Australian Government
Attorney-General's Department

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Inquiry into the Administrative Review Tribunal (Miscellaneous Measures) Bill 2024

Attorney-General's Department submission to the Senate Standing Committee on Legal and Constitutional Affairs

1. Introduction

The Attorney-General's Department (the department) welcomes the opportunity to provide the Senate Committee on Legal and Constitutional Affairs (the Committee) with this submission as part of the Committee's inquiry into the Administrative Review Tribunal (Miscellaneous Measures) Bill 2024 (the Bill).

The Bill forms part of a package of legislation (ART legislative package) that abolishes the Administrative Appeals Tribunal (AAT) and establishes the Administrative Review Tribunal (the Tribunal), a new federal administrative review body that is user-focused, efficient, accessible, independent and fair. The new Tribunal will commence on 14 October 2024.

The ART legislative package includes the *Administrative Review Tribunal Act 2024* (ART Act), *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* (Consequential Act 1) and Administrative Review Tribunal (Consequential and Transitional Provisions No.2) Act 2024 (Consequential Act 2), which passed the Parliament earlier this year.

2. Amendments

Overview

The primary purpose of the Bill is to update references to the AAT in legislation that has passed or been introduced to Parliament since the introduction of the ART Act. These amendments could not be made until the ART legislative package had passed the Parliament and there was certainty as to its commencement date.

In addition, the Bill would make technical amendments to support the efficient conduct of Tribunal review and ensure the legislation operates as intended.

Of Acts amended by the Bill (excluding the ART Act):

- 14 Acts contain only consequential reference changes.
- 30 Acts contain amendments harmonising legislative provisions relating to ART Act procedure across the statute book, with minimal substantive change to how the provisions operate.

Further information on the changes made by the Bill are set out in **Attachment A**.

Only two amendments substantively change the intention of the original legislative package. They are:

- pausing the timeframe to appeal to the Federal Court from a decision of the ART over the holiday period (between 24 December and 14 January), and
- removing time limits to apply for review of debt decisions in relation to Abstudy and Assistance for Isolated Children payments (bringing them into line with all other social services debt decisions).

These amendments enhance access to justice by allowing more time to make applications. All of the other amendments in the Bill clarify and strengthen the original intent of provisions in the Bill.

Amendments to the Migration Act

The department notes that media reporting has characterised measures in the Bill as "overturning" the High Court's decision in *Miller v Minister for Immigration, Citizenship and Multicultural Affairs* [2024 HCA 23] (*Miller*), which dealt with the cancellation of a visa on character grounds. Importantly, these types of decisions are dealt with under the *Administrative Appeals Tribunal Act 1975* (AAT Act) – not the *Migration Act 1958* (Cth) (Migration Act). That decision, handed down on 17 April 2024, found that notwithstanding paragraph 29(1)(c) of AAT Act (which says that an application "must contain a statement of the reasons for the application"), a statement of reasons was not required to make a valid application. The *Miller* decision did not consider the requirements to make a valid application under the Migration Act.

The Bill does not affect the substance of the *Miller* decision. A statement of reasons is not required to make a valid application under either the ART Act or the Migration Act. However, the *Miller* decision demonstrates the importance of making it clear what requirements are mandatory to make a valid application, noting that using the term "must" does not necessarily mean that something is a mandatory requirement.

The Bill amends the Migration Act to remove potential ambiguity about the requirements to make a valid application for review of reviewable migration and protection decisions, in response to the *Miller* decision. Under the Bill, the requirements for making an application are the same as under the law as amended by the ART Act and Consequential Act 1. The timeframes, fee arrangements and information to be included are unchanged. A comparison of the existing requirements with the amendments in the Bill is at **Attachment B.**

Consequential Act 1 changed application requirements to simplify requirements to apply for Tribunal review of reviewable migration and protection decisions. The changes included:

- removing the requirement for applications to be made using a prescribed form, and
- standardising timeframes to apply for review (to 7 days timeframes where a person is in immigration detention, and 28 days for other matters).

Consistent with judicial interpretation of the jurisdiction of the Tribunal in reviewable migration and protection decisions, the Bill includes a legislative note signalling that the Tribunal does not have jurisdiction to review applications that are not properly made.[1]

Purpose of the amendments

The Bill amends sections 347 and 348 of the Migration Act to ensure that it is very clear on the face of legislation what is required to make a 'properly made' application. This is not a change to the substance of the requirements, but rather to the clarity of their expression. The Bill does this by:

- amending the language of '**must be accompanied by**' to more clearly spell out *when* the fee must be paid[2]

[1] See, for example; *SZRLH v MIAC [2013] FCA 384*.

