

Report

Review: section 4 of the Tribunals Amalgamation Act 2015 (CTH)

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CHAPTER 1 – EXECUTIVE SUMMARY

- 1.1 What I set out below is an executive summary of the Report and the measures that might be considered by the Attorney-General and by the Parliament in furtherance of the amalgamation of the Administrative Appeals Tribunal (“**AAT**”) pursuant to s 4 of the *Tribunals Amalgamation Act 2015* (Cth) (“**TA Act**”), and for other purposes of the *Administrative Appeals Tribunal Act 1975* (Cth) (“**AAT Act**”).
- 1.2 Some of the measures I suggest would if adopted come at a cost. I have tried to suggest measures to achieve off-setting savings: reducing administrative staff, redeploying staff to different positions and reducing delays in decision-making.
- 1.3 The absorption of the Migration Review Tribunal (“**MRT**”) and the Refugee Review Tribunal (“**RRT**”), because of their very different legislative regimes and practices, into an amalgamated tribunal, was never going to be an easy task. The difficulties have been immensely compounded by the intimidating backlog of cases in the Migration and Refugee Division (“**MRD**”) of the AAT. Either or both of two solutions might not be enough to eliminate or even much reduce the backlog, or indeed, cope with its likely increase. The first possible solution, of radical changes to migration law and practice, is a political matter and not within my remit. The second is however, that the deficiency of numbers of Members in the MRD be immediately addressed by the appointment of no fewer than 15 to 30 Members, some only of whom should be part-time Members.

Measure 1

An event has overtaken, in part, the measure that I thought essential: an immediate enlargement of the Membership of the MRD, that is the appointment on the 29th of November 2018, within days of the completion of my Report, of 33 legally qualified, part-time, Members to the Division. Because, however, there were more than 53,282 applications on hand on 30 June 2018, the welcome appointment of those 33 part-time Members is unlikely to bring the backlog of cases into manageable proportions without further appointments of, preferably, full-time, appropriately legally qualified, Members.¹

- 1.4 Case management as it is now conducted in the AAT is a matter of concern. Differences in practice and procedure, as well as competencies of Members, complicate the operation of the AAT. There is a clear need for a coordinator and manager of the totality of the AAT's workload in consultation with, and as a delegate of, the President. An appointment of a person to fill that role is, in my view, urgent and necessary. The person who is to fill the role should be a Federal Circuit Court judge as a *persona designata*. I have been unimpressed by suggestions that have been made to me that the designated person should not be a Federal Circuit Court judge because Deputy Vice Presidents of the AAT are paid a larger salary than a Federal Circuit Court judge, albeit that a Federal Circuit Court judge is a Chapter III appointment and has tenure and other prerequisites of office.² Public service pay scales and the settings of the Remuneration Tribunal should not be allowed to defeat essential reform and administrative efficiency. The person holding the office would be acting as the President's delegate, that is, with the authority of the President. There are many instances in public affairs of the payment of lower remuneration to those who are in charge than those whose duty it is to carry out his or her wishes.³ Having regard to the present tensions to which I refer in detail in this report, I think it would be better if the appointment to the office were of a person

¹ Administrative Appeals Tribunal, *Annual Report: 2017-2018*, at page 24.

² See the *Remuneration Tribunal (Judicial and Related Offices—Remuneration and Allowances) Determination 2018* registered 15 November 2018.

³ The Prime Minister of Australia is paid less than the Secretary of the Department of Prime Minister and Cabinet. As at 01 July 2017, the Prime Minister of Australia was paid \$527,852 per annum, while the Secretary was paid, as total remuneration, the sum of \$878,940.00 *per annum*. See the Remuneration Tribunal, *Determination 2017/06: Departmental Secretaries - Classification Structure and Terms and Conditions* (dated 28 June 2017).

external to the AAT. In Queensland, for example, and in other States, the President of the relevant Civil and Administrative Tribunal is a Supreme Court judge and the Deputy President is a District or County Court judge. That arrangement works well.

Measure 2

Appoint a suitable and qualified person, a new Federal Circuit Court Judge, to be a full time Judicial Deputy President of all Divisions, to exercise the function of a Senior Case Manager, to arrange and allocate work of the Divisions of the AAT, in consultation with, and as the delegate of, the President, to ensure that the resources of the AAT are used in the most efficient, expeditious and fair performance of the work possible. The Federal Circuit Court judge so appointed would be expected to hear matters in the AAT and cases in the Federal Circuit Court, as available from time to time.

Measure 3

Case management under the direction and supervision of the Federal Circuit Court judge/full-time Judicial Deputy President (Senior Case Manager) in consultation with the Division Heads will, from time to time, have to be done at the State level in the larger Divisions. That management should ordinarily be done by the Senior Member of the relevant Division in each State, or if appropriate, two States and a Territory, under the overall management and direction of such a Member, a practice leader. The National Practice Managers would no longer be required and may be able to be re-deployed as Members to hearing duties in the MRD. The “discount” from the number of cases that national practice managers in the MRD are now afforded by reason of their duties of case management will no longer be justified.

- 1.5 There is in the MRD a “Dashboard”, a display of the numbers of matters finalised by each Member from time to time, a target in effect disguised as a “benchmark”. It has proved to be a distraction of the Members from their work. The work of a Member, as with that of a judge, is not to be evaluated exclusively on a quantitative basis. The complexity of matters is variable. Quantitative evaluation can only be a partial and not always reliable measure of performance. The adoption of the

benchmark is driven to some extent by the system of funding of the MRD. I do not think that it serves any practical purpose.

Measure 4

Consideration should be given to the removal of the “Dashboard” in the MRD.

- 1.6 Case management should include the holding of conferences, directions hearings, alternative dispute resolution (“ADR”) of all kinds, including mediations (adjudicative or evaluative), conciliations, and like procedures. All of these should be done by Members, and not by Registry staff. The distinction between the work that the Registry *may* do, and the work that the Members *should* do, has become blurred. Conferencing, particularly in an administrative tribunal, can much more readily and fluidly evolve, and productively so, into a conciliation or a mediation, even an adjudicative mediation if agreed. The Members have made an affirmation or oath of office.⁴ The expectation of the community would be that a Member and not a Public Servant conduct every episode (event) of an applicant’s application.
- 1.7 Training is not enough to make a competent practitioner of ADR. An effective mediator needs to have the trust and confidence of the parties. An effective mediator engages in a process of gaining the confidence of the parties, gentle testing and coaching of parties in their cases, and needs to have a good knowledge of the applicable law and the relevant facts. It is wrong to think that a person who possesses merely training and formal qualification will for those reasons enjoy the confidence of the parties and possess the knowledge and versatility required to conduct ADR. The role of registry staff in conferencing should be restricted to conferences for the purpose of ensuring that the formal requirements of a valid application have been and are being met.

⁴ See s 10AB of the *AAT Act*.

Measure 5

All conferences (except as to purely formal matters of compliances) and forms of ADR should be done by Members, and not by Registry staff.

- 1.8 Much of the work of the AAT is difficult, factually and legally. Capacity to undertake forensic analysis and write reasoned judgments is essential. The better qualified, legally and otherwise, an appointee is, the more opportunity there will be for that appointee to sit in a number of Divisions and, therefore, to facilitate the amalgamation. Application of the 2015 Appointments Protocol to the Administrative Appeals Tribunal is desirable, with the qualification that the appointee must have the legal qualification and the capacity to which I have referred, and be appointed on merit. That Protocol at point 3 states:

“... for ... positions, the Attorney-General will seek expressions of interest by public advertisement. The Attorney-General’s Department (AGD) will establish a register to receive applications that address selection criteria developed specifically for the AAT.”

Measure 6

All further appointments, re-appointments or renewals of appointment to the Membership of the AAT should be of lawyers, admitted or qualified for admission to a Supreme Court of a State or Territory or the High Court of Australia, and on the basis of merit (a possible exception is appointment to the Taxation and Commercial Division to which competent accountants might be appointed). This may happen without repeal of s 7(3)(b) of the *AAT Act*, although repeal is, for certainty, desirable.

- 1.9 Subject to s 17F of the *AAT Act*, henceforth all appointees (Members) to the AAT should be appointed to and available to sit in all or any Divisions of the AAT as directed by the President from time to time. Before making appointments, the Minister would be free to make such consultations as the Minister sees fit. If the Minister were not to delegate the power of assignment to the President pursuant to s 10A of the *AAT Act*, the consultation required by ss 17C to 17J should take place in

a timely way so that the Member appointed can take up his or her duties immediately upon appointment to the AAT.

Measure 7

Amendments to the arrangements for the assignment of Members to the Divisions, according to workload, is desirable. At present, some Divisions are not nearly as busy as others. The MRD and the Social Security and Child Support Division (“SSCSD”) are always hard pressed. Others have decisions outstanding for long times. The MRD also will become busier. Flexibility in the deployment of Members is desirable and likely to enhance harmonisation.

- 1.10 Each full-time Deputy President and full-time Senior Member of the AAT needs to be assisted by a “Clerk Assistant”. That is the title appropriate to the position and not the one presently, but not universally, of “Associate” used within the AAT. Inflation of job title should be avoided. “Member Support Officer” or “Associate” is an unnecessarily grand title for the mainly clerical job to be done and which should be done at the lowest reasonable cost to the public.

Measure 8

Each full-time Deputy President and full-time Senior Member of the AAT needs to be assisted by a “Clerk Assistant”. The term “Associate” that Members of the General and other Divisions tend to use for their assistants is an unnecessarily grand title for the largely clerical job to be done and which should be done at low cost to the public.

There should be appointed a further group of Clerk Assistants in each State Registry to provide a pool of Clerk Assistants available for assignment to full-time Members especially in, but not confined to the MRD, and part-time Members as sought and approved by the Vice President or Executive Member of the relevant State Registry after consultation with the President or the President’s delegate. These “non-assigned” Clerk Assistants should have the qualifications and be selected and engaged in the same way as assigned Clerk Assistants. The “non-assigned” Clerk Assistants will support the full-time Members and part-

time Members to whom they are assigned from time to time.

Measure 9

The Clerk Assistants should be:

- (a) engaged for two years at Level 4 of the Australian Public Service;
- (b) selected, after advertisement for applicants, by a selection panel consisting of the Federal Circuit Court judge referred to earlier, the President as Chair, if he or she wishes, a non-judicial Deputy Presidential Member, another Senior Member and a Registry Official nominated by the President;
- (c) answerable and reporting to the Member to whom he or she is assigned as Clerk Assistant, in the performance of his or her work of assisting and supporting that Member; and a person who has successfully completed no fewer than $\frac{3}{4}$ of the subjects required for a degree in law by a recognised Australian University.

- 1.11 Members may and should discuss in a collegiate way the legislation and decisions relevant to their work. There is no need for, and it is not appropriate that Registry staff, whether by preparing “templates” for decisions, or giving “legal advice” to Members, participate in making or writing, or assisting in writing, decisions by Members. The role of the Registry is to support the Members by obtaining and providing to the Members, all necessary resources to enable them to decide cases. Those resources should include a non-intrusive but responsive library, staffed by legal librarians, who collate and publish to the Members, on a regular basis, relevant legislation, decisions of Members and of the Courts. The expectation of the Community is, surely, that the whole of the decision making process is undertaken by the Members and not staff of the Public Service, however well-intentioned that staff may be. I have no doubt that the expectation of the community is that decisions of the AAT are truly and exclusively the work of Members.

Measure 10

The practice of seeking advice from staff by Members should be restricted to

requests for the provision of relevant material from the library. Any request by a Member, for the review of or advice on the drafting of decisions is not acceptable.

- 1.12 The Registry’s whole purpose should be reinforced in the minds of its staff, that it is to support the Members. Registry staff should be courteous and appropriately respectful to Members, especially during hearings or in the presence of applicants and other parties to matters in the AAT. Members, too, need to be courteous and respectful to the Registry.

Measure 11

The new Federal Circuit Court judge (Senior Case Manager) should be able to take all such measures as are appropriate to instil in the staff of the Registry and the Members a practice of courtesy and reciprocal support.

- 1.13 Engagement of external contractors should be reduced. A deal of the work done by external contractors in the last three years is properly the work of Registry staff. I have learnt that, even by the time of my discussion with the Registrar on the 13th of November 2018, the AAT had engaged a further external consultant at an unstated cost. This engagement is, to say the least, premature, and I think entirely unnecessary, being undertaken, as it is, before even the Parliament and the Attorney-General have considered and decided which, if any of the measures I suggest, might be adopted. Routine work of the Registry is not a “project”. Nor in general does the Registry require logos or designations of a “programme” or “project”, even if one were to assume that either is something more than the performance of the Registry’s ordinary functions. Unnecessary time and money should not be spent on travel, meetings and discussions between Registry staff, for example, in furtherance of the “Registry Transformation Program” initiated at a time when this review was imminent or undertaken. There are five people in the Registry who are Senior Executive Staff in the Public Service. Their profession is administration. It is for them not external consultants to administer the AAT and its amalgamation.

Measure 12

The AAT should not engage external consultants to do or assist it to do administration. Notwithstanding the Registrar's statutory power to enter into contracts and the delegation to the Registrar of authority to expend money, as a general practice, external consultants should not be engaged to do administrative work without prior consultation with and approval of the Attorney-General.

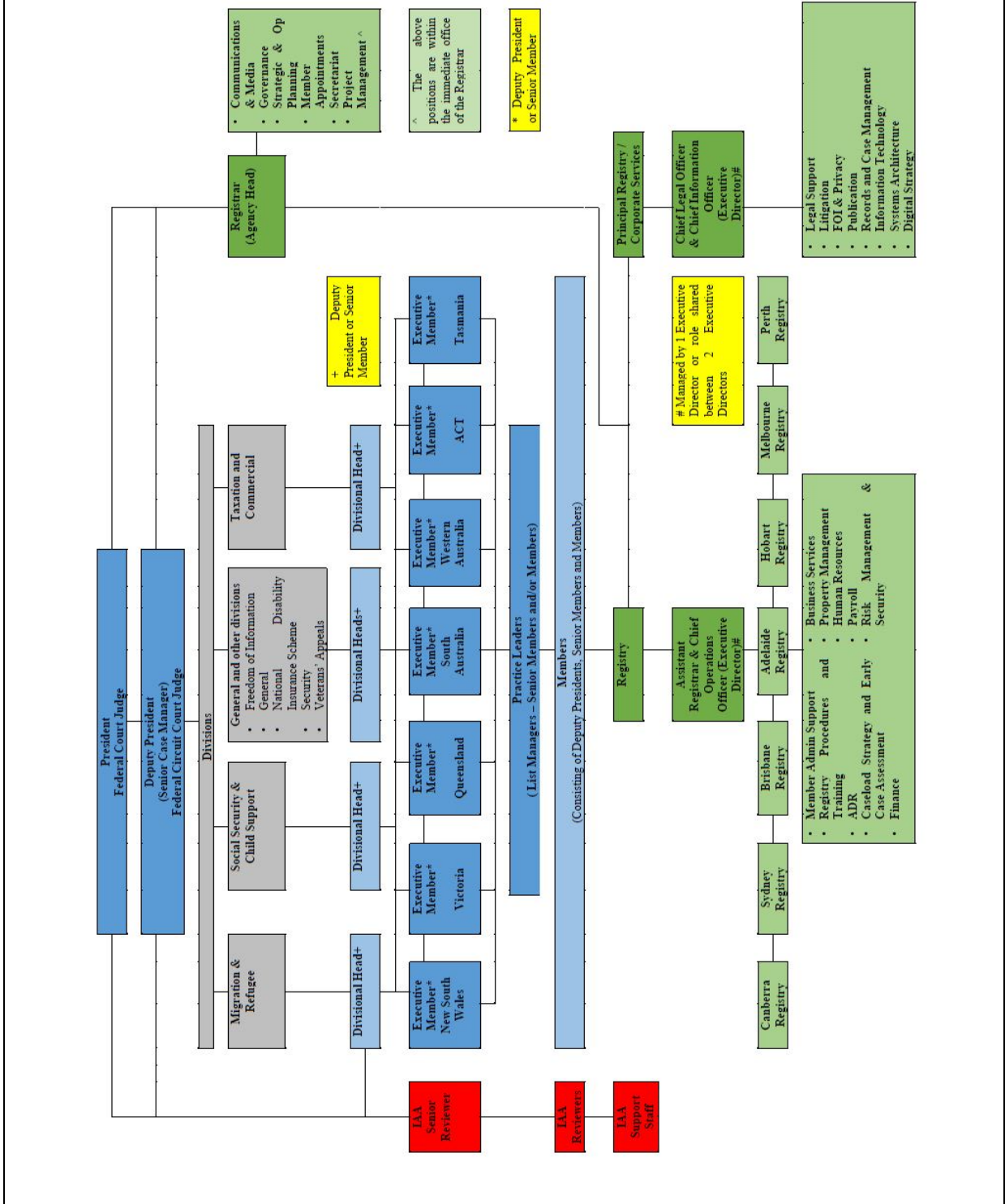
- 1.14 The Second Review by the General Division of the decisions of the SSCSD should be removed. The provision of a Second Tier of review comes at an expense of time and money. It is discordant with the opportunities for review of decisions in other Divisions. Its existence is a legacy of the absorption of the Social Security Appeals Tribunal ("SSAT") by the AAT. The existence of a second review may discourage careful attention to the making of decisions within the Department and in the First Tier of the AAT. In suggesting this measure, I have taken into account the Department's as well as other submissions to the contrary, and relevant statistics.

Measure 13

The Second Tier of review by the General Division of the SSCSD should be removed.

- 1.15 Elements of the support staff of the AAT appear to be unnecessarily and expensively numerous. The Registry should be restructured. That restructure should occur generally in accordance with the organisation chart below to enable redeployment and a reduction of staff to occur, as appropriate, in an orderly manner. External consultants need not be engaged to do this. It would best be done by a small standing committee consisting of the President, the Federal Circuit Court Judge/Senior Case Manager, the Registrar, and such other officials as the President may nominate from time to time.

Measure 14



^ The above positions are within the immediate office of the Registrar

* Deputy President of Senior Member

- 1.16 The role of the Executive Deputy Presidents, presently Deputy Presidents assigned by the President to manage the state registries, provides the necessary local focus and point of contact between the President and Division Heads with respect to the conduct of AAT business in each state. There are, however, substantial variations between the registries as to numbers of Members, their levels of appointment, the proportion of full-time and part-time Members, and caseloads.

Measure 15

The role of the Executive Member (State Manager) appointed by the President should be retained, but not restricted to Deputy Presidents, and could possibly be filled by a Senior Member in the smaller State registries, with non-judicial Deputy Presidents appointed in the larger registries of Sydney, Melbourne and possibly Brisbane.

- 1.17 The appointment of Division Heads and Deputy Division Heads should be by the President by way of delegation from the Minister or amendment to the *AAT Act*. Equally dependent upon the volume of applications and complexity of the matters within a Division the role of Division Head should not be restricted to non-judicial Deputy Presidents. Equally the appointment of a non-judicial Deputy President or Senior Member as a Division Head by the President should be a term as determined by the President from time to time.

Measure 16

The appointment of all future Division Heads and Deputy Division Heads as such should be made by the President, by way of a delegation of the Minister's powers by instrument (s 10A of the *AAT Act*) or amendment to the *AAT Act*. These roles could be filled by a Deputy President or Senior Member dependent upon the volume of applications and complexity of matters within the respective Division. The term of any such appointment would be at the discretion of the President.

- 1.18 As noted in this Report, hearing rooms tend to be allocated to respective Divisions within the AAT throughout the Registries. The larger more formal rooms have

generally been retained for the exclusive use of the General and Other Divisions and not available for use by Members hearing applications in the SSCSD or MRD, even when the matter may involve multiple parties, witnesses or a large volume of material.

Measure 17

Hearing rooms should not be assigned to Divisions but rather be available to all Divisions dependent upon the nature of the hearing and the need for a specific size of hearing room.

- 1.19 A strong case has been made for measured limitations upon the often changing material upon which an applicant to the MRD may presently rely. Why this is so is explained in more detail elsewhere in this Report. I was told by several Members of the MRD that during delays in hearings not a small number of applicants contrived situations to support a favourable decision, or ground for appeal to the courts. In *Shiv Migration Agents Registration Authority*,⁵ the High Court said at [99]:

“Once it is accepted that the Tribunal is not confined to the record before the primary decision-maker, it follows that, unless there is some statutory basis for confining that further material to such as would bear upon circumstances as they existed at the time of the initial decision, the material before the Tribunal will include information about conduct and events that occurred after the decision under review. If there is any such statutory limitation, it would be found in the legislation which empowered the primary decision-maker to act; there is nothing in the AAT Act which would provide such a limitation.”

Measure 18

Consideration should be given to legislation for a new information rule conferring a wide discretion upon the AAT to receive or refuse evidence not before the original decision-maker.

⁵ (2008) 235 CLR 286.

- 1.20 Presently the manner and form in which documents are received by the AAT varies between the Divisions. The MRD is conducting a trial of electronic lodgement of documents with the Department of Home Affairs (“DHA”). Only files for matters within the jurisdiction of the General Division, however, are regularly prepared properly and in accordance with s 37 of the *AAT Act*. All files should be in conformity with the section, complete, paginated, and in chronological order when they reach the AAT.

Measure 19

All files and documents provided to the AAT should be prepared and organised by the respective Departments generally in accordance with s 37 of the *AAT Act*.

- 1.21 The next measure is self-explanatory.

Measure 20

The power of the AAT to remit matters as provided in s 42D (Power to remit matters to decision-maker for further consideration) should be conferred upon all Divisions. This measure could be achieved by amendment to s 42D by way of, for example: amend sub-s (1) by removing “other than a proceeding in the Social Services and Child Support Division”.

- 1.22 The *AAT Act* by s 43C “purports” to limit appeals in relation to certain migration decisions that the *Migration Act 1958* (Cth) (“*Migration Act*”) describe as being a privative clause or purported privative clause decision and an AAT migration decision. It serves no practical purpose.

Measure 21

Repeal s 43C of the *AAT Act*.

- 1.23 I have explained the need for the following measure in the chapters concerning Migration and the MRD. In doing that, I have not disregarded the strongly argued support of DHA (and others) for the retention of the Codes of Procedure.

Measure 22

Repeal the “Codes of Procedure”, an aspirationally exhaustive statement of natural justice, now legislated by the *Migration Act 1958* (Cth) (“***Migration Act***”) in various places in terms generally similar.

- 1.24 The identification of a discrete *question* of law can be problematic. Fact and law are sometimes inextricably mixed. For clarity, appeals should be for errors of law rather than on a question of law.

Measure 23

Amend s 44 of the *AAT Act* to provide for appeals from decisions of the AAT, for error of law in lieu of a question of law.

- 1.25 Migration interest groups have criticised the Immigration Assessment Authority (“**IAA**”) and its processes. My inquiries however, have satisfied me that it is an effective and fair decision-maker in the cases with which it deals. It is an appropriate forum for expedition and fair disposition of cases involving similar and relatively simple facts. It is also an appropriate kind of forum to deal with “surges” of cases of these kinds.

Measure 24

The IAA should be retained and utilised as may be appropriate for time to time.

- 1.26 The AAT’s review of small business taxation decisions was the subject of discussions and correspondence with the Commissioner and Second Commissioner of Taxation. There was agreement that there would be utility in the creation of a decision-maker to review, in a relatively informal process, the disputes of taxpayers with the ATO.

Measure 25

A taxpayer in dispute with the ATO, where the amount in dispute is not more

than \$100,000 for any one year, or the turnover of the business is not more than \$5,000,000 per annum, may, unless the ATO satisfies the AAT that the amount, novelty, or complexity of the dispute or the likely duration of a conference to resolve it, make it inappropriate for the matter to be so determined, by the AAT, elect to have the dispute determined in an informal but adjudicated conference, or other agreed informal adjudicative process, without prejudice to the taxpayer's rights of appeal for error of law. The Member making the decision may make it in brief form but must make it in writing. All Members of all levels in the Division should be available to conduct conferences as required.

- 1.27 It was the view of many of those consulted that the decision in 2015 of the Commonwealth,⁶ effectively, to terminate the operation of the former Administrative Review Council (“**ARC**”) and, instead, transfer its functions to the Attorney-General’s Department (“**AGD**”), was an imprudent one. There is, in my view, doubt whether “a transfer” is legally possible without legislation. Part V of the *AAT Act* sets out provisions for the composition (s 49) and appointment of members (s 50), its functions (s 51) and meetings (s 56). The *AAT Act* clearly assumes the existence of the ARC. It is the duty of the Executive under s 61 of the Constitution to execute and maintain the laws of the Commonwealth. Whether a “transfer” of the functions and powers conferred on the ARC by s 51 of the *AAT Act* is legally possible or not, it is in my view contrary to the intention and spirit of that Act that any section of any department of government might have a role of overseeing or inquiring into the work of the AAT, that is the reviewer of decisions made by officials of many other departments of government. At the first meeting of the ARC on the 15th of December 1976, the Attorney-General, then Mr Robert Ellicott QC, said that the role of the ARC was “... *to ensure that our system of administrative review is as effective and significant in its protection of the citizen as it can be*”.⁷ The work done by the ARC in the preceding 40 years was useful. There is, in my opinion, a present need for its reinstatement to ensure the implementation of such measures as the Executive and the Parliament may adopt for reform of the

⁶ See the statement of the Minister for Finance, “Smaller Government – Transforming The Public Sector”, published on 11 May 2015, announcing the abolition of the ARC.

⁷ See the ARC Website accessed 30 November 2018: <https://www.arc.ag.gov.au/Pages/default.aspx>.

AAT in furtherance of the *TA Act*. The Attorney-General may find it useful to advise the Governor-General to appoint a person, pursuant to s 52(2) of the *AAT Act*, as a member of the ARC to oversee the implementation of the measures suggested in this Report.

Measure 26

The ARC should be reinstated and constituted in accordance with Part V of the *AAT Act*.

1.28 Its effect is that public servants (in the AGD) would have the role of overseeing the AAT, whose purpose and role is to review the decisions of public servants.

1.29 It is not for the Members of the MRD who are hearing an application to act as a contradictor of the applicant. Rather, the AAT is to act inquisitorially, not adversarially.⁸ In discussions with both Members and practitioners, I found strong support for the establishment of a position of a Counsel Assisting in the MRD, who as a qualified and experienced lawyer, could appear as an advocate, as required, in the public interest. I do not think that a Counsel Assisting would be required in every case. The presence in different and complex cases of such a counsel would relieve the Member of the onerous duties that the Members now have and assist unrepresented applicants. Counsel would not be there as a contradictor but as a vigilant lawyer whose presence and purpose would be of value to both parties as well as the Member. (If a tier of review in the SSCSD is removed it may be useful to have Council Assisting in that Division also as required.)

Measure 27

A pool of experienced lawyers should be appointed to act as Counsel Assisting in the MRD (and possibly also the SSCSD).

1.30 I have drawn attention to the serious delays in the Veterans' Appeals Division.

⁸ See *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 164 [40] and 165-166 [47] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

Measure 28

Appoint new Members or assign other Members to decide cases in the Veterans' Appeals Division.

- 1.31 It is anomalous that the only migration matters which are not heard within the MRD are those in relation to cancellations of visas or refusals of applications for citizenship on character grounds. If appointees to the Membership of the AAT were appointed to sit in all Divisions, as I suggest, the anomaly would, in time, effectively disappear. It is quite obvious that the MRD is the repository of experience and knowledge in migration matters. A reason why these matters are directed to the General Division seems to be that the Department may have a contradictor in that Division. Logic would, therefore, have all migration matters, including those to which I have just referred, dealt with by the MRD, where there should be a counsel assisting available, as required, and, in particular, in these matters. Despite a perception on the part of some, the General Division is not superior to other Divisions and does not, in my view, have any better ability to deal with any particular matters.

Measure 29

Consideration should be given to the routing of applications in all migration matters to the MRD. As I have said, Counsel Assisting should be available there and would perform a function in character matters of impartially assisting the Member in the fair resolution of matters according to law.

- 1.32 ADR and case conferencing have proved useful within the AAT and have provided a forum to explain to applicants the requirements and material that they require for their applications and whether the material is sufficient to support an application. Presently this process is not available in all Divisions. Either with the consent of the applicant and the department or by Direction of the AAT it should be available across all Divisions of the AAT. The AAT has previously requested that pre-hearing conferences be available in the MRD and SSCSD as recommended in the

Measure 30

Amendment to the *AAT Act* to enable access to ADR, case conferencing, conciliation and pre-hearing conferences, either by consent of the applicant and the Department or by direction of the AAT, across all Divisions of the AAT.

- 1.33 There are three separate models for the funding of the AAT: one that applied before the amalgamation of the AAT as it was then, and one that applied to each of the former MRT, RRT and the former SSAT.
- 1.34 The pre-amalgamation funding of the AAT which now applies to the General and other Divisions (six Divisions) is effectively a “flat” model that is demand driven and based on a pre-determined annual appropriation calculated on expected numbers of applications recoverable in these Divisions. It does not provide for adjustment, either by way of increase or decrease to meet actual changes of numbers within the period of the budget.
- 1.35 The funding model of the SSCSD is the model inherited from the former SSAT. It is for an annual appropriation calculated by reference to historical caseload information. The model does however allow for adjustment for changes in Policy. Because the model is not a demand-driven model no adjustments can generally be made during an appropriation period. The MRD is the Division that is most in need of further funding. It is now funded by a demand-driven model inherited from the former MRT-IRT that varied from year to year depending on the number of applications finalised. There is an appropriation which has a “baseline” of 18,000 applications. Of the 40,040 applications finalised by the AAT in the 2017-2018 reporting period 17,960 were by the MRD. A further 37,933 applications were filed during this most recent reporting period of 30 June 2018 leaving 44,436 applications on hand to be reviewed. Adjustments are made at a fixed cost per review for matters

⁹ Andrew Metcalfe AO, *Final Report of the Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal* of July 2017 (“**Metcalfe Report**”), at recommendations E2 and E3 of the report.

finalised in excess of the baseline appropriation of 18,000. The first 2000 finalisations above or below the baseline are “valued” at \$2,137 per review, and \$3,036 per review for finalisations over the first 2000 matters above or below the baseline. There is a real and pressing need for further Members and resources in this Division. Whilst there is such a deficit in it, reviews to be made will multiply, deserving applicants will continue to live in uncertainty, and dishonest or ineligible applicants will be able to remain within the country.

Measure 31

Funding of the MRD needs to be changed. A new model for that should be agreed between the relevant Departments and the AAT.

- 1.36 The AAT wrote to the Attorney-General, Senator the Honourable George Brandis QC on 22 December 2017 seeking that priority be given to the implementation of a series of recommendations arising from the Metcalfe Report. Of these requested “Priority recommendations”, the AAT sought the full implementation of recommendations:¹⁰

“Powers to hold directions hearings, make directions, dismiss applications for failure to comply with a direction and reinstate applications should be made available in the Migration and Refugee Division (MRD).”

Measure 32

Power to hold directions hearing, make directions, dismiss applications for failure to comply with a direction and reinstate applications should be made available in the Migration and Refugee Division (MRD).

Measure 33

¹⁰ Recommendations of the Metcalfe Report.

A standardised power for the AAT to compel persons to give the AAT information or evidence by issuing a notice or summons should be introduced. Sanction for non-compliance with the notice or summons should also be available.

Measure 34

The power to make oral decisions should be extended to decisions to vary or set aside a Centrelink decision in the SSCSD.

- 1.37 The AAT in July 2016 formulated a document, “Further Potential Legislative Amendments”, which included the following measures with which I agree. The first proposal relates to s 33(1AB) of the *AAT Act*, which provides that a party to a proceeding before the AAT, and any person representing such a person, must use his or her best endeavours to assist the Tribunal to fulfil the objective in s 2A. Thus, parties and their representatives must act in a way that assists the Tribunal to meet its obligations under the Act. Section 24Z of the *AAT Act* however provides that s 33 does not apply to the Migration and Refugee Division. As such those appearing as applicants or their representatives do not have a duty as in the other divisions to assist the Tribunal.

Measure 35

Legislative change should be made to apply s 33 of the *AAT Act* to applications in the MRD.

- 1.38 Section 43AA of the *AAT Act* allows the AAT to correct obvious errors in the text of a decision or written statement of reasons for the decision, including, obvious clerical or typographical errors, or inconsistencies between the decision and statement of reasons. However, by virtue of the current wording of s 24Z of the *AAT Act* these provisions for correction do not apply to the MRD. Amendment as proposed would not be inconsistent with the ss 368(2A) and 430(2A) of the *Migration Act* as those provisions provide that the AAT has no power to vary or revoke a decision after the day and time the written statement setting out the

Tribunal's decision and reasons is made. Extending s 43AA of the *AAT Act* to apply to the MRD would not be inconsistent with the *Migration Act* as the corrections would not be a change to the substantive decision that has been made.

Measure 36

Amend s 24Z of the *AAT Act* so that s 43AA will apply to the MRD.

- 1.39 The AAT has also pointed out that s 33A(1) provides that the AAT may allow or require a person to participate in an ADR process, directions hearing or hearing by telephone or by means of other electronic communications equipment. Section 33A(2) provides that this is not permitted in proceedings to which s 39A of the *AAT Act* applies; that is, applications relating to adverse or qualified security assessments made by ASIO. The prohibition on allowing a party to participate by telephone or other electronic means currently applies regardless of the type of case "event" to be held and what will be discussed. As such, it therefore includes directions hearings dealing with only procedural matters. The AAT has been informed that the Director-General of Security and his representatives that they have no concerns about participating in directions hearings by telephone when the hearings do not involve discussions of the substantive material in the application. The AAT has proposed that s 33A(2) of the *AAT Act* be repealed. Whether a party or other person, including a witness, would be allowed or required to participate in a hearing by telephone or other electronic means could be then be decided on a case-by-case basis in consultation with the parties. Security considerations would always be paramount.

Measure 37

Repeal s 33A(2) of the *AAT Act* or amend to permit directions hearings of a procedural nature and not touching the substantive material in the application to be conducted by telephone or other electronic means.

- 1.40 As discussed in my Report, a number of Members and other well-informed persons whom I consulted said there were many instances in which applicants (including

many on bridging visas) contrived or deliberately altered their circumstances in Australia for the principal purpose of renewing their visas or establishing a new pathway to a different visa. Whether provisions should be made to disqualify applicants from having automatic access to bridging visas or otherwise deriving rights of residence by these practices is a matter of policy about which it is not for me to make recommendations. Given that s 33A of the *AAT Act* provides for the participation in hearing by telephone, consideration might however be given to discontinuing an automatic entitlement to bridging visas in relatively simple and straightforward applications such as student visa applications. Hearings of these could be conducted by telephone.

1.41 I have made various suggestions in relation to some matters in the body of the report of less consequence than those I have set out above. In due course, consideration might be given to them also.

1.42 Having regard to all of the materials I have read and the discussions I have had, I would respond to the Terms of Reference as follows:

1. The objectives of the *TA Act* have not yet been achieved.
2. The AAT is not operating as a truly amalgamated body; some separation is dictated by differing legislated regimes. To some extent separation is appropriate.
3. Opinions about decisions often depend upon the philosophy or perspectives of people considering them. There is reason to believe that the AAT is genuinely attempting to promote public trust and confidence:
 - (a) the AAT is, for the various reasons that I have stated, not always meeting community expectations; and
 - (b) in some respects, differing legislation, practice directions, ministerial directions, guidelines and policies of the AAT do not interact efficiently or effectively.

4. Workloads and backlogs in the AAT are preventing timely and final resolution of matters.
5. The AAT's operations and efficiency can be improved through further legislative amendments or non-legislative changes. I have suggested some measures for those.
6. Funding arrangements for the operations of the AAT are neither appropriate nor consistent across Divisions.

