



Overview of draft Administrative Review Tribunal legislation

The Australian Government has introduced legislation that would abolish the Administrative Appeals Tribunal (AAT) and establish a new, fit-for purpose administrative review body, to be named the Administrative Review Tribunal (the Tribunal).

On 7 December 2023, the government introduced 2 bills:

- the Administrative Review Tribunal Bill 2023 (the ART Bill), which would establish the new Tribunal and re-establish the Administrative Review Council
- the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill), which would abolish the AAT, make amendments to a range of Commonwealth Acts, and enable the transition of AAT staff, operations and matters to the Tribunal.

The legislation implements:

- all 3 recommendations from the Senate Legal and Constitutional Affairs References Committee inquiry into the performance and integrity of Australia's administrative review system
- 4 recommendations from the Royal Commission into the Robodebt Scheme
- the Government response to 2 recommendations from the Rapid Review into the Exploitation of Australia's Visa System.

The Tribunal's commencement date will depend on timing of passage of the legislation, as well as other transitional arrangements.

Administrative Review Tribunal Bill 2023

The ART Bill is intended to establish a unified, cohesive Tribunal with flexible powers and procedures that best meet the needs of applicants. The Tribunal is intended to play a vital role in protecting the rights and interests of the members of our community, and in ensuring that the government and public service act within the bounds of the law.

The Tribunal would be required to pursue the objective of providing administrative review that:

- is fair and just
- resolves applications in a timely manner, with as little formality and expense as is consistent with reaching the correct or preferable decision
- is accessible and responsive to the diverse needs of parties
- improves the transparency and quality of government decision-making
- promotes public trust and confidence in the Tribunal.



Fair and just

The bills provide for a mechanism of review that is fair and just, and incorporates core features of merits review, expressed for a contemporary context.

The ART Bill includes general principles relating to proceedings to ensure they are fair and just, including that:

- the Tribunal has discretion in how it runs a proceeding (subject to the legislation and the rules)
- the Tribunal must operate with as little formality and technicality as is appropriate
- proceedings must, as far as practicable, be accessible for parties to a proceeding
- the Tribunal is not bound by the rules of evidence but may inform itself on any matter in any manner it considers appropriate
- the Tribunal may determine the scope of the review
- the Tribunal may exercise the powers of the decision-maker
- the Tribunal must ensure each party to a proceeding is given a reasonable opportunity to present their case.

Timely, informal and inexpensive

The ART Bill would equip the Tribunal with powers and functions to support it to resolve applications in a timely manner, with as little formality and expense as is consistent with reaching the correct or preferable decision. This would include:

- a new structure that harmonises procedures in the different jurisdictions of the Tribunal, and provides for more flexible allocation of resources
- powers to give directions about the Tribunal's procedures and consequences for failure to comply with them
- circumstances where a matter can be resolved without a hearing
- the ability for an agency party to elect not to participate in the proceeding, and powers for the Tribunal to order them to participate if necessary
- powers to refer matters to dispute resolution and to make decisions by agreement of the parties
- the ability for certain powers and functions to be performed by authorised persons within the Tribunal, with appropriate safeguards.

Accessible and responsive

The Tribunal would engage with a broad range of people who may require additional, tailored support to meaningfully participate in Tribunal processes. This may include, for example, people with disability and people who do not speak English as a first language (or at all).

In the ART Bill, 'accessible' means enabling people to apply for review and participate effectively in proceedings. This may involve the Tribunal making appropriate adjustments to facilities, technology or access to information.



Powers and functions that would support this include:

- the ability for the Tribunal to appoint a litigation guardian for a party to a proceeding in appropriate circumstances
- the obligation to appoint an interpreter in certain circumstances
- the ability for the President of the Tribunal to make practice directions to promote accessibility and responsiveness to users.

Transparent and high-quality government decision-making

The ART Bill would establish the Administrative Review Council to:

- monitor the integrity of the Commonwealth administrative review system
- inquire into and report on systemic challenges in administrative law
- support relevant education and training for Commonwealth officials.

The ART Bill would also establish a guidance and appeals panel within the Tribunal. The guidance and appeals panel would provide a mechanism for escalating significant issues and addressing material errors in Tribunal decisions. This would promote consistent Tribunal decision-making and rapid responses to emerging issues.

