Senate standing Committee on Social Policy and Legal Affairs

Inquiry into the Administrative Review Tribunal Bill 2023 (ART Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill)

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2 In this submission I will begin by making some general comments about administrative review and the ART Bill before turning to the Consequential and Transitional Bill with a view to looking more closely at the nature of the changes proposed to the *Migration Act* 1958 (Cth).

The concept of appealing the merits of administrative decisions

3 The decision in 1975 to create a system allowing individuals to challenge the *merits* of Federal government decisions was a profound cultural gesture. It was one that spoke to notions of fairness, democracy, accountability and the Rule of Law.[1] Sitting alongside the creation of the Federal Court, the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), and the Federal Ombudsman, the coming into operation of the Administrative Appeals Tribunal (AAT) in 1976 was heralded as the realisation of the 'vision splendid' of the 'New Administrative Law' in Australia.[2] The AAT was vested with power to affirm government decisions under review; remit a matter for reconsideration; vary a decision; or set it aside and substitute a new decision.[3]

4 After 50 years this system in operation we now face a once in a lifetime opportunity to create a new merits review body that meets all the objectives of accessibility, fairness, efficiency and affordability. It will be my argument that a critical part of achieving these objectives is acceptance that applicants should be treated equally.

The ART Bill

5 The central idea of the ART Bill is to create a new regime for the review of administrative decisions that is fit for purpose in the modern era. A key problem with the AAT Act is that it was modelled very much on a judicial paradigm – both in the manner of its appointment

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1 The changes were the product of three inquiries in the 1960s and 1970s. See Commonwealth Administrative Review Committee, *Report*, Parliamentary Paper No 144 of 1971 (Kerr Committee Report); Committee on Administrative Discretions, *Final Report*, Parliamentary Paper No 316 of 1973 (Canberra: AGPS, 1973) (Bland Committee Report); *Prerogative Writ Procedures: Report of Committee of Review*, Parliamentary Paper No 56 of 1973 (Canberra: AGPS, 1973) (Ellicott Committee Report).

2 The *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*). See Lindsay Curtis, 'The Vision Splendid: A Time for Re-Appraisal' in Robin Creyke and John McMillan (eds), *The Kerr Vision: At the Twenty-Five Year Mark* (Canberra: Centre for International and Public Law (CIPL), ANU,1998) 36.

3 See, for example, *Migration Act*, s 348.

processes and in the operation of hearings in the general division. I will argue that the ART Bill addresses these issues in ways that are to be applauded.

Appointments

6 Procedures for *appointing members* to the AAT is in many respects the easiest and most obvious place to start a discussion about tribunal reform. Perhaps the most pressing factor behind the decision to abolish the current AAT is that the tribunal in 2022 overran its budget, yet the backlog in cases was without precedent. The allegation is that the former government appointed members – generally at senior levels - because of their political affiliations rather than their cognate expertise. The cost of the appointments brought no dividends in either quality decision making or in meeting productivity targets. The allegations raise questions about the adequacy of a system based on appointment processes that involve no public accountability beyond the end point of the governor-general's signature.[4] The ART Bill provides for a transparent appointment process that requires applicants to have relevant knowledge, skills and experience and seems to be an obvious and easy 'fix'. Positions must be advertised, panel is to adjudicate the suitability of applicants based on record and performance at an interview. The changes are profoundly important as the most likely marker of success in the new tribunal will be the quality of the individuals appointed to adjudicate actual cases. As well as delivering satisfaction in tribunal users, a system that ensures the appointment of competent members is more likely to attract competent applicants and feed public confidence in the system overall. Reform of the AAT invites consideration of how the new tribunal membership could be more diverse in terms of gender, age, ethnicity and other personal attributes including lived experience of disability. Extensive research on bias in administrative decision making suggests that the most effective antidote to systemic bias is diversity in membership.[5]

7 Significantly, members are no longer protected by complex or inadequate disciplinary and removal provisions that echo mechanisms for removing judges. The ART President is vested with sweeping powers that involve the incumbent in everything from (involvement in) the appointment of Deputy Presidents, the training, oversight and discipline of members – and their dismissal in appropriate circumstances. A code of conduct for members is to be included in delegated legislation to ensure that respectful practices and behaviours are mandated, not aspirational. These are profound, modernising and appropriate changes that in my view are to be welcomed.

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4 See generally, Matthew Groves and Greg Weeks, 'Tribunal Justice and Politics in Australia: The Rise and Fall of the Administrative Appeals Tribunal (2023) 97 ALJ 1.