* * * * *

CHAPTER 2 – INTRODUCTION

2.1 The *AAT Act* came into force on the 1st of July 1976. That Act has been amended, and the scope of the activities and “jurisdiction” of the AAT that it created has been enlarged from time to time. The genesis and history of the AAT need to be considered for a proper understanding and review of the current structure and roles of the AAT. These are the subjects of later chapters in this Report.

2.2 In 2015, the *TA Act* was enacted. Section 4 of that Act provided as follows:

“4 *Review of operation of amendments*

(1) *The Minister must cause a review of the operation of the amendments made by this Act to be undertaken as soon as practicable after the end of the period of 3 years after the commencement of Schedule 1.*

(2) *The review must consider:*

(a) *the effect of the amendments made by this Act; and*

(b) *any other related matter that the Minister specifies.*

(3) *The person who undertakes the review must give the Minister a written report of the review within 6 months after the end of the 3-year period.*

(4) *The Minister must cause a copy of the report of the review to be tabled in each House of the Parliament within 15 sitting days of receiving it.”*

2.3 In July 2018, I was asked by the Attorney-General, the Hon. Christian Porter MP, to undertake the Review for which s 4 of the *TA Act* provided.

2.4 The Terms of Reference are as follows:

1. Whether the objectives of the *TA Act* have been achieved;
2. The extent to which the AAT operates as a truly amalgamated body, and whether any existing levels of separation are necessary and appropriate;
3. Whether the AAT is meeting the statutory objectives contained in s 2A of the *AAT Act*, with particular regard to:
 - (a) The objective to promote public trust and confidence in the decision-making of the AAT, including:
 - (i) The extent to which decisions of the AAT meet community expectations; and
 - (ii) The effectiveness of the interaction and application of legislation, Practice directions, Ministerial Directions, guides, guidelines and policies of the AAT.
4. The degree to which legislation, processes, grounds, scope, and levels of review in, and from, the AAT promote timely and final resolution of matters;
5. Whether the AAT's operations and efficiency can be improved through further legislative amendments or through non-legislative changes; and
6. Whether the arrangements for funding the operations of the AAT are appropriate, including ensuring consistent funding models across divisions.

2.5 A short time after I was engaged by the Attorney-General, three Counsel Assisting were appointed to assist me in my task: Messrs David James, Richard Douglas and Graham Connolly, whose chambers were in Queensland, Western Australia, and New South Wales, respectively. All of these Counsel Assisting, the second named for a week or so only until he was obliged to undertake other unforeseen obligations, have made very useful contributions to this Review. I also express my thanks to Mr Cameron Gifford, Mr Imran Church, Mr Matthew Williams and Ms Julie Ticehurst,

Officials of the AGD, for their prompt responses to inquiries for information and other material from time to time.

2.6 Initially, I was asked to provide my Report by the 31st of October 2018. It soon became apparent that, despite Counsel Assisting and my best efforts, it would not be possible to do that. There were numerous officials, Members of the AAT, judges and others to whom I needed to speak and be informed. Some whom I thought it necessary to interview were not immediately available because of longstanding commitments that they had made. These included the Chief Judge of the Federal Circuit Court, the Hon. William Alstergren, current Members of the AAT, and the Hon. Justice Duncan Kerr Chev LH, the former President of the AAT at the time of the enactment of the *TA Act*, and accordingly the person first responsible for its implementation. There were a number of people who wished to make submissions relevant to the Terms of Reference who were unable to do so within a period which would enable me to give them the consideration that they deserve. The AAT has been the subject of a deal of academic and judicial commentary since it was established. The case law relating to the AAT in both the Federal Court and the High Court is very extensive. There has also come into existence much informed writing on Administrative Law and the relationship between ministers, officials, executive decision making, and the courts. Jurisdiction to review decisions made by officials of the Commonwealth is now conferred on the AAT by more than 450 enactments. Several of these require close study. As soon as I started my work, I became aware that, far and away, the heaviest burden upon the AAT was the review of decisions made under the *Migration Act 1958* (Cth) ("***Migration Act***"). It also became apparent that the operation of the *National Disability Insurance Scheme Act 2013* (Cth) ("***NDIS Act***"), enacted only five years ago, has generated a large and growing number of reviewable decisions. So too, there are many applications for review of decisions made under the *Income Tax Assessment Act 1936* (Cth), the *Tax Administration Act 1953* (Cth), and the *Income Tax Assessment Act 1997* (Cth), as well as the relevant social security and health insurance laws, which are, in each case, highly complex and large pieces of legislation. These are some only of the matters and legislation relevant to the Terms of Reference which needed to be considered.

- 2.7 In the event, the time for the provision of my Report to the Attorney-General was extended beyond the 31st of October 2018.
- 2.8 Section 4(2)(a) of the *TA Act* effectively requires me to review the operation of the *TA Act*. The Terms of Reference necessarily require me to have regard to wide considerations: of public trust and confidence in the decision making of the AAT, community expectations, and the effectiveness of the interaction and application of legislation, practice directions, ministerial directions, guidelines and policies of the AAT. I have found it necessary to look closely to the history of the AAT and its operation since its establishment in 1976. As will appear, it is a diverse and much larger organisation now than it was in the beginning. I have had to look at the accretion of other tribunals and bodies to the AAT, their different practices and legislation applicable to them. I have also found it necessary to pay close attention to migration and the MRD of the AAT. I do not think that I have disproportionately done so because more than 50% of all of the applications to the AAT fall to be decided by that Division. The history of migration in this country itself is relevant. It is the subject of strongly held opinions throughout the community. It has always been, and is a very controversial topic.
- 2.9 The activities of the AAT, the amalgamation, and all the other matters, raised by the Terms of Reference, together constitute an extensive body of material for consideration.

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CHAPTER 3 – PROCESS

- 3.1 In outline in this chapter is the process that I have followed in conducting the Review.
- 3.2 First, I reviewed the *AAT Act*, the *TA Act* and other legislation, especially that which generates most of, and the more complex, cases for review by the AAT.
- 3.3 At the same time, I requested officials of the Attorney-General's Department to prepare an advertisement of the Review, its Terms of Reference, and an invitation for persons at large to make submissions to me by the 24th of August 2018. The Department did that in consultation with me. The advertisement was published in the *The Australian* and the *Australian Financial Review* on the 3rd of August 2018, and the *Weekend Australian* on the 4th of August 2018 respectively.
- 3.4 I contacted and had an early preliminary conference with the President of the AAT, the Hon. Justice David Thomas. Since then, I have had regular consultations with his Honour who has facilitated access to materials and information that I needed to conduct the Review. Justice Thomas has also offered very helpful suggestions and information about the current operations of the AAT and possible reforms to them, and to the AAT generally, as has the Registrar, Ms Sian Leathem, to whom I express my gratitude. In my visits to the Brisbane and Sydney offices of the AAT, I have spoken directly to various officials, including Senior Executive Service (“SES”) Officers occupying four senior administrative offices of the AAT.
- 3.5 I thought it would be helpful to confer with the heads of those Departments whose decisions were subject to review by the AAT. I arranged for several consecutive conferences with them in Canberra so that I would not need to make multiple visits there. Accordingly, on the 6th, 7th, and 8th of August 2018, accompanied on occasions by two of my Counsel Assisting, and on others by one of them, I conferred with those heads of Departments. They included Ms Elizabeth Cosson AM CSC (Secretary of the Department of Veterans' Affairs (“DVA”), Ms Kerri Hartland (Secretary of Department of Jobs and Small Business), Ms Jennifer Taylor (CEO of Comcare), Ms Renée Leon PSM (Secretary of the Department of Human

Services (“DHS”)), and Mr Philip Gaetjens (Secretary of the Department of the Treasury). Usually they were accompanied by other senior officials during my conferences with them. Mr Michael Pezzullo, the Secretary of DHA, was not then in Canberra, so by arrangement I had discussions with him in Sydney on the evening of the 8th of August 2018 (after travelling there from Canberra with Counsel Assisting, Mr Connolly), about national security, migration and other matters for which his Department is responsible. On the 15th and 16th of August 2018, I also conferred with Mr Wayne Byrnes, the Chairman of APRA, and Mr Chris Jordan AO, the Commissioner of Taxation, with Messrs James, Douglas and Connolly. All of these people cooperated with me and have offered valuable insights into their Departments’ interactions with, and appraisals of the AAT.

3.6 Because, as a practical matter, the Federal Court tends to be the court of last resort for applicants to the AAT, I informed the Chief Justice of the Federal Court, the Hon. Chief Justice James Allsop AO, of the Review and of my wish to obtain any relevant views that he might have of the AAT. I was able to meet him and obtain his views in Brisbane on the 3rd of August 2018. Many applications have a terminus in the Federal Circuit Court also. On the 17th of October 2018 I met Judge Rolf Driver and Judge Justin Smith of the Federal Circuit Court, in Sydney, accompanied by Counsel Assisting. On various occasions, I have had discussions with former and current Members of the AAT and former and current judges of the Federal Court. Of the latter, I was much assisted by the reflections of the Hon. Justice Alan Robertson in Sydney on the 31st of August 2018, who, before his appointment to the Federal Court, had an extensive practice in Administrative as well as other fields of law.

3.7 A matter which requires further discussion is relevant here. Periods of appointment of Members vary. I spoke to a respected former Member of the AAT who had, understandably, been disappointed that his appointment had, without explanation, not been renewed. It was not about that however, that he contacted me and offered to make oral submissions to me on condition of confidentiality, but rather about the way in which practices and procedures of the AAT were developed. He was not the only former or current Member to speak to me on condition of anonymity. Conscientious Members of the AAT invest energy and their professional experience

and skill in the AAT. Often they have accepted appointment there not only in furtherance of their legal careers, but also in a spirit of public duty. They not unreasonably may be concerned that if they criticise aspects of the AAT, its jurisdiction or its composition, they may endanger legitimate hopes that they have of renewal of appointment. Some current Members who were critical of the Registry spoke anonymously to me because they were concerned that if identities were revealed, there would be reprisals in various ways, for example, less favourable allocation of workspace rooms, increased workload, unfair criticism of their work, or close surveillance even of the precise times at which they began or finished hearings. I have treated anonymous submissions and complaints with caution, giving weight only to those I thought were sufficiently objectively made, or were of such a consistency and credibility as to be persuasive.

- 3.8 Some current Members of the AAT who were unconcerned about being identified made relevant submissions to me, both orally and in writing.
- 3.9 I have consulted as widely as I could in the time available to me. I have been assisted in my review by discussions with, among others, more than 20 current and former Members of the AAT, all Division Heads, more than five current and former Federal Court judges, two current Federal Circuit Court judges, numerous practitioners in the AAT, the Registrar, other AAT staff members, and people generally interested in the AAT's work.
- 3.10 Some of the work to which I have referred could be done pending the receipt of written submissions pursuant to the advertisement inviting them. In all, before and after the advertised closing date for submissions, I received more than 40 written submissions. Those written submissions are contained in Volume 2 of this Report. They, together with all other submissions, open or anonymous, written or oral, and whether made within the advertised time or not, I have taken into consideration in writing this Report.
- 3.11 Matters of which I read or were informed, prompted correspondence, from time to time, between Counsel Assisting and me on the one hand, the Registrar, and various

other officials or former officials or Members on the other. Relevant correspondence of that kind is contained in Volume 3 of this Report.

- 3.12 From time to time, I also asked Counsel Assisting to undertake research and make inquiries for me, and to provide drafts on various topics pertinent to this review. This was done progressively. I also asked for and obtained suggestions as to further lines of inquiry, possible reforms and other relevant matters from Counsel Assisting. One such line of inquiry was as to the ways in which other common law jurisdictions deal with disputes between citizens and government, particularly in relation to migration matters.
- 3.13 The *AAT Act*, by s 48, makes provision for the establishment of the ARC. Since its commencement of operations in 1976, the ARC has reported upon the functioning of the AAT. I have read a number of those reports, and have had Counsel Assisting read and summarise others relevant to the Review. The former Taxation Boards of Review was absorbed into the AAT as a Division of it in 1986.¹¹ The Report of the ARC of the subsequent year noted that senior taxation officials and others had opposed that absorption.¹² It is sufficient to note at this point that the procedures under which decisions in relation to taxation are reviewed are inevitably quite different from those adopted, for example, in the review of decisions in the MRD and SSCSD.
- 3.14 On the 31st of August 2018, I conferred in Sydney with Executive Directors and senior staff of the AAT Registry consisting of Mr Chris Matthies, Ms Elizabeth Connolly, Ms Jacqueline Fredman, Ms Bernadette Ryan and Ms Sobet Haddad. As the Registrar of the AAT, Ms Sian Leathem, could not be available in Sydney then as she had other responsibilities in Perth, Counsel Assisting, Mr Douglas, met Ms Leathem there on that day. On the same day in Sydney, I had long conferences with Ms Jan Redfern, who is the Deputy President in charge of the MRD, and Mr Bernard McCabe, the Deputy President in charge of the Taxation and Commercial Division, with Counsel Assisting, Mr Connolly. On the 13th of September 2018, accompanied by Mr James I met Mr Jim Walsh, the Deputy President in charge of the SSCSD.

¹¹ See the *Taxation Boards of Review (Transfer of Jurisdiction) Act 1986* (Cth).

¹² Administrative Review Council, Report No. 29 (10 September 1987) at [87].

- 3.15 Assistance from the Registrar included provision of written material and the offering by her of views and suggestions in various discussions with her. The correspondence and materials provided are contained in Volume 3 of this Report and should be read as part of the Report.
- 3.16 On the 3rd of October 2018, I had a brief consultation with the Attorney-General in Brisbane, during which I informed him of the process that I was following and outlined the work that Counsel Assisting and I had done so far. I also ascertained his requirements with respect to the timing of the provision of my Report. I was conscious that the *TA Act* required me to make it to him before it was provided to Parliament, some 15 sitting days afterwards. On the 5th of October 2018 with Counsel Assisting I also had a brief consultation with the Minister for Home Affairs in Brisbane who informed me that I should form my own views on relevant matters notwithstanding views of the Department, if any, to the contrary.
- 3.17 Administrative law continues to evolve in common law and other jurisdictions. The Kerr Committee had regard to these in making their Report more than 40 years ago. Later in this Report, I briefly do the same in relation to current arrangements.
- 3.18 When I was satisfied that I had information and material to enable me to do so, I began to draft the Report, progressively testing as I did, the various tentative views that I was forming, and the views of others, with Counsel Assisting, judges current and former, Members, the President, and practitioners.

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CHAPTER 4 – LEGISLATIVE HISTORY

- 4.1 From the beginning of the 20th century, there was a growing consciousness in the common law world of the expansion of the power of the state.
- 4.2 In this country, as with others engaged in total war between 1914 and 1919, the state extended its authority into many areas, public, personal and private. In 1929, the Rt. Hon. Lord Hewart of Bury, Lord Chief Justice of England published his seminal work, *The New Despotism*. The Great Depression, the New Deal in the United States, and the qualified adoption of Keynesian inspired measures to ameliorate the worst aspects of the Depression in the United Kingdom and in Australia, hastened and increased state intervention, economic and other affairs. The Second World War marked the greatest expansion in Commonwealth power since Federation. National Security Regulations made under the Defence Power conferred on the Commonwealth by the Constitution, affecting almost every aspect of daily life, were made. Various forms of civil conscription were imposed. Some foods, clothing, petrol, rubber and other commodities were strictly rationed. The central government took advantage of its prior right to levy income tax to the extent that the States, which had formerly also done so, were practically precluded from collecting this most valuable form of revenue. Power, once exercised, tends to be reluctantly relinquished. The state, by now the “Big State”, was ominously becoming bigger still with an enormous capacity to affect the lives of its people. Not all of the powers which it exercised were, however, restrictive: much of what its exercisers sought to do was to improve the lives of people by making better provisions for pensions, housing, health, and many other associated benefits. Entitlements were created and expectations raised.
- 4.3 Circumstances such as these caused lawyers, politicians and administrators to give further thought to ways and means of ensuring that people were properly treated by administrators of the state, and that their decisions be opened to scrutiny and reversal.
- 4.4 In October 1968, the Attorney-General for the Commonwealth established an Administrative Review Committee constituted by the Hon. Justice J R Kerr CMG as

Chairman, the Hon. Justice A Mason CBE, Mr Ellicott Esq QC, and Prof. H Whitmore, to consider the jurisdiction to be given to a proposed Commonwealth superior court to review administrative decisions, the procedures for review, substantive grounds for review, and the desirability of legislation similar to the United Kingdom's *Tribunals and Inquiries Act 1958* (UK). The Report which this Committee made in August 1971 (“**Kerr Report**”) is, with respect, comprehensive, innovative, and compulsory reading for anyone interested in the origins and evolution of Administrative Law in this country. Some aspects only of the Report need be touched upon here. In paragraphs 30 to 41, the authors discussed the concept of *ultra vires*, and the limited reach and technicalities associated with the prerogative writs, including those for which s 75(v) of the Constitution makes provision. In addition to the technicalities, there were uncertainties whether a breach of the rules of natural justice could raise a question of law, and the inability of the courts, in some instances, to substitute a decision for the one under challenge, instead of simply directing that the matter be reconsidered by the original decision maker. The Committee summarised the problems in this way in paragraph 58 of its Report.

“It is generally accepted that this complex pattern of rules as to appropriate courts, principles and remedies is both unwieldy and unnecessary. The pattern is not fully understood by most lawyers; the lawman tends to find the technicalities not merely incomprehensible but quite absurd. A case can be lost or won on the basis of choice of remedy and the non-lawyer can never appreciate why this should be so. The basic fault of the entire structure is, however, that review cannot as a general rule, in the absence of special statutory provisions, be obtained ‘on the merits’ – and this is usually what the aggrieved citizen is seeking.”

- 4.5 Later, after discussing the *Boilermakers’ Case*,¹³ the Kerr Committee observed that the distinction between the judicial (Chapter III) functions and the administrative (Chapter II) functions of government were artificial.¹⁴ As prescient as the Committee was, it may be doubted that they foresaw the decisions of the High Court

¹³ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

¹⁴ Paragraph 62 of the Kerr Report.

in *R v Watson; Ex parte Armstrong*¹⁵ and *R v Federal Court of Australia; Ex parte WA National Football League*,¹⁶ which held that judges of the two other Chapter III courts to be soon established would be held to be “officers of the Commonwealth” amenable to prerogative writs issuable pursuant to s 75(v) of the Constitution in the original jurisdiction of the High Court.¹⁷

4.6 Elsewhere in this Report, I briefly consider some of the procedures for administrative review in other jurisdictions. The Commonwealth Administrative Review Committee reported in 1971 that it was looking at developments in other jurisdictions which then fell far short of what the Committee came to conclude should occur in this country. For example, what was occurring in the United Kingdom was an improvement in the supervision of numerous tribunals, established by legislation or ad hoc, which reviewed some, but by no means anything like the broad spectrum of administrative decisions made in that country. For example, reference was made to a [British] Immigration Appeals Tribunal to which an appeal could be brought from an adjudicator by a person excluded or deported from the country. In some instances, the decision of the Tribunal was advisory only, and in others binding. Much has changed in the United Kingdom since then.

4.7 France generally, prefers the inquisitorial system to an adversarial one.¹⁸ It has been accepted in common law systems that the oral process of cross-examination can be very effective in testing credibility and reliability. In Civil Law systems, the Magistrate or judge at first instance who conducts the “inquisition” has the assistance of trained investigators and can compel witnesses. I mention this here as Members who are appointed to the MRD of the AAT must not act as contradictors. The MRD Members are often confronted with competing versions and fabricated

¹⁵ (1976) 136 CLR 248.

¹⁶ (1979) 143 CLR 190.

¹⁷ The reasoning of the High Court excited a degree of surprise in many legal circles, having regard, for example, to s 64 of the Constitution and the strict separation of the judiciary and the executive for which the Australian Constitution provides: s 64 in terms refers to “*officers*”. Some thought that reference, together with the explicit references to judicial power in Chapter III, served to distinguish, indeed clearly differentiate, the two roles. Old cases in the United Kingdom and elsewhere in which prerogative relief had been granted against inferior courts were decided before general rights of appeal to superior courts became available, and in jurisdictions not governed by a Constitution of the Australian kind.

¹⁸ See Morris Ploscowe, ‘Development of Inquisitorial and Accusatorial Elements in French Procedure’ (1932) 23 *Journal of Criminal Law and Criminology* 372-394.

stories by applicants before them. The facts are often dense and complicated, and the relevant law complex. I discuss this further in this report.

- 4.8 Returning to the Kerr Report, I refer to paragraph 233, in which the Committee concluded that a general “Administrative Review Tribunal” needed to be established in preference to a proliferation, as occasion required, of specialised tribunals to cover all cases, accompanied by a supervisory council of tribunals. As events have turned out, it has not been found easy to establish a general and harmonised administrative review tribunal. So far as oversight was concerned, the Committee was attracted to the precedent of the United Kingdom Council on Tribunals, that is, to a supervisory body reporting to the Minister or the Parliament. They contemplated the creation also of a new Federal Court which would effectively be an intermediate court of appeal on questions of law, or error of law, on the part of the new Administrative Review Tribunal which they recommended.
- 4.9 The Committee considered the question which has never gone away, understandably because it is a question that is difficult to answer, of the extent to which policy should or should not be permitted to prevail over independent or neutral evaluation by a person or body detached from the makers of policy.
- 4.10 Frequent reference has been made in papers and discourse to the Kerr Report which I have so far been considering. It is surprising that despite those references, a copy of it is not readily obtainable. It is not accessible in many law libraries. In the event the Registrar was able to find and provide copies of both the Kerr and Bland reports. That Report should be published and stored more accessibly than it now is.
- 4.11 The Bland Committee, consisting of Sir Henry Bland CBE, Professor Harry Whitmore, Mr P H Bailey Esq OBE, and Mr Ernst Willheim Esq, undertook a further consideration of the need for a general court or tribunal for the review of executive decisions. In the event, the *AAT Act* was enacted in 1975 (“*Original Act*”),¹⁹ and came into force in 1976. By the *Original Act*, the AAT was established as consisting of a President and such number of Deputy Presidents and other Members as might be appointed by the Governor-General.

¹⁹ *Administrative Appeals Tribunal Act 1975* (Cth) (Act No. 91 of 1975 as made).

4.12 The ARC noted in 1987 that:

“Before the AAT came into being the legislation of the Commonwealth Parliament had established over the years a considerable number of review tribunals, each limited to a particular area of decision making. There were, for example, Taxation Boards of Review to conduct review on the merits in the taxation area, the Commonwealth Employees Compensation Tribunal to review compensation determinations and, in the repatriation area, War Pensions Entitlement Appeals Tribunals and Assessment Appeal Tribunals. These tribunals had not, however, developed in a coordinated fashion. A fundamental purpose of the creation of the AAT was to centralise the review functions being performed by these tribunals in a single body, with a view both to providing effective, independent and visible review of all appropriate decisions and to ensuring consistency of review standards across all jurisdictions.”²⁰

4.13 Part III of that *Original Act*, by s 19(1), divided the AAT into three Divisions: a General Administrative Division, a Medical Appeals Division, and a Valuation and Compensation Division, with provision for other Divisions as prescribed. Section 19(3) provided that the Governor-General, in the instrument of appointment of a non-Presidential Member, should assign the Member to a particular Division or Divisions, but might not, without the consent of the Member, vary the assignment. Participation in the exercise of the power of the AAT by a non-Presidential Member was, by s 19(4), confined to the Division or Divisions to which the Member was assigned. Section 25 provided that an enactment might provide that applications be made to the AAT for review of decisions made in the exercise of powers conferred by the enactment or another enactment.

4.14 I set out s 43(1) of the *Original Act* which effectively defined, and still defines in the current *AAT Act*, the jurisdiction of the AAT.

“43. (1) For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant

²⁰ Administrative Review Council, above n 12 at page 11.

enactment on the person who made the decision and shall make a decision in writing—

(a) affirming the decision under review;

(b) varying the decision under review; or

(c) setting aside the decision under review and—

(i) making a decision in substitution for the decision so set aside; or

(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.”

4.15 I also set out ss 44(1) and (5) which make provision for an appeal from the AAT to the former Australian Industrial Court on a question of law.

“44. (1) A party to a proceeding before the Tribunal may, in such manner and within such time as are prescribed, appeal to the Australian Industrial Court, on a question of law, from any decision of the Tribunal in that proceeding.

...

(5) Without limiting by implication the generality of sub-section (4), the orders that may be made by the Australian Industrial Court on an appeal include an order affirming or setting aside the decision of the Tribunal remitting the case to be heard and decided again, either with or without the hearing of further evidence, by the Tribunal in accordance with the directions of the Court.”

4.16 Sections 47 to 58 of the *Original Act* established an Administrative Review Council of the kind recommended by the Kerr Committee. Section 59 made the novel

provision for the giving of an advisory opinion by the AAT²¹ on matters or questions referred to in accordance with an enactment. This rather unusual, in Australian terms, provision also enabled the AAT in carrying out that function to inform itself in such manner as it might think appropriate.

4.17 Section 64(1) made provision for the establishment of:

“at least one Registry ... in each State, in the Australian Capital Territory and in the Northern Territory”.

4.18 I set out s 65 of the *Original Act*, because the current arrangements for the administration of the AAT are somewhat different and are the subject of further consideration later.

“65. (1) There shall be a Registrar of the Tribunal and such Deputy Registrars of the Tribunal and other officers of the Tribunal as are required.

(2) The Registrar, the Deputy Registrars and the other officers of the Tribunal shall be appointed by the Minister and shall have such duties, powers and functions as are provided by this Act and the regulations and such other duties and functions as the President directs.

(3) The Registrar, the Deputy Registrars and the other officers of the Tribunal shall be persons appointed or employed under the Public Service Act 1922-1975.

(4) Where the Registrar, a Deputy Registrar or another officer of the Tribunal is, or is expected to be, absent from duty, or the office of the Registrar, of a Deputy Registrar or of another officer of the Tribunal is vacant, the Minister may appoint a person appointed or employed under the Public Service Act 1922-1975 to act as the

²¹ Cf. the exercise of judicial power as held by the High Court not to extend to the giving of advisory opinions: *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

Registrar, as that Deputy Registrar or as that other officer of the Tribunal during the absence or until the filling of the vacancy, as the case may be.

- (5) *A person appointed to act as the Registrar, as a Deputy Registrar or as another officer of the Tribunal has all the powers and duties, and shall perform all the functions, conferred on the Registrar, the Deputy Registrar or the other officer of the Tribunal, as the case may be, and, for the purpose of the exercise of the powers or duties, or the performance of the functions, of the Registrar or of a Deputy Registrar, this Act has effect as if a reference to the Registrar or to a Deputy Registrar included a reference to a person acting as the Registrar or as a Deputy Registrar, as the case may be.”*

4.19 In an opening address to the AAT’s 20th Anniversary Conference on the 1st of July 1996, the first President of the AAT, and by then the Chief Justice of Australia, the Hon. Sir Gerard Brennan AC KBE, in nostalgic terms, described the beginning of the AAT. I quote from that address because of the contrast that it makes between the modest origins of the AAT, and its size and the pressures upon it now:

“It was a cold, crisp Canberra morning on Thursday 1 July 1976 when my wife and I walked down Northbourne Avenue and around London Circuit to the Wales building. The doors of the AAT were opened without ceremony. The bare space was interrupted by the occasional desk and power point. The AAT name was on the noticeboard downstairs but months would pass before anybody needed to find it. Ron Mills, prised away from the Attorney-General’s Department and his favoured Treasury, was on hand to command the Registry. So was Dianne Smith who, apart from her other talents, had a way with African violets, tea and cake. So we celebrated the opening of the Administrative Appeals Tribunal. I was escorted to my new chambers and met the efficient Delcia von Brandenstein whose presence was a tribute to her sense of adventure and to the sense of self-sacrifice of her previous boss, Frank Mahony, the Deputy Secretary of the Attorney-General’s Department.

There was enthusiasm within that Department for this new creature, the AAT. Sir Clarrie Harders, the redoubtable permanent head, decided to expose me at lunch at the Commonwealth Club to the inspection of Sir Frederick Wheeler of Treasury and Sir Alan Cooley of the Public Service Board. As one who came from practice at the Bar to a tribunal charged with the review of administrative decisions on the merits, I encountered a steep learning curve. I had barely stepped upon its lowest point when we lunched that day. Sir Frederick Wheeler asked me how the tribunal would review a decision of the kind he was then contemplating, namely, a recommendation to his Minister to make an ex gratia payment. I had no idea whether the tribunal had any jurisdiction in such a matter but I knew that the Act required a decision-maker to state his reasons. So I responded weakly that, if there were jurisdiction to review such a decision, he would have to state his reasons and we would look at them and do the best we could!

The incident provided a valuable lesson. It showed that the AAT was bound first to ascertain its own jurisdiction and then it had to acquire sufficient experience or wisdom to review usefully primary decisions made by experienced officers who had the strength of departmental culture and research behind them.”

- 4.20 Sir Gerard Brennan pointed out that the AAT had choices as to the way in which it would exercise its jurisdiction:

“The fact that the AAT straddled that divide meant that there were two models available for the AAT to follow. It could follow the administrative model and become, so to speak, a higher tier in the bureaucracy. Or it could follow the judicial model which would mark it as something standing outside the bureaucracy and beyond ministerial power to prescribe the policy it was to follow. It is no secret that the AAT followed the judicial method, nor that the period of my presidency was one in which that model was adhered to closely - perhaps too closely. At this time, on the 20th Anniversary of the AAT's foundation, we may reflect on whether the AAT has evolved in a way that,

irrespective of the model, practically answers the needs of the community and of government administration.”

4.21 Sir Gerard Brennan made the further point that judicial participation in the work of the AAT was intended for two reasons: to secure lawyers of judicial capability to contribute to the elucidation of legal principle; and, to assure the status, independence, and authority of the decision makers and their decisions. He noted that the ARC in its Report No. 39 had proposed that, save for the role of the President, legal qualifications should not be a prerequisite for appointment. He described it as a “startling recommendation”, a proposition with which I respectfully agree. Whatever validity a recommendation that legal qualifications were unnecessary, or should be regarded as not at least desirable, may once have had, it has little or none now for reasons which I will later state.

4.22 There are some other observations made by Sir Gerard Brennan in his speech that are also of relevance now. They are as follows:

“The AAT has been immensely successful, and it would be regrettable if its utility were prejudiced by the conferring of jurisdiction in areas that are not appropriate to external review. It would be equally regrettable if the resources of the AAT were insufficient to allow it to exercise the jurisdictions vested in it. Far better that jurisdictions be withdrawn than that the quality of AAT decision-making, and hence its authority, be compromised.

...

However, informality, when it comes to fact-finding, can be taken only so far or it will start to infringe upon the requirement of natural justice. It must be kept firmly in mind that the issue in an AAT appeal is inevitably one in which an applicant's interests are affected by the decision under review: that is the criterion of an entitlement to apply. If the decision is defended there is a conflict of interest and adversaries are, to that extent, created. If that cannot be avoided, the importance of the preliminary conference is obvious. A sense of grievance arises often from sheer misunderstanding and an opportunity for

explanation given in an impartial atmosphere is likely to remove a large proportion of the contest that would otherwise have to be determined. Preliminary conferences, unlike hearings, are not intended to have a normative effect on administration. They need only the moderating influence of a mediator who, whether legally qualified or not, is familiar with the field.

...

The growth of large volume jurisdiction has necessarily produced a bureaucracy of the AAT itself. I notice from the AAT Annual Report 1994-1995 a diagram of the large bureaucracy under the control of the Registrar. No doubt, having regard to the heavy caseload which the AAT now bears (as the statistics for that year demonstrate), a large bureaucracy spread throughout Australia is required. I hope that the need for this core of personnel and the inevitable closeness of their working relationship with the members, especially the permanent members, is not conducive to a cast of mind that subjects the independence of the members to the corporate memory or knowledge or advice of the AAT bureaucracy.”

- 4.23 I have quoted as much as I have from Sir Gerard Brennan’s speech because of its relevance to my task.
- 4.24 There is included in this Report a diagram of the large bureaucracy which now exists and is under the control of the Registrar. It shows that, unfortunately, Sir Gerard Brennan’s fears have come to be realised. Regrettably, the Registry staff are more numerous than they could and should be, and their relationship with the Members is unduly managerial, on occasions even overbearing, and not as conducive as it should be to the Members’ independence and efficiency in carrying out their hard duties. This is a topic which I discuss again in this Report.
- 4.25 The Registrar wrote to me on the 22nd of November of 2018 that the ratio of Members to staff compared favourably with those of the Federal Court and the Federal Circuit Court. I do not have the time to explore why that is so. It may be that courts’ operations require more staff to be engaged in administration. It might

also be that the ratios of staff to judges in those Courts too are more than they need to be. I do not know whether the numbers I have been given include temporary staff. They do not, in any event, take account, as I understand it, of the external consultants engaged from time to time to advise or undertake “projects”. I was told by each of a recently retired and a current judge of the Federal Court that there was too much bureaucracy attached to that Court.

- 4.26 In saying what I have, I do not disregard the challenge which the Registrar and her staff, as well as the President, have had, and will continue to have in amalgamating disparate tribunals in different locations consisting of approximately 300 full and part time Members. I do not doubt that the Registrar has worked conscientiously and diligently on the amalgamation and to try to resolve problems as they arise.
- 4.27 Section 65 of the *Original Act* was concerned with the office of the Registrar. It provided, unlike the current *AAT Act*, among other things, that the Registrar, the Deputy Registrars and the other officers of the AAT should be appointed by the Minister and have such duties, powers and functions as provided by the Act and the Regulations, and such other duties and functions as the President directed.
- 4.28 Not surprisingly, many amendments and additions have been made to the *Original Act*. I have been greatly assisted by the longest serving Member of the AAT, Deputy President Stephanie Forgie, who assembled for me the various amendments and summarised the effect of the most relevant of them. The assemblage includes Part IIIAA, which was inserted into the *AAT Act* in 1997 by the *Law and Justice Legislative Amendment Act 1997* (Cth). It created the Small Taxation Claims Tribunal. That Tribunal has ceased to exist. The Commissioner of Taxation, with whom I conferred, favours the creation of a new mechanism within the current AAT for the resolution of small taxation disputes. Part IIIAA of the *AAT Act* relating to the Small Taxation Claims Tribunal was repealed by the *TA Act*. The justification for the repeal in the explanatory memorandum was that the principal difference between that Tribunal and the AAT itself was that a lower application fee was charged in the former. As Ms Forgie pointed out to me, s 20(2) of the *Administrative Appeals Tribunals Regulation 2015* (Cth) maintained a fee differential when the amount in issue was less than \$5,000, or the reviewable

decision related to an application under s 340-5 of Schedule 1 to the *Taxation Administration Act 1953* (Cth), that is to say, an application to be released from some specified taxation liabilities.

- 4.29 I refer also to the observations made by the Administrative Review Council in its 1987 Report to the Attorney-General, then the Hon. Lionel Bowen MP:

“In concept the AAT is a general appeals tribunal capable of reviewing on their merits decisions taken under Commonwealth legislation by decision makers of almost any status...

Also fundamental to the creation of the AAT was the notion that discretionary powers under existing and new legislation should be examined to determine whether there should be provision for appeals to the AAT against decisions made in the exercise of those powers. Underlying this notion was the fact that, at the time the AAT was created, the availability of external review on the merits was patchy. There was, as a result, potential for some inequity in the system of government.”²²

- 4.30 A major change occurred in 1989 as a result of the enactment of the *Courts and Tribunals Administration Amendment Act 1989* (Cth). In his second reading speech,²³ the Hon. Lionel Bowen spoke of the government’s continued commitment to the financial and management independence of the Federal Court, the Family Court and the AAT. He added that the amending Act would ensure the independence of those Courts and the AAT from the AGD: it would give them the capacity to make decisions that would enhance their efficient and effective operation. The Courts and the AAT would have the capacity to operate independently of the public service and the government of the day within the resources provided by the Department. The legislation made it clear however that the President would be responsible for the management of “the administrative affairs of the Tribunal” and continued the distinction between the President’s role and the

²² Administrative Review Council, above n 12 at pages 11-12.

