Committee Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

by email to: apl.reps@aph.gov.au

21 December 2023

Dear Secretary,

Submission to the inquiry on the *Administrative Review Tribunal Bill 2023* and the *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Bill 2023*

I provide the attached submission to the Committee's inquiry in the ART legislation.

If there is any aspect of my submission that the committee wishes to seek further information about, I may be contacted on [redacted]

Yours sincerely,

[redacted]

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In light of the length and complexity of the draft legislation, this submission will examine only selected parts of the bill.

A review of the *Administrative Appeals Tribunal Act 1975* ('*AAT Act*') is overdue

1. The *AAT Act* was passed almost 50 years ago. While the Act has been amended many times, it has not been subject to a comprehensive review to determine whether it meets the current needs of Australia's administrative review system. There have been far ranging inquiries which have examined aspects of the administrative review system (these are Hon I.D.F. Callinan AC QC, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Final Report, 23 July 2019) (known as the *Callinan Report*) and Senate Standing Committee on Legal and Constitutional Affairs Committee, *The Performance and Integrity of Australia's Administrative Review System* (Interim Report, March 2022)). While each of these reviews were detailed and provided useful recommendations for reform, neither undertook a full review of the AAT. The ART bill draws upon many recommendations made by the Callinan Report and Senate Inquiry and is the result of a lengthy further review conducted by the Attorney-General's Department. These preceding steps mean the ART bill represents a "refit" of the merits review system that is timely and welcome.

2. The *AAT Act* is part of what is referred to as the 'new administrative law'. This set of comprehensive structural reforms to Australia's system of federal administrative law included enactment of the *Ombudsman Act 1976*, *Administrative Decisions (Judicial Review) Act 1977* and *Freedom of Information Act 1982*. The judicial review statute was comprehensively reviewed by the Administrative Review Council in its 2012 report on federal judicial power. In my view, enactment of the ART legislation provides a useful time to consider similar wide-ranging reviews of these other parts of the (now aged) new administrative law. The federal government should revisit recommendations of the Administrative Review Council about the judicial review statute. It should also consider a comprehensive review of the ombudsman and FOI legislation. I do not suggest that either the ombudsman or the management of FOI is beset with the structural issues that led to recommendations to reconstitute the AAT. I note only that a comprehensive reformation of some parts of our system of administrative law and accountability draws attention to those parts which have not received similar attention.

The stated purpose of the ART

3. The stated purposes of the ART (in cl9 of the ART bill) are clear and sensible. The *AAT Act* did not include an equivalent statement in its original form, which was somewhat odd. The objectives stated in cl9 are welcome for several reasons. The first objective (cl9(a)) that the ART provide a form of review that is "fair and just" is both appropriate and appropriate to be listed first. While the various objectives do not have priority according to their order, listing "fair and just" as the first objective sends a powerful signal about the purpose of the ART. The statement in cl.9(c) that the ART be 'responsive to the diverse needs of parties' before it is a welcome one. Many people who challenge official decisions, such as those in migration, social security and NDIS cases, experience significant disadvantage. That disadvantage, such as using English as a second of third language or being unable to access internet services, often affect the ability of people to mount and pursue a case to challenge official decisions. The vast resources and expertise held by government agencies can stand in stark contrast to the status of people who challenge the decisions of those agencies. The AAT has proven sensitive to these issues and the wording of cl.9(c) constitutes a valuable signal to the ART itself and its stakeholders about the importance of that work.

The proposed Tribunal Advisory Committee

4. The Tribunal Advisory Committee created by cl.238 is a welcome addition to the ART. The composition and function of the Advisory Committee are sensible. The creation of the Committee arguably codifies the kind of sensible administrative practice that should occur within a large tribunal but may not always happen.

The central concept of merits review is not defined

5. The ART bill appears to proceed on the assumption that the new tribunal will apply the same decisional mantra that has arisen in the AAT, which is to make the correct or preferable decision. It seems right to suggest this formula is *presumed* to be guiding the ART because it is referred to in cl.56, which requires the parties to assist the ART in reaching the correct or preferable decision. A similar duty is contained in cl.63(2).

