

## **RESPONDENTS IN THE ADMINISTRATIVE REVIEW TRIBUNAL**

*Submission to the Standing Committee on Social Policy and Legal Affairs by  
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1. This submission seeks to address **clauses 56, 60, 61, 62 and 63** of the Administrative Review Tribunal Bill 2023 and the corresponding sections of the Explanatory Memorandum. These clauses provide for obligations to assist the Administrative Review Tribunal ('ART') and procedures for the participation of respondents in tribunal proceedings.

### **INTRODUCTION**

2. Government agencies adopt a unique role when they become respondents in merits review proceedings. While respondents may choose to appear in most hearings in the current Administrative Appeals Tribunal ('AAT'), they should only do so in pursuit of their obligation to assist the tribunal as an Executive agency.
3. Despite this, procedures in the AAT to determine whether respondents should appear are inconsistent across divisions and agencies, largely as a result of piecemeal development.<sup>1</sup> Patterns of respondent appearances also present challenges for the administrative justice system, entrenching power imbalances and fostering adversarialism.
4. The ART has the opportunity to avoid the inconsistent processes which arose in the AAT. This submission aims to identify the precise effects of respondent appearances on individual proceedings and the administrative justice system, with the hope that this will assist in guiding future decisions on participation and appearances in the ART.

### **RESPONDENT APPEARANCES IN THEORY: RESPONDENTS' LEGAL OBLIGATIONS**

5. Throughout the merits review process, two key sources of legal duties guide the actions of Government agencies.
6. First, the Obligation to Assist requires respondents to cooperate with tribunal members to reach the 'correct and preferable decision',<sup>2</sup> regardless of whether the respondents choose to appear. In the pre-hearing context, this extends to timely correspondence and disclosure

of relevant information.<sup>3</sup> However, what is required of respondents *during* a hearing remains uncertain.

7. Second, the Model Litigant Obligations ('MLOs') prescribe higher ethical standards for respondents engaged in proceedings.<sup>4</sup> The MLOs require Government agencies to act honestly and fairly in handling claims. This includes keeping costs to a minimum and not taking advantage of claimants' relative lack of resources. These duties seek to ensure that administrative justice remains accessible and the 'correct and preferable decision' is reached.<sup>5</sup>

### **RESPONDENT APPEARANCES IN PRACTICE: EFFECTS IN INDIVIDUAL PROCEEDINGS**

8. Respondent appearances often have significant effects on the operation and tone of tribunal proceedings, as summarised below. Broadly speaking, the first four of these effects facilitate a fair, accessible and inexpensive mechanism of review in principle. When determining whether respondents should appear in proceedings, these must be balanced against the risk of trauma/intimidation and cost of appearances.
9. The extent to which these effects manifest in proceedings depends on the type of decision under review and the attitudes that agencies and their legal representatives bring to review proceedings.

### ***Clarifying Policy***

10. In making any decision, tribunal members should have regard to policies binding on the original decision-maker. Policy settings have become increasingly complex: they can be ambiguously drafted, promulgated by various sources or conflict with one another.<sup>6</sup>
11. Respondent appearances serve two purposes for clarifying policy. First, they clarify the agency's interpretation of the relevant policy settings, guiding the member to efficiently reach their own interpretation.<sup>7</sup> Additionally, they assist the member in applying policies to the facts of each case. Ideally, this includes directing attention to considerations which favour the applicant, particularly those not known to them.<sup>8</sup>

### ***Explaining Complex Statutory Frameworks***

12. Respondent appearances may assist tribunal members and applicants when dealing with complicated legislative regimes. Familiarity with the relevant law allows respondents to quickly identify points of disagreement, enhancing tribunal efficiency.<sup>9</sup> Legal representatives take on particular importance in proceedings where the member is not legally trained.

