



Australian Government
Attorney-General's Department

Administrative Review Reform: Issues Paper

Designing a new federal administrative review body that is user-focused, efficient, accessible, independent and fair

April 2023

We acknowledge the traditional custodians of Australia and their continuing connection to land, sea and community.

We pay our respects to the people, the cultures and their Elders, past and present, and thank them for their ongoing contributions to the culture and prosperity of our great nation.

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Introduction

On 16 December 2022, the Attorney-General, the Hon Mark Dreyfus KC MP, announced that the Government would abolish the Administrative Appeals Tribunal (AAT) and replace it with a new federal administrative review body that is user-focused, efficient, accessible, independent and fair.

The objectives of the reform are to:

- restore public confidence with a new administrative merits review body that is **independent and transparent**
- address legacy issues from the amalgamation of the AAT, the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT) and the Social Security Appeals Tribunal (SSAT) by ensuring the new body is **cohesive** and that processes and procedures are **harmonised** where appropriate
- develop a legislative framework that is **modern, fit for purpose** and provides sufficient **flexibility** to address changing needs
- adopt a **user-focused** design with **simple, accessible** pathways for applicants, support for vulnerable cohorts, and a preference for non-adversarial practices and processes including the use of alternative dispute resolution (ADR)
- place the new administrative review body on a **sustainable financial footing** and facilitate the **efficient and just resolution** of matters where appropriate and possible
- **enhance the quality of administrative decision making** across government by creating **feedback mechanisms** in relation to significant issues and trends in matters before the new body.

These principles will guide the development of legislation for the new body.

Scope

This paper considers matters relating to the design of the new federal administrative review body, including its purpose, structure, membership, powers and procedures. It does not consider:

- the types of decisions that are reviewable by the new federal administrative review body
- internal review processes by government agencies
- the conduct or outcome of any specific matter before the AAT.

Making a submission

You can provide a submission in response to the Issues Paper by visiting:

<https://consultations.ag.gov.au/legal-system/administrative-review-reform-issues-paper/> and clicking 'Make a submission'.

If you do not wish to provide a detailed submission but would like to provide views on the design of a new administrative review body, you can complete our short survey by visiting:

<https://consultations.ag.gov.au/legal-system/administrative-review-reform-short-survey/> and clicking 'Have your say'.

You do not need to answer every question. You are welcome to only respond to those questions that are relevant to you or your organisation. Consultation closes on **12 May 2023**. Extensions will not be granted.

You can submit your response under your name or anonymously. We will publish responses at the end of the consultation period. We will not publish submissions if you do not consent, or if there is any potential legal issue with publishing the submission.

Submissions may be subject to freedom of information requests, or requests from the Parliament. Personal information shared through the consultation process will be treated in accordance with the *Privacy Act 1988*. For more information on how the Attorney-General's Department collects, stores and uses personal information, please visit the Attorney-General's Department's Privacy Policy at www.ag.gov.au/about-us/accountability-and-reporting/privacy-policy.

List of questions

Part 1 – Structure and Membership

Design

1. What are the most important principles that should guide the approach to a new federal administrative review body?
2. Should the new federal administrative review body have different, broader or additional objectives from those of the current AAT? If so, what should they be?
3. Should the Administrative Review Council (ARC), or a similar body, be established in the new legislation? What should be its functions and membership?
4. How should the legislation creating the new body encourage or require government agencies to improve administrative decision-making in response to issues identified in decisions of the new federal administrative review body?

Structure

5. What structure would best support an efficient and effective administrative review body?
6. How flexible should the new body be in assigning members across the full spectrum of matters in the new body, and who should have the ability to assign or reassign members?
7. How can the legislation best provide for or support the application of different procedures for specific categories of matters?
8. Should the requirement that the President be a Federal Court judge be retained? Should any modifications be made? For example, should the requirement be extended to include former judges or judges of other courts?
9. Should the new body have other judicial members and what should their role be?

Senior leadership

10. What should be the role and functions of the President (or equivalent) of the new body? What qualifications and skills should be required?
11. What should be the role and functions of the administrative head(s) of the new body? For example, should there be a separate Principal Registrar and CEO?
12. What is the appropriate split of responsibilities and powers between these roles?
13. Below the President (or equivalent), what should be the most senior level of membership in the new body and what should their primary responsibility be?
14. What aspects of leadership, management and administration should sit with the most senior levels of membership in the new body, and which should sit with APS leadership of the new body?