²³ Commonwealth of Australia, Parliamentary Debates, House of Representatives, 22 November 1989, at 2648 (Hon. Lionel Bowen MP, Attorney-General).

Registrar's. The role of Registrar was to assist the President. Henceforth the Registrar would be, however, appointed by the Governor-General "on the nomination of the President", and although the Registrar was empowered to act on behalf of the President in relation to administrative affairs, the Registrar was to be subject to direction by the President in the exercise of his or her powers under the *AAT Act*. Appointment as Registrar could be for a period of no longer than five years. He or she was to hold office on such terms and conditions (if any) in respect of matters as were not provided for by the legislation as determined by the President. A Registrar's appointment could only be terminated by the Governor-General for misbehaviour or physical or mental incapacity, bankruptcy, absence from duty, engagement in paid employment under certain circumstances, or failure to comply with a requirement of disclosure of a direct or indirect pecuniary interest. Section 24Q of the *Courts and Tribunals Administration Amendment Act 1989* (Cth) empowered the Registrar to "engage consultants ... by written agreement". Section 24L required the President to submit estimates to the Minister of receipts and expenditure.

- 4.31 Further important changes to the AAT were made by the enactment in 2005 of the *Administrative Appeals Tribunal Amendment Act 2005* (Cth). They had the effect of removing "[long term] tenure" for further appointments, of non-judicial Deputy Presidents to age 70, and of Senior Members to age 65. I set out some extracts from the second reading speech for that legislation:

"The powers of the president will be expanded to facilitate more effective case management. In particular, the president will have the power to issue directions in relation to the operation of the tribunal and the conduct of reviews. The bill also rationalises the provisions relating to the resolution of disagreements between the members of the tribunal hearing a particular matter, avoiding the costly and inefficient delays that, at present, occasionally result from such disagreements.

In keeping with the government's commitment to alternative dispute resolution as an inexpensive and effective way of resolving disputes between parties, the bill expands the range of alternative dispute resolution processes available to

the tribunal. New alternative dispute resolution processes will include: neutral evaluation, case appraisal and conciliation. The bill also provides the registrar with the capacity to engage appropriately qualified and experienced consultants to conduct alternative dispute resolution processes.

...

This will give the president greater flexibility in managing the tribunal's workload. To ensure that the tribunal is constituted by the most appropriate members in each proceeding, the bill requires the president to have regard to a range of factors when determining the constitution of the tribunal. These factors include:

the degree of public importance or complexity of the matters to which the proceeding relates;

the status of the person who made the decision that is to be reviewed; and

the degree to which it is desirable for the members constituting the tribunal to have special knowledge, expertise or experience in relation to the matters to which the proceeding relates.

...

The bill contains amendments to allow the president to authorise ordinary members to exercise powers currently only conferred on presidential and/or senior members. These powers will include granting applications for an extension of time before a hearing has commenced and giving a party leave to inspect documents produced under summons. These reforms will give the tribunal greater flexibility in the allocation of resources and allow for tailored management of particular matters. It is expected that some matters will be heard more expeditiously than is possible under existing arrangements as a result of these reforms.

...

The bill introduces an amendment requiring the consent of the president before a question of law may be referred to the Federal Court. I wish to stress at the outset that no existing appeal rights will be affected by this proposal. At present, subject to some restrictions, the tribunal constituted for the purposes of a hearing may refer a question of law arising in the proceedings to the Federal Court for decision.”²⁴

4.32 Over the years, and despite the changes to which I have referred and other amendments and repeals, s 43 continues in its original form. The point for present purposes about that section is that although it states what the AAT may do, it does not specify any bases or criteria upon which it is to make its decision. Nor did it or does it descend to the detail of the way in which it should proceed. Having said that, I do not think that anyone would have expected that it would proceed other than in a judicial or quasi-judicial manner. That the President is to be a Federal Court Judge, and other Federal Court Judges Members each as *persona designate*, is only one indication that the quasi-judicial approach would be taken. Another is that the legislation overall raises a clear expectation that applicants would have a hearing and be afforded opportunities beyond those available in the course of ordinary executive decision making.

4.33 Even so, the early appellate decision on s 43 of the *AAT Act*, *Drake v Minister for Immigration & Ethnic Affairs*,²⁵ was not entirely uncontroversial, in holding that the jurisdiction (or obligation) of the AAT was to make the correct or *preferable* decision. The word “appeal” in the Act is a misnomer. The ground for a successful appeal to a court is most commonly for error of law or manifest error of fact. Experienced practitioners and judges know that there may not necessarily be only one *correct* view of the facts, or even sometimes of the law itself. Once the Federal Court held that the AAT could substitute a *preferable* decision, a gate was opened very wide to subjectivity on the part of any Member in reviewing a decision. Obviously successive legislatures have been content with the holding in *Drake* because no attempt was made to legislate for any reversal or variation of it. Indeed,

²⁴ Commonwealth of Australia, Parliamentary Debates, House of Representatives, 16 March 2005, at pages 100-102 (Hon. Philip Ruddock MP, Attorney-General).

²⁵ (1979) 46 FLR 409.

the word “preferable” only made its way into the *AAT Act* itself by insertion, not into s 43, but into s 29AB in 2015.²⁶ The High Court has, from time to time, endorsed it, recently in 2008 in *Shi v Migration Agents Registration Authority*.²⁷

4.34 I have descended into the detail that I have regarding the genesis and evolution of the *AAT Act* and judicial application of it, not for the purpose of any criticism – that would be beyond my Terms of Reference – but to show, under current law, how wide and inevitably subjective the ambit and nature of the jurisdiction of the AAT is. What the merits may be, or what may not be *incorrect* but *preferable*, are questions on which divergent opinions might be given by fair minded members of the public. That this is so goes some way to explain why it is difficult to gauge community expectations about the AAT’s performance and decisions. Another reason why I have explored these matters is to understand the respective roles of the President, the Registrar, and the staff of the Registry, and how they have changed from time to time.

* * * * *

²⁶ Inserted by the *TA Act*.
²⁷ (2008) 235 CLR 286.

CHAPTER 5 – OTHER JURISDICTIONS

- 5.1 The provision to the people of a generous means of challenge to the state and to the decisions that its functionaries make can come at a cost to constitutional order and democratic, responsible, and representative government. Professor Cary Coglianese said this of the legal thickets and factual problems which can arise:

“Even when it is just considered as a body of rules, administrative law is complex. It draws its legal pedigree from a variety of sources: constitutional law, statutory law, internal policy, and, in some countries, common law.

Statutes are seldom self-executing. They need interpretation and must be applied in myriad concrete circumstances. In interpreting and applying statutes, administrators assume discretion. Statutes do not always speak clearly to the varied circumstances that confront administrators. Not only are many of these circumstances unanticipated by legislators, but elected officials often may lack incentives for making laws clear or precise in the first place, as it can be to their electoral advantage to appear to have addressed vexing social problems only in fact to have passed difficult policy questions and trade-offs along to unelected administrators. For some administrative tasks, particularly monitoring and enforcing laws, legislators give administrators explicit discretion over how to allocate their agencies’ resources to pursue broad legislative goals.”²⁸

- 5.2 In common law jurisdictions, concern has been expressed from time to time about the compatibility of the power of an unelected, administrative state with that of a constitutional and representative democracy which should be the repository of real power. Concern has been expressed about a “democratic deficit”. In a country which has a Westminster parliamentary system, the theory is that the executive government is responsible to the Parliament. However, as Professor Helen Gamble said:

²⁸ Cary Coglianese, ‘Administrative Law: The U.S. and Beyond’ (2016) *Faculty Scholarship* (Paper 1656).

*“Acceptance of the supremacy of parliament imports an acceptance of the rule of law but it does not guarantee it ... A system of government by the administration, although vested with its powers by the Parliament, is not inconsistent with an arbitrary regime.”*²⁹

5.3 Courts have been thought to be the guardians of the law and a check on administrative excess but even the most energetic courts suffer constraints of jurisdiction, time, and resources, disabling them from righting every arbitrary decision or punitive measure. While courts may impose requirements on administrators to act in certain ways, they still tend to give at least some deference to the agencies whose decisions are under consideration. Professor Adrian Vermeule spoke of a *capitulation* by the courts to the “administrative state” in the United States:

“In classical constitutional theory, law fills the centre of the frame. In the administrative state, however, law becomes a marginal phenomenon

*It is critical that law has not simply been beaten down. Law’s empire has not crumpled under conquest from without; law has not been ‘overcome’. Rather the triumph of the administrative state paradoxically occurred as a voluntary abnegation of authority by the law ...”*³⁰ [footnote omitted]

5.4 Executive departments and administrators have a greater opportunity and need for rapid and broad decision making than the courts. An administrative issue may raise urgent, complex and technical issues of policy. Courts are expected to, and are accustomed to dealing with legal issues. It is orthodox and understandable that they avoid the shifting sands of policy.

²⁹ Helen Gamble, ‘The Role of the Rule of Law’, (1982) 5(4) *Australian Crime Prevention Council Forum* 17.

³⁰ Adrian Vermeule, *Law’s Abnegation: From Law’s Empire to the Administrative State* (Harvard University Press, Cambridge, MA, 2016) at page 209. See also Professor Vermeule’s essay, ‘Reviewability and “the Law of Rules”’: An Essay in Honor of Justice Scalia’ (2017) 92 *Notre Dame Law Review* 2163.

The United Kingdom

5.5 The history of British Administrative Law is long and, indeed, could even be described as inchoate. Its patchwork fabric was not mended by the United Kingdom's entry into the European Economic Community in 1973 (now the European Union as a result of the Maastricht Treaty in 1992) and, in particular, when the United Kingdom became bound by the *European Convention on Human Rights*. In 1991, Stephen Bourke wrote this in respect of the history of British administrative law-making:

“While there are instances of the making of delegated legislation dating back to the 14th and 15th centuries, it was only comparatively recently that delegated legislation became a popular method of rule-making. The Committee on Minister's Powers (The Donoughmore Committee) cited an enactment made in 1385 concerning the staple as the earliest example of an Act allowing the making of delegated legislation.

The staple consisted of four products - wool, leather, tin and lead - and the marketing was regulated by the Statute of the Staple. Merchants, known as Staplers, had a monopoly in the staple and the mayors of towns from where the staple was exported held Staple Courts. However, the Statute of the Staple is on the Rolls of Parliament, not in the statute book. It gave the King power to determine the places where the staple could be held, the time of commencement, and the form and method of execution.”³¹

5.6 The Reformation and the dynastic conflicts of the Tudors and Stuarts contributed to the growth of a British administrative state. In recognisable form however, an executive administration began to emerge in the administration of Sir Robert Walpole.³² British Administrative Law has since been affected by many events: the Napoleonic Wars, the expansion of the British Empire, and the regular conferral by

³¹ Stephen Bourke, 'Subordinate Rule Making-An Historical Perspective' [1991] *Admin Review* 8.

³² Prime Minister from 1721 to 1742. See also Hilaire Barnett, *Constitutional and Administrative Law*, (Routledge, New York City, 2017) at 226-230.

the Parliament of decision-making power on ministers and civil servants. Stephen Bourke wrote this of the absence of scrutiny of executive decision making:

*“Indeed, a motion put to the House of Commons on January 27, 1937 ‘that in the opinion of this House, the power of the Executive has increased, is increasing and ought to be diminished’ failed for lack of a quorum. It was not until 1943 that the House of Commons established the first Select Committee on Statutory Instruments and until 1973 that both Houses of Parliament in the United Kingdom established a joint scrutiny committee.”*³³

5.7 In the United Kingdom, the Donoughmore Committee on Ministers’ Powers (1932) and the Franks Committee on Tribunals and Inquiries (1958) made recommendations to strengthen supervision by the courts. That subordinate legislation and statutory rules had to be laid before the Parliament had not allayed concerns about the executive’s tightening grip on power.³⁴ The Donoughmore Committee seemed to be resigned to the growth of the administrative state and willing to give it qualified support:

*“We do not agree with those critics who think that the practice is wholly bad. We see in it definite advantages, provided that the statutory powers are exercised and the statutory functions performed in the right way. But risks of abuse are incidental to it, and we believe that safeguards are required.... But in truth, whether good or bad the development of the practice is inevitable.”*³⁵

5.8 The Franks Committee (1957) effectively located administrative tribunals in a “no man’s land” of neither the executive nor the courts.³⁶ That is a location that should not exist in the Australian constitutional system of separate and defined judicial and executive powers.

³³ Bourke, above n 31.

³⁴ *Statutory Instruments Act 1946* (UK).

³⁵ Cited with approval by the Victorian Parliament’s “General Inquiry into Subordinate Legislation” (1969) at [3.2].

³⁶ Franks Committee, *Report of the Committee on Administrative Tribunals and Enquiries* (1987).

5.9 In the United Kingdom, the state of affairs that the Donoughmore Committee was resigned to accept has come to pass, bringing with it a realisation that the Parliament cannot hold all acts of executive administration to account. There is some doubt whether Ministers now may be fairly held responsible for everything that occurs within their departments of state.³⁷ Nonetheless, ministerial responsibility remains fundamental to our arrangements for government:

“The conventions relating to ministerial responsibility are intended to make the executive responsible to Parliament and so indirectly to the people. Ministerial responsibility has two limbs. The cabinet is collectively responsible to Parliament for the conduct of the government as a whole while individual ministers are responsible to Parliament for the conduct of their departments. Thus there is a chain of accountability. When ministerial responsibility was developed in the eighteenth century government departments were small enough for ministers to be personally in control. The position is different today since many government departments are multi-million pound businesses staffed by hundreds, sometimes thousands of civil servants. It is therefore impossible to expect a minister to be personally in control of the many detailed decisions that are made on a day-to-day basis. The meaning of the convention is therefore unclear. In an extreme case the minister should resign but in practice this is likely to happen only where the minister is personally at fault or where the problem is the result of a policy for which the minister is directly responsible.”³⁸

5.10 Since the early 1970s, British law and practice have diverged, increasingly, from much of the rest of the common law world. European law, especially human rights law, as construed and implemented by the European Convention on Human Rights, has influenced the development of British administrative law. That and the written Australian Constitution for a federal nation make recent British administrative experience less relevant to this country.

³⁷ See, for example, *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 464 (Callinan and Heydon JJ).

³⁸ Jonathan Alder, *General Principles of Constitutional and Administrative Law* (4th Edition) (2012, Palgrave, London UK) at 78.

United States of America

- 5.11 The Constitution of the United States divides power between the Congress (Article I: legislature), the President (Article II: executive), and the Courts (Article III: judiciary).
- 5.12 All executive power is vested by Article II in the President of the United States. Since 1789, however, the Congress has created departments, and Presidents have appointed the officers of them. The infant United States needed a revenue service, a post office, an army and a navy, a diplomatic service, and so forth. By the time of the Mexican and Civil Wars, as well as the expansion of the United States' territories into the Pacific Ocean, a vast administrative state was slowly but inexorably being built. Before the Great War, there was the need for supervision of interstate commerce,³⁹ an independent Federal Reserve to supervise the United States' money supply,⁴⁰ an independent commission to supervise business' conduct,⁴¹ and, soon afterwards, a federal radio regulator was recognised as needed.⁴² The "New Deal" Presidency of Franklin Delano Roosevelt accelerated the trend for new agencies, such as the Securities and Exchange Commission, the National Labour Relations Board, the National Recovery Agency, the Tennessee Valley Authority, and the Federal Power Commission. Subsequent presidencies and congresses have, as Australia has, created federal agencies for the regulation of aviation⁴³ and shipping.⁴⁴
- 5.13 The various, ever-multiplying, United States federal agencies, all promulgating rules and regulations by the authority of the President, or of some other executive officer, have brought into existence an incalculable number of occasions for the making of decisions by officials, regulated, so far as that is possible, by the *Administrative*

³⁹ The Interstate Commerce Commission was created in 1887.

⁴⁰ The Federal Reserve was created in 1913.

⁴¹ The Federal Trade Commission was created in 1913.

⁴² The Federal Radio Commission was established in 1926 and became the Federal Communications Commission in 1934.

⁴³ The Federal Aviation Administration was created in 1958.

⁴⁴ Federal Maritime Commission was created in 1961.

*Procedures Act.*⁴⁵

- 5.14 The process for the challenging of decisions by federal administrators is uncertain and expensive. Lobbyists will often be engaged to argue for relief or preference. Accruals of power to administrative agencies give rise to risks of corruption. The advent of a doctrine of formal deference by courts to the decisions of administrative agencies, absent an unambiguous legislative intent, has done little to reduce this risk.⁴⁶
- 5.15 Migration is administered differently in the United States. A number of systems for review of decisions exist there. Five relevant institutions or personages, executive and judicial, exercise a jurisdiction for review of decisions under United States immigration law. They are:
- (a) Immigration Court – while staffed by ‘Immigration Judges’, notwithstanding its name, is actually an office of the United States Department of Justice, exercising Article II executive power;
 - (b) Board of Immigration Appeals – an Article II executive body which is part of the United States Department of Justice;
 - (c) Attorney-General of the United States – an Article II executive officer serving in the Cabinet at the pleasure of the President of the United States;
 - (d) The United States Administrative Appeals Office – an Article II office that is part of the United States Department of Homeland Security; and
 - (e) Court of Appeals – an Article III court exercising the judicial power of the United States, which will review (a)-(d) in certain self-limited circumstances.⁴⁷

⁴⁵ Codified in Title 5 of the United States Code. As per the American practice, a departmental or agency’s rules and regulations are first promulgated by the Federal Register, a chronological publication and then formally codified in the Code of Federal Regulations. These regulations are challenged, routinely, by those affected by them, in the courts of the United States.

⁴⁶ *Chevron USA Inc v Natural Resources Defense Council Inc* (1984) 467 US 837; *Food and Drug Administration v Brown & Williamson Tobacco Corp* (2000) 529 US 120 at 132.

⁴⁷ *Chevron USA Inc v Natural Resources Defense Council Inc* (1984) 467 US 837; *Food and Drug Administration v Brown & Williamson Tobacco Corp* (2000) 529 US 120 at 132.

In some cases, these questions will make their way to the Supreme Court of the United States.

- 5.16 The major actor in United States immigration affairs is the United States Immigration Court (headed by the Chief Immigration Judge) which is not a court. The United States Immigration Court is, in law, an executive tribunal, created by statute and exercising executive power under Article II. The United States Immigration Court judges are appointed by the Attorney-General as salaried officers of the United States executive branch. Immigration judges must be practising attorneys and must pass extensive background checks, including security. The Attorney-General appoints administrative judges as officers within the Office of the Chief Immigration Judge, again, an administrative official employed by the Department of Justice.
- 5.17 The United States Government is represented in the Immigration Court by attorneys from the Department of Homeland Security, not the Department of Justice. The Department of Homeland Security is responsible for enforcing immigration laws and administering immigration and naturalisation. By contrast, the Immigration Courts and the Board of Immigration Appeals are responsible for reviewing decisions, independently (noting these are all Article II executive matters) under the United States' immigration laws. Functionally, if not constitutionally, the Department of Homeland Security is separate from the Department of Justice. In proceedings before the Immigration Court or the Board of Immigration Appeals, the Department of Homeland Security is deemed to be a party and is represented by its component agency, Immigration and Customs Enforcement.⁴⁸
- 5.18 The United States offers one model of an executive system for contested immigration hearings. The US has approximately 330 immigration judges who preside over the 58 US Immigration Courts throughout the United States. In calendar year 2016, the United States Immigration Court issued 137,875 decisions, of which 70% were deportation orders.⁴⁹ Aliens in United States immigration proceedings may be represented by an attorney of his or her choosing but the United

⁴⁸ See the US Department of Justice, *Immigration Court Practice Manual*.

⁴⁹ See the US Department of Justice, *FY 2016 Statistics Yearbook* (prepared March 2017).

States Government will not pay for legal counsel and is under no obligation to provide any counsel. The statistics show that approximately 37% of the immigrants attending an Immigration Court hearing have legal representation. While the Immigration Court proceedings do have some of the features of a trial, they are, still, executive hearings only. Protections such as the Sixth Amendment to the United States Constitution, requiring the "assistance of counsel", are not engaged and the United States Government is not obligated, as it is in a criminal matter, to provide legal counsel to applicants.

Canada

- 5.19 Canada is subject to the Charter of Rights and Freedoms (“**the Charter**”), which is entrenched in the Constitution of Canada. This means that law and practices there in respect of immigration and refugees differ from those of Australia.
- 5.20 The *Immigration and Refugee Protection Act 2002* (“**IRPA**”) governs migration and refugees’ rights in Canada. It is a requirement of IRPA that it be understood and applied in a manner that is consistent with the Charter. Additionally, decisions made under IRPA must be in accordance with those conventions to which Canada is a signatory, such as the Refugee Convention and the Convention on the Rights of the Child (“**CRC**”).
- 5.21 The Canadian immigration system relies on three main executive agencies to determine who is allowed to migrate to and reside in Canada:
- (a) Immigration, Refugees and Citizenship Canada is the government department that has the overall responsibility for immigration and refugee matters. IRCC determines claims for refugee protection made abroad at Canadian embassies and consulates. It is responsible for selecting immigrants, issuing visitors' visas, and granting citizenship. It is also IRCC that determines the eligibility of all refugee protection claimants, and refers eligible claims to the Immigration and Refugee Board of Canada for a decision;
 - (b) Canadian Border Services Agency is the policing authority that patrols and

guards Canada's borders, admits persons to or removes them from Canada, and refers claims of refugees; and

- (c) Immigration and Refugee Board of Canada (“**IRB**”) is Canada's independent administrative tribunal responsible for deciding immigration and refugee applications. It is Canada's largest administrative tribunal. The IRB is divided into four separate divisions:
 - (i) Immigration Division – which conducts hearings concerning the admissibility and/or detention of immigrants to Canada;
 - (ii) Immigration Appeals Division – which hears appeals from the Immigration Division, including appeals against removal orders made by the Minister;
 - (iii) Refugee Protection Division – which grants or refuses applications for protection by individuals in Canada;
 - (iv) Refugee Appeals Division – which hears appeals made by the minister or refugee applicants against decisions of the Refugee Protection Division.

5.22 The IRB is an independent executive tribunal that performs functions that are similar to those of the AAT. The IRB:

- (a) decides refugee claims made by people in Canada;
- (b) holds hearings to determine whether a person is eligible to enter or remain in Canada;
- (c) holds detention reviews; and
- (d) hears and decides appeals in relation to immigration matters, such as removal orders, and appeals in relation to immigration sponsorship.

- 5.23 The IRB is responsible to Parliament through the Minister of Citizenship and Immigration, but members of the IRB remain independent of the department and the Minister. The IRB's members are not necessarily practising lawyers or even legally qualified. There is no requirement for applicants to an IRB hearing to be legally represented. An applicant may be self-represented.
- 5.24 This brief survey suggests that the Western democracies all provide to entrants, and would-be entrants, some means to challenge unfavourable executive decisions. Australian processes and avenues for challenge are no less, and probably more, accommodating here, where the applicants have had chances to make a case for entry to the Department, the AAT, the Federal Circuit Court, the Federal Court, and in some instances the High Court. In some cases, the applicants have not only made appeals to courts, including the High Court, but also, separately, applications for the issue of prerogative writs by the High Court in its original jurisdiction. Any criticism that Australia does less than other common law countries to provide review of applications made by foreigners to enter and remain in Australia are not well founded.

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CHAPTER 6 – SUMMARY OF WRITTEN SUBMISSIONS

6.1 In this chapter I summarise the written submissions that I have received for easier reference to them, and give indications in some instances, of my response to them. Those submissions are contained in a second volume of the Report. A reader interested in a particular topic, to be fully informed, would do well to read the written submissions on it in full. The submissions deserve consideration because there may be suggestions in them that I have overlooked, or are preferable to the measures I suggest. Outcomes in particular cases were not strictly within the Terms of Reference: a few people disappointed by them sought however to make submissions. In some places I also foreshadow possible measures.

Applicants to the AAT

Private and Confidential – 7 August 2018

6.2 The submitter was an applicant for a review of a decision of the DVA by the AAT. He wrote this:

“I make reference to this as I read that one of your key areas of response is – Has the AAT used a compassionate/common sense approach in their responses. I will allow you to make your own determination from what you read in this short submission.”

6.3 The submitter was understandably disappointed (as most in his position are) by the unfavourable outcome of his or her application. It is not for me to comment on the correctness of the adverse decision. It would be regrettable, however, if there were a want of compassion or common sense in the making of any decision by the AAT.

Brian Auckram – 21 August 2018

6.4 Mr Auckram was an applicant in a Centrelink case. He provided correspondence relating to it and asserted that:

“... [he] can show, with *evidence*, that the Tribunal is not meeting its objectives and is failing to produce decisions which are consistent with the law, facts and evidence provided.”

6.5 Mr Auckram’s submission was in substance that the decision rejecting his application was wrong. It is not appropriate or within my Terms of Reference to consider whether that is so or not.

Anonymous – 24 August 2018

6.6 This submission relates to an applicant’s experience of the AAT in a Comcare matter. The submitter complains that there has been an abuse of power by Comcare by not acting as a model litigant in accordance with the *Safety, Rehabilitation and Compensation Act 1988* (Cth).

6.7 The submitter describes long waiting times between applications and determinations, attributable to the conduct of Comcare. The submitter found the AAT website confusing to navigate. According to this applicant, Comcare misled the AAT in his or her case.

Katherine Vavasour – 24 August 2018

6.8 Ms Vavasour was an applicant in a Comcare matter listed for hearing in the AAT.

6.9 The submission addresses, “whether the objectives of the TA Act have been achieved”.

6.10 Ms Vavasour is of the opinion that the AAT should be less formal, less expensive and offer expedited dispute resolution. She contends that the engagement of barristers by the respondent in her case is not in accordance with Model Litigant Policy. This, she says, among other things, discourages applicants.

Scott Steele – 23 August 2018

6.11 Mr Steele has been an applicant to the AAT.

6.12 In his submission, Mr Steele gives a summary of the origins of the AAT.

6.13 Mr Steele's submission goes to matters beyond the Terms of Reference for this Review.

Peter Tregear – 23 August 2018

6.14 This submitter was an applicant to the AAT, disappointed by its result. His criticism is a criticism of the respondent, Comcare, as much as it is of the AAT. He says that his application should not have been subjected to the delays that it was.

Karen Hutchinson – 24 August 2018

6.15 Ms Hutchinson complains that in a Comcare matter, the model litigant rules were not observed. She suggests that there was a denial of procedural fairness and natural justice when Comcare made its original decision adverse to her. Her concerns are not within the Terms of Reference.

Other

Sandra McGovern – 24 August 2018

6.16 Ms McGovern attached to her submission a paper titled, "One Eye Open: Administration of Privacy in Child Support Cases" by Joanna Slater,⁵⁰ and submitted that it well addresses the effectiveness of the interaction and application of legislation, practice directions and policies of the AAT. She says that:

"In short, the Tribunal's practices in child support matters reinforce and replicate deficient practices employed by the Department of Human Services (DHS) involving an incomplete reading of the statutory framework."

The paper discusses privacy practices of DHS in Child Support Assessment matters. She argues that the practices are not aligned with the intentions of Parliament

⁵⁰ (2017) 8 *The Western Australian Jurist* 137.

regarding privacy. Consequently, she says, the AAT presently does not enjoy the confidence of the public.

Government Departments and Agencies

Administrative Appeals Tribunal – 28 August 2018

- 6.17 As a result of the *TA Act*, the AAT increased from 230 or so Members and staff fielding approximately 7000 applications yearly, to an organisation of more than 900 Members and staff handling lodgements of about 59,000.
- 6.18 Increases in applications since amalgamation have been greatest in the MRD, where they have more than doubled.
- 6.19 Notwithstanding the current workload, the AAT finalised more than 40,000 applications in the last financial year. The AAT attributes this to the adoption of new case management strategies which include early assessment, and, when possible, early resolution of matters, and the introduction of national case lists managed nationally by Practice Leaders. MRD case lists are categorised as follows:
- (a) Business;
 - (b) Skill linked;
 - (c) Family;
 - (d) Partner;
 - (e) Visitor;
 - (f) Student Cancellation;
 - (g) Student Refusal; and
 - (h) Protection.

- 6.20 I have looked at cases in all of these categories. In each of the categories there are numerous cases in which the Member has to look carefully into matters of detail and to resolve different questions of fact.
- 6.21 Further work can be done, the AAT submits, to achieve efficient amalgamation in these ways:
- (a) the removal of some practices and procedures embedded in legislation in the MRD;
 - (b) legacy practices should be changed to provide a more functional structure within the AAT; and
 - (c) funding arrangements inherited from former tribunals need to be altered to address actual caseloads, and a clear need for flexibility in the allocation of cases.
- 6.22 Current Membership (other than Chapter III Judges) of the AAT is 300 Members, including the President (who is a Federal Court Judge), 20 Judicial Deputy Presidents, 16 non-judicial Deputy Presidents (10 full time and 6 part-time), 47 Senior Members (28 full-time and 19 part-time), and 216 Members (67 full-time and 149 part-time). Federal and Family Court judges who have been appointed to the AAT sit as required.
- 6.23 The AAT is managed in eight Divisions, which are controlled within three overall divisional groupings lead by a Division Head for each of those groupings. Groupings or Divisions include the MRD, the SSCSD, and the General and Other Divisions. The “Other” Divisions that are managed together with the Tax and Commercial Division include the Freedom of Information (“**FOI**”), National Disability Insurance Scheme (“**NDIS**”), Security, General, and Veterans’ Appeals Divisions.⁵¹

⁵¹ Section 17K of the *AAT Act* provides for assignment of Deputy Presidents to Divisions as Heads of them.

- 6.24 More than 400 Commonwealth enactments make provision for review of decisions made under them by the AAT. The submission contains statistics of lodgements and finalisations. In 2016-2017, there were 26,604 lodgements and 18,908 finalisations completed by a [full-time equivalent] Membership of 91 with 24,462 matters on hand. In 2017-2018, there were 37,933 lodgements and 17,960 finalisations by a [full-time equivalent] Membership of 77 with 44,436 matters undetermined. Additional appointments, particularly on a part-time sessional basis, to assist the MRD with the backlog and increasing workload, are necessary.
- 6.25 The IAA and its structure are briefly discussed in the submission.
- 6.26 It is suggested then that consideration be given to these measures:
- (a) organisation of Divisions to promote flexibility and agility to meet changing demands;
 - (b) enabling Senior Members to be assigned as Division Heads;
 - (c) enabling the President to assign both Division Heads and Deputy Division Heads under a delegation from the Attorney-General or otherwise (s 10A of the *AAT Act* permits the Minister to delegate to the President any or all of the Minister's powers or functions under the Act); and
 - (d) amending the *AAT Act* so that persons currently assigned as Division Head or Deputy Division Head for the duration of his or her appointment, are able to be assigned for a specified period or periods (see also ss 17K(5) and 17L(5) of the *AAT Act*).
- 6.27 The AAT has adopted and continues to implement many of the recommendations from the Metcalfe Report. The submission discusses training and support of Members.
- 6.28 Standardised procedures in all Divisions are not achievable because of the differing legislative regimes. For example, two tiers of review [in reality, identical in kind]

are available in Social Security matters, except that the second is done in the General Division.

- 6.29 The submission contains details of funding models both before and after amalgamation. The funding model for the General and Other Divisions is effectively a flat one, not demand driven and based on pre-determined annual appropriation. Adjustment of funding to reflect or respond to changes in volume of applications is generally not possible.
- 6.30 Funding for the MRD is based on a demand-driven model with a baseline of 18,000 finalisations, and adjustments at a fixed marginal cost per additional review. This formula provides that the first 2000 reviews finalised above the baseline are valued at \$2,137 each. The second level of funding is \$3,036 for each review more than 2000. The DHA funds up to the baseline. Adjustments and supplementary funding are drawn from Consolidated Revenue. If finalisations fall below 18,000, money is returned to Consolidated Revenue. There is a need to increase the baseline to a more realistic number. The number of cases that can be finalised in a financial year has a direct correlation with the number of Members working in that Division.
- 6.31 The SSCSD's funding is by an annual appropriation based on historical caseloads. It is adjusted upwards or downwards depending on predicted numbers. There are no adjustments to funding if the anticipated caseload has been over or under estimated.
- 6.32 The AAT's existing funding model for the SSCSD should be changed to reflect a realistic baseline of finalisations having regard to recent fluctuations in lodgements. The AAT's view in relation to funding of the General and Other Divisions is that there is little utility in having a demand-driven model there. Should lodgements in the NDIS Division increase markedly, consideration should be given to a demand driven model if a stable baseline caseload can be discerned.
- 6.33 Fees were considered. In the MRD, applications are made in an approved form as required by ss 347(1)(a) and 412(1)(a) of the *Migration Act*. In the SSCSD, applications, other than for review of paid parental leave, are to be made in writing, either in an approved form, or another form, or orally. Parental leave applications,

subject to s 224(3) of the *Paid Parental Leave Act 2010* (Cth), are to be in writing accompanied by a statutory declaration verifying the application. These last may be in an approved form or any other form.

6.34 As to the other Divisions, applications in accordance with s 29(1)(a)(i) of the *AAT Act* may be in writing in an approved form or any other form. It is proposed that all applications be in writing in an approved form. Currently, charging of fees varies depending upon the Division, engaged by an application, whether a fee is payable at all, or, if a fee is payable, if there are grounds for seeking a reduction or a refund. Access to documents is another issue. It is proposed that matters in the MRD be subject to the application of s 37 of the *AAT Act* in relation generally to documents provided to the AAT.

6.35 In an attachment addressing the power to make directions and the availability of sanctions, there are proposals for a new legislative power to require a decision-maker to arrange for the making of investigations, and to gather information. The *AAT Act* and the *Migration Act* make separate provision for appearances and the production of documents (see s 40A(1) of the *AAT Act*), that are not available in the SSCSD. A written notice may be given requiring a person to produce documents (see s 117 of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth), s 95F of the *Child Support (Registration and Collection) Act 1988* (Cth), s 228 of the *Paid Parental Leave Act 2010* (Cth), item 3 of the table in s 147 of the *Social Security (Administration) Act 1999* (Cth) together with s 119 of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth), s 95H of the *Child Support (Registration and Collection) Act 1988* (Cth), s 230 of the *Paid Parental Leave Act 2010* (Cth), and s 165A of the *Social Security (Administration) Act 1999* (Cth)).

6.36 At Attachment 6, the rules governing procedural fairness as provided by the Codes of Procedure in the *Migration Act* are discussed. Parts 5 and 7 of the Act codify procedural rules including those relating to the provision of information to applicants and comment on adverse information at hearings. [These rules are far more prescriptive than the relevant common law (see ss 359A and 424A of the *Migration Act*). Information is to be given to the applicant together with timeframes

relating to responses. There is an option of putting adverse information to an applicant orally during a hearing, but again, the process is technical. Reference is also made to s 39(1) of the *AAT Act*, which imposes a duty to comply with the rules of procedural fairness. This provision however, does not currently apply to the MRD, SSCSD and Australian Security Intelligence Organisation (“ASIO”) assessments in the Security Division (see ss 24Z and 39(2) of the *AAT Act*). It is proposed that s 39(1) have application to non-agency parties in the SSCSD as it does in other Divisions, and that s 39AA should be applicable only in a limited way to agency parties in the SSCSD. Presently, s 39AA states that a non-agency party may make oral or written submission to the AAT and sets out the rules relating to the involvement of agency parties.