### ***Explaining Public Interest Considerations***

13. Tribunal members are often required to balance the demands of individual justice with the 'public interest', as expressed through policy. Appearances allow respondents to articulate specific public interests which the Government considers relevant, especially if members are not aware of the complete circumstances informing the policy.<sup>10</sup>
14. Oral advocacy is key here, since written submissions alone may not adequately convey the Government's conception of the public interest or their policy objectives. This may be a leading reason why respondents choose to appear in relatively simple matters: to ensure that their policies remain effective and are not overturned on review.<sup>11</sup> When pursued in contravention of respondents' MLOs, this practice is ultimately detrimental to confidence in the administrative justice system.

### ***Promoting Prompt Responses and Accountability***

15. Respondents are able to promptly respond to requests for further information when they attend hearings. Members and applicants have raised frustrations with delays caused by some respondent agencies, especially when the delays result in unnecessary adjournments.<sup>12</sup> The AAT wastes its limited resources, while the extended wait for an outcome negatively impacts applicants' experience.<sup>13</sup>
16. The direct line of communication also enables respondents to receive feedback on their decision-making processes and policies from tribunal members. This allows Government agencies to adjust their procedures to avoid further merits reviews of their decisions and identify systemic issues early.<sup>14</sup>

### ***Retraumatising Applicants***

17. Respondents may risk intimidating or retraumatising applicants when appearing. Intimidation and re-traumatisation can severely impact applicants' abilities to participate in tribunal proceedings, which may result in applicants withdrawing from appeals altogether.<sup>15</sup>
18. In some cases, the mere presence of the agency or specific decision-maker in the hearing may cause the applicant distress. In others, the matters which the member is obliged to consider raises traumatic details.<sup>16</sup> This is worsened when some respondents pursue intense lines of questioning or make strategic use of powers during the hearing.<sup>17</sup> These effects are more often seen in AAT divisions which deal with vulnerable populations (eg, NDIS,<sup>18</sup> Migration and Refugee).<sup>19</sup>

### ***Expenditure of Public Resources***

19. Each respondent appearance in tribunal proceedings uses public resources. For this reason, respondents generally do not appear in high-volume cases where the issues before the member are straightforward, or where the respondent has little to contribute beyond their written submissions.<sup>20</sup>
20. Absent any legislative requirements to appear, such resourcing decisions are made by government agencies at their discretion. However, respondents may choose to appear when seeking to uphold the effectiveness of their adopted policy, even though this appearance may cost the agency more than any prospective savings from a favourable decision.

### **RESPONDENT APPEARANCES IN CONTEXT: EFFECTS ON ADMINISTRATIVE JUSTICE**

21. Beyond individual proceedings, patterns of respondent appearances create additional barriers for applicants, implicitly shaping the administrative justice system and confidence in it.

### ***Reinforced Power Dynamic***

22. Government agencies possess inherent advantages on account of their institutional knowledge of the system and access to specialists and financial resources.<sup>21</sup> Marc Galanter describes respondents as 'repeat players' — since they frequently appear in similar merits

review cases — while applicants are ‘one-shotters’ who may have never participated in tribunals.<sup>22</sup> The extent of this advantage depends on the applicant.<sup>23</sup> The respondent will likely hold greater advantages where the applicant is from a vulnerable population, as in refugee and social security cases.<sup>24</sup> Conversely, the advantage may be minimal when the applicant is well resourced, such as a corporation appealing a tax decision.

### ***Increased Adversarialism***

23. Respondent appearances often render proceedings more adversarial and formal. Members and practitioners note that some respondents erroneously approach tribunal proceedings with a goal of ‘defending’ their decision.<sup>25</sup> To this end, they may contest otherwise uncontroversial points, prolonging proceedings and obscuring key issues.<sup>26</sup> Such an adversarial mindset is inappropriate in merits review,<sup>27</sup> particularly where the tribunal receives new information not previously considered by the agency.<sup>28</sup>