6. The notion of correct or preferable arose in influential early cases about the AAT. The concept was largely fashioned by the Federal Court in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 1 ALD 60 and *Minister for Immigration and Ethnic Affairs v Pochi* (1981) 3 ALD 139. It was also fleshed out by Justice Brennan in his influential decision *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 644 ('*Drake (No 2)*'). While the concept has been expressly adopted in the legislation governing state and federal CATs (Civil and Administrative Tribunals), those statute have also not sought to define or otherwise codify the concept. In my view, the ART bill is wise to continue this approach. Any attempt to define the content of merits review in a detailed or substantive manner could easily alter or restrict it.

Standing to commence ART proceedings

7. The standing test to commence ART proceedings contained in cl.17(1) is simple and clear. This test essentially reproduces the longstanding one of the *AAT Act*. It is desirable that the ART bill continues a well settled standing test.

8. The ART bill allows federal agencies to seek merits review of the decisions of federal officials: cl.17(2). This apparently unfettered right allows the federal government to appeal unfavourable decisions about FOI and veterans' affairs. The right to appeal veteran cases is particularly concerning. It is arguable that a government agency that wishes to oppose (by way of merits appeal) a decision affecting a veteran should have to meet a higher standard. The cases a government would seek to appeal would invariably be ones that favour the veteran. The complexity and negative impact that lengthy proceedings can have upon veterans is well known. If those problems are lessened even slightly by a higher threshold for agency appeals, such a change would be welcome.

9. The standing test in cl.15 essentially continues the existing standing test of the *AAT Act*. I strongly endorse this approach because it continues a simplified approach to the standing of associations and groups. In judicial review, representative groups and associations can only demonstrate a special interest sufficient to have standing after they have satisfied the court that their activities and stature in the relevant area meets the rather imprecise test that is widely traced to *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492. The complexities of that approach are cast aside by cl.15(a) because it deems a group to be sufficiently affected if the decision relates to things stated in the objects of the relevant group. There is an apparent protective aspect in cl.15(a), which makes clear that this beneficial standing test applies only if the relevant part of a group's objects or purposes

was present "at the time the decision was made". I suggest a qualification to this requirement. My reasons can be traced to the Robodebt scandal.

10. Much of the community-based resistance to Robodebt was led by groups that formed *after* the processes of Robodebt began. Given the unexpected and unprecedented nature of Robodebt, it was hardly surprising that groups were formed in response to that program rather than in advance. These groups would not qualify for standing under cl.15 of the ART bill. We may all think Robodebt was a once in a generation failure, but who can be sure? I suggest a simple caution. Cl.15 can be amended to enable the recognition of the standing of a group or association in exceptional circumstances. Robodebt was such a case. If we use that disaster as a touchstone for the rare instances in which standing rules should be able to be varied, the caution I suggest deserves consideration. The exceptional nature of any possible variation to standing principles could be confirmed if any such clause stated that decisions of this nature could only be made by Presidential members of the ART.

Decision-makers should explain why they choose not to participate

11. The ART bill proceeds on the assumption that decision-makers will normally be a party to proceedings that seek to review their decisions. Clause 60 provides an exception, by allowing decision-makers to elect not to participate. While there may be sound reasons why officials may elect not to participate in proceedings to review one of their decisions, the practical effect of an election raises an odd question. Why would officials elect not to participate in a review hearing but not also concede entirely to an applicant? In my view, any election made under cl.60 should be required to be accompanied by reasons from the decision-maker. The decision-maker should explain why he or she has chosen not to participate in the ART proceeding but nonetheless believes it is appropriate that the claim continue before the ART rather than be conceded in some way.

Merit is expressly stated as a criterion for all appointments, except one

12. The qualifications and criteria for appointment to the ART do not vary significantly to those used for the AAT. One notable difference is that the ART bill makes express reference to the role of merit-based decision-making in the appointment process. The requirement for the appointment process to be a merit based one is made in the provision governing appointment of the President [cl.205(2)(b)(1)], the non-judicial Deputy Presidents [cl.207(2)(b)(i)], Senior and General Members [cl.208(2)(b)(i)] and the Principal Registrar [cl.227(2)(b)(i)]. In light of the recent political and media controversies about appointments to the AAT, the express acknowledgment of the role of merit in appointments is important. The ART bill does not seek to define what constitutes a merit-based process, or what might constitute a merits-based decision. In my view, what might appear an omission is a sensible recognition that decisions about merit will inevitably contain an element of subjective judgement, which can vary between whoever makes the appointment decision.