- 6.37 Attachment 7 addresses s 42D of the *AAT Act*, which allows the AAT at any stage of the review before final decision to remit a matter to the original decision-maker for reconsideration. This power is not available in the MRD or SSCSD. It was submitted that the discretion to remit for reconsideration should not be limited as it currently is by s 42D of the *AAT Act*.
- 6.38 Attachment 8 to the submission refers to the rules relating to oral decisions and proposes that the SSCSD be able to give decisions orally in suitable cases. Presently, oral decisions cannot be given if the decision under review is to be varied or set aside (see ss 126(1)–(2) of the *Family Assistance Administration Act*, ss 235(1)–(2) of the *Paid Parental Leave Act*, ss 178(1)–(2) of the *Social Security Administration Act*, and ss 318(1)–(2) of the *Student Assistance Act*). In child support cases in the SSCSD and in other Divisions, oral reasons for a decision may be given (see s 43(2) of the *AAT Act*, s 95P(1) of the *Child Support (Registration and Collection) Act*, and ss 368D and 430D of the *Migration Act*).
- 6.39 Where oral decisions are made, a party may request a written statement of reasons. In all Divisions except the MRD, the request for written reasons must be made within 28 days of the receipt of notification of the AAT’s decision in accordance with s 43(2A) of the *AAT Act*. MRD decisions and some SSCSD decisions allow 14 days for a request to be made, and 14 days for the production of the statement of reasons by the AAT (see s 126(4) of the *A New Tax System (Family Assistance)*

(Administration) Act, s 95P(3) of the *Child Support (Registration and Collection) Act*, ss 368D(4)–(5) and 430D(4)–(5) of the *Migration Act*, s 235(4) of the *Paid Parental Leave Act*, s 178(4) of the *Social Security (Administration) Act 1999 (Cth)* and s 318(4) of the *Student Assistance Act*.

- 6.40 Attachment 9 addresses the varying rules governing the receipt and provision of documents to the AAT. A table within the attachment shows the differences in procedural requirements. It is submitted that there should be standardisation of rules relating to these.
- 6.41 Attachment 10 discusses proposed changes to MRD processes. Application of s 37 of the *AAT Act* would reduce delays by way of the provision of documents in an organised fashion within standardised time frames.
- 6.42 The power to give directions in individual cases with the possible sanction of dismissal for non-compliance is proposed as a necessary amendment to assist with the business of the MRD. It is noted that powers currently exist under ss 359 and 424 of the *Migration Act*. These powers are, however, limited as a failure to comply still requires a decision on review of all of the materials. It is submitted that the power of dismissal in s 42A of the *AAT Act* should apply. In that regard, it is said, ss 359 and 424 of the *Migration Act* do not relieve the AAT of its other procedural obligations such as putting adverse information to the applicant. Section 424, in the absence of a provision equivalent to s 363A (Mandatory Loss of Hearing) further restricts the effect of the provision.
- 6.43 Most of the detailed proposals made by the AAT deserve consideration. Except where I indicate otherwise, I am generally in agreement with them. My agreement is reflected in the measures which I set out elsewhere in this Report. The submission has been of much assistance to me in making this Report.

Attorney-General's Department – 24 August 2018

- 6.44 The submission of the AGD commenced with the observation that:

“The AAT generally conducts merits review of matters afresh, based on the circumstances at the time of the review. This may involve consideration of relevant new information if it becomes available after the original agency decision was made. The AAT’s ability to consider new information at the time of review is part of its function to ensure the correct and preferable decision is made.”

I received a deal of information on this topic. I discuss elsewhere possible measures in relation to it.

6.45 The AGD saw the purpose of the Review as an overview of “Australia’s administrative review system”, a system of both merits review and judicial review. I respectfully agree with that, and have done my best to achieve it.

6.46 The AGD made this suggestion:

“The Reviewer may wish to consider appropriate methods to measure the consistency and quality of government decision making”.

I have tried to do that. Quantitative measurement is one indicator only of good performance in decision making. The high number of affirmations certainly suggests however that the decisions of most officials on most occasions are of reasonable quality and consistent.

6.47 The AGD drew attention to the AAT’s annual reports of 2015-2016 and 2016-2017.

6.48 The AGD helpfully pointed out that on the 13th of August 2018, 147 of 264 Non-Presidential Members overall were assigned to more than one Division.

“[F]urther cross-assignment of members would assist in breaking down silos, and lead to better consistent decision making across all divisions of the AAT ... the AAT’s divisions continued to work within a divisional framework, reflecting the arrangements of the former tribunals”.

This is correct. It is reason for appointments of Members who are capable of sitting in all or most Divisions.

- 6.49 Differing statutory procedures retained after the transition of the former tribunals to the AAT are impediments to the harmonisation of the AAT's operations. I think this is so, but the different statutory requirements admixing policy and process make it inevitable that, without coherent changes in both, harmonisation is, and will remain elusive. Neither a common practice nor procedure is possible whilst, for example, Comcare matters are conducted adversarially, and migration matters may not be, indeed must not, be conducted in this way. It may be that given the differentiation by legislation of types of decisions and reviews of them, attempts to further harmonise Divisions will be counter-productive.
- 6.50 With respect to the FOI Division, a key objective of the Government was the abolition of the Office of the Australian Information Commission. The AGD explained that the FOI Division of the AAT was a small Division with a limited workload of only 44 lodgements and 37 finalisations in the 2016-2017 reporting period. Thirty-six Members however were assigned to this Division as of the 8th of August 2018: all of them had assignments to other Divisions. This, in my view, gives emphasis to the point made that a capacity for cross assignment is necessary.
- 6.51 The AGD stressed a need for effective channels of communication between the AAT and all interested persons and agencies.

“The Reviewer may wish to consider the merits of introducing a mechanism for managing complaints against AAT members in the AAT Act. The AAT has suggested, and the AGD agrees, that a model similar to that contained in the Fair Work Act 2009 relating to the handling of complaints against Fair Work Commission (FWC) members may be appropriate”.

As I have said, I received, despite public advertisement, few complaints of any kind from the general public about Members or their performance. I think an agency or tribunal of the kind suggested is unnecessary. The reinstatement of the

Administrative Review Council as an oversight body would be a preferable solution, if there were a need for a body to deal with complaints.

6.52 The AGD made submissions about stratification of Members.

“Clarifying the roles and responsibilities of members at each level, within each category of member, might be an alternative option. For example, member’s level 2 and 3 could be combined and be considered an ‘associate member’, member level 1 could be a member and senior members level 1 and 2 could be combined.”

There is much validity in this. I suggest measures about it.

6.53 In relation to appointments of Deputy Presidents and Senior Members, the AGD observed that the *AAT Act* does not specify the maximum number of Members at any one time. The AAT has jurisdiction to hear reviews under more than 400 pieces of legislation. Flexibility is important. The AGD proposed:

“... the membership of the Tribunal continues to consist of members, with the number of Deputy presidents and senior members appointed being proportionate to the lower level of cases with increased complexity and the need for leadership and mentoring roles.”

A footnote to this proposal was: “AGD notes judicial appointments should not be considered in these numbers”. I agree generally with the thrust of this. An organisational chart and other measures suggested could help to give effect to it.

6.54 A process of consultation with Ministers as to assignment of Members is required by s 17D of the *AAT Act*. As to that, the AGD said:

“The AGD considers that there may be merit to the assignment of Division heads and Deputy Division heads falling within the purview of the President of the AAT. This could be achieved through legislative change or through delegation of power by the Attorney-General.

AGD also considers assignments of senior members and members necessary to ensure only members with the relevant expertise are able to exercise powers in a division. However, the Reviewer may wish to explore whether the consultation process for assigning members is necessary (noting government consideration is required for any appointment) or could be improved to enhance the efficiency of the assignment process. In particular, the power to assign senior members and members may be delegated to the President or amended through legislative change.”

I have made the exploration to which the AGD refers, and suggested measures that occurred to me as I did that.

- 6.55 The AGD referred next to s 6(4) of the AAT Act, which states that a Member (other than a Judge) shall be appointed as a full-time or part-time Member. When a Member requests a change to his or her appointment from part-time to full-time, or vice versa, a new appointment is required.

“It is the AGD’s view that a member appointed to the tribunal is suitably qualified to undertake their duties on either a full-time or part-time basis. As such the review may wish to explore whether it remains necessary to appoint members (other than a judge) on a full-time or part-time basis. AGD considers it may be appropriate to appoint members to the Tribunal, and not specify either a full-time or part-time basis. Alternatively, a legislative amendment may provide the President with the ability to alter a member’s appointment from full-time to part-time or vice versa.”

I do not favour these proposals. Some able candidates will only wish to work part time. Others will wish to work full time and hope to have a long term future as a Member.

- 6.56 The AGD, as did other submitters, referred to problems of inconsistent funding of the AAT:

- (a) The model for the General Division and other pre-amalgamation Divisions is a “flat” funding one based on estimated lodgements and estimated marginal costs per case.
- (b) In the SSCSD, the model was inherited from the former SSAT, which was agreed between the Department of Social Services and Finance in 2013. It employs a methodology for calculating resource implications, based on estimates of workloads and predicted changes in them.
- (c) The MRD funding model is a demand-driven model. Funding for caseloads in the MRD varies according to increases or decreases in cases finalised. There is baseline funding for 18,000 finalisations. The first 2,000 reviews finalised above or below 18,000 are calculated at \$2,137 per review. The second marginal cost-estimate after the first 2,000 reviews is calculated at \$3,036 each.

“AGD considers that a demand driven funding model could be considered for the SSCSD due to the relatively predictable fluctuation in the caseload over time, and because the jurisdiction arises from a relatively consolidated set of original administrative decisions. Implementing a new funding model for the SSCSD would likely require consultation with DSS and DHS to assess anticipated future workloads.

AGD considers that a demand driven funding model would be considerably more complex for the General and other Divisions.

Consideration should be given to amending the MRD funding model so that the baseline number of finalisations more accurately reflects the increasing lodgements in the MRD.”

The Department’s views on this topic are self-evidently correct.

- (d) AGD’s submission supported proposals made in the Metcalfe Report in these terms:

- “1. *the use of conferencing in processes in the MRD and SSCSD, and*
2. *the introduction of directions hearings and the making of enforceable directions in the MRD.”*

I agree with these proposals. It is important though that the conferences and directions hearings be conducted by Members, and that the directions be enforceable. Non-compliance should, where warranted, lead to dismissal of an application, as delay causes further delay and comes at a considerable cost to the community.

- 6.57 The above is a brief summary only of the AGD’s submission. The whole submission in its entirety was informative and influential.

Comcare – 23 August 2018

- 6.58 Comcare is a statutory body established under the *Safety, Rehabilitation and Compensation Act 1988* (Cth). Its focus is on participation and productivity through healthy and safe workplaces. Comcare is effectively the insurer of the Commonwealth in claims by employers for rehabilitation and compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth). It is also responsible under the *Work, Health and Safety Act 2011* (Cth).
- 6.59 The Comcare scheme covers a broad range of occupations and agencies, including defence, law enforcement, transport, logistics, finance, banking, manufacturing, construction, telecommunications and postal services. It is also the insurer of various employers in private enterprise, some, but certainly not all of which were formerly government enterprises. It is in consequence a very large and important agency.
- 6.60 In 2017-2018, 4276 claims were accepted under the *Safety, Rehabilitation and Compensation Act 1988* (Cth). Decisions about workers’ compensation claims are reviewable by the AAT. On the 1st of July 2018, there were 1938 pending applications. Of these, 1362 were decisions made by Comcare, approximately 10%

of Comcare's open claims, and 576 of self-insured licensees. Comcare matters are heard in the General Division.

- 6.61 Comcare was concerned about timeliness of finalisation of its cases. Its data indicated that the average time for the AAT to determine an application for review under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) is 382 days, an increase from 354 days in 2016-2017, and 327 days in 2015-2016. In the current reporting period, the average time taken for the AAT to issue a decision in a Comcare matter after the hearing was 88 days. This too is an increase two days over the previous reporting period of 2016-2017. The cost of claims is increased by delays, as is obvious, and is verified by independent research.
- 6.62 Decisions, Comcare says, are not consistent in quality. Some are less comprehensive than they should be. Comcare gave examples of alleged inconsistencies. It is beyond doubt that consistency is important. If there is an absence of or deficiency in it, the Division should repair it by better decision making.
- 6.63 Comcare referred to the application of paragraphs 4.4 to 4.8 of the General Practice Direction in *Euttigieg v Comcare*.⁵² Some AAT Members require parties to follow surveillance disclosure steps in accordance with the General Practice Direction, while others do not. It is submitted that the General Practice Direction should be revised to address this inconsistency.
- 6.64 Finally, reference was made to Comcare's "Clinical Framework", an evidence-based policy that states principles for allied health professionals. Since 2014, the AAT has had regard to the Framework in reaching decisions. Comcare submits that the Framework is not applied consistently by the AAT, and again provides examples.
- 6.65 These last matters really go to the merits of particular decisions, matters upon which it is not for me to comment. I agree, however, with the proposition that consistency is highly desirable to the extent that it can be achieved in merits reviews. Lack of consistency when it can and should be achieved is likely, as Comcare submits, to

⁵² [2017] AATA 1002.

undermine public confidence.

Department of Human Services – 24 August 2018

- 6.66 The Department of Human Services provides an overview of its role and the payments system it operates as master programs, for Centrelink, Medicare and Child Support. It enclosed a flowchart outlining internal and external review processes. Internally, a “customer” can have a matter reviewed by a “matter expert”, and, if still dissatisfied, by an authorised review officer. DHS has no right, and is not funded to appear in the SSCSD other than in exceptional circumstances (s 39AA(5) of the *AAT Act*). The SSCSD may require the Department to attend a hearing and provide oral submissions. An applicant dissatisfied with the decision of the SSCSD can apply to a Second Tier, the General Division for a further merits review.
- 6.67 DHS has a large volume of cases in the AAT. Decisions most frequently challenged are rejections of claims for payments, (for example, of Disability Support Pensions), debt recovery (including of Family Tax Benefits paid), participation failure and starting dates of payment, and rates of payment. Relevant statistics were provided.
- 6.68 As to the amalgamation, DHS says that it has no evidence that it has either improved or compromised the efficiency and effectiveness of the AAT, or the quality or consistency of decision making. There has been, however, inconsistent decision making in the General Division, primarily in the interpretation of statutory provisions. The legislation of the Social Security Agreement between New Zealand and Australia is a source of these.
- 6.69 DHS is unable to say whether amalgamation has resulted in savings. One consequence for DHS has been the absorption of very substantial costs in the preparation and electronic provision of documents to the SSCSD, of the order of \$8 million per annum. The content and formats of documents required by the SSCSD and the General Division differ. The format required by the General Division is much more labour intensive than required for the SSCSD.

- 6.70 DHS says that it would not be feasible due to cost to provide the same format in the SSCSD as for the General Division. Options for digitalisation of documents for both levels of the AAT would have to be carefully considered to ensure that this work was properly costed and resourced. Anecdotally, DHS says, applicants find it less intimidating to proceed in the SSCSD (an informal setting) than in the General Division (a more formal setting).
- 6.71 DHS refers to recommendations in the Metcalfe Report: that the SSCSD should be permitted to deliver oral reasons for decisions to set aside or vary a decision under review, that alternate dispute resolution be extended to the SSCSD, and that the SSCSD be given power to issue a summons to require the Secretary, DSS or Child Support Registrar to exercise coercive powers to obtain documents or information.
- 6.72 DHS thought that confidence might be eroded by allowing oral decisions to be given as they may not be properly understood by either the applicant or the Department. As to the recommendations for ADR and information gathering, the DHS is concerned that these may further delay decisions.
- 6.73 DHS reiterates its views of the importance of the maintenance of the two separate levels of merits review in social security matters. I am unpersuaded by this submission. I point out that applicants to the AAT have already had the benefit of two internal assessments of their cases. Why should they have another two, rather than one, as is the position in other matters? Content and format produced by the Department should not vary according to which Tier is to review it and when.
- 6.74 Efficiencies could be achieved by ensuring that new evidence presented to the SSCSD is provided promptly to the Department, and secondly, (subject to costing) standardisation of the requirements as to documents for the AAT in the SSCSD and General Division be implemented.
- 6.75 Of course new evidence should be provided as soon as possible. If two tiers of review are to continue to be available, standardisation of documents should occur. But as I make clear elsewhere, I do not favour two tiers of review.

Treasury – 31 August 2018

6.76 In summary, Treasury proposes a number of changes:

- (a) explicit requirements for Members of the AAT to have appropriate qualifications and expertise to deal with the specialist nature of business and economic regulation;
- (b) implementation of more flexible appointment arrangements to ensure that specialist Members are able to be used as needed on specific cases;
- (c) provision be made for improved Registry processes to deal with specialised AAT reviews together with enhanced Registry training; and
- (d) expansion of the permissible categories of administrative decision making: administrative review processes should be streamlined or appropriately adapted to the broader set of current specialist economic and business regulatory activities.

6.77 Treasury points out that the majority of reviewable decisions in the Treasury portfolio are reviewed in the Taxation and Commercial Division. Although these are only 2% of the AAT's workload, they raise issues affecting the operation of businesses and market regulation.

6.78 Treasury fears that the assignment of generalist AAT Members to matters of highly specialised economic and business regulation may be detrimental to the nation. There has already been a reduction in expertise, noticeably in taxation and specialist business areas. That reduction has caused delays of decisions with some matters in the Taxation and Commercial Division of up to 12 months. The submission proposes that consideration be given to exclusion from merits review of some decisions that could have a large impact on the Australian economy, such as with respect to banks and big businesses. Merits review in these cases would only be available in exceptional and appropriate instances. The right to seek judicial review would remain. I doubt whether the last proposal would be in accordance with

community expectations. Furthermore, it is difficult to see why there should be any discrimination with respect to rights to review between one form or size of an enterprise or others.

Department of Home Affairs – 28 September 2018

- 6.79 The submission of DHA raises some questions of economic and political importance beyond the Terms of Reference. I can say this within my Terms of Reference however, that well qualified and experienced lawyers acquire the capacity to decide varieties of cases in different areas of the law. Broad experience and legal knowledge should be a necessary qualification for all Members of the AAT, including of the MRD. Reviewers of taxation decisions may be an exception. Many experienced accountants are very competent experts in taxation affairs.
- 6.80 DHA supported the retention of Divisions within the AAT: a divisional structure which represented the separate pre-amalgamation Tribunals the better to manage the large and varied caseloads, and to promote consistency.
- 6.81 It also supported the preservation of legislative requirements and procedures required by the *Migration Act* which, the submission says, are essential to the maintenance of fair and efficient processes in the MRD. Specifically, the Codes of Procedure in Parts 5 and 7 of the *Migration Act* are unique and underpin policy settings by assisting in the management of the caseload.
- 6.82 I have respectfully formed a different view of the last upon which I expand elsewhere in this Report. The Codes of Procedure are too prescriptive. They are a distraction from effective and fair decision making. Many to whom I spoke, or who made relevant submissions, criticised the Codes. They have not in practice promoted consistency or efficiency. They have instead encouraged a formulaic approach rather than a reflective consideration of all relevant factors, that is the case as a whole.
- 6.83 I do not accept the submission that legislative change to remove or amend the Codes of Procedure would in effect split the governance of MRD matters between two

statutes and two Government portfolios.

- 6.84 DHA continues that although it supports a number of the harmonisation processes within the AAT, there are matters unique to the MRD which are not suitable for adoption in the MRD. DHA is working with the AGD and the AAT to improve the quality of files in electronic form, but does not believe that a general form can be used for all matters and Divisions.
- 6.85 I could find no convincing evidence that an affirmation rate of 92% of departmental decisions was due to the Codes of Procedure and would be prejudicially affected if it were removed.
- 6.86 That delay (as DHA contends) is the motivation of a large number of applicants is almost universally known.
- 6.87 DHA supports the move towards digital file transfer and generally the harmonisation measures proposed in the Metcalfe Report and already underway.
- 6.88 DHA makes no submissions about funding.

Australian Taxation Office – 19 November 2018

- 6.89 This submission said that the Australian Tax Office (“ATO”) maintains a collaborative relationship with the AAT. Meetings with the Deputy President Heads of the Taxation and Commercial Division and the Deputy President Head of the General and Other Divisions take place every six months to improve the experience of tax payers in dispute with the ATO.
- 6.90 The ATO submits that the Members presently assigned to the Taxation and Commercial Division have the requisite experience and are competent in the conduct of reviews within the Division. The ATO submits that more appointments of practitioners with specialist legal and taxation knowledge given the complex issues that fall for determination in taxation matters should be made to reduce a backlog of cases.

- 6.91 The ATO is concerned that there is less interaction and contact within the Registry on administrative issues as there were before amalgamation: there is not uniformity in procedures between state registries. This has produced delays. There is a need for national consistency of procedures. At the end of 2018, the ATO awaited finalisation in 530 matters the five oldest of which began in 2011. Approximately 11% of those matters are more than 5 years old. Consent orders are taking up to a month to be issued after settlement. In Victoria, there are two cases which were heard in September and October 2016 in which decisions are awaited, and a further five matters in Victoria which have been reserved for more than 12 months.
- 6.92 The submission supports current early assessment and case management processes and conciliation conferences of the AAT. They frequently result in resolution of cases.
- 6.93 The ATO submits that a separate sub-division for small claims by small businesses may be of benefit. Case management there would be less formal. The submission discusses a “small business tax division” by reference to recommendations for it appearing in the Joint Committee of Public Accounts Report of 1993.
- 6.94 In correspondence in November this year, the ATO and I discussed the introduction of an expedited process for determination of smaller claims and disputes. I suggest measures arising out of that discussion. It is important, however, that the decision makers there be “fully fledged” Members of the Division, that is to say, that all Members, Deputy Presidents and otherwise, should sit there so that there is no perception of inferiority of the process it offers.

Australian Skills Quality Authority – 19 November 2018

- 6.95 The Australian Skills Quality Authority (“**ASQA**”) is a regulatory agency that plays an important regulatory role in relation to student and skill visas. It was established in 2011 as the national vocational education and training regulator by the *National Vocational Education and Training Regulator Act 2011* (Cth). Its responsibility is the regulation of training organisations and vocational educators who offer courses

to overseas students under the *Education Services for Overseas Students Act 2000* (Cth).

- 6.96 The acting head of ASQA called on me in person to discuss the experience of ASQA generally. She told me that delays in making decisions had repercussions beyond the AAT. ASQA was aware that organised crime was sometimes, perhaps even regularly benefiting from counterfeit vocational training programs and colleges. There were, for example, “ghost colleges”, little more than addresses operated by people who provided no real training or tuition. Their “students” were not bona fide students. Often the so-called provider would find a job for the foreign entrant, charging commissions to both the employer and the so-called “student employee”, and arrange, again at cost, the transmission of funds to the “student’s” home country.
- 6.97 Other Members from whom I received oral submissions also had reason to believe that similar activities occurred in relation to Subclass 457 visas. All of these would come at a cost to this country, a cost considerably more, I would think, than the cost of appointing more Members, appropriately qualified, to reduce backlogs of cases and the capacity of people either overstaying, or disentitled to visas, to “game” the system.
- 6.98 ASQA points out that the practice with respect to application to the AAT varies between registries. Costs associated with the provision of T-documents in hard form rather than electronic is a considerable expense for ASQA as its materials are often “document heavy”.
- 6.99 Occasion for the granting of stays is a pressing issue for ASQA. There should be a more specific practice direction than is currently in place, which does not allow for an orderly and considered assessment of applications, particularly when the decision to be stayed goes to the continued existence of a Registered Training Organisation (“RTO”). ASQA has little time to respond to applications. It proposes that there be a call over list or directions hearings for the efficient, consistent and considered making of both interim and final decisions in relation to the colleges and other operators whom it regulates.

6.100 Conferencing and other ADR procedures are unsatisfactory because the applications for provider registration of training organisations and other quite different types of applications are listed together: for example, applications subject to review by the same RTO were joined by the AAT and sought to be dealt with by case conferencing and conciliation. The only common feature there was of the Agency. There was a lack of consultations by the AAT with ASQA.

Department of Veterans' Affairs – 28 November 2018

6.101 The Veterans' Appeals Division reviews earlier reviews of the Veterans' Review Board in relation to benefits available under the *Military Rehabilitation and Compensation Act 2004* (Cth), *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth), and the *Veterans' Entitlements Act 1986* (Cth).

6.102 Matters that come before the Veterans' Appeals Division have, almost always, been subject to an initial merits review by the Veterans' Review Board, an agency of the DVA. Claims made under the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act* too have been subject to a separate internal review by DVA.

6.103 In discussions with DVA, and in the DVA's own submission, I was told that, since the amalgamation, the AAT had taken more of a generalist approach to applications, even in this highly specialised Division. There has also been an increase in the time taken to hear and resolve cases.

6.104 In some registries, a delay of over nine months was not unusual. According to the AAT, there were 361 applications filed in 2017-2018, 480 of which were finalised, leaving 418 pending.⁵³ Only 56% of claims in the Veterans' Appeals Division were finalised within 12 months. This Division is, therefore, possibly the least productive Division in the AAT. The Annual Report of the AAT reveals that the dismal completion rate in the Veterans' Appeal Division in 2017-2018 was not unprecedented. It was a rate that had, simply, "declined further" from earlier years.⁵⁴

⁵³ Administrative Appeals Tribunal, above n 1 at page 28.

⁵⁴ Ibid at page 30.

There may be some force in an argument that, owing to the unique nature of military service, delays in gathering evidence may occur.

- 6.105 On any view however, veterans and their dependents deserve better and quicker attention to their applications than they are receiving. The late provision of this submissions meant that I was unable to explore the reasons for the delays in this Division.

Law Societies, Associations and Interest Groups

SCALES Community Legal Centre – 23 August 2018

- 6.106 Southern Communities Advocacy Legal and Education Service (“SCALES”) is a community legal centre working predominantly in regions southwest of Perth. SCALES has represented clients in matters before the AAT for the last 20 years. The Murdoch School of Law offers a clinical legal education program in which students work with SCALES in assisting applicants in migration matters before the AAT.
- 6.107 SCALES submitted that there has not been, as a result of the amalgamation, an improvement of process.
- 6.108 The submission supports the Divisions of the AAT. Specialisation of Members is important: it would be unreasonable to expect that all Members could apply all of the law which has to be applied by the AAT.
- 6.109 Expertise within a Membership group is necessary. These are my views. Supreme Courts of the States do have divisions. But most of their judges sit in more than one division. Experienced, able lawyers who have specialised in particular areas of the law who are elevated to the judiciary usually quickly adapt to other areas of the law. Courts need the versatility of capable lawyers to enable them to function flexibly and responsively to fluctuating demands. A tribunal undertaking merits review needs to be similarly flexible.

- 6.110 The submitter favoured the inquisitorial process adopted in the MRD. As I say elsewhere, the process, absent counsel assisting, can place an almost unbearable burden upon the Member and prolong reviews.
- 6.111 SCALES claimed that the former Attorney-General did not make transparent merit-based appointments. It commended the current Attorney-General for returning to the practice of providing biographical information on appointees. The need for independence was stressed. Criticism was made of comments by the Minister for Home Affairs of decisions of the AAT. (In other places in this Report, I discuss the issue of commentary upon decisions of the AAT.)
- 6.112 The submission addressed community expectations. A case study was provided of a hearing of an application for a restoration of a cancelled protection visa in the General Division. SCALES contended that directions were complex, legal assistance was lacking, accessibility to transcripts was difficult, and that for all these reasons the applicant was disadvantaged. SCALES advocated for legal representation by government funded lawyers, whilst acknowledging that some assistance was currently available but only under the Immigration Advice and Application Assistance Scheme for vulnerable non-citizens.

Community and Public Sector Union – 24 August 2018

- 6.113 The Community and Public Sector Union (“CPSU”) is the primary union representing staff in the AAT. It is committed to providing a strong voice for its members in key public policy and political debates.
- 6.114 With respect to the amalgamation, CPSU surveyed its staff.

“A third (31.3%) do not believe that AAT acts effectively as an amalgamated body and nearly two fifths (37.5%) believe it only acts effectively in some areas. Many staff report the amalgamation has been in name only, primarily through co-location, and they continue to operate separately...”

Others commented that amalgamation has created an organisation that is

“very MRD-centric” and that “Tribunal forums are generally solely about MRD, with other Divisions occasionally receiving honourable mention.”

I interpolate here that it is the Members of the MRD who feel that they are, in effect, the poor relations of the other Divisions.

6.115 CPSU referred to variations in the sizes of caseloads between Divisions.

“Nearly two thirds (64.9%) of the 53,683 lodgements during 2017-2018 were in the MRD, a fifth (22.4%) were in the Social Services and Child Support Division and one in ten (9.1%) were in the General Division.”

6.116 CPSU submitted that the AAT was understaffed and under resourced.

“Improving the operations of the AAT will require the provision of more resources, across Division, including a better funding model, hiring more ongoing staff and appointing more Members, as the AAT is already undertaking other strategies to reduce caseloads.”

6.117 CPSU said that there was public concern about “a swathe of ‘political’ non-legal appointments to the AAT”.

“In June 2017, a quarter of all non-judicial appointments expired and 42 of 76 Members were not reappointed. 51 Members left, primarily from the MRD, and were replaced by 30 new but inexperienced Members.”

6.118 CPSU said that 78.1% of the staff had expressed concerns about appointments and believed that issues about appointments was causing delays and affecting the quality of decisions.

“While seven in ten staff believe there are issues with public trust and community confidence, they cite the media campaign against the AAT which has spread misinformation about the AAT as the primary reason why, not the AAT’s actual decisions.”

6.119 In conclusion, CPSU submitted that there should be more consultation with staff to improve operations. More Members should be appointed. Further training should be done. Different funding models should be applied.

Asylum Seeker Resource Centre – 24 August 2018

6.120 The Asylum Seeker Resource Centre (“ASRC”) is:

“an independent not for profit, working [group] to protect the human rights of people seeking asylum. For most of the past 17 years the ASRC has provided free and independent legal assistance to people seeking asylum at all stages of the refugee determination process.”

6.121 It supports the amalgamation and the concept of a more generalised AAT to develop a coherent body of principles and greater consistency in administrative law. Reference was made to the IAA.

“... despite the IAA being housed within the AAT, it operates as a separate merits review body with different legislative rules to the MRD.

The IAA only provides limited merits review to people seeking asylum subjected to Fast Track process under Part 7AA of the Migration Act. Notably, the IAA is bound to conduct a review of Departmental decisions ‘on the papers’ and may only consider new information regarding applicant’s protection claims in ‘exceptional circumstances’ and this must be provided within a very short timeframe of 21 days from the time of referral...

The only distinction in whether a person seeking asylum has access to merits review at the IAA or AAT is whether the person arrived by sea or plane to Australia. It is completely arbitrary and discriminatory that persons who arrived in Australia by sea only have access to limited merits review at the IAA.”

6.122 The submission continued:

“Matters in the MRD remain largely subject to the same laws and procedures as they were previously, including their exclusion from Part IV of the Administrative Appeals Tribunal Act 1975 (Cth), which provide stronger procedural fairness requirements and which govern review of all other administrative decisions.”

6.123 In discussing the “Centrality of independence for review of protection-related applications”, this submission was made:

“It has been a longstanding problem that bodies responsible for very serious and often complex reviews of decisions concerning Australia’s protection obligations, have been made vulnerable to politicisation under both Labor and Liberal/Coalition Governments. They have also often been the subject of unbalanced, inaccurate and inflammatory reporting in the media.”

“It appears that the MRD is the only division of the AAT subject to a funding arrangement that provides a financial incentive to finalise more cases or where the Division may face a financial penalty if insufficient cases are finalised.”

6.124 Another submission is that all applications related to protection matters, including cancellation on character or other grounds, be exempt from fees. Timelines, the ASRC submits, for notification of decisions and the dismissal of applications for non-attendance is unfair to people who often are in poverty and do not have access to mobile phones, the internet or email.

“We recommend that a full review be conducted of the impact of the strict deadlines, and notification procedures attached to dismissal of cases for non-attendance at hearings, on applicant’s access to justice.”

Refugee Council of Australia – 24 August 2018

6.125 The Refugee Council of Australia (“**RCOA**”) describes itself as:

“... the national umbrella body for refugees, people seeking asylum and the organisations and individuals who work with them. Representing around 190 organisations, RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.”

6.126 RCOA in its submission restates the concerns that it expressed to the Senate Legal and Constitutional Affairs Committee with respect to the Tribunals Amalgamation Bill 2015. The matters emphasised were:

- (a) the necessity for independence of the MRD;
- (b) a need to review the ‘exceptional’ nature of the MRD and IAA; and
- (c) delays in hearings and decisions, and harsh consequences for non-compliance of applicants.

6.127 RCOA argued that the MRD was politicised because, among other things, s 17D of the *AAT Act* requires the Minister for Immigration to be consulted before a Member may be assigned to the MRD. While s 17CA of the *AAT Act*, RCOA said, requires the Minister to ensure the Member has relevant training, there is no such requirement in s 17C of the *AAT Act*. RCOA submitted that the requirement of consultation with Ministers should be removed, and the “Best Practice Guide to Tribunal Independence in Appointments” published in 2016 by Council of Australasian Tribunals (“**COAT**”) be adopted.

6.128 RCOA referred to a wide range of exceptional provisions excluding or limiting natural justice, and the narrow scope of judicial review. That, together with the power of the Minister to overturn some decisions, in its view, erodes public trust and confidence. Part IV of the *AAT Act* which governs reviews conducted by the AAT, does not apply to MRD matters, save for limited exceptions. Codes of Procedure tend to exclude or reduce natural justice, the power to dismiss applications when a

party fails to appear, ministerial powers to exclude review, and the strict time limits that apply should be repealed. The MRD should be subject to Part IV of the *AAT Act* to promote harmonisation.

- 6.129 RCOA contended that short term appointments, review on the papers and the exclusion of late evidence make the IAA less independent than it should be and erode public trust and confidence. RCOA favours the abolition of the IAA as a separate reviewer with its different processes and narrower scope for review than the MRD.
- 6.130 RCOA is critical of the funding model for the MRD, which provides for a baseline of 18,000 finalisations.
- 6.131 The submission addresses visa cancellation processes and argues that the *Migration Act* should be amended to prohibit the cancelation of visas of people who are owed non-refoulement obligations.

Australian Human Rights Commission – 24 August 2018

- 6.132 The submission of the Australian Human Rights Commission (“**AHRC**”) primarily responds to the third term of reference, whether the AAT is meeting its statutory objectives under s 2A of the *AAT Act*. The AHRC states:

“The Commission supports the vital merits review function of the AAT and opposes any dilution of its powers and jurisdiction to review administrative decisions. To this end, the Commission recently has raised concerns about restrictions on the conventional process of merits review in respect of certain decisions made under the Migration Act 1958 (Cth).”

- 6.133 The AHRC refers to earlier submissions and recommendations on the topic of merits review. In those submissions, it had raised concerns about the “fast track process” legislated by Part 7AA of the *Migration Act*, and other expedited processes for reviews under ss 501 and 501CA of the *Migration Act*. The AHRC said:

“Should the AAT’s powers or jurisdiction to conduct merits review be diminished, or the power of the executive branch to overturn AAT decisions be enhanced, the Commission holds concerns about the impacts on the accessibility, efficiency and efficacy of administrative justice.”

6.134 The AHRC discusses human rights and merits review by reference to Australia’s obligations. It emphatically supported accessibility to a fair hearing.

6.135 In my opinion, as I explain elsewhere in this Report, Australia’s arrangements for accessibility to a fair hearing, and avenues of challenge, compare favourably with other Western democracies. More than 147 out of 195 nations are signatories to the International Convention and Protocol on Refugees. Many of those are closer geographically than Australia and other first world signatories to places from which refugees are moving or fleeing. Notwithstanding the customary international law principle of first country asylum,⁵⁵ Australia receives many people from many places claiming asylum and provides several levels of review and adjudication for verification of them.