5 See Stephen Legomsky, 'Learning to Live with Unequal Justice: Asylum and the Limits of Consistency', (2007) *Stanford Law Review* 413. For a few such studies see, for example, Jaya Ramji-Nogales, Andrew I Schoenholtz and Philip G Schrag, 'Refugee Roulette: Disparities in Asylum Adjudication' (2007) 60(2) Stanford Law Review 295; Jaya Ramji-Nogales, Andrew I Schoenholtz and Philip G Schrag, Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform (New York University Press, 2009); Sean Rehaag, 'Troubling Patterns in Canadian Refugee Adjudication' (2007) 39(2) Ottawa Law Review 335; Sean Rehaag, 'Judicial Review of Refugee Determinations: The Luck of the Draw?' (2012) 38(1) Queen's Law Journal 1; Sean Rehaag, 'Judicial Review of Refugee Determinations (II): Revisiting Luck of the Draw' (2019) 45(1) Queen's Law Journal 1. In Australia see Daniel Ghezelbash, Keyvan Dorostkar and Shannon Walsh 'A Data Driven Approach to Evaluating and Improving Judicial Decision-Making: Statistical Analysis of the Judicial Review of Refugee Cases in Australia' (2022) 45(3) *UNSWLJ* 914

Guidance and Appeals panels

8 One aspect of the ART Bill that may cause some controversy is the abolition of a second tier of appeal in Social Security cases. While I do not have strong views on this matter, one aspect of the Bill that is a definite gain is the creation of a mechanism for constituting 'guidance panels' through a process managed largely through the President (See Part V of the Bill). While the AAT Act contains provisions that do allow for the constitution of such panels, the mechanism was rarely used.[6] The benefit of the new guidance panel system is that it will address a problem that has plagued the AAT. Where different members come to different views on aspects of the law, there is no ability in the President to force members to follow a particular line. This means that the only recourse is to seek judicial review in individual cases which is neither fair nor efficient. ART members (but not judicial members) would be bound by decisions made by the Guidance panel, a measure that should foster greater consistency across the new tribunal.[7]

9 Clause 155 of the ART Bill provides that Part 5 (guidance and appeals panel) does not apply in relation to an intelligence and security decision. The reasons given for this carve out in the Explanatory Memorandum (at pp 129-30) is not convincing. For decisions involving security issues where initial ART review is available, the same potential exists for a defective review decision as in any other subject area of decision-making. If appropriate protections can be put in place for the initial review, I cannot see why the same could not be done for a review by the guidance and appeals panel. My concern with this blanket carve-out or exclusion of the Guidance and Appeals panel is it could be possible to cynically label a decision as 'intelligence and security' to render it less susceptible to review without good reason. At the very least the President should be given discretion in these cases as is the situation with migration applicants.

Unified processes

10 A significant gain in the ART Bill is the creation of a unified hearing mechanism in Part III that strikes a good general balance between fairness to applicants and the avoidance of rigid legal processes. The legislation recognises the need to accommodate different practice areas: Clause 5 correctly acknowledges that the application of the ART Act can be altered by other cognate enactments. However, the Bill envisages most hearings being run in person, in a quasi-inquisitorial model, without a government contradictor. The President, again, would be empowered to direct cases to be conducted in a more adversarial manner as required. Importantly, the Bill recognises the right of applicants to be represented; and the right to an interpreter when required. The legislation sets uniform notification requirements. It articulates time limits and provides for structured discretion to allow for extensions of time.

11 To see the benefit this proposed system the operation of merits review within the current AAT is worth considering in some detail. The hierarchy of processes within the AAT is profound. At the apex, the General Division operates in ways that can resemble judicial processes. The member or members preside at a hearing where both the applicant and the relevant government department can submit oral arguments. Applicants have a right to be represented; they are

[6] I think it was only convened once – in a refugee case involving consideration of the status of East Timorese asylum seekers with rights to Portuguese nationality.

[7] See ART Bill, Cl 110.

provided with a range of documents that include detailed reasons for the decision made; and hearings can be preceded by various pre-hearing conferences and/or alternative dispute resolution processes.