13. The appointment provisions for judicial Deputy Presidents make no mention of merit. It is possible that decisions about these appointments proceed on the assumption that appointment for judicial office (in this case, the Federal Court) have made the relevant person inevitably suited to a role in the ART. If that is the case, why is the merit requirement included in the provisions governing the ART President? It seems odd to include a merit requirement for one but not the other.

The code of conduct for ART members

14. The ART bill requires the President to make and publish a code of conduct that will apply to non-judicial ART members: cl.201. This requirement is a welcome one. The principles, if any, that guide AAT members has long been unclear and lacking in transparency. The imposition of a duty upon the President to promulgate a code of conduct will provide important guidance to members of the tribunal and its users. The President will also be empowered to investigate conduct that constitute a breach of any code. Some aspects of this regime might benefit from further detail.

15. The President is able to delegate many of his or her powers, though some are non-delegable (as specified by cl.279). The President is given various powers to consider and investigate the conduct of members under cl.203. The power to temporarily restrict a member's duties if the President believes this is in the interests of the public or the Tribunal (which is possible under cl.203(3)) cannot be delegated. Any action taken under cl.203(3) is serious and rightly not able to be delegated. But the remainder of cl.203 appears, by implication, capable of delegation. In my view, this is odd. The formation of an initial opinion of whether a breach of a code of conduct, or other performance related issues (which occurs under cl.203(1)), is an extremely serious step and seems unsuited to the possibility of delegation. Consideration should be given to adding this power to those which cannot be delegated.

16. A different consideration arises with the investigation of the conduct of members, which is possible under cl.203(2). There may be good reasons why the President would wish to delegate this function. The President may simply be too busy in the daily management of a large tribunal. If delegation of investigations is thought appropriate for this and other reasons, greater clarity would be useful to make clear that the President may delegate the conduct of an investigation but cannot delegate the power to accept/reject the recommendations of an investigation. But the use of a delegate to conduct investigations raises a subtle but vital question – at what point does investigation end and decision-making start? If the President were able to delegate the conduct of an investigation and this included the ability to make draft recommendations, those draft recommendations could serve to inadvertently delegate all power to investigate and determination of the outcome.

17. Another difficulty in a tension between the first and second clauses of cl.203. The first clause is activated if the President forms an opinion that a non-judicial member may have engaged in certain conduct. The second clause allows for an investigation of that conduct. In their current form, these provisions enable the President to both form an opinion that a matter requires investigation and then conduct that investigation. While this clear arrangement may constitute a legislative variation of the rules against bias, whether it is sensible is another matter.

Re-establishment of the Administrative Review Council (ARC)

18. The continuation of the ARC is a very welcome step. There seems little value in repeating the many public and academic statements about the value of the ARC, so I confine myself to two small issues.

19. The membership of the ARC is narrower that its existing terms under the *AAT Act*. In essence, the Presidents of the Australian Law Reform Commission and Australian Human

Rights Commission will no longer be standing members of the ARC. If we can assume that the revised ARC will communicate with those two office holders on appropriate occasions, their omission as standing members of the ARC seems understandable because administrative law and review is not a core part of the work of either office. I suggest one new member.

20. Consideration should be given to including the APS Commissioner as a standing member of the ARC. The ART bill makes clear that the wider purpose of the new tribunal is to improve the quality of government decision-making (cl.9(d)). While that particular goal is (oddly) not within the stated objectives of the ARC, the functions of the council include many goals for which the APS commissioner can provide a unique and valuable perspective.

21. The reformed ARC will be expressly empowered to examine issues of its own motion [cl.249(2)]. The equivalent provisions governing the ARC in the *AAT Act* did not expressly enable it to conduct inquiries of its own motion. The clarification of this issue in the ART bill is extremely welcome because it prevents the government of the day from exercising total control over the ARC's processes. While it is highly likely that the subject matter of any inquiries conducted by the ARC would be settled after consultation with the Attorney-General's Department, it is possible there may be rare occasions where it is appropriate for the ARC to inquire into an issue the government of the day would prefer it did not. Robodebt is such a case.