6.136 The AHRC referred to recent adverse media reports in relation to AAT decisions. These, it said, focussed on a small proportion of cases which do not represent a balanced assessment of the AAT’s function. Of the 40,000 applications finalised in the 2017-2018 reporting period, only 146 were visa cancellations on character grounds.

6.137 In conclusion, the AHRC accepted that:

“Overall, the Commission considers that the AAT is a appropriate administrative mechanism that plays a central role in fulfilling the right to a fair hearing.”

⁵⁵ See Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, especially at paragraph 43 and Article 35. See also the discussion in Morten Kjaerum, ‘The Concept of Country of First Asylum’ (1992) 4(4) *International Journal of Refugee Law* 514–530. The discussion in the European Commission’s July 2016 *Proposal for a new Asylum Procedure Regulation* notes (at page 5) that, “Where applicants have already found a first country of asylum where they enjoy protection or where their applications can be examined by a safe third country, applications must be declared inadmissible”.

Assistant Professor Narelle Bedford, Faculty of Law, Bond University – 24 August 2018

- 6.138 Assistant Professor Bedford teaches and has practised in Administrative Law.
- 6.139 Assistant Professor Bedford questioned whether true amalgamation has been successfully achieved. She saw the Veterans’ Review Board and the IAA as standing apart in function, principle and process from the MRD and the AAT generally.
- 6.140 Assistant Professor Bedford recognises that the statutory objectives [of the amalgamation] may be difficult to achieve simultaneously. She thinks however that the AAT is aware of the challenges presented by detailed and competing statutory objectives and is managing them appropriately.
- 6.141 The submitter also referred to public trust and confidence. Considering the relatively few successful appeals against AAT decisions in the Federal Courts, she said:
- “This important evidence-based fact confirms that the AAT is undertaking its role in accordance with law and ... the public should be confident and have trust in the AAT.”*
- 6.142 With respect to the question, “The extent to which decisions of the Tribunal meet community expectations”, she believes that it is inherently difficult to define or identify such expectations. Public controversy about some migration decisions, does not mean that the AAT is not meeting those expectations.
- 6.143 Focusing on “The effectiveness of the interaction and application of legislation, Practice Directions, Ministerial Directions, guides, guidelines and policies of the Tribunal”, she reflects that it is appropriate to review [periodically] the Practice Directions and Ministerial Guidelines, including those for the IAA, having regard to the stated aim of amalgamation, of simplification and coherence.
- 6.144 Turning to the question whether “The degree to which legislation, processes, grounds, scope, and levels of review in, and from the Tribunal promote timely and

final resolution of matters”, Assistant Professor Bedford submitted that the AAT’s legislation and current processes do promote timely final resolution of matters. She would not support the introduction by legislation of specific timeframes.

6.145 Addressing the question, “Whether the Tribunal’s operations and efficiency can be improved by legislative amendments or non-legislative changes”, she proposed that economy and efficiency should be effected by the AAT itself. She commended some writings of Deputy President McCabe on these topics. (I have read those writings.)

6.146 The Term of Reference, “Whether the arrangements for funding the operations of the Tribunal are appropriate, including by ensuring consistent funding models across divisions”, was considered by her. If the AAT is to function optimally, she said, there is a need for [adequate] suitable funding. She agreed that the AAT faced challenges in obtaining suitable funding – challenges likely to be aggravated by high volume applications to the AAT under the NDIS.

6.147 Assistant Professor Bedford saw certainty and longevity of Membership as important.

Professor Kim Rubenstein, Australian National University College of Law – 23 August 2018

6.148 Professor Rubenstein is a lecturer at the Australian National University in Administrative Law, and a pro bono advocate.

6.149 This submission included correspondence between the writer and the President of the AAT in March 2018. Professor Rubenstein expressed her appreciation of the President for his assistance to enable her students to attend hearings as appropriate. She went into some detail about one of those hearings.

Australian Lawyers Alliance – 23 August 2018

6.150 The Australian Lawyers Alliance (“**ALA**”) is a national association of lawyers, academics and other professionals numbering 15,000 and representing about

200,000 people a year.

- 6.151 The submission focuses on the degree to which legislation, process and levels of review promote timely and final resolution of matters in the AAT, and whether the AAT's operations and efficiency can be improved.
- 6.152 The submission is that the NDIS will cause a substantial increase in applications and expresses concern that without substantial additional resourcing, there is potential for much delay. It is concerned that inconsistent decisions and processes by the NDIS Division will lead to even more delay, and, ultimately, expense.
- 6.153 ALA claims that there is already bureaucratic dysfunction within the National Disability Insurance Agency. This submission also argues for legal costs to be recoverable from the Agency in successful applications.

National Social Security Rights Network – 23 August 2018

- 6.154 The National Social Security Rights Network (“NSSRN”) is a community organisation concerned with “income support law”, policy and administration. NSSRN favoured the amalgamation of the SSAT and the AAT so that administrative arrangements may be shared. NSSRN sees no detriment to its clients as a result of the amalgamation. The SSAT has retained its Second Tier of review, a right to legal representation, and the availability of payments pending the outcome of reviews. Case management, delays, short notice of hearings, unclear lodgement processes, and oral decisions in Tier One need attention. NSSRN criticises the current process of early case assessments as interfering with the right to a hearing.
- 6.155 Registry arrangements are unsuitable for the management of a two tier system. It is unsatisfactory that Sydney and Melbourne Registries deal with different, rather than both tiers.
- 6.156 Notifications of the listing of hearing dates are often sent too close to actual hearing dates, sometimes only four days. Documents are often provided only a week before a Tier One hearing. DHS has 28 days to supply documents to the AAT, whilst a Tier

One hearing may be listed four to five weeks from the date of lodgement. In consequence, a community legal centre may have only a week or less to prepare the case.

- 6.157 There should be no extensions of the categories of cases in which oral decisions may be made. Section 178 of the *Social Security (Administration) Act 1999* (Cth) allows an oral decision in Tier One if the Member is affirming the decision of the Department. Although written reasons may be requested within 14 days, vulnerable clients may not realise there is a need to request reasons in writing. There is a lack of video-link services or face-to-face hearings when they would be useful. The NSSRN urges further resourcing in remote areas to facilitate the hearing of applications in the AAT in preference to mere telephonic conferences.
- 6.158 Early case assessments tend to interfere with applicants' rights to a hearing. The AAT is trialling "Early Case Assessments" of Tier One social security matters by contacting applicants before hearings to indicate a view as to likely success at hearing. There is no power to reinstate a case after an applicant withdraws. This is a matter of concern to the network.
- 6.159 The submission calls for adequate funding of community legal centres.
- 6.160 Supplementary to its original submission of the 28th of August 2018, submissions were made to stress the importance of the two tiers of review. In 22% of matters at the Second Tier, the AAT (General Division) changed the decision under review. The NSSRN acknowledged, however, that the First Tier operates quickly and informally in the absence of a Departmental representative. The Second Tier provides a more deliberative review and for the Department to appear.
- 6.161 This is a submission which required very careful consideration. I have given it that. I do not think it decisive of the need for a second tier of review that 22% of the decisions are changed there. The review is a merits review by one person of another's view. The existence of a second review is anomalous, and disharmonious on that account as well. The removal of a Second Tier will require more care on the part of a sole reviewer and will encourage good decision making.

6.162 As to delay, NSSRN has noticed that there has been much improvement over the past 6 to 12 months.

6.163 The NSSRN acknowledges also that there have been reductions in delays in the assessment of cases. It remains deeply concerned about any expansion of the early case assessment process. It submits that properly funded duty lawyers should be provided to give legal advice on the merits of matters.

Law Council of Australia – 27 August 2018

6.164 In its introduction, the Law Council of Australia (“**LCA**”) submits that the Terms of Reference for the current Review are broad in nature and invite a “wholesale” review of the AAT. They observe, correctly, the timeframe for the Review, a review of much significance, should have been longer.⁵⁶ LCA was concerned about political emphasis on visa cancellations on character grounds, a small percentage only of the AAT’s work. Experienced Members whose appointments were not renewed were a loss to the AAT. The LCA warns the Review not to reach conclusions unless they are founded on soundly based research and consultation.

6.165 The submission refers to the meaning of “community expectations”: no definition of these appears in the *AAT Act*. Reference is made to them in Ministerial Direction No. 65 (dealing with “Visa Refusal and Cancellation s 501 and Revocation of a Mandatory Cancellation of a visa under s 501CA”).⁵⁷ A “primary consideration” in the exercise of a discretion to cancel a non-citizen’s visa is an expression that appears there. As with other submissions, reference is made to *YNQY v Minister for Immigration and Border Protection*,⁵⁸ in particular the observations there of Mortimer J. Constraints on the discretion of merits reviewers will only drive people to the courts, as, it suggests, has occurred in matters heard by the Immigration Assessment Authority.

⁵⁶ Section 4(3) of the *TA Act* mandates a maximum period of 6 months.

⁵⁷ Ministerial Direction No. 65 is at this web address:
<<https://archive.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf>>.

⁵⁸ [2017] FCA 1466.

- 6.166 The submission says that some aspects of harmonisation are unachievable. LCA submits that a single procedure or process would compromise the good management and proper disposition of matters in the different Divisions of the AAT. The submission discusses the General Practice Direction made under s 18B of the *AAT Act*, together with other directions applying to all Divisions relating to the giving of documents, allocation of business, and the constitution of the AAT, together with specific MRD Practice Directions. It accurately records that some of these Practice Directions were only introduced after the Review commenced, and as such their effectiveness will need to be assessed over time.
- 6.167 LCA accepts that the amalgamation has streamlined and simplified Commonwealth merits review by co-location of Tribunals, a single Registry in each capital city, and by public explanations of what is intended and has happened. LCA has noticed the increase in lodgements in the MRD, and suggests that a contributing factor may be a decline in standards of decision making at first instance. The DHA has moved to a “global decision-making framework”. The framework does not permit one case officer to handle an application from start to finish. The LCA understands that DHA has directed case officers to refuse applications summarily not accompanied by all necessary documentation. The Codes of Procedure that apply to primary decisions (ss 51A to 69 of the *Migration Act*) is said to permit this approach.
- 6.168 LCA is concerned about the finalisation of matters in the MRD. It says that there are long delays there, and that matters are not being reviewed in a way that is “economical, informal and quick”, as required by the *TA Act*. LCA recognises, however, that the AAT is in the process of implementing Directions Hearings and improved “triaging” within the MRD. LCA supports these initiatives, but is concerned that directions hearings in this Division in New South Wales seem to have been discontinued, and not adopted in some other places. LCA raises for consideration the role of representatives within the AAT, and within the MRD in particular. Inconsistent procedures for reviews are applicable under Part 5 (Migration Decisions) and Part 7 (Protection Visa Decisions) of the *Migration Act*. Applicants seeking review under Part 5 are entitled to be assisted by another person: that assistant, however, is not entitled to present arguments or to address the AAT unless the AAT is satisfied that there are exceptional circumstances. There is no

right to any assistance under Part 7 of the *Migration Act*. In this regard, LCA says that applicants under Part 7 are an especially vulnerable group. LCA says that an applicant under Part 5 is entitled to have access to written material before the AAT with some limitations whilst no such right is given to applicants under Part 7 as to access to documents. Access for these is dependent on a request for Freedom of Information.

- 6.169 LCA says that there is an imbalance in caseloads of the three major Divisions of the amalgamated AAT. The MRD and SSCSD lodgements are 14 times the number of the former Tribunal, whose caseload is now largely within the General Division. The larger Divisions have the potential to dominate the smaller ones and to receive the lion's share of resources. This would adversely affect the work of the current General Division.
- 6.170 It is submitted that, to address calls for expertise not possessed within the AAT, and to meet spikes in applications, there should be more scope for temporary appointments.
- 6.171 LCA cautions against shorter tenures (less than five years). There may be an apprehension that Members whose reappointment is imminent will be reluctant to find against government agencies. LCA favours appointments of Members with specialised legal knowledge and skills. There should be a more open and merits based selection process following advertisement, an agreement between the former President of the AAT and the previous Attorney-General for the adoption of a protocol to govern appointments is cited.
- 6.172 LCA addresses the issue of two tiers of administrative review, and in particular the Second Tier review of the Veterans' Review Board. That system has led to hearings by multiple Members with different levels of capacity and remuneration.
- 6.173 LCA supports the divisional structure, together with the President's authority under s 18B of the *AAT Act* to give directions for the arrangement of business.

- 6.174 LCA believes there has been an improvement in accessibility by the location of one Registry in each capital city, and regional sittings, which should however take place more often. Multiple IT systems and different filing arrangements for the MRD and the General Division are two matters which are obstacles to harmonisation. LCA discusses MRD fees, and submits that waiver for disadvantaged applicants should be reinstated and the current rates of fees reviewed.
- 6.175 LCA reports that it has received comments from the Victorian Bar that the premises in Melbourne are not adequate, and that there are fewer rooms available for tax cases than formerly.
- 6.176 In relation to amalgamation, LCA points out that Part 7AA of the *Migration Act* requires different procedures from the general procedures of the AAT.
- 6.177 It too submits that the IAA should be abolished and replaced by a separate division of the AAT with its own specialist procedures, observing principles of fairness and natural justice.
- 6.178 LCA submits that the general nature and scope of review should be maintained and that the Review not recommend restrictions on scope, or grounds for review which currently allow the AAT to correct factual and legal errors in reaching the preferred decision based on the most up to date evidence available.
- 6.179 LCA drew attention to s 44 of the *AAT Act* which permits appeals on a question of law subject to exceptions which include some migration decisions (see s 43C) and certain decisions of the SSCSD (see s 44(1A)). It submits that there are no compelling reasons to maintain restrictions on appeals for error of law or on a general question of law.
- 6.180 LCA has concerns in relation to the funding of matters on a basis of finalisation of them in the MRD. The submission is, in effect, that the model does not properly meet the needs of the MRD.

6.181 Finally, LCA argues for resurrection of the ARC, and that in any event oversight of the AAT should not be assumed by officials in the AGD, as now happens. Detached oversight is necessary.

Victoria Legal Aid – 25 August 2018

6.182 Victoria Legal Aid (“VLA”) has concerns, among other things, about the NDIS, visa cancellations and “robo-debts” to recover social security debts. In 2017-2018, VLA provided legal advice in respect of about 850 AAT matters. The AAT plays a crucial role in the Australian legal system in affording an opportunity for applicants to present their cases on the basis of their personal circumstances differently from the way they may or may not do that in an appeal to a court. The AAT relieves pressure on the courts and ensures accountability and better government decision making.

6.183 VLA favours retention of the two-tiered model in social security matters: the First Tier has to manage high volumes, and the Second Tier is able to take a more comprehensive and measured approach.

6.184 VLA submits that closer attention should be paid to model litigant guidelines.

Refugee Advice and Case Work Service – 24 August 2018

6.185 The Refugee Advice and Case Work Service (“RACS”) is a dedicated refugee legal centre that has been assisting refugees on a not-for-profit basis since 1988.

6.186 RACS submits that there has been an escalation in waiting times in the MRD in applications for Protection Visa reviews, up to two years or longer in some instances. RACS speaks of the negative impacts of these delays on applicants.

6.187 RACS expresses concerns about ministerial criticism of the AAT, arguing that these may lead to a reduction of public confidence in the AAT.

6.188 RACS submits that appointments and reappointments to the AAT should be transparently made.

6.189 According to RACS, the IAA's procedures are arbitrary and unjust. Procedural safeguards are not in force there. Review by it should be abolished and its caseload transferred to the MRD. Applicants should have the benefit of hearings and interviews, and be enabled to address adverse information. The practice directions made under s 473FB of the *Migration Act* limit the ability of applicants to advocate at the IAA.

Kingsford Legal Centre – 24 August 2018

6.190 Kingsford Legal Centre (“**KLC**”) is a Community Legal Centre providing legal advice to and advocacy for people in need of legal assistance in the Randwick and Botany local areas of Sydney. KLC advised that, in 2017, 56.3% of its clients stated they had no income or were low income earners, 27% spoke a language other than English as their first language, 6.4% identified as being Aboriginal or Torres Strait Islander, and 24.5% suffered a disability.

6.191 The AAT provided an effective and accessible mechanism for review of government decisions, which have a serious impact on lives. There were concerns about the AAT's independence and scope to review government decisions. Improvements could be made to increase accessibility for vulnerable people. Government action has undermined the independence of the AAT by political criticism of decisions. Laws that give the Executive power to overrule decisions of the AAT should be repealed, including ss 501A and 501B of the *Migration Act*.

6.192 KLC raise concerns that the current migration law system does not provide the AAT with sufficient oversight of government decisions to cancel visas. It submits that the *Migration Act* should be amended to enable the AAT to review all visa cancellation made under s 501 of that Act.

6.193 In migration matters, applicants who satisfy the current conditions for a reduction in fees at the AAT should be exempt from paying any fee.

6.194 The submitter pointed out that the time for application to the AAT in most Divisions for merits review is 28 days. In taxation and compensation matters, the period is 60

days or longer. By contrast, a person is compelled to apply for a merits review of a visa cancellation or revocation decision within just 9 days. The time limit for application to the AAT for merits review of a visa cancellation or revocation should be extended to 30 days or more.

- 6.195 KLC submits that there should be an increase in funding of \$200 million to fund legal assistance services in line with the Productivity Commission's Report on Access to Justice Arrangements.
- 6.196 In relation to the timely and final resolution of cases, KLC says that that most are resolved in a timely fashion. The AAT has performed well in finalising matters in a less expensive and less formal manner than the Federal Courts.
- 6.197 The KLC recommends a transparent, merits-based selection process for Members.
- 6.198 The KLC repeats what many other submitters said, that the funding model for the MRD is defective. It seeks a review of the AAT's funding model, and says that increased funding to the AAT would flow from it.

Refugee Legal (Refugee and Immigration Centre) – 27 August 2018

- 6.199 The submission explains that Refugee Legal is a specialist community legal centre that has provided free legal assistance to asylum seekers and disadvantaged migrants in Australia for 30 years, including asylum seekers and migrants, both in the community and in detention. It is a long-standing member of the AAT's (MRD) Community Liaison Consultation Group.
- 6.200 As to whether the objectives of the *TA Act* have been achieved, Refugee Legal submits that the AAT has been largely successful. The AAT in its MRD has, however, failed to meet a number of the specified objectives. It has failed to implement an open, transparent, merit-based system for appointment of Members.
- 6.201 Legislative reform is required to simplify and better align the requirements for applicants in the several Divisions. There is a difference between fees payable in the MRD and the General Division. Refugee Legal recommends that the AAT adopt

uniform exemptions from fees for all applicants who are detained in a public institution or under 18 years of age.

- 6.202 The submitter noted that s 29(7) of the *AAT Act* which confers a discretion to extend time for an application does not apply to all reviews, and in particular does not include MRD matters or GD matters under s 500 of the *Migration Act*, and argued that the discretion should be exercisable there.
- 6.203 It argued that legislative change should be made to provide the General Division with a statutory discretion to review documentary evidence submitted fewer than two business days before a hearing where it would be reasonable to do so.
- 6.204 Addressing the time limit for lodgement of applications to the General Division subject to s 500 of the *Migration Act*, the submission is that the General Division should be compelled to make a decision within 12 weeks, or 84 days of the notification decision: otherwise, the decision should be taken to be affirmed by the operation of s 500(6L) of the *Migration Act*. The AAT has no discretion to extend this period. The submission notes that in some instances this provision provides for a quick finalisation of matters, however, where an applicant is unable to obtain legal representation, or is vulnerable due to other circumstances, a fair hearing is not truly available. Legislative amendment to provide the General Division with a statutory discretion to extend the period in s 500(6L) of the *Migration Act* where it would be reasonable to do so should be made.
- 6.205 Sections 362B(1A) and 426A(1A) of the *Migration Act* provide for the dismissal of applications in the MRD if an applicant fails to attend a hearing. Following reference to a case study, the submission supports legislative change to confer a discretion on the MRD in the AAT to extend the period for requesting reinstatement of an application dismissed under ss 362B(1A) and 426A(1A) of the *Migration Act*, where it would be reasonable to do so.
- 6.206 Reference was next made to the SSCSD, which can in some circumstances fund reasonable travel expenses to assist parties to attend hearings under s 14(3) of the

AAT Regulations. Refugee Legal recommends that similar provision be made for applicants in migration matters.

- 6.207 Funding, it is argued, of legal assistance by the AGD should be provided in migration and social security matters.
- 6.208 Refugee Legal expressed concerns about “multiple applicant hearings” in the MRD. The Division has been conducting accelerated multiple applicant hearings for both general migration reviews under Part 5, and also protection visa reviews under Part 7 of the *Migration Act*. It submits that this requires a large number of unrelated applicants to attend hearings at the same time. In purported compliance with the requirements of a private hearing, the Presiding Member takes evidence from each applicant in private. This, the submitter urges, should not happen.
- 6.209 Refugee Legal favours merit-based appointments, in accordance with COAT’s “Best Practice Guide”, to be enacted into law.
- 6.210 Refugee Legal urges that the number of Members appointed to the MRD and General Division be increased to reflect the continuing increase in applications, and improved training of new Members.
- 6.211 The Minister (or Delegate) under the *Migration Act* (ss 375, 375A and 376 – Migration Reviews, and ss 437 and 438 – Protection Reviews) may restrict the provision of certain information held by the Department. Reference is made to *Minister for Immigration and Border Protection v Singh*,⁵⁹ in which the Full Federal Court discussed common law procedural fairness and held that the AAT, in compliance with that, was bound to disclose the existence of non-disclosure certificates to an applicant. The President of the AAT, Refugee Legal submits, should make a direction under s 18B of the *AAT Act* to ensure that Members when dealing with non-disclosure certificates comply with the decision of the Full Federal Court.

⁵⁹ (2016) 244 FCR 305.

- 6.212 Further, Refugee Legal submitted, the President should make a direction under s 18B of the *AAT Act* to ensure that Members adopt a consistent procedure for making non-disclosure and non-publication orders under s 35 of the *AAT Act*.
- 6.213 The MRD has recently sought to mirror the General Division by listing matters for a directions hearing before the substantive hearing. Unlike directions hearings in the General Division, the MRD does not permit parties to appear by telephone. This should change to ensure that representatives be consulted, by telephone before a directions hearing is conducted and that the representatives be permitted to appear by telephone without the need for the applicant to be present (as is the practice in the General Division).
- 6.214 Refugee Legal supports legislative change to compel the Australian Border Force and DHA to facilitate an in-person hearing in the AAT for immigration detainees. In the interim, the AAT should enter into a Memorandum of Understanding with Border Force and the Department to ensure that this be the practice.
- 6.215 Refugee Legal urges that more women be appointed as Members. Applicants should be given a choice of reviewer in this regard.

Migration Institute Australia – 31 August 2018

- 6.216 The Migration Institute Australia (“**MIA**”) makes six recommendations:
1. A model similar to the United Kingdom’s judicial appointment commission should be considered.
 2. Directions hearings should be introduced in the MRD consistent with other AAT Divisions.
 3. The MRD should consult with DHA to determine the causes of and meet the increase in the MRD caseload.
 4. The funding model for the MRD should be reviewed.

5. The IAA should be abolished.
 6. Applications by asylum seekers who have entered Australia as unauthorised maritime arrivals should be heard by the MRD.
- 6.217 The submission is made from the practical perspective of MIA members, Registered Migration Agents, and their clients. The submission says that the AAT's objectives of fairness, informality and expedience are not being met in the MRD. MIA supports the COAT's Best Practice Guide to appointments and the United Kingdom's judicial appointment procedures.
- 6.218 Delays in hearings are rife in migration and refugee matters: caseload statistics demonstrate that this is so. More funding is desirable.
- 6.219 Practice Directions for the IAA are very different from the comparatively fair and just systems of the other Divisions of the AAT. Restrictions as to submissions, and time limits produce an unfair system with a high refusal rate. The IAA should be abolished and its jurisdiction exercised by the MRD.

Legal Practitioners and Law Firms

Global Mobility Immigration Lawyers – 20 August 2018

- 6.220 Global Mobility Immigration Lawyers (“**GLOMO**”) described themselves as a firm of immigration lawyers and Registered Migration Agents practising in Melbourne. They expressed a hope that:

“[the] Review would result in a more effective Tribunal, in such matters as the timely and effective resolution of matters, improvements to operations and efficiency and the promotion of public trust and confidence in decision-making.”

- 6.221 GLOMO commended the AAT for its finalisation of 75% or so of applications to it within 12 months of lodgement. As to public trust and confidence in the AAT, they

criticised comments by the Minister of some AAT decisions which overturned visa cancellations on character grounds.

6.222 They said this of appointments to the AAT:

“[there is a] perception that Members of the AAT fail to have their contracts renewed if their decisions are not favourable to the Government. This is an issue that warrants scrutiny.”

6.223 These submitters expressed concern about politicisation of decision making, and a hope that the Review empowers the AAT to maintain independence from the executive arm of government.

Maurice Blackburn Lawyers – 22 August 2018

6.224 Maurice Blackburn Lawyers is a firm of lawyers with 31 numerous branches in the mainland States and Territories. The firm employs 300 or so lawyers. It has acted for clients in the AAT especially in Comcare, Seacare, Migration, Social Security, and recently NDIS matters. It has therefore broad experience of the AAT.

6.225 The submission focused, among other things, on the timely and final resolution of matters:

“In our experience, the timeliness of decisions differs from registry to registry. Some ... have capacity to produce decisions within an efficient timeframe – say four to six weeks. Others, however, are renowned for taking between 6 and 12 months to produce a decision. In our experience, these differences are not always associated with the complexity of the case.”

Examples were not provided to the Review in support of this contention. I was invited to investigate timelines and compare registries. The firm suggested that I recommend “an appropriate period or cap for handing down a decision”. Delays occurred because of jurisdictional complexities. Additional power should be given:

“... to modify the expedition of administrative decisions made under supplementary legislation in order to facilitate the expedited jurisdiction of proceedings for related matters.”

- 6.226 In response to the question whether the AAT’s operations and efficiencies could be improved, the solicitors submitted:

“That the Review recommends dispensing with, or reducing the frequency and duration of, preliminary telephone conferences in matters where both parties have legal representation and it is appropriate to do so.”

It is difficult to identify particular types of cases to which this submission refers. In general, however, it seems to be a sensible suggestion. Clear practice directions and early participation in case management by Members should reduce both the number and duration of all preliminary conferences.

- 6.227 Maurice Blackburn also submitted that the parties should be sent material electronically and not required to collect it in hard copy personally from the AAT. Another submission sought an increase in the use of electronic files and communication, and the need for these in the recently created NDIS Division: they described the internal review process there as inefficient and poorly resourced.

“NDIS related decisions are about to increase exponentially.”

Appropriate practice directions for the ease of drafting of applications and related materials in this Division should be made.

- 6.228 The firm gave thought to the question whether the AAT is satisfying its objectives to public trust and confidence:

“... a key element in ensuring access to justice is the right to representation, and appropriate cost recovery”

Inequality of power and constraints upon access to justice were inherent problems that, they said, affected the NDIS. By contrast, in Comcare cases, a successful

litigant can recover party-party costs of up to 75% of the Federal Court Scale. Conference registrars, they argued, should have power to recommend solicitors to self-represented applicants, and there should be a panel of experienced solicitors for this purpose.

6.229 These last submissions raise matters of economic policy. Mounting costs, the differing capacities to pay them, and of many members of the community, especially disadvantaged ones, are a problem in all courts and tribunals. In an ideal world, the problem would not exist. The extent to which costs should be available in NDIS matters would have to be considered in the costing of the Scheme overall.

Jason Donnelly, Barrister-at-Law, Lecturer and Course Convenor of the Graduate Diploma in Australian Migration Law at Western Sydney University – 23 August 2018

6.230 Mr Donnelly thinks that, broadly speaking, the decisions of the AAT are largely meeting community expectations and are in accordance with legislation, policy and applicable guidelines (AAT's statistics for the period 2016-2017 show that 82% of applications were finalised within 12 months). Reference is also made to the 2015-2016 reporting period, in which 80% of applications were finalised within 12 months. As to the 34,495 applications on hand in the AAT on 30 June 2017, he says that an increase of 24% has resulted in an increase of 36% in the number of applications on hand. Mr Donnelly points out that the AAT has been able to finalise a substantial number of applications within reasonable periods, and, that apart from the MRD, most Divisions have finalised a substantial number of applications within 12 months of lodgement. The writer also noted that in the 2016-2017 reporting period, only 3% of appeals from the AAT were allowed. He was of the view that the integrity and competence of the AAT could not seriously be in question: the AAT genuinely promotes public trust and confidence.

6.231 With respect to the MRD, this submitter noted that in the financial year to May 2018, migration lodgements increased by 43% and refugee lodgements by 47%.

6.232 The submission relates that the AAT varied the decision of the official decision maker in fewer than 26% of the cases. Sometimes the variation was only made on

the basis of new or additional evidence available to the AAT, or the capacity of the reviewer to assess credibility of oral evidence adduced. The submitter believes that the AAT provides a reasonably fair and just review and individualised justice.

- 6.233 Mr Donnelly next referred to s 501 of the *Migration Act* and Ministerial Direction 65⁶⁰. Almost four years have passed since its introduction. The Direction is intended to meet “Expectations of the Australia Community”. It is time, he says, to consider amendments to it.
- 6.234 The submission contends that there is inconsistency between two Migration cases he cites and that the inconsistency should be resolved by amendment to the Codes of Procedure. The submitter referred to other cases in which the *Migration Act* was applied. (It is unnecessary to discuss these cases here.)
- 6.235 The submission also raises the issue of two tiers of review in the SSCSD. Mr Donnelly proposes that the Second Tier be abolished: it is not fair, just or rational that it remain. It also causes friction within the AAT.
- 6.236 In general, Mr Donnelly thought that the *TA Act* is achieving its purpose.

John Findley – 23 August 2018

- 6.237 The submission cites the Hon. Justice Duncan Kerr Chev LH’s paper, “Keeping the AAT from becoming a Court”, and discusses briefly the separation of powers under the Constitution and the AAT’s position as firmly part of the Executive Government. The submission, however, questions Executive Government influence and criticism of AAT decisions. These, the submitter believes, do not promote public trust in the AAT.
- 6.238 Under a heading “Too many lawyers”, the submitter argues that lawyers focus too much on fine points of practice. There is an acknowledgement that in the MRD, no contradictor is available and legal representation is not facilitated. Reference is then made to ss 366A and 366B of the *Migration Act*. Mr Findley says that matters in the

⁶⁰ Ministerial Direction No. 65 is at this web address:
<<https://archive.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf>>.

Taxation and Commercial and MRDs are complex. He goes on to say that the MRD operates capably because of its expertise.

6.239 With respect to matters concerning small businesses, the resources of the Australian Taxation Office exceed those of applicants. He proposes a small business taxation division to operate in a manner similar to the MRD without lawyers. Power to grant stays in respect of an amended assessment should be restored to the AAT.

6.240 In conclusion, the submitter argues that the AAT should become a Chapter III Court to protect it from outside influence and criticism.

Heather Marr, Albany Migration Services – 24 August 2018

6.241 The writer is a Registered Migration Agent whose practice is primarily in family reunion and asylum cases.

6.242 Ms Marr refers to the amalgamation of the AAT. Loss of experienced Members of the MRD in the AAT has had a negative impact. There is too much delay in the making of decisions there.

Lorenzo Boccabella, Barrister-at-Law – 28 November 2018

6.243 I received a late written submission from Mr Boccabella, a barrister who is a regular practitioner in the MRD and elsewhere in the AAT.

6.244 Mr Boccabella's submission drew attention to s 363(1)(d) of the *Migration Act* and its application to a case in which he had appeared before the AAT, and is now the subject of an appeal. It is not necessary or, indeed, appropriate for me to consider the merits of the case or the pending appeal. Mr Boccabella did submit, however, that all Members should be "admitted" lawyers and that there should be no restrictions on the appearance of lawyers in the AAT in any of its Divisions.

6.245 Mr Boccabella expressed concern that, if there were to be a counsel assisting rather than a legal officer from the Department presenting a case for the Department, Members might come to think that they can use that counsel as a confidential,

sounding board.

Past and Present Tribunal Members

Sue Raymond, Former Member of the AAT – 20 August 2018

- 6.246 Ms Raymond was a lawyer for 35 or so years. She spent 16 years as a Senior Member of both Commonwealth and State Tribunals. She has also been an officeholder of a State Chapter of COAT. She had been a Senior Member of the Migration and Refugee Tribunal before the amalgamation.
- 6.247 She said Members of the MRD worked in the most difficult tribunal environment she had experienced. Their work was complex, in law and policy, and voluminous. Absence of a contradictor (of an applicant) at hearings imposed an additional burden on Members.
- 6.248 I understand and accept what she has said of these problems. Members of the MRD to whom I have spoken, and they include Members at all levels of membership, echo her submissions.
- 6.249 In directly addressing the Terms of Reference, Ms Raymond said that “community expectations” should be taken to be the expectations of informed and unbiased people. The basic expectation would be that cases be decided fairly and justly and according to circumstances particular to them.
- 6.250 Ms Raymond deplored critical publicity, contending that it had a tendency to create a public perception unfairly adverse to the AAT and its decisions. She posed the question as to who should defend the AAT publicly. (I discuss issues of publicity and sensitivity elsewhere in this Report).
- 6.251 Her submissions continued that community expectations would be best met by:

“the appointment of independent, appropriately qualified decision-makers. In my view the appointment of members is best achieved by a transparent, merit-based, advertisement, interview and appointment process.”

- 6.252 This submission conforms, in slightly differing terms, with views of several of the other Members and others to whom I have spoken or from whom I have received submissions.
- 6.253 Ms Raymond made reference to the COAT's guide to appointments and said that it had not been adopted or followed by Government over the past two years. She accepted that it is the prerogative of the Executive Government to make appointments to the AAT, but even so, it should do that by a transparent process which would instil public trust.

Susanne Tongue – 24 August 2018

- 6.254 Ms Tongue's relevant and extensive experience is outlined: first Head of Migration Review Tribunal, and the last Head of the Immigration Review Tribunal. She was formerly a Member of the ARC, an Adjunct Professor of Law at the Australian National University College of Law, President of the Australian Institute of Administrative Law, Deputy President of the Australian Law Reform Commission, Senior Consultant at Canberra University Centre for Customs Studies, Member of the DIAC College of Immigration Oversight Group, Member of the 1996 Review of Migration Decision-Making, and Legal Advisor to the Senate Scrutiny of Bills Committee.
- 6.255 Her submission includes a concise history of Australian Tribunals within the Australian legal framework. She wrote this of the amalgamation.

“The benefits of an amalgamated body far outweigh the desirability of levels of separation because amalgamation improves quality decision-making by providing more resources for sharing expertise and sources.”

- 6.256 The submission continued, that suitably qualified applicants should be appointed. Improvements in decision making can be achieved without legislative change. Because of the short period since amalgamation and the large increase in workload, the AAT should be allowed to develop, and be monitored before major legislative changes are considered and implemented.

- 6.257 The submission provides an informative explanation of the procedures of the former Migration Review Tribunal and Immigration Review Tribunal. It also explains the origins of Ministerial Directions and the role and responsibility of the Minister as a “barometer” [my term] of the public interest.
- 6.258 Ms Tongue submits that improvement by way of innovation and management of decision making is desirable. Efficient use of technology, exercise of his or her authority by the President or Head of the MRD to direct that certain decisions be guidance decisions, and increased staff participation in the preliminary preparation of documents and templates for Members, would promote efficiencies. (As will appear elsewhere, some of this I would accept, other parts of it I would not for reasons that I give.)
- 6.259 Finally, Ms Tongue observes that funding of merits review of migration decisions has been uncertain, meagre and not responsive to changing conditions.