The ART Bill would provide the Tribunal with powers and functions that support it to promote transparent and high-quality government decision-making, including:

- requirements for jurisdictional area leaders to identify systemic issues identified in administrative reviews
- an explicit function for the President to inform ministers and the Administrative Review Council of systemic issues
- scope to publish Tribunal decisions generally, and an obligation to publish decisions of the guidance and appeals panel and any other decision that raises significant issues of law or have major implications for Commonwealth policy.

Public trust and confidence in the Tribunal

The ART Bill would enshrine a transparent and merit-based selection process for members, who are responsible for making the Tribunal's decisions. This is an important reform to ensure independent and high-quality decision-making within the Tribunal.

Other elements of the ART Bill that recognise the importance of public trust and confidence in the Tribunal include:



- the requirement for the President to make a publicly-available member code of conduct and performance standard
- the ability for the President to direct members, investigate conduct and temporarily restrict a member's duties if there is a performance or conduct concern
- the ability for the Governor-General to terminate a member's appointment for breaches the code of conduct, performance standard, serious misconduct or conviction of an indictable offence
- clear roles and qualification requirements for senior leadership of the Tribunal, including requirements to consider stakeholder feedback in advising the President on key decisions
- requirements for disclosing, avoiding and managing conflicts of interest
- the opportunity to refer Tribunal decisions to the guidance and appeals panel if there may have been a material error
- enhanced requirements for reporting on how the Tribunal is meeting its objective.

Structure of the Tribunal

Under the ART Bill, the Tribunal would have a simplified membership structure, with 4 levels of membership:

- President
- Deputy President (Judicial and Non-Judicial)
- senior member
- general member.

The President would be supported by a CEO and Principal Registrar, as the head of the APS agency. The President and Principal Registrar would also receive advice and support through a Tribunal Advisory Committee consisting of key senior leaders in the ART.

The Tribunal would be made up of 8 jurisdictional areas, each of which will be led by a jurisdictional area leader who is the President or a Deputy President:

- General
- Intelligence and Security
- Migration
- National Disability Insurance Scheme
- Protection
- Social Security
- Taxation and Business
- Veterans' and Workers' Compensation.

The President may establish lists within each jurisdictional area, led by a Deputy President or Senior Member, to focus expertise on particular types of applications.



Consequential and Transitional Bill

The Consequential and Transitional Bill would repeal the Administrative Appeals Tribunal Act 1975. It would make consequential amendments to 138 Commonwealth Acts, covering the majority of the Tribunal's caseload.

The Bill would amend legislation relating to reviews of taxation and charity, social security, the National Disability Insurance Scheme, migration, veterans' entitlements and security and intelligence decisions to ensure they are fit for purpose.

Through significant reforms to the Migration Act, the Bill would assist to reduce delays and backlogs in migration and refugee matters, increase fairness, and support the integrity of the migration system.

Additionally, the Consequential and Transitional Bill would:

- retain a range of existing rules for Tribunal reviews of taxation and charity matters
- abolish the Immigration Assessment Authority and harmonise provisions relating to reviews of migration and refugee decisions, providing a broader suite of tools for the efficient and effective resolution of these matters.
- provide a more fit-for-purpose style of review of Social Security and Child Support decisions, whereby matters will be triaged and resolved according to their complexity, and consideration given to whether the decision-maker's participation will assist a matter's effective and efficient resolution
- continue existing pathways and protections for the review of matters involving sensitive national security or intelligence information, with enhancements to simplify drafting and promote consistent, effective approaches
- maintain merits review in 2 separate bodies as a unique feature of veterans' entitlement law, with matters reviewed in the Veterans' Review Board continuing to also be appealable to the Tribunal
- promote consistency and simplicity by repealing special arrangements that overlap, duplicate or unnecessarily displace core provisions of the ART Bill.

The Consequential and Transitional Bill also contains measures to enable the transition from the AAT to the new Tribunal. This includes transitioning the Tribunal's active, pending and potential caseloads, including matters before the courts, to minimise disruption and to maintain review rights.

Further technical amendments will be required to approximately 120 Acts that refer to the AAT. These will be introduced into Parliament as soon as possible.

