



THE LAW SOCIETY
OF NEW SOUTH WALES

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16 August 2018

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 CANBERRA

By email: Nathan.macdonald@lawcouncil.asn.au

Dear Mr Smithers,

Statutory Review of the Tribunals Amalgamation Act 2015 (Cth)

1. Introductory Comments

This submission is provided to the Law Council of Australia in response to its invitation dated 27 July 2018.

The comments are directed at the Terms of Reference (“ToR”) provided by the Attorney-General for the purposes of the statutory review as required by section 4 of the *Tribunals Amalgamation Act 2015* (Cth) (the “Amalgamation Act”). Mr Callinan QC is required to provide his report to the Attorney-General by 31 October 2018.

Given the broad nature of the ToR, the Law Society expresses concern at the short time in which to make any submissions to Mr Callinan QC. This is disappointing given the contentious nature of the Tribunal’s jurisdiction, in particular with regards to migration matters. The Law Society notes that on 14 March 2018 the Minister for Home Affairs asked the Joint Standing Committee on Migration to inquire into and report on the review processes associated with visa cancellations made on criminal grounds. A number of submissions have been made to that Committee and a number of public hearings have been held. The Law Society wrote to the Law Council on 12 April 2018 expressing its views. The Law Society reiterates the concerns set out in that letter.

Bearing this background in mind, it would be unfortunate if this review were to be driven by issues that are perceived to arise in one of its jurisdictions only. The Administrative Appeals Tribunal (“AAT”) has played a central role in providing independent merits review for many government decisions for over 40 years. Its jurisdiction covers decisions in a number of different areas ranging from tax to Freedom of Information to social services to migration and many others. The AAT’s 2016-2017 Annual Report says that the Tribunal finalised 42,224 applications in 2016-17. The Tribunal exceeded its overall target of finalising 75% of cases within 12 months.¹

¹ Administrative Appeals Tribunal, *Annual Report 2016-17* 2-3.

2. The Role of the Tribunal and its Objectives

As noted in the Law Society's April letter, the objective of merits review was succinctly stated by the Administrative Review Council in 1999 as follows:

1.3. The principal objective of merits review is to ensure that those administrative decisions in relation to which review is provided are correct and preferable:

- correct - in the sense that they are made according to law; and
- preferable - in the sense that, if there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts.

1.4. This objective is directed to ensuring fair treatment of all persons affected by a decision.

1.5. Merits review also has a broader, long-term objective of improving the quality and consistency of the decisions of primary decision-makers. Further, merits review ensures that the openness and accountability of decisions made by government are enhanced.²

While the Tribunal is part of the Executive, it provides for independent review of decisions subject to being required to follow lawful government policy unless "there are cogent reasons to the contrary"³ and it must follow lawful directions given by a Minister where there is statutory power to give such a direction.⁴

The legislated objectives of the Tribunal are set out in s 2A of the *Administrative Appeals Tribunal Act* ("AAT Act"), as inserted in 2015 by the Amalgamation Act, namely:

In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:

- (a) is accessible; and
- (b) is fair, just, economical, informal and quick; and
- (c) is proportionate to the importance and complexity of the matter; and
- (d) promotes public trust and confidence in the decision-making of the Tribunal.

These objectives are referred to in the ToR, and in relation to (d), the Reviewer is asked to have particular regard to:

the extent to which decisions of the Tribunal meet community expectations;
and

the effectiveness of the interaction and application of legislation, Practice directions, Ministerial Directions, guides, guidelines and policies of the Tribunal.

The expression "community expectations" is not one that is found s 2A or elsewhere in the AAT Act.⁵ It is to be found in Migration Act Direction No. 65. This was considered by Mortimer J in *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 who observed that:

² Administrative Review Council, 'What decisions should be subject to merit review?' (1999) <https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjectto meritreview1999.aspx>

³ *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 644-645 (Brennan J). And see Michelle Howard et al, 'Promoting Administrative Justice: The Correct and Preferable Decision and the Role of Government Policy in the Determination' (2013) 32 *University of Queensland Law Journal* 170.

⁴ For example, see *Migration Act 1958* (Cth) s 499 and Direction No. 65.

⁵ See the consideration of 'community values' in Bernard McCabe, 'Community Values and Correct or Preferable Decisions in Administrative Tribunals' (2013) 32 *University of Queensland Law Journal* 103.