Emeritus Professor Terry Carney AO – 23 August 2018

- 6.260 Emeritus Professor Carney AO records that for over 39 years, until September 2017, he served as a Member of the former SSAT and, post amalgamation, the SSCSD of the AAT.
- 6.261 His opinion is that the introduction of the SSAT to the expanded AAT has proceeded well given the leadership of the Registrar. The reputation of the AAT has suffered from a lack of independent process in the making of appointments. He also raises the issue of funding for the AAT, which, he says, is too low and not well applied. Emeritus Professor Carney enclosed a published paper he has written in support of these assertions.

Private and Confidential – Anonymous Member of the AAT – 24 August 2018

- 6.262 This submission provides a detailed outline of the Member’s experience and discusses a number of issues adversely affecting the proper management and efficiency of the AAT. The first issue raised is of merit based statutory

appointments rather than political ones. There should be uniform terms and conditions of service by Members. Willingness to accept cross-appointments within the Divisions of the AAT, would provide flexibility and should be a qualification for appointment.

6.263 A Selection Committee independent of the Government should be established. Tenure of Members should be 3, 5, 7 or 10 years. The submitter says that some recent appointments were of people who had worked in Ministers' offices as advisors. The submitter was of the view that no one should be appointed who was under 35 years of age.

6.264 The leadership of the MRD should not be driven by statistics. Morale in the Division is low. This Division is now seen more as an executive, public service type of appointment with influence exerted by the public service. There have been bullying and threats adverse to independence within the MRD. The submitter discusses his or her own experience in this regard.

6.265 There have been limited financial "wins" in the amalgamation. Public Servants who truly sought to assist Members have been lost by it. Support of Members by the Registry is not forthcoming.

6.266 In relation to case management, the MRD "casemate" system is not suitable: it is "Public Service friendly" but not "Member friendly". The roles of Public Servants and Members have been blurred. Many of the practice and policy directions are too detailed and prescriptive: parts of these policies are in direct conflict with legislation.

6.267 It is suggested that MRD Members should be able to undertake work in other Divisions so as to be exposed to different subjects to broaden their experience.

Anonymous Senior Member of the AAT – 31 October 2018

6.268 An anonymous Senior Member outlined his or her experience in Administrative Law and service on various tribunals and statutory bodies. The submitter says that there

are effectively three distinctive tribunals employing different case managements and approaches, and different hearing rules and procedures in the AAT.

- 6.269 The submission argues that the AAT is not meeting its objectives in the MRD because of the increase in workload, its backlog, and insufficiency of Members. The submitter claims that the MRD is poorly managed in Victoria, both at Member and Registry level. There is a need, this person says, for more specialised training at regular intervals. The submitter is critical of current procedures and appointments to the MRD.
- 6.270 The submission also criticises the current system of benchmarking in the MRD, to enforce targets of finalisations. There is a lack of mentoring of new Members. The submission discusses hiring of Registry staff on short contracts, and absence of suitable experience within the Registry. It is suggested that opportunities for promotion within the Registry are not always based on performance and ability, but rather on connexions and loyalties.

Confidential – Anonymous Member of the AAT – 19 November 2018

- 6.271 This submission states that the writer is a legal practitioner of considerable experience who has in the past been a Member of a number of Divisions of the AAT.
- 6.272 The submitter is of the opinion that the skills of a lawyer are necessary for the application of legislation across the multijurisdictional breadth of the AAT.
- 6.273 It is submitted that appointments pre-amalgamation, often requiring advertisement of positions and interviews of candidates, were better made than now. Non-lawyer Members encounter difficulties in doing the work. The submitter asserts that there have been “political” appointments, disposed to make politically popular decisions. A core group of long-term experienced Members is necessary for the proper and efficient conduct of the work of the AAT. Members without legal experience and qualifications require far more training and mentoring at cost to the taxpayer.

- 6.274 Registry staff have entered into case management and conferencing on a large scale: in consequence, there is less support provided to Members by staff than there should be.
- 6.275 Renewal or reappointment of experienced Members is highly desirable. The AAT and its Members will not engender public trust and confidence if a government make unmeritorious appointments.

Anonymous Member of the AAT – 21 November 2018

- 6.276 The writer is and was a Member of the AAT before and after amalgamation. The focus of the submission is the appointment process and its impact on the progress of the amalgamation.
- 6.277 The submitter suggests that some recent appointments have been “captain’s picks”, and do not reduce the workload of the Divisions.
- 6.278 There are, the submitter says, different workloads and caseloads among the States. The General and Other Division is considered within the AAT to be the most elite and important Division. There is a pressing need for further appointments and more senior appointments to the MRD.
- 6.279 At present, the AAT does not provide a career path for Members due to the relatively short term of most appointments and the infrequency of reappointments: there is a constant loss of experience in consequence.
- 6.280 The Registry continues to expand, in numbers and activities. It fills gaps in Membership numbers and is doing work which should be done by Members, such as list and case management.

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CHAPTER 7 – THE CURRENT AAT LEGISLATION

- 7.1 In order to answer the questions, explicit and implicit, in the Terms of Reference, it is also necessary to consider the operation of the *AAT Act* in its current form.
- 7.2 The operating part of the AAT, its Membership, consists of the President, who must be a Federal Court Judge, Presidential Members, and Members. A Presidential Member is the President or a Deputy President.
- 7.3 “Proceeding” in relation to the AAT includes an incidental application made in the course of, or in connexion with, an application or proposed application.
- 7.4 “Second review” is a second review pursuant to an enactment making provision for it.
- 7.5 “Tribunal” is defined to include “an officer of the Tribunal exercising powers of the Tribunal”.
- 7.6 Part 2, Division 2 of the *AAT Act* provides for the appointment of Members. A person (other than a judge) who is to be appointed as a Member of the AAT is to be appointed as a Deputy President or as a Senior Member or Member. Section 6(3) provides for six levels of Membership, Deputy Presidents, two levels of Senior Membership, and three levels of ordinary Membership. In my opinion, it is questionable whether there ought to be so many levels of Membership, each attracting a considerable differential in remuneration. It is easy to see why there is a need for the appointment of Deputy Presidents to oversee lists and generally undertake a leadership role. There may even be a case for two levels of Senior Membership to assist Deputy Presidents in their roles. A number of the Members whom I interviewed told me that sometimes the most Senior Members (Level 1) were allocated less demanding work, rather than complex cases which could be expected to be allocated to those Senior Members enjoying their higher grading and better remuneration. I could not discern any particular pattern of superiority of qualifications, or experience, or performance on the part of Senior Members generally. Indeed, the contrary may have been the case in some instances.

- 7.7 The seemingly inexplicable differences in levels of Membership and remuneration are prejudicial to the performance of the AAT and accordingly to the process of amalgamation. Serious consideration ought be given to whether these differentials are unproductive and unjustifiable, and if they are, whether they should be replaced by one or two levels only with a consequential gradual levelling of remuneration.
- 7.8 Section 7(2) provides for the appointment of Judges of the Federal and Family Courts, legal practitioners enrolled for at least five years, or others in the opinion of the Governor-General possessing special knowledge or skills relevant to the duties of a Deputy President, as a Deputy President. More than one Federal Court Judge to whom I spoke said that in his or her opinion there was little purpose to be served by appointing Federal or Family Court Judges to the AAT. One Federal Court Judge said, however, that there were cases, especially taxation cases, in which the same or similar points were arising for consideration in the Federal Court, or there was litigation between the same parties in that Court as in the AAT, and accordingly in which it was efficient and expedient to have a Federal Court Judge sit as both a Member of the AAT and as a Federal Court Judge exercising jurisdiction in both. I am informed that some appointees to the Federal Court have declined a commission to sit as Deputy Presidents on the AAT.
- 7.9 Almost all of the enactments, in fact some 450 or so, which make provision for reviews of decisions under them by the AAT, are long and complex. They give rise to many serious issues, either of fact or of law, and more often than not of mixed fact and law. They raise difficult questions, for example, of causation, relationships, evidence and credit. Members really need forensic training and experience, and a capacity to write reasoned and accurate decisions (opinions) in order to do their work efficiently and reasonably expeditiously. As conscientious and well-meaning as “non-legal” appointees may be, they labour under the disadvantage of lacking these skills or expertise. One can see from the Kerr and Bland Reports why, in the beginning, persons without legal qualifications but possessing administrative and like capacities might be seen to be suitable candidates for appointment to the AAT. Sir Gerard Brennan, the inaugural President of the AAT, spoke in a speech, to which I have referred, of the novelty of the nature of enterprise of the AAT when it came into existence.

- 7.10 No one quite knew how it would proceed, or what would be the criteria of a good, or the apparent defects of a bad decision by an official. As I discuss elsewhere, this question, although asked by the first Members of the AAT, was effectively held by an early Full Federal Court to be inapt, that the question which the AAT should ask itself was whether it could make a correct or *preferable* decision [italics added].⁶¹ Further, both the range of decisions to be made and the law applicable to them far exceed the relatively few enactments and the relative brevity of them in the beginning.
- 7.11 If special expertise to assist the AAT, such as medical, aviation or education, is required, then the AAT could readily gain access to it by engaging an appropriate expert witness. The only exception that I might make would be in respect of claims arising out of military service which has its own particular disciplines, traditions and risks well understood by those who have served in the military. Section 73(3) of the *AAT Act* as it stands, does allow for the appointment of persons said to have special knowledge or skills relevant to the duties of the Membership.
- 7.12 Terms of employment of Members may not exceed seven years. Some Members criticised the random nature of the periods of appointments of Members for periods of between three to seven years. They also said that appointments should be for longer rather than shorter periods, and even longer than seven years.
- 7.13 Arguments can be made both for longer tenures than those that are presently allowed by s 8 of the *AAT Act*. I spoke to more than one former Member whose performance as a Member was not, and to my knowledge, could not be questioned but whose terms were not renewed by the government of the day. They did not understand why this had happened. It did seem to me that failure to renew their appointments may have resulted in a loss of experience, capacity and institutional knowledge, particularly desirable for the amalgamation. On the other hand, Members are not obliged to accept the appointments that are offered to them which are quite specific as to period of service. All institutions benefit from a degree of recurrent reinvigoration.

⁶¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409.

- 7.14 I have formed the view that these competing considerations have not always been evenly balanced. So too, insufficient regard has been had to the fact that a professional person in accepting appointment as a Member can be interrupting a professional career which it will not be easy to re-enter after the conclusion of service as a Member. All of these factors need to be carefully weighed in future. In my opinion, if a diligent, competent Member whose term has expired seeks renewal of appointment, the AAT would benefit from his or her re-appointment.
- 7.15 On the matter of appointments, I received many submissions complaining about a lack of transparency. Proposals have been made from time to time for the establishment of an independent committee to make recommendations as to who should be appointed as Members. Appointment of Chapter III Judges is undoubtedly an executive function. It would be anomalous if the appointment of Members who are not Chapter III Judges and are effectively exercising Chapter II functions, albeit quasi-judicially, were to be appointed differently.
- 7.16 I should record at this point that a number of Members also complained that over many years, “political” appointments have been made. In my opinion, there should be a register kept by the AGD of persons expressing interest in appointment to the AAT. Availability of positions should be advertised and the Executive Government should generally appoint qualified lawyers with proved capacity and experience in forensic analysis and opinion or judgment writing. They should also be, of course, persons of good character, even temperament, courteous disposition and proved diligence.
- 7.17 Section 17K(1) the *AAT Act* provides that the Minister may assign a Deputy President to be the Head of one or more Divisions of the AAT. Before the Minister may do so, however, the Minister must consult the President and any Minister required by ss 17D to 17H to be consulted in relation to that person’s assignment to the Division. An assignment must be for the duration of the person’s appointment as a Deputy President and may not be varied or revoked without the person’s consent. These rigid provisions restrict, even deny, the flexibility that in my opinion is necessary, not only for the amalgamation of the AAT, but also for its better operation generally. Elsewhere I comment upon the different processes which each

tribunal brought to the amalgamated AAT and the practical divisions to which those differences give rise. That this is so does not mean, however, that competent Members and Deputy Presidents should not be versatile and available to sit in and across Divisions from time to time. Unequal allocation of work and resources to do that work are sources of understandable complaint by Members. There are surges in types of work from time to time. It is often difficult to evaluate duration and complexity of a case at the outset. I do not doubt that the AAT and its amalgamation would be much better served if in future [capable] Members were appointed to all Divisions. That would enable Tribunals to be constituted by the President on the basis of demand from time to time. It would also promote harmony, and therefore the amalgamation, by removing ground for assertions or attitudes of superiority of any Division over any other Division. As it is, s 17K stands firmly in the way of flexibility in requiring that the Minister consult another Minister before making an appointment to a Division. Section 17L erects a similar barrier to the appointment of Deputy Division Heads who could also work in a number of or all Divisions.

- 7.18 Part III Division 2 is concerned with the arrangement of the business of the AAT. Section 18A provides that it is the President who is responsible for ensuring its expeditious and efficient discharge, and the achievement of its whole purpose as defined in s 2A of the *AAT Act*, to be accessible, fair, just, economical, informal and quick, proportionately to the importance and complexity of a matter, and to promote public trust and confidence in its decision making.
- 7.19 Section 18B empowers the President to give written directions as to operation, process, conduct of reviews and the arrangement of the business of the AAT. The President must consult the Head of the Division to which a direction would apply. Appointment of persons as Head of one Division and the need for a consultation by the President of that Head should not stand in the way of appointment of a person as a Member of all Divisions as well as the Head of a particular Division.
- 7.20 Sections 19A and 19B empower the President to direct Members to sit in particular proceedings and at particular places and enables the President to constitute a Tribunal with up to three Members. This is a Tribunal which is struggling to do a

mountain of work. In my opinion, it should only be in rare and special cases that more than one Member sit on a particular matter.

- 7.21 Section 19E and 19F makes legislative provision for proceedings in the Security Division, which are by their nature special and therefore deserving of special treatment.
- 7.22 Part IIIA of the *AAT Act* makes provision for management of the AAT. It makes provision for the division of these between the President and the Registrar, still leaving, however, overall responsibility and control, as they should be, in the hands of the President. Section 24A(2) does, however, relieve the President of the responsibilities conventionally imposed upon heads of agencies under the *Public Governance, Performance and Accountability Act 2013* (Cth) and the *Public Service Act 1999* (Cth). In carrying out his or her duties under those Acts, the Registrar is not subject to direction by the President. Even so, the Registrar must consult with the President in relation to his or her performance of functions or exercise of powers under those two enactments. Section 24B is an important and clear provision which I set out in full.

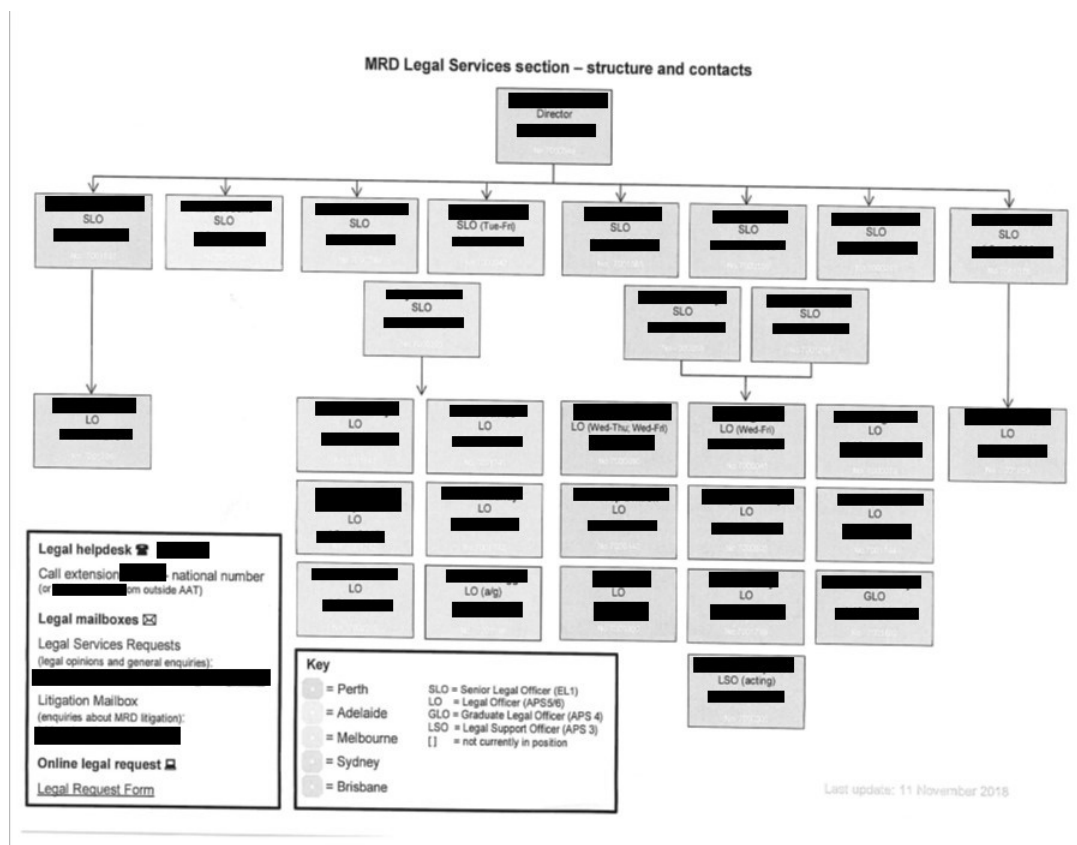
“24B Registrar of the Tribunal

In the management of the administrative affairs of the Tribunal, the President is assisted by the Registrar of the Tribunal.” [emphasis added]

- 7.23 It is unnecessary for me to enter into the detail of the Registrar’s responsibilities under the two other enactments to which I have referred in the preceding paragraph, except to say that they do not include control, supervision or anything other than support of Members and the means by which the Members do their work. What is clear, however, is that the President and the Deputy Presidents under the President’s direction should be in full control of the processes, procedures and workings of the AAT as a decision making institution.
- 7.24 In the management even of the administrative affairs of the AAT, the Registrar is to assist the President to manage the AAT. It is necessary for me to make this fundamental point because, with only a few exceptions, no Member, past or present,

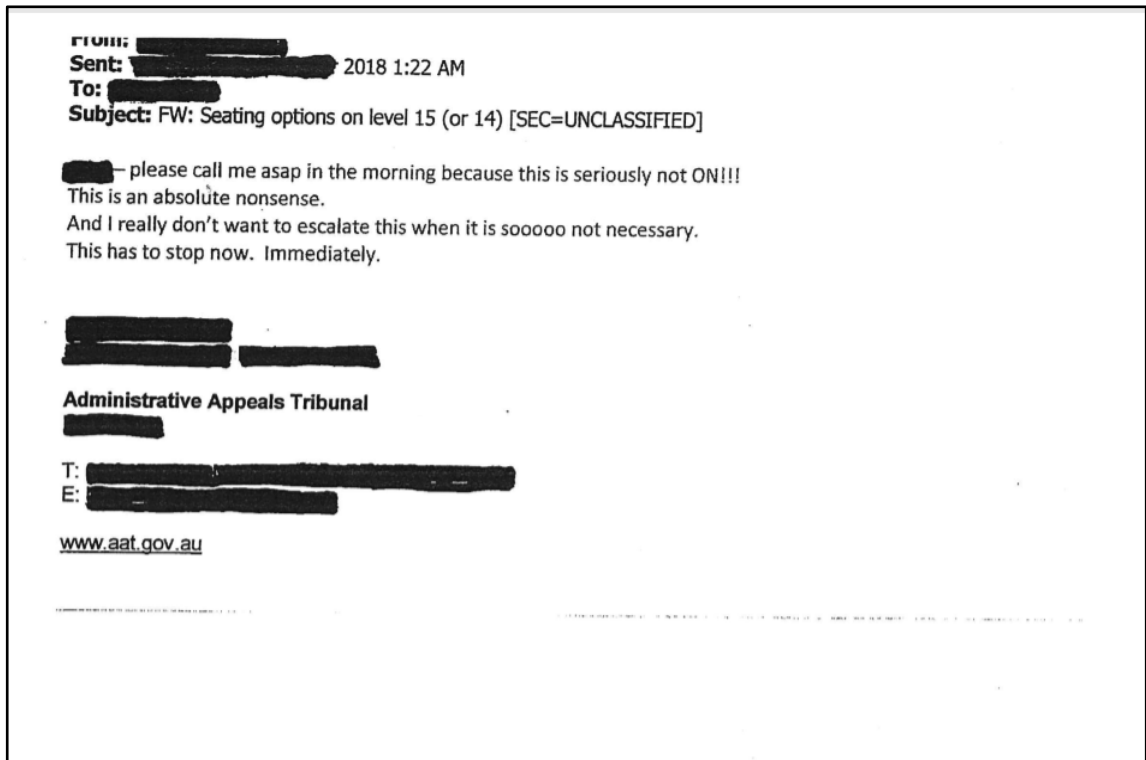
to whom I spoke, was entirely satisfied with the role or support of the Registry. There was a strong and pervasive view of a large majority that the Registry was intrusive, or seeking to be so, upon the role of Members as decision makers.

7.25 The MRD Legal Services Section has places for 30 staff members. There are seven levels of staff. According to the organisational chart, which I reproduce for ease of reference below, 28 or so of these positions are for legally qualified people.



7.26 Most of these people would say, as did the Registrar, that their role, in summary, consists of the provision of legal advice to Members and the researching of legal materials on behalf of Members. The staff in this section are located in five Registries: Perth, Adelaide, Melbourne, Sydney and Brisbane. Among other things, they have prepared from time to time “templates” of determinations. I am told that at one stage, this section either volunteered to, or otherwise sought, and did in fact, “check” decisions by Members, on occasions requesting, if not almost insisting, upon changes beyond proofing changes. As well intentioned as this may have been, it is quite inappropriate, and if it is occurring should cease because it involves

participation in the work of the Members by staff not appointed to do it, not under oath or affirmation to do it, and presents risk of contamination of decisions. The role of the Registry, it should be emphasised, is a role of support. It should not be carried out in an officious or aggressive manner. Highly respected and competent Members, including the judicial ones of considerable seniority, have not always been treated with the courtesy, let alone respect, that their office and duties require, by some staff members. One example only of this appears from a chain of email correspondence sent by a member of staff at 1.22am in the morning to a highly respected, courteous Senior Member about the allocation of a room. This is the last email in the chain:



- 7.27 The ends of collegiality and cooperation are best served by proximity of Members to one another. Permanent Members do need appropriate accommodation because the writing of reasoned determinations requires absence of distraction and reasonable writing conditions.
- 7.28 There were recurrent complaints about the allocation of hearing rooms. The larger ones, even when not occupied by a Member of the General Division or any other Member, were treated, on occasions, reverentially by staff (and some Members of

that Division) as if suitable for and available only to Members of the General Division.

- 7.29 It is necessary to mention also that there has been a move by staff to conduct [more] conferences and ADR, which should be done by Members for reasons upon which I expand elsewhere in this Report. The Registry has taken on a role in determining who should work as assistants to Members. Those assistants effectively answer to superiors in the Registry. They should be answerable to Members whom they assist, to the Division Heads, and ultimately to the President. Allocation of assistants on a person to person basis is not for a Registry official, however senior, to decide. Nor should Registry officials, legal or otherwise, decide who should attend, who should present, or set a syllabus for educational programmes for the training of mediators, conciliators or facilitators. Staff should not be given the task or led to believe that they can perform the task of conciliators, mediators, or even of conductors of other than formal or very preliminary conferences. This is work that is best, and can only efficiently be done by persons having the standing of Members. Long experience in mediation, conciliation and facilitation teaches that aggrieved people respond best to persons of knowledge, experience and authority, as well as training.
- 7.30 “Conferencing” can be an ambiguous expression. It can apply to anything from a first encounter of an applicant with an official in the Registry, a directions hearing, mediation, or a conference, which if appropriate and requested by the parties, may turn into mediation, even an evaluative or adjudicative one.
- 7.31 In general, it is the task of the Registry to assist an applicant to comply with the statutory and evidentiary requirements for an application, to inform when possible an applicant of deficiencies, if any, in it, but not to embark with the applicant upon an evaluation, formal or informal, of its merits.⁶²
- 7.32 The function of the Registrar and staff are the subject of s 24P of the *AAT Act*, which again makes it clear that it is the President who is in charge. In carrying out his or her functions, the Registrar must necessarily have, and is given power by s 24PA to

⁶² In saying what I have, I do not overlook s 24D of the *AAT Act*, which empowers the Registrar “to do all things necessary or convenient ... for the purpose of assisting the President”, that is to “assist” the President in the management of the administrative affairs of the AAT.

do those. There is no doubt that, pursuant s 24Q, the Registrar has the power to engage [external] consultants. There have been engagements since the amalgamation (apart from Mr Metcalfe who, I understand, was engaged by the AGD) to assist the Registrar. Engagements of those kinds obviously came at an expense. I raised this issue with the Registrar. I asked her what benefits she had obtained from them. I have looked at the materials that one produced. In my opinion, the engagement was unnecessary. The work that was done should have been capable of being done by the Registry, which includes five members of the Senior Executive Service of the Commonwealth, and other senior administrators, whose remuneration is fixed on the basis that they are experienced and competent administrators.

- 7.33 Part IV of the *AAT Act* is intended to deal with processes to be followed in the reaching of conclusions by Members of the AAT. The MRD is exempted from compliance with some sections in this Part, namely, ss 25 and 42. The former of these deals with matters of jurisdiction, delegation, acting appointments, scope of reviews, deadlines, and some other non-relevant matters for present purposes. Section 42 is concerned with proceedings in which more than one person will constitute a Tribunal and the resolution of disagreements between them.
- 7.34 Section 27A imposes an obligation upon an official making a reviewable decision to give notice to interested persons in writing who might be affected by it.
- 7.35 Section 27B confers a power upon the Attorney-General, by legislative instrument to determine a Code of Practice for the facilitation of the operation of the preceding section.
- 7.36 Pursuant to s 28, an applicant may apply to an official for the provision of a statement in writing to that applicant of the findings of material questions of fact with reference to the evidence or other material on which those findings were based, and reasons for the decision. This provision in its current form has caused some practical difficulties. The official making the decision must provide it in writing within 28 days of a request for it.

- 7.37 Officials within Departments are often very hard pressed. Certainly this is the situation within the Department administering the *Migration Act 1958* (Cth). Most people knowledgeable on the topic tell me that a similar situation is imminent and likely to be prolonged in the Department administering the National Disability Insurance Scheme. It is undesirable that the period of 28 days should be lengthened because so many of the matters which the AAT has to decide are urgent, and as the *AAT Act* itself commands, should be dealt with expeditiously. It may be that the requirement of detailed findings and references to evidence is larger than it should be. An important purpose of the *AAT Act* was to promote better decision making by officials by ensuring that they give careful attention to the evidence and their reasoning in making decisions. It may also have been thought that fulfilment of the requirement would assist the AAT in making its review. On the other hand, a review undertaken by the AAT is a review, a fresh hearing, and not an appeal. Further, a recent holding of the High Court⁶³ confirms that the AAT must make its decision on the evidence before it, which, in some Divisions, goes to completely different factual scenarios from the ones under consideration by the departmental decision makers. Section 29(2) may also come into play to prolong the period of 28 days for the making of an application.⁶⁴ Parliament might do well to consider whether this onerous prescription in relation to the original decision maker is useful or necessary, or should at least be made less onerous.
- 7.38 I draw attention to s 30A of the *AAT Act* which permits the Attorney-General (apparently in the AGD discretion) to intervene on behalf of the Commonwealth in a proceeding before the AAT. So far as I can ascertain interventions are very rare. Elsewhere I refer to the desirability of the presence of a qualified lawyer as a counsel assisting in the MRD where the proceedings are, unlike many of the other proceedings in the AAT, inquisitorial.
- 7.39 The subject matter of s 32 is representation before the AAT. It enables a party (which would include a Department or a relevant official of it) to be represented by another person, or an applicant in some instances to be so represented (with some presently non-relevant exceptions).

⁶³ *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286.

⁶⁴ Note also s 29(4) of the *AAT Act*.

7.40 Section 33 provides that the procedure of the AAT (subject to the *AAT Act* and other written laws) is to be within the discretion of the AAT, which must, however, conduct proceedings with as little formality and technicality and as much expedition as is appropriate. Obviously, some proceedings will lend themselves to less formality than others. Inevitably, however, when sums of money and other interests or entitlements are in issue proceedings will tend to be conducted formally and adversarially. Elsewhere in this Report, I refer to the desirability of the creation of a section as part of the Taxation and Commercial Division to deal in an informal way with smaller taxation matters. The sum of money involved in other Divisions or sections of the AAT is not of course determinative of the importance of a matter. Access to a particular right or even a small sum of money will be equally important to the applicant seeking it as a very large sum of money is to another applicant. Section 33 also demands the assistance to the AAT of the original decision-maker. This is not always forthcoming. That is not to say that the decision maker or the department in which the decision maker serves is withholding assistance. Sometimes the assistance that a hard-pressed department is able to provide is limited by the high volume of applications with which it is obliged to deal. I was told millions of applications per year are processed by the Migration Department. The Department's own statistics for 2017-2018 states that, in that year, the "*Department granted a record 8,694,048 temporary visas (up 3 per cent from 2016-17) and 162,417 permanent visas within the Migration Program*". It is the Department's forecast that visa applications will increase from this current figure of approximately 9 million to an estimated 13 million by 2026-2027.⁶⁵

7.41 I next refer to s 33(1A). It authorises the President or a Member to hold a directions hearing in relation to a proceeding. Section 33(1A)(2)(a) provides, however, that a directions hearing may also be conducted by "an authorised officer" if the direction is made before a hearing has been commenced. This last "power" needs further consideration. In practice, from time to time, "Conference Registrars" and others have conducted hearings or proceedings in various ways which have resulted in the giving of directions or their like. In the past, courts and tribunals have employed or experimented with all sorts of processes to expedite hearings and make them more

⁶⁵ See Department of Home Affairs, *Annual Report 2017-2018* at page 53.

efficient. “Masters”, judicial and conference registrars have been engaged in them. It has almost invariably been found, however, that the ends of justice are better achieved if the control of a matter is firmly vested in a judge or judges, not necessarily the judge who may hear the case. The judge is best equipped to do this. The judge, by qualification, experience and designation of office, will have a better understanding of what is required to decide the case, how and when the evidence is to be adduced, and the times and ways in which the parties and those who represent them should be directed, to procure efficient resolution. Parties and their representatives are more likely to cooperate with a judge. By virtue of office, a judge can also be more creative than an official in moulding a process to the particular demands of a case. There is, if anything, an even greater need for control by the Members of applications to the AAT than there is by judges in the courts. Members have the authority and prestige of their office. They deal with the decisions of other officials. The AAT is required to be expeditious and informal, and therefore is given wide latitude for appropriate creativity in process. Such staff in the registry as are conducting conferences or otherwise giving directions before hearing would be better deployed in working in other capacities immediately supportive of and as required by the President, of Members.

7.42 Section 33A allows the AAT to conduct a directions hearing or an alternative dispute process by telephone. More than one Member in the MRD told me that this section is frequently applied, and that there are substantive hearings that can be, and are in practice from time to time, conducted in this way. Those Members who touched upon the topic, for the most part, were of the view that if people, including students, whose visas had expired and who were applying for a renewal or a different kind of visa, were not automatically granted a bridging visa and were therefore unable to remain in the country, their applications should and could be adequately determined in hearings conducted by telephone.

7.43 Sections 34(2) to 34H are concerned with ADR. Section 34A is to a similar effect to s 33(1A)(2) and enables in some circumstances an officer of the AAT to conduct an ADR process. I would say of this what I said earlier about conferencing and the giving of directions by Members rather than by staff of the AAT. I understand that mediation and like courses have been conducted within the AAT which were

attended not only by Members but also by staff with a view to the deployment of those staff to conduct mediations, facilitations or the like. It is not only an error to think that money and time will be saved by the deployment of staff in this way, but also a disappointment of community expectations.

7.44 Long experience and practice in mediations and other forms of dispute resolution teach that to be most effective, the person conducting them needs to be knowledgeable in the relevant law, to have forensic capacity, and to be mature and experienced. Although ADR is usually a non-adversarial process and requires abstention by the mediator from decision making, the mediator has to have the ability, if, and when so required, as often happens, to influence an appropriate outcome. Section 34F already provides that a Member who conducts an ADR process may not hear the matter if it is not resolved by the alternative dispute process if a party object. Section 34H allows for the engagement of persons to conduct ADR processes by the Registrar on behalf of the Commonwealth. This power, it seems to me, to the extent that it may need to be exercised, which it should only rarely be, would be better exercised, and indeed more appropriately exercised, by the President or a Member delegated to do so by the President. It is one thing for the Registrar to make the relevant contracts of engagement on behalf of the Commonwealth, but altogether another for the Registrar to be the person to do the assessment for which section 34H(2) provides, of the adequacy of the qualifications and experience of the person to be engaged.

7.45 Section 37 and some following sections make provision for the lodgement of material with the AAT. Section 37(1)(a) requires the original decision maker to lodge with the AAT within 28 days after receiving notice of an application, a statement setting out the findings on material questions of fact with reference to the evidence or other material on which the findings were based, and reasons for the decision. As appears from these and my summary of the *Original Act*, there has been from the outset a requirement of this kind. One of the purposes of the enactment of the *AAT Act* then was the improvement of decision making in general by officials. It was thought that the requirement would ensure that a relevant official would fully apply his or her mind to a matter and write a carefully reasoned decision about it. No one would quibble with those good intentions. In an ideal world, they

should produce decisions of better quality, and fewer applications for review by the AAT. The reality is, however, that since 1976, the number of decisions which officials have to make has increased exponentially. That is so in several Departments, but even more markedly in the DHA. It is not entirely surprising, therefore, that the state of the files which reach the AAT from that Department are sometimes in such a state of disarray that the Member in MRD has first to take valuable time to reorganise a file before reading it prior to a hearing. The other point to be made is that an application to the AAT is not an appeal. No doubt a well-reasoned decision by the original decision maker would assist the AAT in determining an application, but the AAT has to decide for itself on all of the evidence before it, whether there is a correct or preferable decision to be made.

7.46 Files in other Divisions tend, on the whole, to be better organised. A T37 Form is provided with the file in those other Divisions. The more frequent adversarial nature of the proceedings in other Divisions also means that each side will be presenting a case generally in an organised form which defines and distils the issues. Most taxation cases are well refined, largely because of the sophistication of the Commissioner's own processes, by the time that they reach the AAT. It is open to question how much utility there really is in a requirement of detailed reasons and reference to the relevant evidence when the decision is to be reviewed rather than the subject of an appeal and the principles applied in appeal courts.

7.47 There is another particular problem, to which I refer elsewhere, of the shifting, often more than once of scenarios with which the MRD has to deal. The law as it stands is that the AAT must make its decision on the facts and circumstances as they are at the time of the making of the decision. A Member in the MRD may well be considering a different case from the one the subject of the applicant's decision.

7.48 Almost everyone experienced and knowledgeable in migration affairs told me that there are applicants, not small in number, and some persons who represent them, who "game" the system, well knowing there is an automatic entitlement to a bridging visa. By applications to the AAT and to the Courts, by assuming new commitments, or by finding other pathways to secure more lengthy or permanent

residence, their presence in Australia is prolonged. In my opinion, there should be a fresh evidence rule, or, as it is put elsewhere, a “New Information” rule.