Members

15. What should be the levels of membership in the new body, and what should be the roles, responsibilities and qualifications required at each level?
16. Should all members be required to be legally qualified to be eligible for appointment?

17. What is the value of members holding specific expertise relevant to the matters they determine? Should the new body set particular criteria for subject-matter expertise (alongside more general qualifications)?
18. Should the new body have the ability to appoint experts to assist in a matter? If so, in what circumstances should this occur and what should be their roles?
19. Is there value in having members who are available to hear matters on an ad hoc basis (sessional members)? What role should they play?

Appointments and reappointments

20. Should the requirement for a transparent and merit-based selection process for members, including the Senior Leadership of the body, be incorporated in legislation? What elements should be included?
21. Should the legislation require the Minister to consult the President before appointing or reappointing members?
22. What guidelines or procedures (similar to the present Guidelines for appointing members to the AAT) would support a transparent and merit-based appointment process?
23. What is the appropriate term of appointment for members, the President and the Registrar (or equivalent)? Should terms be fixed, and should there be a maximum number of reappointments?
24. What should be the process and criteria for reappointment of members? How should past performance be assessed to inform reappointment or appointment at a higher level?
25. How can the current legislative requirements and processes for managing conflicts of interest, actual or perceived, be enhanced for the new body?
26. What interests or outside employment of a member could give rise to an actual or perceived conflict of interest in a matter. What consequences for the member should follow from such a conflict?
27. Should members be prevented from appearing as a representative or an expert witness in matters in the tribunal while they are members or for a period after their term as member concludes?

Performance management and removal of members

28. How should the legislation empower the new body to manage and respond to issues relating to member performance and conduct?
29. What are the appropriate grounds, thresholds and process for suspending or terminating the appointment of a member? Who should be responsible for suspending or terminating the appointments of members?

Part 2 – Powers and Procedures

Making an application

30. How can the new body ensure that application methods and processes are accessible to all those seeking review? For example,

- a. What should be the requirements to lodge an application? Should a statement of reasons by the applicant be required? Should different requirements apply to particular types of applications or to particular cohorts?
 - b. What should be the time limits for making an application? Should these be consistent across all matters? In what circumstances should the new body be able to grant an extension of time or set the date of effect of a decision?
 - c. Are application fees at an appropriate level? Are current criteria for reduced fees or fee exemptions appropriate? Should the rules relating to fees and fee refunds be harmonised? What other protocols might apply? For example, should application fees be refunded to successful applicants and how may success be judged?
31. What should be the consequences of failing to comply with application requirements, including non-payment of fees, and what powers does the new body need to manage non-compliant applications effectively?
32. What methods of lodgement should be permitted? To what extent should lodgement methods be harmonised for all applications?
33. Which applicants or categories of applicant should be able to lodge an application orally (noting the workload/resources involved and the need for clear criteria)?

Case Management, Directions and Conferencing

34. What powers should the new body have to use case conferencing (or other forms of managing a matter) for the effective and efficient management and resolution of cases? Are there matters for which case conferencing is not appropriate?
35. What should be the role and functions of conference registrars (or equivalent) in the new body? Should conference registrars have particular skills or training, for example legal qualifications or skills in dispute resolution?
36. What directions making powers should be available for the new body? Should these powers be available to the new body for all matters? Who should be able to exercise them?
37. What powers should the new body have to address non-compliance with directions?
38. What other interlocutory processes and proceedings should be available in the new body?
39. What powers or procedures should be available to the new body to expedite the resolution of matters? Are there specific types of matter which could benefit from expedited review processes?

Information provision and protection

40. What documents should respondents be required to provide the new body in relation to the original decision, and in what timeframes? Should these provisions be standardised across all matters?
41. What powers should the new body have to compel departments, agencies, applicants, or third parties to provide documents, information or evidence? Should these powers be available across all matters?
42. What documents and information should the Tribunal share or not share with applicants?

43. By what criteria should the new body allow private hearings or make non-disclosure/non-publication orders?
44. Should all matters involving sensitive national security information have a common set of protections and processes? What should those protections be?