...this is not a consideration dealing with any objective, or ascertainable expectations of the Australian community. It is a kind of deeming provision by the Minister about how he or she, and the executive government of which he or she is member, wish to articulate community expectations, whether or not there is any objective basis for that belief. (at [76])

More generally, the legal effect of Direction No. 65 was considered by the Full Court of the Federal Court of Australia in *Jagroop v Minister for Immigration and Border Protection* [2016] FCAFC 48; 241 FCR 461 in particular at [57] and [78].

In *Re Visa Cancellation Applicant and Minister for Immigration and Citizenship* [2011] AATA 690 the AAT President (Downes J) in his Further Reasons for Decision, repeated and expanded on comments the Tribunal had made on the same day in *Re Rent to Own (Aust) Pty Ltd and Australian Securities and Investments Commission* [2011] AATA 689, about the role of the Tribunal when considering a discretionary power and deciding what is the 'preferable' decision. The President commented on the role of community standards and expectations in the decision-making process and in the articulation of Tribunal reasons. He encouraged the articulation of such factors in reasons for decision. He also pointed out in the *Visa Cancellation* case that the fact that the Minister had exercised his statutory power in a number of cases to set aside Tribunal decisions not to cancel a visa did not highlight "a supposed competition or conflict between a Minister and the Tribunal" (at [91]). He added:

Where the Tribunal makes a final decision within power; where the Minister makes a final decision within power, they are both contributing to good administration.

This submission now considers some issues that may arise out of the ToR.

3. Amalgamation Issues and the Objectives of the Amalgamation Act

The Amalgamation Act has no stated objectives, but they can be discerned from the Explanatory Memorandum for the Bill in which it was said variously that the Bill was intended to:

1. streamline and simplify the Commonwealth merits review system and improve access to justice by fostering greater awareness of the Tribunal's function: [13];⁶
2. produce the coherent merits review framework that was envisaged when the AAT was established in 1976: [16];
3. establish a sound institutional framework for the amalgamated Tribunal, which would preserve its independence and the expertise of its members: [17];
4. seek to harmonise and simplify procedures applicable to merits review where appropriate, but ... also provide for flexibility in rules and diversity in approaches across the amalgamated Tribunal's varied jurisdictions [by preserving] successful processes and features of the existing tribunals: [17];
5. preserve other procedures that are essential to maintaining fair and efficient reviews in the migration and refugee, and social services and child support, jurisdictions: [23];
6. ensure that merits review of government decision-making is accessible no matter where an applicant to the Tribunal may be located, including by modernising provisions related to hearings by electronic means, which promotes accessibility: [23]; and
7. preserve alternative dispute resolution processes currently in place, which are a core component of the AAT's function and contribute to an economical, informal and quick review process: [23].

⁶ Paragraph references are to the Explanatory Memorandum to the *Tribunals Amalgamation Bill* 2015.

Some of these principles are addressed below.

3.1. Streamline and simplify the national tribunal system

The Law Society considers that the amalgamation has streamlined and simplified the Commonwealth merits review system by amalgamating Commonwealth tribunals with high volume applications. This was effected in 2015 with the addition to the AAT of the other major Commonwealth tribunals namely, the Migration Review Tribunal (MRT), the Refugee Review Tribunal (RRT), the Immigration Assessment Authority (IAA), and the Social Security Appeals Tribunal (SSAT).

These moves have assisted merits review to become more accessible to Australians.

3.2. Coherent merits review framework

Amalgamation has gone a considerable distance towards producing the coherent merits review framework that was envisaged when the AAT was established. The AAT now comprises all the high volume merits review tribunals in the one body, with the notable exception of the Veterans' Review Board.

The Law Society has a concern about the imbalance in size of the caseloads of the three major divisions of the amalgamated Tribunal. The 2016-2017 figures indicate that the Migration and Refugee Division ("MRD") and Social Services and Child Support Division ("SSCSD") lodgements in combination are 14 times the number of the former AAT, now largely the General Division ("GD"): 41,432 (SSCSD) and 51,426 (MRD) cf 6,581 (GD).⁷

The concern is that the larger divisions potentially will dominate the smaller division and will inhibit the retention of features of the former AAT. This was a concern expressed in relation to the comparable proposal to amalgamate tribunals in New South Wales.⁸ The Law Society suggests that a close watch should be kept on the position going forward.

3.3. Sound institutional framework to preserve the Tribunal's independence and expertise

The Law Society accepts that the Amalgamation Act has established a sound institutional framework to preserve the expertise of the amalgamated Tribunal's members. The evidence is that the Tribunal has members with expertise over the many areas of jurisdiction covered by the AAT.