- 7.49 I mention in passing s 37(1AAB), which refers to second reviews, which I discuss elsewhere in this Report. There are other procedural matters the subject of the sections to which I refer in this paragraph. Those processes should in my view all be managed by Members under a system of intensive case management overseen by a person in a position analogous to a senior judge administrator to be appointed for that purpose, and having the status of a Federal Circuit Court judge under and effectively as a delegate of the President. I enlarge upon this topic elsewhere.
- 7.50 The actual procedural powers of the AAT are set out in Part IV Division 5 of the *AAT Act*. Section 40(4) provides that evidence may be taken inside or outside Australia. I am informed that this often happens with evidence taken on the telephone. Some Members who sit in the MRD emphasised that if bridging visas and some other visas were not either automatically or in practice easily accessible, entrants and people holding certain visas would have to leave and reapply offshore. Another Member, a senior one, told me that she would not in general take evidence on the telephone in some matters, but insist that the applicant be brought by the Commonwealth to the venue of the hearing to be present in person.
- 7.51 Section 40B deals with disclosure and inspections of documents. Leave to inspect may be granted by an authorised officer. This would be unnecessary if case management of the kind which I have suggested is generally adopted. As it stands now, s 40B does contemplate in some circumstances a review by the AAT of a decision granting leave to inspect a document made by an officer of the AAT.
- 7.52 Section 43 of the *AAT Act* has always been in essentially the same form. It is unnecessary for me to add to what I have already said about it in my discussion of the *Original Act*. I do note, however, s 43(5AA), which refers to a second review and the availability of an appeal to a court on a question of law. To avoid

ambiguity, I think it would be preferable to substitute “for error of law” for the words now appearing “a question of law”.⁶⁶

- 7.53 Section 44AA confers upon the Federal Court jurisdiction to transfer appeals to it to the Federal Circuit Court, unless the appeal is an appeal against a decision by a Tribunal constituted by at least one Presidential Member, or in some other limited circumstances. I spoke to two Federal Circuit Court Judges who confirmed that there is a very large backlog of appeals from the AAT to that Court. I observe again, because it needs to be fully understood, that all of the DHA, the MRD of the AAT, and the Federal Circuit Court are under very great pressure to decide migration cases at the various levels that they do. The Federal Circuit Court is of course toiling under the burden of many other categories of cases.
- 7.54 Section 44A provides that an appeal does not affect the operation of a decision of the AAT. The Court dealing with the appeal does however have power to grant a stay of the decision if appropriate. Under s 45, the AAT, with the agreement of the President, may refer a question of law arising in a proceeding before the AAT to the Federal Court of Australia.
- 7.55 In conventional litigation, parties to an appeal ordinarily prepare an appeal book which will be submitted to a senior official, the Registrar or Deputy Registrar of the appeal court for settling and refinement. Section 46 of the *AAT Act* imposes a greater burden upon the AAT when an appeal is instituted against a decision by it. That section requires the AAT to cause to be sent to the court all documents that were before the AAT in connexion with the proceeding to which the appeal relates. I am informed by the Registrar of the AAT that, having regard to the very large number of appeals lodged, numerous staff are required to prepare what is effectively an appeal book. There may be a question where the burden of preparation is better borne: in the relevant Department, the AAT, or even the appeal court.
- 7.56 Part V of the *AAT Act* provides for the establishment of an Administrative Review Council. It consists of the President of the AAT, the Commonwealth Ombudsman, the President of the Australian Human Rights Commission, the President of the

⁶⁶ See s 44(7)(a) of the *AAT Act*.

Australian Law Reform Commission, the Australian Information Commissioner, and not fewer than three other members. The last of these are to be appointed by the Governor-General as part-time members. Section 51 of the *AAT Act* states the functions and powers of the Council, which include inquiry into procedures relating to the exercise of administrative discretions and generally to keep the composite administrative law system in Australia under review.

7.57 Several reasons may be advanced for the establishment and maintenance of such a council. The office of Ombudsman and some other related offices were established contemporaneously with the AAT. The Kerr Report had, it may be recalled, regard to contemporaneous events in the United Kingdom as well. There, it had been recommended that there be an earlier body similar in kind to the Council to keep under review, not just a few administrative tribunals, but the multiplicity of tribunals, ad hoc and otherwise, that existed in the United Kingdom at the time. I have read most of the reports produced by the Council over the years. As administrative law has evolved, and a body of sophisticated practitioners and academics have participated in that evolution, the intended role of the Council may have changed somewhat. In the present different circumstances of backlogs of cases and a need for change, I have formed the view that it should be fully reinstated.

7.58 Pursuant to s 51A, the Minister may direct the President of the Council in respect of the performance of its functions and the exercise of its powers. As with s 10A, s 51A could give rise to a constitutional writ.

7.59 There is one matter which I should note in passing. Section 10A of the *AAT Act* (formerly, in a slightly different form, s 10(7) of the *Original Act*) provides as follows re delegations:

“10A Delegation

- (1) *The Minister may, by signed instrument, delegate to the President any or all of the Minister’s power or functions under this Act.*
- (2) *The President may, by signed instrument, delegate to a member any or all of the President’s powers or functions under this Act or*

another enactment.

(3) *The Registrar may, by signed instrument, delegate to an officer of the Tribunal or a member of the staff of the Tribunal any or all of the Registrar’s powers or functions under this Act or another enactment.*

(4) *In exercising powers or performing functions under a delegation, the delegate **must comply** with any directions of the delegator.”*
[emphasis added]

7.60 The effect of s 10A(1) and (4) is that the Minister may delegate powers or functions under the Act to the President as delegate, who *must* comply with the Minister’s directions.

7.61 In *Drake*⁶⁷ and *Hilton v Wells*,⁶⁸ the issue was whether a Federal Court judge could act, in a statutory capacity, to exercise Chapter II executive power. The High Court held in *Grollo v Palmer* that the judge validly could.⁶⁹ Reference was made in *Grollo*⁷⁰ to statements of the Supreme Court of the United States in *Mistretta*⁷¹ to an “incompatibility condition” that can sometimes arise when a judicial officer is appointed to an executive office:

“This is not to suggest, of course, that every kind of extrajudicial service under every circumstance necessarily accords with the Constitution. That the Constitution does not absolutely prohibit a federal judge from assuming extrajudicial duties does not mean that every extrajudicial service would be compatible with, or appropriate to, continuing service on the bench; nor does it mean that Congress may require a federal judge to assume extrajudicial duties as long as the judge is assigned those duties in an individual, not judicial, capacity. The ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch ...

⁶⁷ (1979) 46 FLR 409 at 412-414 per Bowen CJ, Deane J.

⁶⁸ *Hilton v Wells* (1985) 157 CLR 57.

⁶⁹ *Grollo v Palmer* (1995) 184 CLR 348.

⁷⁰ *Ibid* at page 365.

⁷¹ *Mistretta v United States* (1989) 488 US 361 at 404, 407.

The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colours of judicial action.” [emphasis added]

7.62 This case was decided before *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs*.⁷² There, a Federal Court judge (Matthews J) was nominated by the Minister⁷³ to prepare a report in relation to an area for which a group of indigenous people were seeking statutory protection by way of a ministerial declaration. The report by Matthews J (as rapporteur) would, in turn, be relied upon by the Minister as a basis for the making of a protection declaration, an exercise of executive power. The High Court held that the role of Matthews J as a rapporteur to the Minister was incompatible with her position as a Federal Court judge.⁷⁴ The ratio of the majority was:

- (a) the report prepared by the judge was an integral part of an exercise of executive power;⁷⁵
- (b) Matthews J was functionally equivalent to a ministerial advisor;⁷⁶
- (c) there was nothing to prevent the Minister from giving directions to Matthews J as rapporteur and her complying with those directions;⁷⁷
- (d) the report involved the preparation by Matthews J of an advisory opinion on questions of law, which is alien to the exercise of judicial power of the Commonwealth;⁷⁸ and
- (e) in conclusion:

⁷² (1996) 189 CLR 1.

⁷³ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 10.

⁷⁴ (1996) 189 CLR 1 at 19-20 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.

⁷⁵ *Ibid* at page 18.

⁷⁶ *Ibid* at page 19.

⁷⁷ *Ibid* at page 19.

⁷⁸ *Ibid* at pages 19-20.

*“The Constitution is concerned not with the conduct of a judge who exercises his or her discretion to maintain independence from the Legislature or the Executive Government but with the limits on legislative and executive power that might be exercised to confer a function bridging the separation of the Judiciary from the Legislature and the Executive Government.”*⁷⁹

7.63 The applicability of a doctrine of incompatibility to Chapter III and the integrated Australian judicial system was affirmed by the High Court in subsequent cases.⁸⁰ There is risk therefore – I put it no higher than risk – that s 10A may offend against the doctrine of incompatibility referred to in *Wilson*.

7.64 Some Members in the MRD spoke to me about s 62A of the *AAT Act*. The effect of it is to render liable a witness who knowingly gives false evidence. The concern of the Members who spoke to me about this section was that they quite often were presented with evidence by witnesses, including applicants, who in their opinion were clearly lying. They also told me that sometimes it was apparent that systematic frauds were either being committed or attempted to be committed: that there were people who were participating in schemes to falsify student or business qualifications for residence, or, for example, to enable students to work more than 20 hours per week, or work for less than award wages. Both a senior experienced practitioner in migration matters and the Deputy Chief Commissioner of Australian Skills Quality Authority, Ms Saxon Rice, who made a written submission to me, and whom I also interviewed, confirmed that these schemes were operating. I was told that there are “ghost colleges”, which were locations only, and that the courses provided by them were shams. More than one of the Members to whom I spoke told me, and I have been able to verify, that a more senior Member with whom the question of reference to an appropriate law enforcement authority for consideration of a prosecution was raised, discouraged such a reference. Although obviously not lightly to be made, a Member, as any other person in the community, who becomes aware of likely criminal conduct, is entitled, some might say “morally bound”, to refer it to a relevant investigative or prosecuting authority in the same way as courts do from time to time.

⁷⁹ Ibid at page 20.

⁸⁰ *Wainohu v New South Wales* (2011) 243 CLR 181 at 207 [41] per French CJ and Kiefel J.

7.65 Section 68AA enables the President to give directions, not necessarily in writing, which are binding upon the person to whom they are given. The President does, and has exercised the power to give directions from time to time. These practice directions are under consideration regularly, and could be adapted for the purposes of case management of the kind which should, in my view, be introduced and implemented.

7.66 In this brief survey of the operation of the current *AAT Act*, I have touched upon a number of sources of friction between Members and staff, and also upon the different processes of the MRD. The unique nature of it has made it a difficult creature to absorb into the AAT and to operate procedurally in harmony with other Divisions. That has been the source of some strain between some Members of those other Divisions and the understandably work stressed Members of the MRD. The Registrar of the AAT, whom I interviewed, was aware of some of these, and was striving, insofar as it was within her power to do so, to reduce those stresses and frictions. A more clear delineation between the role of staff and the role of Members in the ways that I have suggested would remove some but by no means all sources of strain and friction.

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CHAPTER 8 – THE MIGRATION AND REFUGEE DIVISION

History of Australian Migration Law

- 8.1 The history of migration weighs heavily on the heads of all concerned with its administration today. An awareness of the events that have shaped it, and the volatile nature of opinions about it, are relevant to its administration today.
- 8.2 Migration, repatriation, deportation and removal, however bluntly or euphemistically they have been termed, have been highly controversial matters in Australia throughout its modern history. The political and legal focus upon them has always been subject to debate and change. So too, have the policies with respect to the laws governing the reception and residence of other nationals in this country.
- 8.3 British migrants have come here as a matter of course since 1788. Until the High Court decided in *Re Patterson; Ex parte Taylor*⁸¹ that British nationals were subjects of a foreign power, it was generally assumed that “Britishers” had at least a de facto right to enter and live in Australia at will. Indeed, from time to time, arrangements were made between the governments of the United Kingdom, Australia and the States for the positive encouragement of families, and even children without their parents to settle in Australia which was seen to be a land of opportunity offering better prospects, particularly to disadvantaged people in the United Kingdom. From 1815 to 1840, no fewer than 58,000 free settlers travelled from the British Isles to New South Wales assisted by funding from the Crown. During the “Gold Rush” of the 1850s and 1860s, more than 600,000 migrants arrived in the Australian colonies. The influx continued into the 1880s.⁸²
- 8.4 Europeans were admitted to the Australian colonies at a time when many of them were known by their ancestral languages, for example, Italians and Germans, as they did not have formal nationalities until the 1870s. Chinese and other Asian migrants also came. 3,000 or more Chinese people lived in Australia before the 1850s. By

⁸¹ (2001) 207 CLR 391.

⁸² Department of Immigration and Home Affairs, *History of the Department of Immigration: Managing Migration to Australia* (2017: Australian Government, Canberra) at page viii.

1861, approximately 3.3% of Australia's population was of Chinese origin.⁸³ Many Malays and Japanese worked in the Australian pearling industry in the 19th century. From 1863 to 1904, no fewer than 62,000 indentured workers from the Pacific Islands were brought to Australia, some allegedly violently, to work in the Queensland sugar industry.

8.5 By Federation, approximately 78% of those born outside Australia were of British Isles ancestry. One of the first laws passed by the new national Parliament was the *Immigration Restriction Act 1901* (Cth), enacting the infamous "White Australia Policy". The "dictation test" of 50 words in any European language, arbitrarily selected, was also enacted. Alfred Deakin said the intent of the test was, "not to allow persons to enter the Commonwealth but to keep them out."⁸⁴ Between 1905 and 1914, a further 390,000 settlers would arrive in Australia from the British Isles. Australia's population by the outbreak of the Great War was almost five million.⁸⁵

8.6 While the Great War reduced immigration, it did nothing to reduce controversy about it. Australia had a small but well-established community of German ancestry. Of these, by war's end, almost 700 would be deported, and another 4,600 would volunteer to be repatriated to Germany.⁸⁶

8.7 Among the many destabilising consequences of the Great War, there were massive impoverishment and displacement of populations, causing millions to seek new homes elsewhere. The Russian Revolution of 1917 left millions of its former subjects stateless, and desperate to find refuge in other countries. Sometimes the victors were indistinguishable from the vanquished. Novel means of assisting displaced persons to find refuge were adopted. For the displaced, especially those who were once subjects of the Russian Empire, the League of Nations would issue a stateless persons passport from 1922 to 1938, a "Nansen Passport",⁸⁷ which would be recognised by many nations as valid and a basis for entry and resettlement.

⁸³ Ibid at page 6.

⁸⁴ Ibid at pages 10-14.

⁸⁵ Ibid at page 16.

⁸⁶ Ibid at page 17.

⁸⁷ "Nansen Passport" was named for the Norwegian statesman and diplomat, Fridtjof Nansen, who had conceived of the passport as a means of allowing those displaced to find resettlement elsewhere.

- 8.8 Australia's population continued to grow in the interwar years. Migrants came from the British Isles, and also, as a result of the United States' immigration restrictions of 1924, increasingly from southern Europe. The Turkish expulsion of Greeks saw an increase in Greek migration to Australia. Similarly, the collapse of the Austro-Hungarian Empire and the founding of the new Kingdom of Yugoslavia saw an increase in Balkan migrants, especially from Croatia.⁸⁸
- 8.9 By the early 1930s, the effects of the Depression and the rise of oppressive regimes, especially Nazi Germany, would see a renewed flow of peoples seeking refuge elsewhere. The flow turned to a flood after Nazi Germany annexed Austria in the Anschluss of 1938. Australia's initial response to the crisis of refugees was a slow one. The Evian Conference, convened by the United States President Franklin Roosevelt, was held in France in July 1938 to consider what should be done for the great numbers of people seeking refuge from the Nazis. The Conference failed. Even so, Australia did undertake to accept 15,000 Jewish refugees. Unfortunately, because of the outbreak of the Second World War, only 5,000 Jewish refugees could take advantage of the proposal by Australia. Moreover, restrictions and quotas applied during the war and post-war period, albeit that by 1954, some 17,000 Jewish refugees had been accepted in Australia, not only from Europe but also from China.⁸⁹
- 8.10 The experience of the Second World War would change, unalterably, Australia's approach to immigration. First, for Australia, which had risked, if only for a brief period, military isolation from its major allies, it was an imperative that the nation "populate or perish" to survive. The wartime Prime Minister, John Curtin, and his government, embarked on the task of planning for non-British migration, including those who had been displaced by the war. There was popular support for migration.
- 8.11 From the cessation of hostilities in Europe in June 1945, the International Refugee Organisation established presences in many of the former capitals of European countries, some of whose boundaries had ceased to exist, or were being redrawn by the allies and others. Millions of people no longer had a homeland or a homeland

⁸⁸ Department of Immigration and Home Affairs, above n 82 at pages 19-20.

⁸⁹ Ibid at pages 20-21.

that was habitable, or one which would be democratically governed in the foreseeable future. In consequence, self-evidently, the vast majority of these people could easily be seen to be genuine refugees by any reasonable standard. Some of them bore and would carry for the rest of their lives the tattoo of the number allotted to them in concentration camps. Expired passports issued by defeated or occupied countries, or of countries that had ceased to exist as nations were proud possessions, sometimes the only evidence of true identity because they were the sole survivors of their families, or the ravages of war had irrevocably parted them from their relatives.

- 8.12 Refugees were sometimes indifferent to the (democratic) country in which they might settle. Sometimes they were given a choice, for example of Canada or the United States or Australia. Sometimes they were offered little or no choice: escape was paramount.
- 8.13 Demobilisation was returning many service people to civil employment, but there was still a bipartisan appetite for a larger population in Australia.
- 8.14 Although there are undoubtedly many genuine refugees from strife torn or brutally governed countries today, current circumstances and attitudes, political and social, to their reception and residence in Australia are divided and often volatile. One major difference between now and then was that the vast majority of refugees were processed offshore. The United Nations Convention Relating to the Status of Refugees (“**Refugee Convention**”) was not done until 1951, and further considered and amended by the 1967 Protocol.
- 8.15 The initial intention of the Refugee Convention was to deal with the stateless and mainly European refugees. In 1967, the Protocol to the Refugee Convention removed the prior stipulations, and instead applied the Refugee Convention to refugees without regard to geographic limitations. There are 145 parties to the Refugee Convention and 146 to the 1967 Protocol. Australia is a party to both, while the United States is a party only to the Protocol but considers itself generally if not completely bound by the Convention.

- 8.16 The most important provision of the Refugee Convention is Article 1, as amended by the 1967 Protocol, defining a refugee:⁹⁰

“A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

- 8.17 Other than entrants who were British subjects or European or Irish people, entry into Australia remained, however, restricted until the late 1960s. The White Australia policy and the dictation test were regularly applied. The Colombo Plan came into operation in 1950. It was not seen as an education programme for the benefit of Australians, (except perhaps as an enhancement of Australian standing in the world), but rather as a scheme which would enable Asians given tertiary education in Australia to return to their countries after graduation to share the benefits of their Australian education.

- 8.18 The point of this brief historical summary is the contrast that it makes with contemporary conditions. In 1958, for example, the *Migration Act* (as enacted) was a slim volume of about 67 sections. Its operation was the subject of an equally brief but clear and well-written policy document. Reference to the Act itself was generally unnecessary and rarely made by officials. An administrative review tribunal did not exist. Section 75(v) of the Constitution was rarely invoked by rejected migrants or refugees, or indeed others subject to adverse decisions by the Commonwealth. Universities were much smaller and did not regard themselves as being in business. They neither advertised in, nor solicited fee paying students from overseas countries. Many of those who did come to Australia were effectively conscripted to work on similar large projects or in regions (such as the Snowy

⁹⁰ Definition of “refugee” as set out in Article I of the 1951 Refugee Convention, as amended by the 1967 Protocol Relating to the Status of Refugees.

Mountains Hydroelectricity project) for a period. They usually could be readily located and rarely failed to comply with conditions of their entry and residence.

- 8.19 It is a reality that all people, not just those holding visas or having some other means of entering this country, are more mobile than they were 50 or more years ago. The only practical means of travel to Australia for most people, then, was by travel by sea.
- 8.20 The truth is that migration law and its administration, and the development of Administrative Law, taken together with changing policies and legislation with respect to all of these, have made the administration of migration policy and law very complex. For this reason, as well as others to which I refer in this Report, it is necessary, I believe, that Members of the MRD (as well as all other Divisions) be legally qualified. It is also necessary that the community understand the pressures under which the Members of the Migration Division work.
- 8.21 The law and practice of common law jurisdictions in handling migration and refugee matters may be instructive in several ways. The act of granting or refusing entry to persons as migrants or refugees is an important activity of the executive government on behalf of the nation state. Ultimately, though, there is an overriding need for the executive government to engage in a process that, while offering justice to an applicant for entry to Australia, does so while protecting Australian interests in an orderly, rules-based and fair immigration system.

The Migration and Refugee Division

- 8.22 In 2017, approximately 52% of the total number of applications made to the AAT were made to this Division. There are more than 140 different kinds of visas that are on offer to persons wishing to visit, work or settle in Australia. Cancellations and referrals of visas on character grounds may be reviewed by the AAT.
- 8.23 The task of Members of the Decision is prolonged and complicated by the disorganised state of hastily assembled files often provided to them. Not only do Members have to absorb, but also they have to scrutinise changing scenarios alleged

by some applicants. Most are unrepresented and some do not speak English. Conditions in the countries which they have left are not always easy to ascertain and may alter quickly. The Member has no one there to assist him or her during a hearing. Often the Member is left consider the veracity and reliability of an applicant or witness by close and detailed questioning, and even by making inquiries of third parties. Further material is then to be put to the applicant. Sometimes it is necessary for a Member to seek additional materials from the Department.

- 8.24 No “contradictor” of an applicant seeking review by the AAT in the MRD is permitted.⁹¹ Nor does the Member hearing an application have any lawyer otherwise present to assist in carrying out any kind of helpful role. The Member has to thread a way through a labyrinth of facts, sometimes even confected, ministerial directions, complex legislation, much case law, and international instruments.
- 8.25 I discuss the requirement for a Counsel Assisting for the more complex cases in the MRD elsewhere in this Report. Suffice to say, provision for the availability of a counsel assisting is, in my opinion, a necessary reform. No one should think that the proposal is for an adversarial role. Counsel assisting assists, generally and impartially, in the search for a correct, or as it is in the AAT, a correct or preferable decision.
- 8.26 When it became part of the AAT, the MRD, as it was to become, brought with it the processes of the Migration Review Tribunal and the Refugee Review Tribunals. Those processes were not perhaps unique, but unusual in proceedings in Australia. But more notably, the MRD brought with it an enormous volume of cases, much greater even than the workload of the SSCSD. It soon became apparent to me that the extent and complexity of the work that it was doing were not always appreciated by some of the other Members and some AAT staff: they did not lay out the welcome mat for the new Division.
- 8.27 I have to say, regrettably, that some Members of the General Division and some staff have, on occasions, adopted a condescending attitude to the MRD. All staff

⁹¹ *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 47.

and Members need to understand that this Division is overworked, under resourced, engaged in decision making in complicated, sometimes distressing, and often shifting factual and legal scenarios.

8.28 No Western democracy has found it easy to make policy and law universally acceptable to its own nationals for the reception, assessment and expulsion of other nationals, whether migrants or refugees. Opinions are strongly held and stated. Even so, some Members in the MRD may have been rather thin skinned about criticisms that have been made of their decisions. They need to remember that in accepting their appointments they will be working not as Judges, but as quasi-judicial administrative officials in controversial public affairs about which people, including the media, will express views. The more informed those views are the better. Nonetheless other Members of the AAT and its staff would do well to understand all of the burdens which the MRD carries, and to support it better than it has so far been.

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CHAPTER 9 – GENERAL AND OTHER DIVISIONS OF THE AAT

9.1 The AAT has three Division Heads who are Non-Judicial Deputy Presidents of the AAT. In this chapter, attention is focussed upon SSCSD and the General and Other Divisions. These “Other” Divisions include:

- (a) FOI Division;
- (b) NDIS Division;
- (c) Security Division;
- (d) Taxation and Commercial Division; and
- (e) Veterans’ Appeals Division.

The NDIS Division is most likely to receive large increases in applications.

General Division

9.2 The General Division has the biggest caseload within this grouping of General and Other Divisions. Applications that are not legislatively allocated or otherwise directed to a particular Division are heard there, together with Second Tier applications from the SSCSD. The latter includes Centrelink decisions (with some limited exceptions), a person’s entitlement having regard to percentage of [cost of] care for a child, and applications for review of decisions made by the AAT’s SSCSD in refusing extensions of time to apply for review of child support decisions. Most of the work of this Division consists of Second Tier reviews, unqualifiedly misdescribed by some Members as “appeals”. In the 2017-2018 reporting period, there were 5,300 applications lodged (inclusive of 1,919 Second Tier Centrelink applications) within the General Division. The Division finalised 5,234 of those applications, and 3,819 were pending.

Freedom of Information Division

9.3 Reviews of decisions made under the *Freedom of Information Act 1982* (Cth), *Privacy Act 1988* (Cth) and the *Archives Act 1983* (Cth) (except for access to records of the Australian Security Intelligence Organisation) are heard in the FOI Division. It received 47 applications in 2017-2018 and finalised 89 applications, leaving 151 applications on hand at the end of the reporting period.

National Disability Insurance Scheme Division

9.4 There were 802 applications filed in the 2017-2018 reporting period, of which 441 were finalised, and 515 were pending. The decisions under review are made under the *National Disability Insurance Scheme Act 2013* (Cth). As the Scheme is implemented across the country, the AAT will inevitably see large increases in applications to this Division. Some of those applications will be complex. Decision makers under the applicable legislation are required in making their assessments to have regard effectively to the sustainability of funding which raises issues yet to be fully explored.⁹²

Security Division

9.5 This Division hears applications for review of security assessments made by the ASIO under the *Australian Security Intelligence Organisation Act 1979* (Cth), and with respect to ASIO records under the *Archives Act 1983* (Cth). In the 2017-2018 reporting period there were only seven applications made. The Division finalised 10 reviews, leaving eight on hand.

⁹² I have read decisions from this division (AATA 1023 4 March 2016, AATA 186 19 January 2017, AATA 692 23 March 2018, AATA 1263 18 May 2018, AATA 1465 31 May 2018, and AATA 3099 9 August 2018), all of which do not do more than make passing reference to the considerations the subject of ss 3(1) and 4(17)(c) of Part 6A of the *National Disability Insurance Scheme Act 2013* (Cth). I mention these matters because they exemplify the sorts of difficulties which are likely to arise: the meeting of high expectations; the total amount of the funds available; and the possible need for evidence in some cases on the considerations arising under the Act earlier referred to affecting the financial sustainability of the Scheme which is required to produce *fair* and consistent outcomes.

Taxation and Commercial Division

9.6 Applications for review of decisions made by the Australian Financial Security Authority, the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission, the Australian Tax Office, and the Tax Practitioners Board are heard by this Division.

Veterans' Appeals Division

9.7 This Division reviews earlier reviews of the Veterans' Review Board in relation to benefits available under the *Military Rehabilitation and Compensation Act 2004* (Cth), *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth), and the *Veterans' Entitlements Act 1986* (Cth).

9.8 Matters that come before the Veterans' Appeals Division have, almost always, been subject to an initial merits review by the Veterans' Review Board, which is an agency of the DVA. Exceptions are claims made under the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act*, which too have been subject to a separate internal review by DVA.

9.9 In discussions with DVA, and in the DVA's own submission, I was told that, since the amalgamation, the AAT had taken more of a generalist approach to applications, even in this very specialised Division. There has also been an increase in the time taken to hear and resolve cases.

9.10 In some registries, a waiting time of over nine months was not unusual. According to the AAT, there were 361 applications filed in 2017-2018, with 480 finalised, leaving 418 pending.⁹³ Only 56% of claims in the Veterans' Appeals Division were finalised within 12 months. This division appears to be the least productive of the AAT. The Annual Report of the AAT reveals that this performance was not unprecedented. It was a rate that had "declined further" from earlier years.⁹⁴ While there may be some force in an argument that, owing to the nature of military service,

⁹³ Administrative Appeals Tribunal, above n 1, at page 28.

⁹⁴ Ibid at page 30.

delays in gathering evidence will occur, it is also the case that veterans and their dependents deserve better and quicker attention to their applications than they are receiving.

Social Services and Child Support Division

9.11 The former SSAT, which became part of the AAT in 2015, was established in 1975 by Ministerial Instruction and enacted in 1988 by the *Social Security Act 1947* (Cth). The SSAT's legislated status was maintained by the *Social Security Act 1991* (Cth) and later by the *Social Security (Administration) Act 1999* (Cth). The SSAT was constituted by three or four Members and initially had power to make recommendations only to the Director-General of Social Security as to the decision that should be made. In 1988, the SSAT was given further power to affirm or change a reviewable decision. The SSAT continued until 2002 to be constituted by three Members. After 2002, the SSAT was constituted by two Members for hearings and determinations. In 2007, when the SSAT was given power to review child support decisions, it was still being constituted by two Members. In 2011, the SSAT began to hear matters by a single Member, except for matters considered "exceptional" when two Members would sit. On the 1st of July 2015, the SSAT became a Division of the amalgamated AAT. The SSAT brought with it, as did the MRT and the RRT, its own processes and procedures.

9.12 The SSCSD received a total of 13,435 applications for review in the last financial year, and 17,450 in the previous period. That represents a decrease in lodgements of 23% per annum. There were 2,698 applications on hand on 30 June 2018, a decrease of 38% compared with those at 30 June 2017.

9.13 In 2017-2018 there were, in the First Tier of review of Centrelink applications, 10,913 lodgements and 12,550 finalised reviews. There were also 1,912 applications on hand at 30 June 2018. Ninety-nine percent of lodgements were finalised within 12 months. As to child support applications, there were 2,328 lodgements in the 2017-2018 reporting period with 2,299 applications finalised. That is a resolution of 99% of cases within 12 months of lodgement. There were 769 applications on hand on 30 June 2018 for child support. In relation to paid

parental leave applications, 194 lodgements were received in the period 2017-2018, 226 applications were finalised and 17 on hand on 30 June 2018. One-hundred percent of these applications resolved within 12 months of their lodgement.

9.14 Lodgements relating to decisions about disability support pensions were the most numerous of applications. They accounted for 33% of all Centrelink applications. Lodgements of this kind fell by 42% in 2017-2018. The number of applications for other payments also fell during the 2017-2018 period, Family Tax Benefit by 11%, Newstart allowance by 20%, Age Pension by 22% and Youth allowance by 10%. The Annual Report states that the types of decisions that were most frequently subject to applications in the last full reporting period related to assessment or recovery of debt by the Commonwealth (40%), and those rejecting claims (38%).

9.15 This Division has continued to operate with an active focus on early case management by the use of Practice Managers (Members) managing national lists by which applications are assessed and then assigned to Members, and on occasions, registry staff for further caseload management and then hearing by Members. Centrelink cases that present fewer issues are selected for “outreach”, or fast track hearings. “Outreach” consists of telephone conferencing and sittings outside metropolitan areas. In Child support assessment applications early case assessment and outreach have assisted the parties to resolve applications without the need for hearings.

Centrelink

9.16 The SSCSD in 2017-2018 finalised 14,168 Centrelink decisions, 23% of which were set aside or varied on review: 49% of those reviews resulted in affirmations.⁹⁵

Child Support

9.17 Applications in this area accounted for 17% of all lodgements for review in the Division in 2017-2018, an increase of 4% over the preceding period. Approximately 69% of applications related to requests for a change to assessment of child support

⁹⁵ Ibid at page 39.

payable, and determinations as to the “percentage of care”. In the period 2017-2018, there was an increase of 11% in applications finalised. The AAT affirmed 25% of the decisions under review and set aside or varied 33% of the applications. The Annual Report of 2017-2018 stated that of the remainder of applications withdrawals accounted for 11%, and dismissals of 7%. The balance, 13%, did not proceed as the decisions were either not reviewable, or the application was lodged out of time and no extension was granted.

Paid Parental Leave

9.18 In the 2017-2018 reporting period there were 194 lodgements. The AAT finalised 232 applications in the same reporting period. Approximately 51% of reviews resulted in affirmation of the original decision, 10% of the applications were set aside or varied, and the remainder were either withdrawn or dismissed for want of jurisdiction.

Second Tier Reviews

9.19 Review decisions to vary or set aside Centrelink, child support and paid parental leave decisions presently under the relevant referral legislation may be subjected to a second and further merits review (“**Second Tier**”). That was the position before the amalgamation. Then and now the second review was done by the General Division. They remain merits reviews.⁹⁶

9.20 In the 2017-2018 reporting period 1,919 applications for Second Tier review were lodged in the AAT in Centrelink matters. In this period 72 applications for Second Tier review of Child support decisions and 12 applications for Second Tier review of paid parental leave decisions were lodged. As I observe elsewhere, I regard the Second Tier of review as unnecessary, and discordant with the single opportunity for review in other Divisions, and such as to suggest perhaps to the original decision makers and First Tier reviewers that they need take less care because there is a further review available. The First Tier is not a warm-up or a rehearsal. It is a merits review by one person, a Member, of an official’s decision. Why would a

⁹⁶ Ibid at pages 41-42.

second Member make a preferable decision to either of the decisions of the official or another Member. Interested groups of submitters supported access to two reviews on the ground that the people seeking them were especially vulnerable. Many applicants in other Divisions, including severely incapacitated people, indigents, impoverished refugees, disadvantaged indigenous people, illiterate and others in need of assistance. Of the applications for Second Tier reviews of Centrelink decisions, 75 were lodged by the Secretary of the Department of Social Services, and 5 by the Department of Education and Training. The AAT 2017-2018 Annual Report noted that of the 70 “Secretary” appeals finalised in the period, the Division’s decision remained unchanged in 46% of the instances. The Division’s decisions were set aside or varied after hearings in 26 instances, and set aside or varied by consent in 12 applications.⁹⁷

9.21 Differences of the kinds referred to stand in the way of a complete or even partial harmonisation of the AAT. It may be that there are conflicting or good reasons of policy for the Two Tiers. I cannot discern them. Almost all reviews in all decisions are made by one person of another decision. A decision by one detached person (Member of the AAT) is not necessarily or even likely to be better than another decision of another detached person (also a Member of the AAT). The Department is in favour of the retention of the Second Tier. None of the statistics to which I refer provide a proper basis for two tiers of review. I have considered, but do not think the arguments advanced by the Department and others for retention of the Second Tier are persuasive. Retention, particularly when it involves two different Divisions of the AAT, will likely continue to be a source of disharmony.

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⁹⁷ Ibid at page 41.

CHAPTER 10 – CONCLUSIONS

- 10.1 The following summarises my Report and addresses the Terms of Reference.
- 10.2 The collection, collation, absorption, analysis, and distillation, of the relevant materials, and even a further proofing of this Report, would better have been done with more time than the statutory period of six months allowed by the *TA Act*.⁹⁸
- 10.3 The *TA Act* has not achieved the full purpose for which it was enacted. Having said that, I would point out that the purpose was ambitious, perhaps excessively or unnecessarily so. I will explain why I think this to be the case.
- 10.4 The AAT that came into existence in 1976 was novel, small and free standing. The *Original Act* which created it contained few indications of the processes that it should follow: its conception was effectively contemporaneous with the establishment of a Commonwealth Ombudsman, other executive offices, and the new, Chapter III, Federal Court. Some of the “jurisdictions” were similar in intent and bound to overlap. The borders between them could only be drawn over time and experience. The Taxation Board of Review was a separate, mature and respected Tribunal standing apart from the AAT. Repatriation and veterans’ tribunals had long functioned in various forms with their own unique processes, onuses, and standards of proof. Many of the departments, agencies and other bodies whose decisions are reviewable by the AAT did not exist. For example, the National Companies and Securities Commission (now ASIC) only came into existence later. The population of Australia grew between 1976 and 2015 from some 14 million people to almost 24 million people. Many additional – and highly complex – social security benefits (with differing criteria for access to them) have become available to Australians under Commonwealth law since 1976.
- 10.5 A National Disability Insurance Scheme of the current kind was not remotely on the horizon in 1976.⁹⁹ It is improbable that anyone then would have foreseen that the

⁹⁸ As Blaise Pascal wrote in 1657 in *Lettres Provinciales*, “I would have written a shorter letter, but I did not have the time”.

⁹⁹ There had been discussion about and a proposal for a universal no fault disability scheme in the 1970s, but the proposal lapsed.