[2] Under the current law, the fee for migration review applications must be paid within the timeframe for making the application: https://www.aat.gov.au/apply-for-a-review/migration-and-refugee/migration/fees ("The fee must be paid before the deadline for lodging the application. If you want to pay a reduced fee, either the full or reduced amount must be paid and a fee reduction form lodged before the deadline for lodging the application".)
Reviewable protection decision applicants are not required to pay a fee upfront for the application to be valid. Fees for review of reviewable protection decisions must be paid within 7 days of the Tribunal's decision in a matter, and only where the Tribunal has affirmed the initial decision.

- elevating the existing legislative note to an operative provision, to clarify that only properly made applications invoke the Tribunal's jurisdiction[3]
- adding a new s 348(3) to spell out what is meant by "properly made" which restates the requirements in s 347 and 347A.

Clear requirements ensure that all parties – particularly those who do not have legal representation – understand what is required and can make a valid application, and do not lose the opportunity for merits review due to misunderstanding those requirements.

In the context of reviews of migration and protection decisions, it must be clearly and objectively apparent whether a valid application has been made. This is because:

- applicants for review are entitled to a bridging visa for the period of review
- the system currently operates consistent with the clarified provisions - having ambiguous drafting impedes the effective operation of the Tribunal and leads to uncertainty for applicants, and
- noting the very sizeable backlogs and delays in this jurisdiction, the Tribunal is assisted by clear parameters for the validity of application and a clear pathway to assess applications it has no jurisdiction to consider.

The Bill does not affect requirements for making an application for review of a character cancellation decision (under section 501 of the Migration Act). However, it is noted that Consequential Act 1 changed these general ART Act requirements (which also apply to reviews of character decisions), by removing the requirement for a statement of reasons.

Other amendments in the Migration Act

The Bill will amend section 348A of the Migration Act ensure that decision-makers under the Migration Act must participate in guidance and appeals panel proceedings so that matters raising issues of significance to administrative law are properly ventilated. It also amends section 140GB of the Migration Act to clarify the interaction between the Migration Regulations and the ART Act for notices of decisions.

Amendments to the ART Act

During preparations for implementation of the reform, further opportunities were identified to clarify and improve the ART Act. None of these amendments is crucial to the operation of the Act, but the Bill provided an opportunity to make these improvements. Additionally, some amendments are required to align the ART Act with changes made to the AAT Act through other legislation since the ART legislative package was introduced.

Amendments include:

- excluding the period between 24 December and 14 January from the calculation of the 28-day period from which a party can appeal a decision of the Tribunal to the Federal Court of Australia
- clarifying that practice directions can specify an alternative timeframe for decision-makers to provide the Tribunal with additional documents
- ensuring that persons exercising powers and functions in the Tribunal's Intelligence and Security jurisdictional area are of an appropriate level of seniority and experience

[3] The note to s 348(1) of the Migration Act, as inserted by Consequential Act 1, states "*Note: The ART has no jurisdiction to review a decision if the application for review is not properly made."* This is elevated to an operative provision in the Bill: "*(2) If such an application is not properly made, the ART must not review the decision."*

- updating the definition of 'exempt security record decision' to ensure that decisions of the National Archives of Australia under the Archives Act relating to records that identify ASIO or ASIS employees, affiliates and agents, and records of the ACIC relating to a criminal intelligence assessment are considered by the Intelligence and Security jurisdictional area. These amendments would reflect changes to the definitions contained in the National Security Legislation Amendment (Comprehensive Review and Other Measures No. 3) Act 2024, and the *Intelligence Services Legislation Amendments Bill 2023* (currently before the Parliament), respectively,
- allowing the Attorney-General to delegate the power to authorise the payment of costs or grant legal or financial assistance to officers in the department, and
- aligning section 84, which relates to who may only apply to continue a proceeding if the applicant can no longer continue to proceeding because they have died, become bankrupt, wound up or otherwise have ceased to exist, to ensure that it reflects changes to standing arrangements in other legislation.

These amendments are consistent with the original policy intentions of the ART Act.

3. Conclusion

The Bill is the final part of the legislative reform process to establish the Tribunal. It makes minor, technical amendments to Commonwealth legislation to ensure that the ART legislative package operates as intended.

All Commonwealth agencies and the AAT are focused on ensuring a smooth transition from the AAT to the ART for users. The department continues to work with stakeholders, including staff and users of the new Tribunal, to enable the initial and ongoing success of the new Tribunal.

Timely passage of the Bill will facilitate the transition, and support the efficient, harmonised operation of the federal administrative review system.