Administrative Review Tribunal – Consultation outcomes

Public consultation

April to May 2023



1 public issues paper and survey



7 cities visited



80+ consultations held



120 submissions received



147 stakeholders reached



287 survey responses

Common themes

Stakeholders identified the following key elements for the new administrative review body:

- The success of the new body will rely on the quality and independence of members and the leadership. A transparent, merits-based process to appoint (and reappoint) qualified individuals is essential.
- The emphasis on inquisitorial approaches, the ability of applicants to feel heard, and the core principles and process of merits review were seen as key aspects of the AAT that are working well and should be retained.
- Systemic issues need to be identified and brought to light – the Administrative Review Council should be re-established; but the Tribunal needs pathways to identify and action systemic issues in government decision-making.
- Tribunal decisions should be consistent (while recognising that each case must be decided according to its individual merits), and outcomes of external merits review should be incorporated into decision-making.
- Procedures should be simplified and standardised (where appropriate), with greater focus on supporting users through matters, trauma-informed approaches, and the efficient resolution of matters at the earliest possible stage.

Stakeholder group-specific comments

Migration stakeholders emphasised the importance of procedural fairness in merits review, and that the new body needs to have fairness and accessibility centred in its design. This included addressing barriers to accessing review, provision of information, the timing of reviews and supports for applicants including legal assistance. Opportunities for greater efficiency in decision-making were identified, such as the ability for conference registrars to remit on the papers in certain circumstances.

Targeted consultation on draft Bills

September to October 2023

Expert Advisory Group

AAT

Federal Courts

Government agencies and departments

Non-government entities, including:

- Peak bodies
- Legal assistance providers
- User advocates

Expert Advisory Group

10 meetings since February 2023

Membership

Hon Patrick Keane (Chair)

Rachel Amamoo

Emeritus Professor Robin Creyke AO

Professor Anna Cody

Emeritus Professor Ron McCallum AO

Hon Alan Robertson SC

Emeritus Professor Cheryl Saunders AO

Post-introduction sessions

December 2023

5 sessions, including with non-government entities

Social security stakeholders appreciated the speed and informality of the first tier of review, however noted the inability to conference (for those matters that often settle, such as debts) was an inefficiency. Stakeholders expressed concern at the formality at the second tier of review. Some stakeholders suggested a single tier of review is not always sufficient to reach a correct or preferable decision. Stakeholders noted low levels of representation for applicants and the need for legal assistance, possibly through duty lawyers or referrals by the Tribunal to pro bono assistance, and support for vulnerable applicants.

Disability stakeholders noted the importance of accessibility for applicants. Stakeholders noted the need for reviews to be informal and non-adversarial, and expressed concern the confronting nature of reviews when respondent lawyers are in attendance, including delays that can be caused when lawyers are unprepared or need to seek instruction. Stakeholders noted timely resolutions are imperative, as delays can leave applicants without supports.

Tax stakeholders expressed concern about delays, including instances where years had passed between a hearing being held and a decision being made. They requested that thought be given to expediting resolution of precedential decisions that could affect large numbers of taxpayers and highlighted the importance of members who were skilled practitioners in the field.

AAT staff and **members** expressed a desire for strong, visible leadership and a more clearly articulated and embedded sense of purpose to unite the organisation and reinforce the focus on users. They identified that the current structure can tend to be siloed across divisional, geographic, administrative and personnel lines. There was support for better definition of responsibilities and expectations at all levels, with clearer processes for performance appraisals and how they feed into professional development, reappointments and appointments at a higher level. A number of opportunities were identified to enhance efficiency, including the need for a power to issue enforceable directions and enhancing the role of conference registrars.

Users said that access to the tribunal should be simple and accessible (teleconferences and videoconferences). They also noted the benefit of legal representation in some circumstances, as well as the need for shorter decision waiting times, flexible hearing times, and for training for Members to better respond to applicant needs during hearings.

Implementation of Inquiry recommendations

The Bills implement all 3 recommendations of the Senate Legal and Constitutional Affairs Committee's inquiry into [The performance and integrity of Australia's administrative review system](#):

- to abolish the AAT and replace it with a new federal administrative review body;
- establish a merit-based process for appointment of members; and
- re-establish and re-fund the Administrative Review Council.

The Bills directly implement 4 recommendations of the [Royal Commission into the Robodebt Scheme](#):

- requiring the publication of Tribunal decisions which involve a significant conclusion of law or have significant implications for Commonwealth policy or administration (recommendation 20.4);
- re-instating the Administrative Review Council and providing that its functions include supporting training and developing guidance on the Commonwealth administrative law system (recommendations 20.5 and 23.4); and
- retaining the ability of the Commonwealth Ombudsman to refer, or recommend referral, of questions of law to the Tribunal (recommendation 21.5).

