitively that the Tribunal's regular functions are administrative in nature, and that Ch III judges can be validly enlisted to perform them, provided, of course, that they consent to accept appointment.

Moreover, at [68]–[69], the Full Court stated that:

In answer to a question from the Court, Mr Burnside [representing the unsuccessful appellant] acknowledged that Ch III judges had been permitted to serve as presidential members of the Tribunal since its inception. However, he submitted that this had nothing to do with the doctrine of persona designata. He was mistaken in that regard. The cases discussed above demonstrate not only that such judges can serve in that capacity, but also that they are able to do so because they are appointed as designated persons, and not in their capacity as judges.

In that regard, it should be noted that the persona designata doctrine has developed essentially as a mechanism for avoiding the separation of powers restrictions on the use of federal court judges for non-judicial functions.

8. Given the jurisprudence set out above, the Law Council does not hold concerns about the constitutional validity of the functions of the President of the Tribunal under the ART Bills. We note that in the response provided by the Attorney-General's **Department** to a question taken on notice from Senator Shoebridge on this issue at the Committee's public hearing on 26 April 2024,⁸ the Department came to the same conclusion.

⁴ Administrative Review Tribunal Bill 2023 (Cth) cl 205(3).

⁵ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 3 May 2024 (Peter Woulfe, Law Council of Australia) 8.

⁶ *Hussain* was, together with several other cases, expressly overturned by *Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315, but only in relation to questions of law on appeal.

⁷ *Drake*; *Hilton v Wells* (1985) 157 CLR 57; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

⁸ Commonwealth Attorney-General's Department, Response to Spoken Question on Notice (5) taken on 26 April 2024 at the hearing of the Senate Legal and Constitutional Affairs Legislation Committee.

Contact

9. If the Committee requires further information or clarification, please contact Ms Leonie Campbell, General Manager, Policy on (02) 6246 3754 or at leonie.campbell@lawcouncil.au.

Yours sincerely

Greg McIntyre SC
President