(a) Independence and the appointment process

The Law Society has a general concern about whether there is a sound framework which sufficiently protects the independence of its members. In general, tribunals in Australia are expected to exhibit impartiality and fairness. Public confidence would be undermined if tribunals were subject to governmental influence in the same direct way as other executive officers. Tribunal independence is a constant theme that has been echoed in landmark Australian reviews.

The issue of political appointments to tribunals is a contentious one. There has been public comment critical of appointments at various times in the AAT's history. The Law Society

⁷ Administrative Appeals Tribunal, *2016-17 At a glance* (2017).

⁸ Report 49 of the NSW Legislative Council, Standing Committee on Law and Justice, *Opportunities to consolidate tribunals in NSW*, (2012) at [3.47].

notes its concern that there has been public disquiet about the degree of independence of recent appointments and criticism of the AAT.⁹

The Law Society suggests that it would be timely to consider putting in place processes that would ensure a more open and merit based appointment system. The Law Society would favour a process of appointments following public advertisement, with clearly delineated selection criteria.

(b) Two Tiers of Administrative Review

The Law Society notes that second tier review is available in veterans' appeals, and the first tier, the Veterans' Review Board ("VRB") is not a tribunal within the AAT structure. The quality which justifies two tier review in income support and veterans' matters is that each is a high volume jurisdiction and claims can be dealt with more expeditiously by the AAT first tier or the VRB in light of the particular procedures adopted in those jurisdictions. However, a consequence within the AAT of having two tiers of review has led to multiple classes of members, with different levels of remuneration.¹⁰ Different classes of membership can also inhibit use of all members to handle matters across the AAT's jurisdiction.

3.4. Harmonise procedures while maintaining diversity of procedures

The Law Society accepts the need for a level of flexibility to meet the particular needs of parties in specialised jurisdictions.¹¹ There is also an important equal objective of harmonising and simplifying procedures applying to merits review where appropriate.

The Law Society notes that the first objective has been met by the authorisation under the AAT Act of the maintenance of separate procedures for matters in the MRD and the SSCSD, and to a lesser extent, the Security Division and the National Disability Insurance Scheme ("NDIS") Division. These distinctions are reflected also in the General Practice Direction, Part 3 which sets out the Directions and guides applying to classes of applications. Although the Law Society accepts that legislative permission for separate procedures for these divisions maintains separateness of functions, structures, and members, in principle it is inimical to harmonisation and needs re-evaluation and fine-tuning to reduce the degree of separation between the three principal divisions.

The second objective is effected by the President's authority under s 18B of the AAT Act to give written directions for the arrangement of business, including the procedures of the Tribunal. This power can ensure consistency in matters of procedure. The Law Society notes that a Practice Direction and President's Directions have only very recently been issued in relation to the Migration and Refugee Division. There has not yet been time to observe how they are working in practice.

3.5. Accessibility of merits review

The use of information technology (IT) systems, and the take up of IT developments is important to ensure that applications to the Tribunal are accessible. It is understood that online applications are now occurring in 50% of GD matters; 80% of MRD matters and 60% of SSCSD matters. The encouragement and facilitation of use of these technology systems

⁹ Law Council of Australia, 'Minister's comments attacking independence of tribunals were unfortunate, should not be repeated' (Media Release, 17 May 2017; John Handley, 'Citizenship and power: Appeals tribunal must remain independent', *The Age*, 13 June 2017; Ben Doherty, 'Judge defends independence of courts in wake of Dutton comments', *The Guardian*, 19 June 2017; Michael Koziol 'George Brandis clears out 'infuriating' Administrative Appeals', *The Age*, 29 June 2017.

¹⁰ Remuneration Determination 2017/09 Table 2A.

¹¹ Justice Kevin Bell *One VCAT: President's Review of VCAT* (2009) 12.

is a significant step towards ensuring that merits review of government decision-making is accessible no matter where an applicant to the Tribunal may be located.

Barriers to further improvements exist. These include the failure to adopt a single IT system for accessing the Tribunal, and the need to increase the take up of electronic lodgement.

It is also important that applicants located in NSW but outside Sydney have easy access to the Tribunal and its hearing processes. The use of telephone and video facilities is to be encouraged. However, the Tribunal only sits face to face in Sydney. The Law Society suggests that the Tribunal should be encouraged to consider the use of country sittings, similarly to the District Court of NSW, so that there can be better access and more promotion of the Tribunal outside Sydney.

4. Timely and Final Resolution of Matters

4.1. Grounds and Scope of Review

The ToR provides for a very general question about the extent to which the grounds and scope of review provide timely and final resolution of matters. It is necessary first to ask what is meant by 'grounds' and 'scope' of review.