New features of the Tribunal will also drive an overall uplift in the capability of the administrative review system to identify, escalate and resolve systemic issues such as those which were the subject of the Robodebt Royal Commission.

The Bills also implement the Government's responses to recommendations 32 and 33 of the [Rapid Review into the Exploitation of Australia's Visa System](#), by providing that the Tribunal's objective includes to 'ensure that applications to the Tribunal are resolved as quickly, and with as little formality and expense, as a proper consideration of the matters before the Tribunal permits'. The Bill harmonises the powers and procedures of the Administrative Review Tribunal (ART), including for migration and protection visa matters. This provides more tools to promote the efficient resolution of matters (for example, expanding the circumstances where a matter can be resolved without a hearing, allowing directions hearings, and escalating matters raising systemic issues for consideration by the guidance and appeals panel).



Australian Government

Guidelines for appointments to the Administrative Appeals Tribunal (AAT)



Australian Government

Summary

These Guidelines set out a transparent and merit-based process for the appointment (including reappointment) of all AAT members. Key features of the process include:

- selection of non-judicial members will be made against a core set of selection criteria, supplemented by additional criteria as required, and
- a panel report endorsed by the chair of the assessment panel will be provided to the Attorney-General recommending candidates found suitable for appointment and reappointment.

Exclusions

The following appointments are excluded from these Guidelines:

- the AAT President, and
- the AAT Registrar

Where short term (less than three month) acting appointments are to be made (for example during the absence of the AAT President), the processes prescribed in the relevant legislation should be followed.

Where short term (up to three month) extensions of appointments or short term reappointments are to be made to ensure continuity of AAT membership, the processes prescribed in the Cabinet handbook should be followed. The Attorney-General will consult with the President about short term extensions and reappointments.

Filling vacancies

At least once each year the Attorney-General will determine what positions need to be filled and at what level, informed by the advice of the AAT President.

Vacancies in the AAT will be filled in the following manner:

Appointments and reappointments of judicial members

- 1 The appointment and reappointment of judicial members will be made following consultation by the Attorney-General with the AAT President and the relevant Chief Justice.

Appointments and reappointments of non-judicial members

- 2 Expressions of interest will be sought at least every six months, unless there are no vacancies to be filled or it is impractical to do so.
- 3 Expressions of interest in appointment will be sought via public advertisement. Positions will be advertised at a minimum on the APSjobs website and in the national press.



Australian Government

- 4** Non-judicial member selections will be made against the following core selection criteria, supplemented by additional criteria as required:
 - a. ability to conduct hearings and other Tribunal proceedings
 - b. decision-making and reasoning
 - c. writing and communication skills
 - d. independence, integrity and collegiality
 - e. productivity, diligence and resilience
 - f. for senior roles such as Senior Members, Deputy Presidents and Division Heads, leadership
 - g. an understanding of, and a commitment to, safe and respectful workplaces; and
 - h. the needs of the Tribunal.
- 5** A register will be established to receive expressions of interest that address the selection criteria.
- 6** An assessment panel will assess applicants' claims against the selection criteria. Multiple assessment panels may be required depending on the nature of the vacancies.
- 7** Assessment panels will be chaired by the Attorney-General's Department Secretary or their delegate.
- 8** Assessment panels will comprise the Chair, the AAT President (or delegate), and one member nominated by the Attorney-General.
- 9** Assessment panels will determine the methodology to be used to assess the suitability of applicants who have provided expressions of interest to the register.
 - a. For existing members seeking reappointment or promotion, a referee report will be sought from the President, a Division Head or another member of appropriate seniority with knowledge of the member's work.
- 10** Assessment panels will provide a report to the Attorney-General setting out those applicants considered and those found suitable for appointment, including reasoning.
- 11** If two panel members consider an applicant suitable for appointment and the third panel member disagrees, this should be reflected in the report to the Attorney-General, including the reasoning of the respective panel members.

Ministerial recommendations to Cabinet

- 12** The Attorney-General will use the panel report to recommend non-judicial appointments and will use the merit list in recommending non-judicial appointments to similar vacancies occurring within a reasonable period of the recruitment process being undertaken.
- 13** The Attorney-General will use consultations with the AAT President and relevant Chief Justice to recommend judicial appointments.
- 14** The Attorney-General will consult ministerial colleagues who must be consulted in respect of potential appointments to particular Divisions.
- 15** If the appointment(s) receive Cabinet's approval, the Attorney-General will recommend the appointment(s) to the Governor-General for consideration.