24. Adversarialism and formality concerns are exacerbated when respondent agencies engage legal representation. Inadvertently or otherwise, some legal representatives may adopt practices used in court, such as rhetorical question styles and arguments grounded in rules of evidence.<sup>29</sup> While the formality of tribunal proceedings should vary depending on the type of decision under review,<sup>30</sup> patterns of respondent representation have led some applicants to not seek review of unfavourable decisions, especially when their own access to representation is limited.<sup>31</sup>

## **RECOMMENDATIONS**

25. In light of these findings, this submission makes three recommendations:

- I. **Formalising Decision-Making:** Considering the effects of respondent appearances, the Attorney-General's Department should develop a set of criteria to guide Government agencies' decisions on whether to participate and/or appear in any particular ART proceeding.
  
- II. **Implementing These Criteria:** The Attorney-General's Department should explore appropriate means of giving effect to these criteria, whether in the legislation creating the ART, secondary legislation, or tribunal or departmental policy. Members may also be given powers to determine the extent of respondent participation in each proceeding.
  
- III. **Recasting Obligations:** The Attorney-General's Department should develop tribunal-specific model litigant obligations, which are adapted to the intended informal and accessible nature of merits review proceedings.

## ENDNOTES

- <sup>1</sup> Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 14 September 1995) 65 [3.191] (*'Better Decisions Report'*).
- <sup>2</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1AA); *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 420; *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 32 FLR 469; Garry Downes, '[Government Agencies as Respondents in the Administrative Appeals Tribunal](#)' (Discussion Paper, Australian Government Solicitor Government Law Group, 16 June 2005) 7 [17].
- <sup>3</sup> See JW Constance, '[Issues in Proceedings: The Tribunal](#)', (Speech, The Obligation to Assist: Model Litigants in AAT Proceedings Seminar, 26 August 2009) 4–10.
- <sup>4</sup> *Legal Services Directions 2017* (Cth) app B.
- <sup>5</sup> Downes, 'Government Agencies as Respondents' (n 2) 7 [17].
- <sup>6</sup> See Duncan Kerr, '[Challenges Facing Administrative Tribunals: The Complexity of Legislative Schemes and the Shrinking Space for Preferable Decision Making](#)' (Speech, Council of Australasian Tribunals Victoria Twilight Seminar, Melbourne, 18 November 2013); Stuart Morris, 'Tribunals and Policy' in Robin Creyke (ed), *Tribunals in the Common Law World* (Federation Press, 2008) 139, 141.
- <sup>7</sup> Garry Downes, '[Introduction](#)' (Speech, The Obligation to Assist: Model Litigants in Administrative Appeals Tribunal Proceedings Seminar, 26 August 2009) 4–5.
- <sup>8</sup> Garry Downes, '[Address to the Forum of Commonwealth Agencies Network](#)' (Speech, Forum of Commonwealth Agencies Network Lunch, 15 September 2005) 7.
- <sup>9</sup> *Sordini v Wilcox* (1982) 64 FLR 439, 450; *McDonald v Director-General of Social Security* (1984) 1 FCR 354, 366 (Northrop J); Bernard McCabe, 'Perspectives on Economy and Efficiency in Tribunal Decision-Making' (2016) 85 *AIAL Forum* 40.
- <sup>10</sup> See Philip Walker, '[Issues in Proceedings: The Bar](#)' (Speech, The Obligation to Assist: Model Litigants in AAT Proceedings Seminar, 26 August 2009) 4–6 [13]–[20].
- <sup>11</sup> Katherine Hooper, 'Model Litigants, Migration, Merits Review and Mediation' (2013) 32(1) *University of Queensland Law Journal* 157, 159–60.
- <sup>12</sup> *HRZI and National Disability Insurance Agency* [2023] AATA 481; Youth Disability Advocacy Service and Youth Affairs Council Victoria, '[Submission No 808771196](#) to Administrative Review Taskforce, *Administrative Review Reform Issues Paper* (May 2023).
- <sup>13</sup> Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Performance and Integrity of Australia's Administrative Review System* (Report, March 2022) 36 [3.73] (*'2019 Senate Committee Report'*).
- <sup>14</sup> Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2009) 245; *Better Decisions Report* (n 1) 111–18. See also Tribunals Service (UK), *Report by the President of Appeal Tribunals on the Standards of Decision-Making by the Secretary of State 2007-08* (Report, 2008) 1.9–1.10; Terry Carney, 'Robo-Debt Illegality: The Seven Veils of Failed Guarantees of the Rule of Law?' (2019) 44(1) *Alternative Law Journal* 4.
- <sup>15</sup> Victorian Mental Illness Awareness Council, '[Submission No 475617415](#) to Administrative Review Taskforce, *Administrative Review Reform Issues Paper* (May 2023).