12 Next in the hierarchy are the 'quasi-inquisitorial' processes used in veterans affairs, social security and migration. Although not uniform across divisions, common features of these systems are that applicants generally appear alone, with no contradictor from the relevant government department. Relevant cognate legislation typically provides that the AAT is not bound by rules of evidence but should make decisions that are 'fair, just, economic and quick'.[8] Tribunal members are enjoined to act with 'substantial justice and the merits of the case'.[9] Perhaps the most notable feature of this system is the power vested in the members relative to the rights of the applicants. Applicants have no automatic right to be legally represented, although non-English speakers are entitled to an interpreter. The right to an oral hearing has also diminished over time, with statutory amendments increasing the instances in which members can make rulings 'on the papers'. A common feature of these processes is that tribunal members determine the questions asked, the evidence collected and considered and the witnesses to be called (if any). Conversely, the system does not impose on members any general duty to inquire. Nor are applicants furnished with the same range of material as is generally provided in general division processes. The area where this has most consequences is migration and refugee decision making. In this field (unlike social security and child support, for example), there is no right of appeal to the general division.

13 The attraction of the proposed ART is that the rigidity of the different divisions has been removed. In complex cases and matters that threaten serious detriment to an applicant general division processes can be entirely appropriate. Whether the elaborate processes are apt in all cases, however, is an open question. Complaints about the general division of the AAT include that hearing processes can be drawn out, overly legalistic and intimidating. The flexibility of the ART regime should allow for the appropriate use of different mechanisms as a particular case requires.

14 One matter that is a little disappointing is that the ART Bill retains a provision allowing applicants to seek written reasons for decisions – reasons are not given as of right. This is how s 13 of the AAT Act works. While this is probably designed to facilitate the delivery of ex tempore oral rulings, some consideration could be given to making reasons obligatory across the board. This is already the case in migration decisions (see below).

The Consequential and Transitional Provisions Bill

15 The AAT is facing problems in both process backlogs and poor community satisfaction across three areas: immigration/refugees; social security and disability law. In each instance concerns have been raised about unjust outcomes, unconscionable delays and high rates of judicial review and/or applications for ministerial intercession. The worst manifestations are in the migration jurisdiction, where process failures have resulted in great harms, including loss of livelihood or

[8] See, for example, Migration Act, s 353(1).
[9] Ibid, s 353(2).

opportunity and prolonged deprivation of personal liberty. In this section I will just address changes proposed to the *Migration Act* 1958.

16 The rationale for the inquisitorial processes enshrined in the Migration Act is that applicants should not need legal representation. All they need do is answer the questions posed by the member and the system should operate to deliver their just entitlements. The gulf between this theory and practice is great – particularly where applicants have little or no appreciation of the legal consequences of the responses to questioning. Add to this, deficits in a member's knowledge of the area of law under consideration, and it is not difficult to see how the system can fail to deliver satisfactory outcomes.

17 At the bottom of the hierarchy in the field of refugee law is the Immigration Appeals Authority (IAA) which was established to allow for the review of refugee status determination decisions made under legislation passed to deal with the 'Legacy' caseload of asylum seekers who came to Australia as unauthorised maritime arrivals between 2012 and 2013.[10] The system is closer to what might be termed an 'internal' departmental review than an administrative appeal. Applicants are allowed to submit 5 pages of written arguments contesting the rejection of their claims. The presumptive starting point is that the review must be carried out without accepting or requesting new information, and *without interviewing* the applicant. A key element of review by the IAA is the restriction on consideration of new information.[11] In theory the IAA has power to seek out and consider new information. It can invite an applicant to give information orally or in writing, but did not do so in practice. As predicted, the IAA system lead to very few legacy caseload decisions being reversed. It generated a large number of judicial review applications, few of which succeeded. It did little to expedite or resolve the legacy caseload matters: in February 2023 over 12,000 cases remained un-resolved. In brief, the system has been cruel, inefficient and has little to commend it.[12]

18 The Consequential and Transitional Provisions Bill would abolish the IAA (in Part 7AA of the Migration Act) and bring all merits review into Part 5 of the Migration Act under a simplified (but still bespoke) procedural code. A major benefit of the proposed change is that most of the common procedures set out in Part III of the ART Bill would apply in migration cases – including provisions relating to the right to be represented. This is a major improvement on the current system. Although disappointing that migration applicants are not given a right to seek the constitution of a guidance panel, I note that the President has discretion to convene such a panel in appropriate instances. [It seems that it is only in security cases that guidance panels cannot be convened.]

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[10] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (the Legacy Caseload Act). See also *Migration Act 1958*, Part 7AA; *Migration Regulations 1994*, r 2.15.