AAT, in the space of four decades, would be called upon to review many thousands of decisions made by officials and other members of the Executive under more than 400 Commonwealth laws annually.¹⁰⁰

- 10.6 Before I come to the Terms of Reference, I would make some general observations.
- 10.7 No one could doubt the good intentions that moved the Parliament to enact the *TA Act*. Perhaps what may, however, have been underestimated, are the increasing volume of matters to be reviewed and the divergences in practices, legislative or otherwise, of the different Tribunals and Divisions which came to constitute the amalgamated AAT. Not only were the practices and procedures different, but, also, the organisation and presentation of files by Departments whose decisions are reviewable were different. As desirable as complete harmonisation may theoretically be, it is difficult and probably undesirable to impose upon the respective Divisions, identical, or even very similar practices and procedures.
- 10.8 Examples of differences can be multiplied. One of the most marked are the differences between the applicable legislation. Practices and procedures applying to the MRD, and those applying to the SSCSD. In the MRD, reviews are conducted without a representative of DHA, a contradictor, or a qualified person to assist the reviewer. Effectively, the reviewer has to conduct an inquiry into often complex and contestable factual matters, and having found them, to apply detailed legislation (including the Codes of Procedure) to them.
- 10.9 Not one Member of the MRD to whom I spoke was in favour of the Codes of Procedure. It is unnecessary and a distraction for Members in carrying out their difficult work. It tends to produce formulaic rather than reflective decisions. As Kitto J pointed out,¹⁰¹ there can be no universal test of the question of whether natural justice has been afforded. I agree with this statement, in a passage approved by the Privy Council:¹⁰²

¹⁰⁰ Administrative Appeals Tribunal, above n 1 at page 10.

¹⁰¹ *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 503-504.

¹⁰² *University of Ceylon v Fernando* [1960] 1 All ER 631 at 637.

“[T]he requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.”

Social Services and Child Support Division

10.10 As is apparent from the submissions, opinions are divided with respect to the need for two tiers of review of relevant applications. I have foreshadowed my opinion on the topic. I think one tier of review is sufficient. Provision could be made in it for the assistance of a “Counsel Assisting” in difficult cases, as in the MRD. The availability of a Second Tier is a brake upon amalgamation. It may also have a real tendency for less focus and care in the making of decisions in the Department and in the current First Tier of review.

Taxation and Commercial Division

10.11 Tax questions are reviewable in the Taxation and Commercial Division. By the time that a taxation case comes to that division, the issues are well defined and the files are in an orderly form. I have seen no reasons for change in the workings of this Division, except for the creation, not of a new Division or Sub-Division, but for a more informal and quicker form of access and determination.

Veterans’ Appeals Division

10.12 I had a late response from the DVA to the invitations to them to make submissions. For that reason, I have been unable to explore why there are serious delays in the resolution of claims by or in respect of behalf veterans. (The AAT undertakes reviews following upon reviews of the Veterans’ Review Board (VRB)).

Migration and Refugee Division

10.13 There are many problems in the MRD. In this summary, I emphasise the urgency of the adoption of measures to assist in dealing with these problems.

The Need for a Counsel Assisting in Migration Matters

10.14 The role of a Counsel Assisting is now well established and understood. Counsel Assisting is literally that, a person who will either or both test or verify evidence and make helpful submissions to a decision maker, whether a commissioner of inquiry, a coroner, or a reviewer as the case may be. Counsel Assisting, traditionally and necessarily, has a special role in ensuring that an inquirer has all the available evidence to enable a full and complete determination of the matters.¹⁰³ As Dr Hallett wrote in relation to Commissions of Inquiry:

*“[P]art of the reason counsel assisting has developed a high degree of independence is that he is standing in the shoes of the Attorney-General representing the public interest.”*¹⁰⁴

Trust in the AAT

10.15 The AAT does not operate as a truly amalgamated body. “Levels” of separation are not necessary and appropriate but some degree of separation of process and procedures is dictated by the legislation under which decisions are reviewed.

10.16 The other questions raised by the Terms of Reference are more difficult to answer. They ask whether the objective of the promotion of public trust and confidence in the AAT has been achieved by reference to “community expectations” about decisions of the AAT and the effectiveness of the application of legislation, practice directions, ministerial directions, guides, guidelines, and policies of the AAT.

¹⁰³ See the comments of the Beach Police Inquiry (1975) extracted in Leonard Arthur Hallett, *Royal Commissions and Boards of Inquiry* (Law Book Company, Sydney, 1982) at 216.

¹⁰⁴ Hallett, *Royal Commissions and Boards of Inquiry* at 215.

- 10.17 For any decision maker or reviewer, whether a current or former judge, or a member of a tribunal, to claim to speak for or on behalf of the community can be presumptuous and I hesitate to do so. I hesitate, in particular, to do that in respect of all or any of the “decisions of the Tribunal”. Indeed, decisions of the AAT inevitably involve matters of policy, political philosophy, and the expenditure of public funds. Practically every member of the community has an opinion on these matters. The government of the day, whatever its political persuasion, particularly under our system of responsible government, is for the period of its tenure, one and a not inappropriate barometer and expression of “the community”. A member of any democratically elected government has, at least, the same right to speak on behalf of the community as, for example, Members of the AAT or the media, whilst acknowledging that the Parliament has given the right of determination to the AAT.
- 10.18 One respect in which “community expectations” are likely to be disappointed would be any participation by anyone other than sworn or affirmed, appointed Members in the making of decisions of the AAT. A fundamental purpose of the *AAT Act* was to ensure that the review by the AAT of a public servant’s decision was *not* conducted by another public servant but by a person detached from the public service who could only be removed for proved misbehaviour or other specified grounds.
- 10.19 I have considered the relevant legislation, directions, guidelines, and policies, of the AAT earlier in this Report. As appears from that consideration, I have thought that there is reason for their repeal, or refinement, or substantive amendment, in terms of the suggestions that I have made. I would report that the legislation or processes or grounds or scope, and levels of review, in and from the AAT, do not in many instances promote timely and final resolution of matters. I have made suggestions for measures which, I think, would promote that purpose. The AAT’s operations and efficiency could be improved in various ways, by amendments to legislation and by non-legislative and administrative changes. I have made suggestions which I believe would improve the AAT’s operations and efficiency.
- 10.20 There has been conduct in the AAT that has caused friction and should be corrected within it.

10.21 Not all of the arrangements for funding the operations of the AAT are appropriate or consistent across Divisions. In particular, the MRD is under-funded and under-resourced.

10.22 There are more than twice as many staff as there are full-time Members. Within the AAT, there are several different “back offices”:¹⁰⁵

1. General and other Divisions Member Support Teams;
2. Legal and Policy Section;
3. Library Services Team;
4. MRD Legal Services Team;
5. Proofreading Team; and
6. SSCSD Member Support Unit.

10.23 The MRD Legal Services complement consists of approximately 28 legal officers and others. The Legal and Policy Section consists of 10 legal and “policy officers”. In general, “policy”, (as opposed to its implementation) unless advice on it is sought, is not a matter for public servants. I am unpersuaded that there is a need for a “policy” section in the Registry. I was informed by the Registrar that MRD Legal Services comprises legally qualified staff who provide a range of services, “products”,¹⁰⁶ and resources to assist AAT staff and Members. The Registrar described the work done by this section in five dot points in a briefing to the President. In my opinion, the role of this section is questionable. In fairness to those who have shaped it, the lack of legal qualifications of a number of Members of the AAT provides some justification for its existence. The third dot point in the briefing reveals that the section gives advice on substantive issues, at the request of Members, and sometimes reviews draft decisions or draft correspondence for legal issues. Members should not need to seek, or seek, advice, legal or otherwise, from

¹⁰⁵ Attachment L to the Registrar’s letter dated 26 September 2018 to the Review.

¹⁰⁶ Managerial language that has become part of the argot of the AAT.

public servants, and public servants should not offer to or provide it. Material provided by the Registrar also showed that draft decisions are, upon request by a Member, reviewed for “legal issues” by the SSCSD Member Support Unit¹⁰⁷. Equally, in the case of the General and Other Divisions, Member support teams, among other things, “edit draft decisions and reasons for decisions”.¹⁰⁸ All of these practices should cease. They have a real capacity to affect the independence of the AAT and to fall short of reasonable community expectations. Decision-making in these ways is not transparent.

10.24 Experience tells that case management is best conducted by the ultimate decision makers because litigants, applicants, and people generally, respond best to the experience, authority, position and prestige of the ultimate decision maker. Almost all courts now conduct intensive case management by the judges who give directions as to procedures, evidence, and various forms of ADR. Judicial Registrars, Masters, and Conference Registrars, have all been tried and had a measure of success, but have given way to the judges as the primary and procedural case manager. In a written briefing for the President, the Registrar described the function of Conference Registrars as “vital” in the General and Other Divisions, as approximately 80% of the matters were finalised without a hearing, with 1.5 conferences per matter of a combined duration of less than 80 minutes. The Registrar said that there were 14 Conference Registrars (equivalent to 11 full time officers) who are permanent Executive Level 2 employees and are experienced legal practitioners, and accredited mediators, with expertise in Administrative Law and AAT procedures. It is puzzling why there should be a serious shortage of lawyers as Members of the AAT and a multiplicity of them on the staff. That there are so many staff lawyers may have contributed to an intrusion of the bureaucracy into the proper territory of the decision-makers. I think that such an intrusion would disappoint “community expectations”. There is a need to ensure the separation of the activities of Members and those of Registry staff, legally qualified or not.

10.25 In paragraph 15 of the briefing by the Registrar to which I have referred, she said that, when Members “initially” conducted conferences, it was common for two days

¹⁰⁷ Attachment L to the Registrar’s letter dated 26 September 2018 to the Review.

¹⁰⁸ Ibid.

of preparation to be required for three days of conferencing, with an average of 5 to 10 conferences being conducted by a single Member per week. That was a reference to conferencing in the 1980s, before training and expertise ADR were readily available. Nor was ADR then the widely practiced and sophisticated process that it now is. The Registrar was not therefore comparing like with like. I doubt whether “conferencing” by staff enables savings in costs. A part-time, ordinary Member of the AAT is paid a daily rate of between \$797 to \$1,062, and a full-time Member is paid \$190,180 per annum.¹⁰⁹ A Conference Registrar (EL-2) is paid between \$122,095 and \$146,884 per annum.¹¹⁰ The latter sums would not necessarily represent the full cost of employment of a full-time public servant as a Conference Registrar. Any differential between the cost of employment of a Member and of a full-time public servant may be apparent rather than real.

Organisational Arrangements

- 10.26 In the interests of a smoother and more efficient amalgam, the organisational arrangement of the AAT needs to be reformed. It is unnecessary that there be four executive directors.
- 10.27 Presently, the Registry has an executive director of registry operations, responsible for the State registries. There is also a second executive director responsible for “review support”, who controls the AAT’s ADR, caseload management, early case assessment, MRD Legal Services, the program management office, and SSCSD. Separate from the Registry is the Principal Registry, which also has two executive directors. The first executive director has responsibility for the Strategy and Policy Division, which includes e-services, information management, legal and policy, and strategy, communications, and governance. The second executive director controls corporate services, which include business support, finance services, human resources, and information technology. In discussions between the Reviewer and the Registrar, the Registrar said that a reorganisation of the Registry’s organisational chart and AAT’s hierarchy was proposed. The proposal would remove

¹⁰⁹ See the *Remuneration Tribunal (Judicial and Related Offices—Remuneration and Allowances) Determination 2018* of 14 November 2018.

¹¹⁰ Executive Level – Grade 2.

communication, media, governance, strategic and operational planning, Member appointments accommodation, secretariat, and project management, out of the Registry and Principal Registry, and into the direct control of the President and Registrar.

10.28 In my opinion the Registry should be divided into two functional sections by:

- (a) merging the offices of Assistant Registrar and Chief Operations Officer; and
- (b) merging the offices of Chief Legal Officer and Chief Information Officer.

Initially these two sections of the Registry might be managed by a sharing of the roles with the aim that, in the future the AAT would have two executive directors.

10.29 A proposed organisational chart is set out below with the inclusion of a new position of a new permanent Judicial Deputy President (Senior Case Manager), being a Federal Circuit Court Judge, assisting the President with case management, of the whole of the AAT, as the delegate of the President. Below the permanent Deputy President should be the Divisions and their Division Heads, non-judicial Deputy Presidents or Senior Members. Controlling and having responsibility for the work in the State Registries, would be an executive Member or a Deputy President or for the smaller volume work a Senior Member, depending upon the size of the registry. Currently the business of the Divisions of the AAT is organised through national practice managers and list managers referred to as “practice leaders”. As the practice leaders would manage the various lists within the Divisions on either a National or State level depending on the volume of applications, there would be less need for the assignment of Senior Members to roles of practice management.

10.30 Several Members of the MRD raised with me the problem of unmeritorious applications for bridging visas. To the extent that this may touch upon policy, it may not be a matter for me entirely. I note however that in the material provided by the Registrar to the Review,¹¹¹ there is a discussion paper which refers to bridging

¹¹¹ Attachment 9 to the Response dated 12 Oct 2018.

visas and applications for stays, and includes a proposal that may deserve serious consideration:

“A person whose substantive visa has been cancelled may also apply for a Bridging Visa, generally a Bridging Visa E. This visa could be granted, among other things, on the basis of an application for merits review of the cancellation decision. For a Bridging Visa granted on the basis of a merits review application, the BV generally ceases 35 days after the AAT affirms the decision.

An applicant who holds a BV on the basis of merits review (whether in relation to a refusal or cancellation decision), and who is unsuccessful, may apply for a further BV on the basis of making an application for judicial review of the AAT’s decision. If the judicial review application is unsuccessful ‘judicial review BV’ ceases 28 days after the judicial review proceedings are completed. There is a perception that some of the judicial review BV cases are made purely to extend people’s stay in Australia, without realistic prospects for success in the judicial review application, seeking to take advantage of delays in the court process and resulting in an increased workload of the courts, which results in further delays.

Section 44A of the AAT Act enables the Federal Court of Australia to make orders staying or otherwise affecting the operation of a decision of the Tribunal. However, s44A does not apply to reviews undertaken by the MRD under Part 5 and Part 7 of the Migration Act 1958 (Cth)”¹¹²

Appointments

10.31 Some Members and former Members criticised “political appointments”. There have been appointments to the AAT of people who have served in State and Federal Parliaments or who have worked in various capacities for members of Parliament. Political engagement, either as a politician or an employee of a politician, is no more

¹¹² Parts 3.3-3.5 inclusive of the Migration and Refugee Division Legal Services Discussion Paper, dated 24 October 2017.

a disqualification for office than employment as a public servant. Indeed, service of all of these kinds may be useful experience in undertaking merits review as the AAT does. But no matter what other qualifications a candidate for appointment to the AAT might have, overwhelmingly submitters favour, as I do, the appointment of people of good character, even temperament, diligence, possessing legal qualifications, and selected as a result of a transparent process.

- 10.32 Criticism of back benchers, shadow ministers and ministers who question decisions of the AAT is often misconceived. Politicians are engaged in the exercise of power and the making of policy. Differences between them about the latter will inevitably occur from time to time. The quality of a decision, particularly a merits decision where policy is involved, may be contestable and accordingly, debatable publicly. It needs also to be kept in mind that politicians should be free to promote or denounce policies according to their political philosophies. Matters of these kinds were closely considered by the High Court in *Minister for Immigration and Multicultural Affairs v Jia Legeng*; *Minister for Immigration and Multicultural Affairs v White* in which Gleeson CJ and Gummow J said this:

“First, both French J and Cooper J evaluated the statements and conduct of the Minister in the light of his political functions and responsibilities. This is a matter of importance. In considering whether conduct of a decision-maker indicates prejudgment, or in some other respect constitutes a departure from the requirements of natural justice, the nature of the decision-making process, and the character of the person upon whom Parliament has conferred the decision-making capacity, may be of critical importance. French J was right to consider the Minister’s conduct in relation to the radio interview, and the letter to the President of the Tribunal, in the light of the fact that he was “an elected official, accountable to the public and the Parliament and entitled to be forthright and open about the administration of his portfolio which ... is a matter of continuing public interest and debate”. (57) This is a matter that

*will be considered further in relation to the argument on apprehended bias.”*¹¹³

I would adhere to the views that I expressed in my different capacity there:¹¹⁴

“[244] It is also relevant, as both French J and Cooper J observed, to the construction of the sections that the power exercised by the Minister is conferred upon him, and is exercisable by him as a member of the Executive and not as a Court or Tribunal in respect of which rules of procedure and conduct are prescribed by statute or regulations. His is also an exercise of power not reviewable under the Administrative Decisions (Judicial Review) Act 1977 (Cth) on a ground of either a breach of the rules of natural justice (s 476(2)(a)), or that the decision was so unreasonable that no reasonable person could have made it (s 476(2)(b)). The Minister as a Minister is obliged to wear two hats, one as a member of the Federal Executive, and another as a person to whom a power as a decision-maker is entrusted. The performance of his duties of office when he is wearing one of them, however, should not be too readily taken to be an indication of the way in which he thinks about, or will discharge his duty when he is wearing the other of them.

[245] Other observations may be made about the Minister's dual roles. As a Minister of State he will have a role and involvement in the formulation and implementation of government policy. That policy may be to seek to change existing laws, because, in his or the government's opinion, those laws do not reflect government policy or they are not readily capable of application, or because they are being misapplied. One important and conventional means of effecting such a change is to draw public attention to the current operation of the existing laws. This is a legitimate public function of an elected member of the Executive. That he may have another role requiring him faithfully to give effect to the existing laws should not, and in my opinion, does not disable him from expressing dissatisfaction with, and advocating change to them [178]. To say so much is merely to point to the difference between a Minister and a

¹¹³ (2001) 205 CLR 507 at [78].

¹¹⁴ Ibid at [244]-[245].

judge, and indeed, a Tribunal or member. The role of none of these is identical with the roles of the others. And different considerations requiring the application of different rules in relation to each of them are involved in a judgment whether one of them is affected by disqualifying bias. The Minister is, it should be noted, in a different position from a Tribunal such as the Australian Broadcasting Tribunal. It was not, and has no role as a protagonist [179]. The Minister, on the other hand is, and necessarily so, a contradictor and protagonist in curial and other proceedings under the Act.”

10.33 As I say elsewhere, Members should not be thin skinned. Persons seeking to work as Members of the AAT need to understand that they are undertaking merits review of executive decisions in matters upon which fair minded people can and do disagree, often strongly so. Competent Members of the AAT themselves will from time to time disagree about the merits of a particular executive decision. A recent example of this is a case decided on the 27th of August 2018 in the MRD.¹¹⁵ The issue was whether the visa of an alleged “bikie” should have been cancelled by the Minister. The Deputy President of the AAT and a Senior Member who had acted as Freedom of Information Commissioner in Victoria disagreed on the issue. Because she was the senior of the two, the opinion of the Deputy President prevailed. If respected Members of the AAT can disagree, it is hardly surprising that politicians, the media and members of the public themselves might disagree on these controversial matters. Criticism that is fair and measured is obviously preferable to strident or unfair criticism. But the price of participation in public affairs can sometimes be exposure to criticism. Statements made from time to time on behalf, not only of tribunals, but also of courts, that criticism undermines public confidence in them, are not entirely well founded.¹¹⁶ What is “preferred” as a decision by one person may not be preferred by another. In merits review, there will almost always be an intersection with public policy, that is to say political policy, and sometimes adverse consequences to some people affected by it. Sometimes those effects will

¹¹⁵ *Burton (Migration)* [2018] AATA 4220 (27 August 2018).

¹¹⁶ The topic of criticism of judicial decisions and judges’ response to them has been the subject of a learned speech made on 23 January 2018 by the Hon. Dyson Heydon AC, a retired Justice of the High Court of Australia: “*Does Political Criticism of Judges Damage Judicial Independence?*” I respectfully endorse what the Hon. Dyson Heydon AC said there.

be intended, either in a broader public interest or otherwise.¹¹⁷ I would respectfully adopt the explanation of this intersection and the way in which it should be managed by Brennan J in his reasons in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*¹¹⁸ on remitter to him (as President of the AAT) by the Full Federal Court:

“Under the Westminster system of government, a Minister is politically responsible to the Parliament for the policy adopted to guide the exercise of his discretionary power, and he should be left to formulate that policy in whatever manner he thinks appropriate from time to time. Administrative policies are necessarily amenable to revocation or alteration on political grounds, and they are best formed and amended in a political context.

....

When the Tribunal is reviewing the exercise of a discretionary power reposed in a Minister, and the Minister has adopted a general policy to guide him in the exercise of the power, the Tribunal will ordinarily apply that policy in reviewing the decision, unless the policy is unlawful or unless its application tends to produce an unjust decision in the circumstances of the particular case. Where the policy would ordinarily be applied, an argument against the policy itself or against its application in the particular case will be considered, but cogent reasons will have to be shown against its application, especially if the policy is shown to have been exposed to Parliamentary scrutiny.”¹¹⁹

The first answer to criticism is the production and publication of good decisions supported by cogent reasons. They are also then likely to give the public confidence in the AAT.

¹¹⁷ That is a reason why applicants are not as they are sometimes described by Registry staff “clients” or “customers”.

¹¹⁸ *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.

¹¹⁹ *Ibid* at 643-645.

Legally Qualified Members

10.34 There is, in my opinion, no necessity to appoint professionals other than lawyers to the AAT (except perhaps for accountants to the Taxation and Commercial Division). In the General Division, in which Comcare matters are heard, the contest is usually a medical one but each side will have its own doctors and medical evidence. If there is a need for independent medical opinion then the AAT should be able to appoint an independent expert on its own motion. As the ARC noted in 1987, and which I endorse now:

*“The Council notes that section 33(1)(c) of the AAT Act provides that the AAT is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks fit. Thus it is open to the AAT to consult with experts beyond those called by the parties. If the AAT itself were to call expert witnesses during the course of a hearing, the expert evidence would be a matter of record and subject to cross-examination by the parties. Alternatively, the AAT could have a pool of experts available to be called upon when a question within their area of expertise arose.”*¹²⁰

10.35 Courts and tribunals are well accustomed to deciding issues in disciplines other than legal ones by analysing differing expert opinions. What I have just said about independent medical opinion applies to expert opinion of all kinds. Engagement of an independent expert, if and when required, is likely to be more economical for the Commonwealth than the appointment of experts in disciplines other than law to the AAT.

10.36 So far as the constitution of a Tribunal is concerned, it should only be in very special and rare cases of more than one Member.

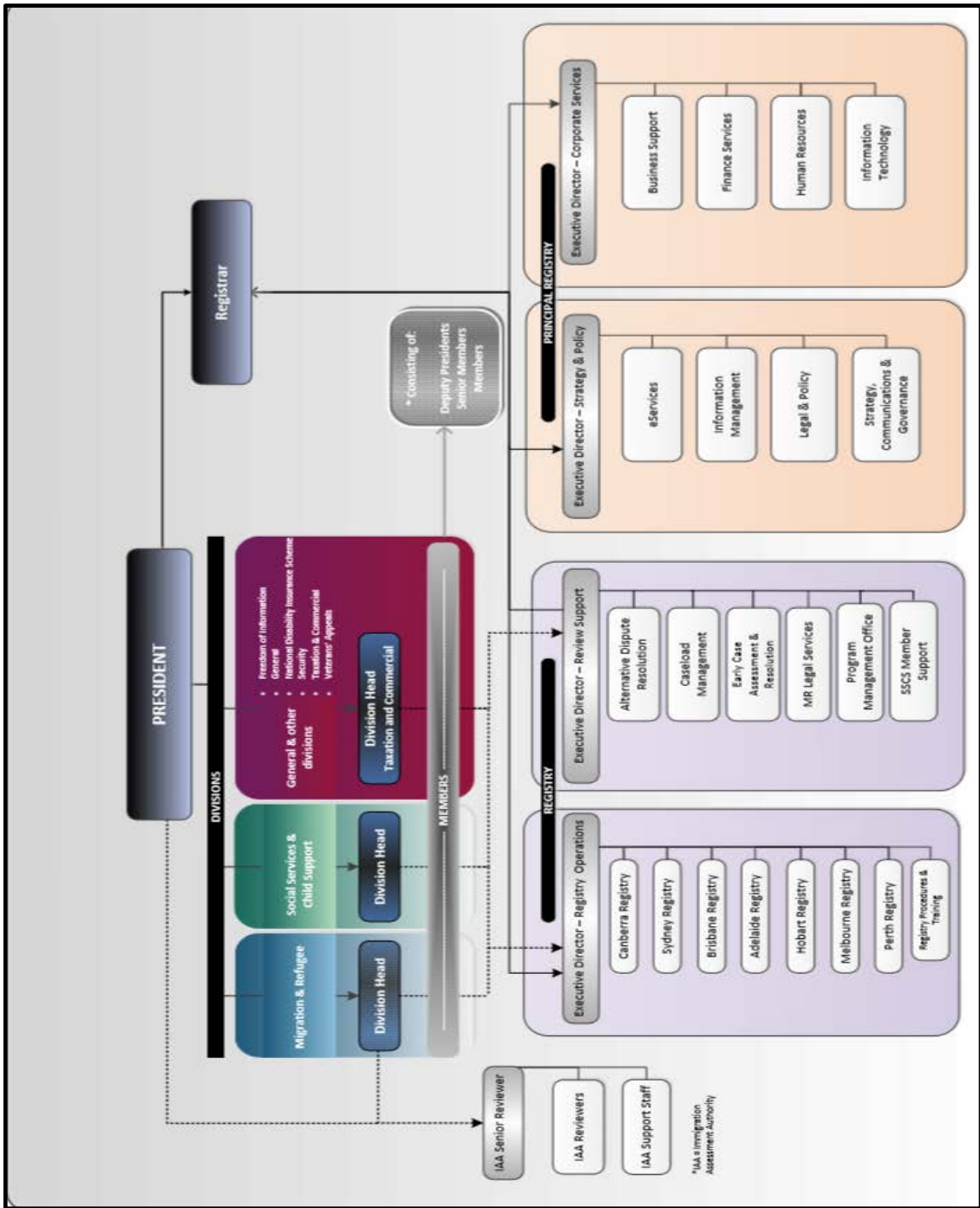
10.37 Administration should be done by the public service. Only in very exceptional circumstances should the expense of external consultants be incurred. It is surprising that a government agency of some 600 or so administrative staff, headed by five members of the Senior Executive Service, might think it necessary to engage

¹²⁰ Administrative Review Council, above n 12.

external consultants to do this sort of work. The expertise of Senior Executive Service public servants should be administration. I was not told by the Registrar, but I have ascertained that after the commencement of my Review, which is a Review that is mandated by and is to be laid before the Parliament, the AAT had engaged a firm of external consultants to:

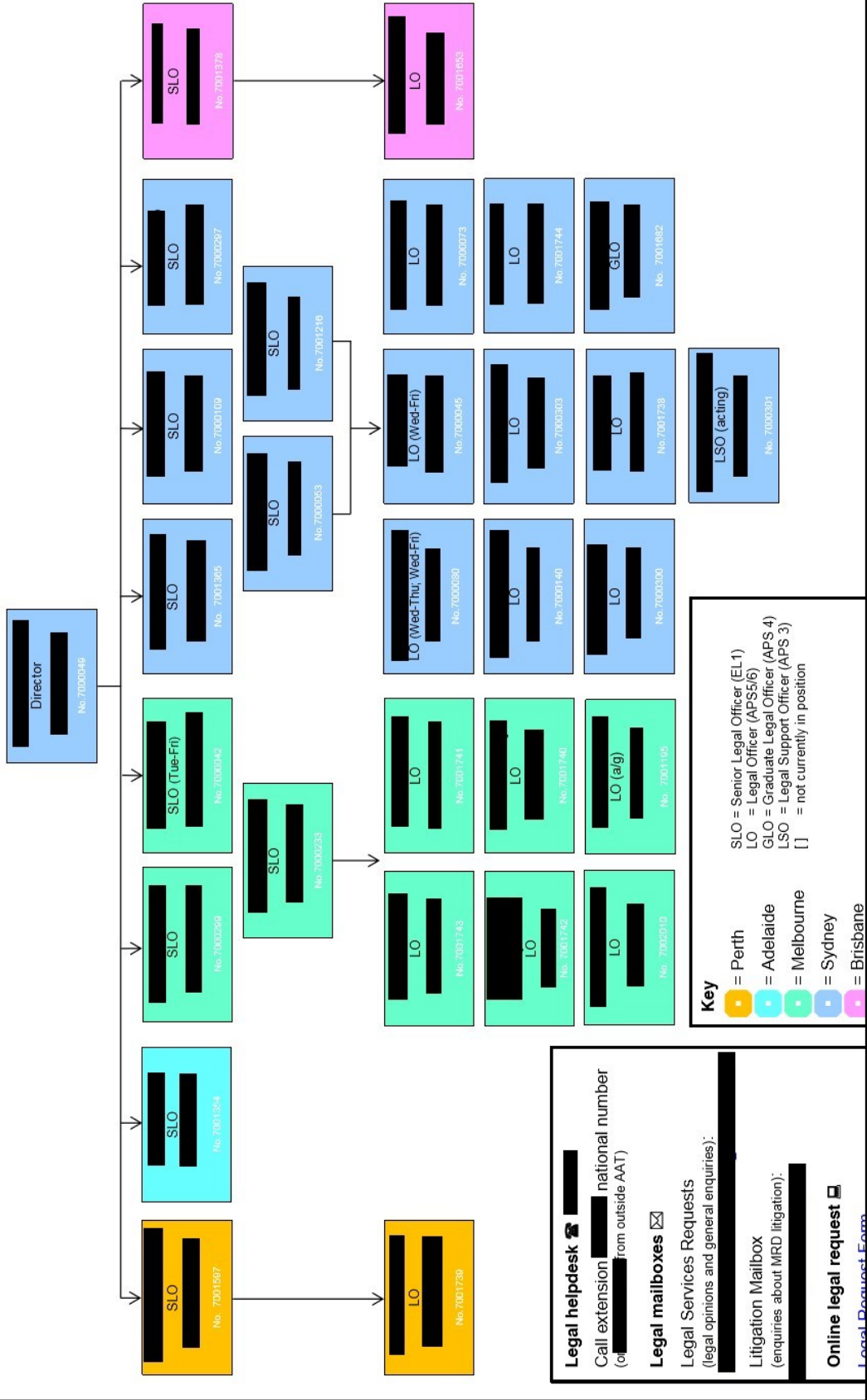
“... improve the way we operate and to convey their findings to senior leaders ... Findings along with any relevant recommendations in the Report of the Statutory Review being undertaken by the Hon Ian Callinan (due for release soon) will be used ... to develop a model for how we will operate in the future.”

- 10.38 The language of managerialism and bureaucratisation of the AAT do not assist, indeed, they impede successful fusion of the constituents of the amalgam. So too, neither client nor customer, is an apt description of an applicant to the AAT. It is the duty of an administrative and a reviewing tribunal, by their decisions from time to time, to deny applicants what they want. This is done as a matter of obligation to the public in a public interest, not as a service to a “client” or “customer”.
- 10.39 Two current organisational charts, which I reproduce below, are cogent evidence of bureaucratisation of the AAT to which I have referred.

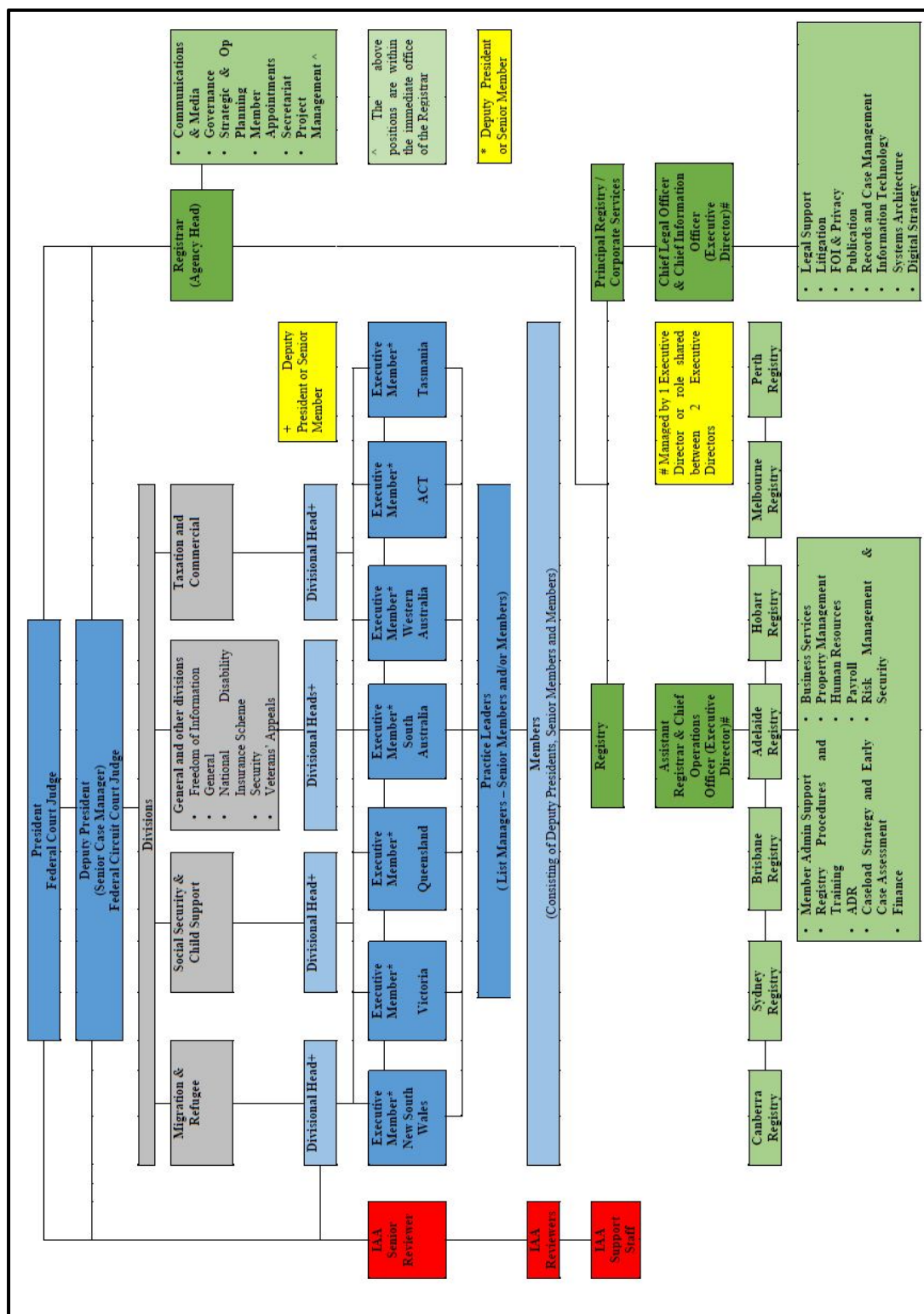


*IAA is Immigration Assessment Authority

MRD Legal Services section – structure and contacts



10.40 My Counsel Assisting and I discussed what I consider to be a better and less expensive organisation, in the form of an organisation which I chart below.



10.41 It would be seen as a great irony if the perceived antidote to the “Big State”, the AAT, has become a manifestation of the “Big State” itself.

- 10.42 The stratification of Membership of the AAT, in salary and otherwise, is a source of disharmony in the ranks of the Membership and another impediment to amalgamation. It may be a legacy of former tribunals now absorbed into the amalgam. It is, in any event, a matter which should be reconsidered unless this stratification serves some public interest of which I am not aware.
- 10.43 A summary is not intended to and will not capture all the relevant details of all of the matters under consideration. The suggested measures appearing in Chapter 1 of this Report should be regarded as part of this summary.



I.D.F. Callinan AC
19 December 2018

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