The AAT is part of the executive and it stands in the shoes of the original decision-maker to review the relevant decision and arrive at a decision that is 'correct or preferable'. In undertaking that task, subject to statutory intervention, it can have regard to material and evidence that was not before the original decision-maker: see in this regard *Shi v Migration Agents Registration Authority* [2008] HCA 31.

The phrase "correct or preferable" is not used in the AAT Act other than in the context of the insufficiency of a statement of reasons (see s 29AB). But Bowen CJ and Deane J made clear that this is the scope of review when the Tribunal approaches its task in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577.

In the view of the Law Society it is important that the general nature of the scope for review be maintained and that limitations on that scope or on the grounds for review are not introduced so as to hamper the important role of the AAT in correcting factual and legal error and in reaching the preferred decision from a range of decisions based on the most up to date evidence that is before it with the benefit of submissions (including oral argument) and legal representation where that is available.

4.2. External Rights of Appeal/Review

An issue potentially raised in one of the ToR is the degree to which review by the Federal Court of Australia "promote[s] timely and final resolution of matters".

In general terms, section 44 of the AAT Act permits appeals to the Court on a question of law. The Law Society is not aware of any reason to change the current AAT provisions dealing with the right of appeal for error of law. The Law Society notes that the capacity for the constitutional writs to extend to Tribunal decisions cannot, in any event, be excluded, so review on the basis of error of law is an appropriate form of review.

4.3. Internal Rights of Appeal/Review

It has been noted above that there may be good practical reasons for retaining the two tier structure for the mass volume SSCSD jurisdiction. The NSW Civil and Administrative Tribunal legislation (*Civil and Administrative Tribunal Act 2013*) makes provision for appeals

of decisions (other than interlocutory decisions) to an Appeal Panel as of right on questions of law and with leave on any other grounds (s 80(2)).

There may be some merit in considering a similar type of regime within the federal tribunal system although the potential benefits of adding a layer of review would need to be considered against the addition of complexity and delay to the existing framework.

5. Tribunal Funding

The final item in the list of the ToR calls for a consideration of the arrangements for funding the operations of the Tribunal, including ensuring consistent funding models across divisions.

A Note to the Financial Statements for the AAT 2016-17 Annual Report in respect of the line item "Revenue from Government" states that:

The variance against Revenue from Government is due to the demand-driven funding model in place in the Migration and Refugee Division, inherited from the Migration Review Tribunal and Refugee Review Tribunal at amalgamation. The funding model is based on appropriation at budget for finalising 18,000 decisions per annum, adjusted for any variances above (additional appropriation) or below (handing back appropriation) that number, at Portfolio Additional Estimates Statements (PAES). The Migration and Refugee Division finalised 18,905 decisions in 2016-17.

The Law Society is concerned that funding based on the number of 'finalised' matters is not a sound basis on which to allocate funding to an independent tribunal charged with reaching correct or preferable decisions in individual cases that come before it. The appropriate funding for a body such as the AAT is driven by a number of matters many of which are beyond the control of the AAT itself. These include the extent and nature of jurisdiction given to the Tribunal, the quality of government decision making, the propensity of decisions to be challenged, the rate of success of applications, the processes used to manage each case from those akin to adversarial to ones that are much more informal and flexible in nature and the nature and quality of representation of parties before the Tribunal.

The Law Society would oppose the introduction of a demand-driven funding model that does not recognise these matters and that might inadvertently strike at the role that the Tribunal plays in promoting fair and consistent decision making by primary decision-makers.

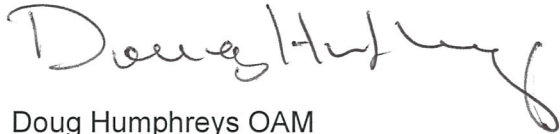
6. Efficiency Issues

The use of technology has been referred to above as a source of efficiency. At the same time the human face of the Tribunal needs to be recognised. One of the advantages of the Tribunal from the viewpoint of the applicant is that this may be the first time that there is an opportunity to hear and, other than in what may appear to be a pro forma rejection letter, probe the reasons for the decision. Being able to deal face to face with a government representative can assist the applicant to decide whether the application should proceed. It can also enable the decision-maker to take into account anything further that the applicant wishes to say. The Tribunal, including through its use of ADR processes, offers significant help in this process.

To the extent that the AAT can share physical and technology resources with other agencies that should be given consideration. Earlier in this letter the use of country sittings was raised.

Thank you for the opportunity to comment. Should you have any questions, please contact Andrew Small, Policy Lawyer, on (02) 9926 0253 or email andrew.small@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink that reads "Doug Humphreys". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Doug Humphreys OAM
President