[11] Section 473DD of the *Migration Act 1958* provides that the IAA must not consider any new information unless:

(a) the IAA is satisfied that there are *exceptional circumstances* to justify considering the new information; and

(b) in relation to information provided by the applicant, the applicant satisfies the IAA that the new information:

(i) was not, and could not have been, provided to the Minister before the Minister made the decision; or

(ii) is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims.

[12] See, for example, Daniel Ghezelbash, 'Fast-track, accelerated, and expedited asylum procedures as a tool of exclusion *Research handbook on the law and politics of migration.* Dauvergne, C. (ed.). Cheltenham, UK ; Northampton, USA: Edward Elgar Publishing, 2021), 248-261 (Research Handbooks in Law and Politics). As predicted, the IAA has been neither fast not efficient, generating a huge number of judicial review applications. See Mary Crock and Hannah Martin, 'Refugee Rights and the Merits of Appeals' (2013) 32 *University of Queensland Law Journal* 137-155.

19 One disappointment in the Consequential and Transitional Provisions Bill is that the Bill retains provisions that restrict the right for applicants to be represented. Clause 366A reads:

> **(1)** The applicant is entitled, while appearing before the Tribunal, to have another person (the ***assistant***) present to assist him or her.
>
> **(2)** The assistant is not entitled to present arguments to the Tribunal, or to address the Tribunal, unless the Tribunal is satisfied that, because of exceptional circumstances, the assistant should be allowed to do so.
>
> **(3)** Except as provided in this section, the applicant is not entitled, while appearing before the Tribunal, to be represented by another person.

A preferable approach would be to delete these provisions so that migration applicants have the same procedural entitlements as applicants generally under the ART Bill. I note that the current provisions relating to interpreters have been retained in s 366C

20 Another disappointment is that the Bill does not touch the separate code of procedures for notification, time limits and (I am assuming) application fees. The separate code – especially provisions preventing the new tribunal from extending time limits in migration cases - is a major shortcoming for three reasons.

21 First, the inflexibility of time limits undermines the ability of the tribunal to deliver effective and efficient justice for applicants. If the tribunal is denied jurisdiction to hear a case, applicants must either apply for judicial review in the Federal Court or they must seek an exercise of the Minister's 'non-reviewable, non-compellable' discretion (see s 351 of the Migration Act). With the backlog in judicial review applications and the overwhelming number of ministerial appeals,[13] it is difficult to see the wisdom in this constraint on the new ART.

22 Second, where it is separate (or bespoke) for migration applicants, the code is always more punitive and restrictive than the general ART provisions. It is very disappointing that migrants should continue to be treated as persons with inferior procedural entitlements. Specifically, at a time when almost one in two Australians were either born overseas or have an overseas born parent,[14] we should stop seeing migrants as less worthy of procedural entitlements just because they are non-citizens. This is most especially the case where applications can involve matters of life and death – or profound disruption to human rights, including the right to live with a partner and immediate family.

23 The third reason why the maintenance of a separate code for migration cases is disappointing is that it suggests an unwillingness to bring immigration fully back into the mainstream of administrative review. A great many changes to the Migration Act have been made over time to counter-act particular judicial rulings in a process I describe as 'tit-for-tat' law making. The result is the legislative equivalent of the House that Jack Built: the Migration Act is a veritable nightmare at the heart of a system that the Minister for Home Affairs rightly describes as 'broken'. While the Migration Act retains a bespoke procedural code for merits review the capacity for tit-for-tat law making will continue. It would be much more difficult to get amendments to the ART Act where one affected Minister or Department dislikes a particular ruling. Incidentally, my personal view is that a single process residing in the ART Act would

[13] The situation facing the Minister for Immigration was rendered even more difficult by the ruling of the High Court in Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs [2023] HCA 10 (12 April 2023). In that ruling the Court confirmed that the Minister is required by law to consider cases personally – it is not lawful to delegate consideration functions to departmental staff.

[14] See https://www.abs.gov.au/media-centre/media-releases/2021-census-nearly-half-australians-have-parent-born-overseas.

actually take the political heat out of migration appeals because they would be part of a universal system. In other words, a unified code could deliver a win-win for migrants and government.

Conclusion

24 The ART Bill and associated legislation is overwhelmingly positive in the reforms that would be made to administrative review in Australia. With small and very modest changes in the Consequential and Transitional Provisions Bill the regime affecting migration applicants could be strengthened even further.

Professor Mary Crock

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19 January 2024.