<sup>16</sup> Ibid.

<sup>17</sup> Mark Carey (Victorian Bar), [Submission No 151290572](#) to Administrative Review Taskforce, *Administrative Review Reform Issues Paper* (May 2023).

<sup>18</sup> Kylie Burns et al, [Submission No 605265529](#) to Administrative Review Taskforce, *Administrative Review Reform Issues Paper* (April 2023).

<sup>19</sup> Asylum Seeker Resource Centre, [Submission No 552065519](#) to Administrative Review Taskforce, *Administrative Review Reform Issues Paper* (May 2023) 4.

<sup>20</sup> Eg, Protection visa reviews; first-tier Social Security Division cases: Senate Legal and Constitutional References Committee, Parliament of Australia, *Administration and Operation of the Migration Act 1958* (Final Report, March 2006) 80 [3.63]. See Linda Kirk, [Submission No 719785161](#) to Administrative Review Taskforce, *Administrative Review Reform Issues Paper* (May 2023) 38–41.

<sup>21</sup> Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law & Society Review* 95, 98; Advocacy Tasmania, [Submission No 815387818](#) to Administrative Review Taskforce, *Administrative Review Reform Issues Paper* (12 May 2023) 11; Victorian Mental Illness Awareness Council (n 15).

<sup>22</sup> Galanter (n 21) 98.

<sup>23</sup> Ibid 106.

<sup>24</sup> Asylum Seeker Resource Centre (n 19) 3, 4.

<sup>25</sup> Walker (n 1010) 8 [30]. See, eg, *Scott v Handley* (1999) 58 ALD 373, 383–4 [46]; Advocacy Tasmania (n 21).

<sup>26</sup> See, eg, *National Disability Insurance Agency v Davis* [2022] FCA 1002, [43]–[44] (Mortimer J); Brain Injury SA, [Submission No 124540237](#) to Administrative Review Taskforce, *Administrative Review Reform Issues Paper* (12 May 2023) case studies 4 and 5.

<sup>27</sup> Ian Govey, '[Issues of Consistency, Standards and Compliance](#)', (Speech, The Obligation to Assist: Model Litigants in AAT Proceedings Seminar, 26 August 2009) 5; Downes, 'Address to the Forum of Commonwealth Agencies Network' (n 8) 6–7; *Re Cimino and Director-General of Social Services* (1982) 4 ALN N106; Office of Legal Services Coordination, *Guidance Note 1: The Administrative Appeals Tribunal Act 1975: Obligation to Assist the Tribunal*, 29 June 2019, 1 [4], [5].

<sup>28</sup> Walker (n 1010) 8 [30].

<sup>29</sup> Mark Carey (n 1717); Burns et al (n 18). See also Dennis Pearce *Administrative Appeals Tribunal* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2015) 236 [13.31].

<sup>30</sup> *Better Decisions Report* (n 1) 30 [3.22]. See also McCabe (n 99) n 16; *Charara v Commissioner of Taxation* [2016] FCA 451, [116]; Dennis Pearce, *Administrative Appeals Tribunal* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2013) 341.

<sup>31</sup> Burns et al (n 18); Victorian Mental Illness Awareness Council (n 15). See also *2019 Senate Committee Report* (n 13) 31–3.