Resolving a matter

45. What types of dispute resolution should be available in the new body?
46. Should dispute resolution be available across all types of matters? Are there matters where it may be less appropriate? Should some methods of dispute resolution only be made available for particular types of matters?
47. What additional powers or procedures should be introduced to increase the accessibility and availability of dispute resolution in the new body? Who should be able to refer a matter to dispute resolution?
48. What powers should the new body have to resolve a matter before hearing? Which of these powers should be conferred on non-members? Should these powers be standardised across all matters?
49. What powers should the new body have to manage applications that are frivolous or vexatious?
50. In what circumstances should the new body be able to dispense with a hearing?
51. How should hearings be conducted to ensure that they are accessible, informal, economical, proportionate, just and quick?

Decisions and appeals

52. What should be the requirements and timeframes for issuing oral and written reasons for decision in the new body?
53. How can the new body achieve quality, consistency, accessibility and simplicity in explaining the reasons for a decision?
54. Are there ways to streamline appeal processes and pathways to reduce the overall duration of a matter?
55. What should be the timeframes for lodging an appeal from a decision of the new body? Should this date be from the receipt of a decision, or the receipt of written reasons for decision?
56. When and how should the new body be able to refer a question of law to the Federal Court of Australia? Are there other ways for the new body to seek clarity on unsettled matters (such as guidance decisions or decisions by an appeal panel within the new body) and how should these be used?
57. What processes should be in place to ensure the new body refers questions of law to the Federal Court of Australia in appropriate circumstances?
58. Should a second, more formal tier of review be available in the new body, either for specific types of matter or across all matters? For example, should there be an appeals mechanism within the new body for complex matters or matters raising systemic issues?

- a. If available, how should the second tier of review operate and how should it be accessed? For example, should the President be able to refer a matter of their own motion? Should leave be required to appeal?
- b. Should some matters be referred to a second tier of review from the outset and in what circumstances should this occur?

Supporting parties with their matter

- 59. Should there be a requirement in the new body to seek leave to appear with representation? If so, should this extend to all matters or a specific category of matters?
- 60. Should there be requirements or a code of conduct for representatives to ensure representatives act in the best interests of a party? How should this be enforced?
- 61. What services would assist parties to fully participate in processes under the new body and improve the user experience? Which of these services should be provided:
 - a. by departments and agencies
 - b. by the new body
 - c. by other organisations.
- 62. How can the new body (or ancillary services) enhance access for vulnerable applicants?
- 63. How can the new body protect the safety and interests of applicants who have experienced or are at risk of trauma or abuse? For example, what special processes may be needed in relation to information protection, participation in dispute resolution and hearings for at-risk applicants?
- 64. Should the legislation place an obligation on the new body to promote accessibility for all users?
- 65. How can the new body ensure that a party with a disability is supported to participate in proceedings in their own capacity?
- 66. Should the new body be able to appoint a litigation guardian for a party where necessary? If so, what should the requirements and process be for the appointment of a litigation guardian?

Other matters

- 67. Do you have any other suggestions for the design and function of a new administrative review body?

Background

Administrative review

Administrative review (also called ‘merits review’) is the process which allows a decision by government (an administrative decision) to be reviewed ‘on the merits’. This process helps to ensure that the correct or preferable decision is made and that it is made properly and fairly. Administrative review is an essential part of the legal framework which protects the rights and interests of individuals and organisations in relation to government, and upholds the integrity of government programs. Effective administrative review also promotes government accountability and improves the quality and consistency of government decision-making.

During an administrative review, a person or body other than the primary decision-maker decides for itself the facts and what is the correct or preferable decision. This has been described as the reviewer ‘stepping into the shoes’ of the primary decision-maker and considering that decision afresh.¹ The result of administrative review may be to:

- affirm the original decision – where the original decision is not changed by the review
- vary the original decision – where the original decision is amended by the review
- set aside the original decision – where the decision is overturned and a new decision (made by the review body) is substituted in its place, or
- remit the decision to the original decision-maker to be remade – where the decision is overturned, but the matter is sent back to the original decision-maker to make a new decision (this is often accompanied by directions or recommendations).

Administrative review is different to judicial review, which is conducted by the courts. The court considers legality and fair process – the court cannot ‘step into the shoes’ of the original decision-maker and remake the decision. Where the court finds legal error, including a denial of procedural fairness, it will set aside the decision and send it back to the original decision-maker. In administrative review, the decision-maker considers the material presented at the time of the review to make findings of fact and to arrive at the correct or preferable decision. Unless the legislation specifies otherwise, this includes any new information not available at the time of the original decision. People performing administrative review must only exercise the powers and discretions that were available to the original decision maker.²

History of the AAT

The AAT commenced on 1 July 1976 following reports by the Commonwealth Administrative Review Committee (Kerr Committee) in 1971 and the Committee on Administrative Discretions (Bland

¹ See *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139, 143 (Smithers J).

² Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 14 September 1995), 15.

Committee) in 1973, which found Australia required a model for the external review of government decisions that was accessible, informal and relatively affordable.

The Kerr Committee report recognised the ‘considerable expansion’ of the ‘range of [government] decisions... which affect the individual citizen in many aspects of daily life’³ which had not been accompanied by commensurate increase in the ability of individuals to challenge these decisions. It recommended the creation of a ‘comprehensive system of administrative law, but one which is essentially Australian’.⁴ This would include a general Administrative Review Tribunal to review administrative decisions⁵ and an Administrative Review Council (ARC) to perform continuous research on matters relating to administrative law.⁶

The subsequent Bland Committee examined the range of decisions made under Commonwealth legislation and the appropriate form of review for these decisions. The Bland Committee’s interim report recommended the creation of the Commonwealth Ombudsman,⁷ while its final report focussed on the potential scope and operation of a general administrative tribunal.⁸

In the second reading speech for the Administrative Appeals Tribunal Bill 1975 (Cth), the then Attorney-General, the Hon Kep Enderby QC, outlined the rationale for the creation of the AAT, and its purpose:

An inevitable development of modern government has been the vesting of extensive discretionary powers in Ministers and officials in matters that affect a wide spectrum of business and personal life. Unfortunately, this development has not been accompanied by a parallel development of comprehensive machinery to provide for an independent review of the way these discretions are exercised. While there has been established a considerable number of review tribunals of one kind or another under the legislation of this Parliament, these have not developed in any coordinated fashion.

The intention of the present Bill is to establish a single independent tribunal with the purpose of dealing with appeals against administrative decisions on as wide a basis as possible.⁹

³ Commonwealth Administrative Review Committee, Parliament of Australia, *Report* (Report, No 144, August 1971), [15] <<https://nla.gov.au/nla.obj-1928610510/view?partId=nla.obj-1933534037>>.

⁴ Commonwealth Administrative Review Committee, Parliament of Australia, *Report* (Report, No 144, August 1971), [237].

⁵ Commonwealth Administrative Review Committee, Parliament of Australia, *Report* (Report, No 144, August 1971), [390].

⁶ Commonwealth Administrative Review Committee, Parliament of Australia, *Report* (Report, No 144, August 1971), [283].

⁷ Committee on Administrative Discretions, Parliament of Australia, *Interim Report* (Report, No 53, January 1973) <<https://nla.gov.au/nla.obj-1362163435/view?partId=nla.obj-1364688594#page/n0/mode/1up>>.

⁸ Committee on Administrative Discretions, Parliament of Australia, *Final Report* (Report, No 316, October 1973) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=%20Committee%20on%20Administrative%20Discretions%22;rec=1;resCount=Default>>.

⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 6 March 1975, 1186 (Kep Enderby, Attorney-General).

<<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=HANSARD80;id=hansard80%2Fhansardr80%2F1975-03-06%2F0078;query=id%3A%22hansard80%2Fhansardr80%2F1975-03-06%2F0046%22>>.

It was envisaged that the AAT would be the main tribunal for Commonwealth administrative review, and that specialist tribunals would be created by exception.¹⁰ Notwithstanding this intention, between 1975 and the early 1990s, a number of new tribunals were created, particularly to review decisions in high volume areas of law such as migration, social security and veterans' benefits.

In late 1993, the then Minister for Justice, the Hon Duncan Kerr, asked the Administrative Review Council (itself created by the *Administrative Appeals Tribunal Act 1975* (Cth)) to inquire into the effectiveness of the Commonwealth system of external merits review tribunals. That review resulted in the 1995 report *Better Decisions: Review of Commonwealth Merits Review Tribunals*, which recommended consolidating five main Commonwealth review bodies (the AAT, the Veterans' Review Board (VRB), the Social Security Appeals Tribunal (SSAT), the Immigration Review Tribunal (IRT) and the Refugee Review Tribunal (RRT)) into a new Administrative Review Tribunal.¹¹ Legislation to implement this recommendation and other reforms, the Administrative Review Tribunal Bill 2000, was defeated in 2001. Key concerns raised at the time were the proposed funding and appointments process, and that the ability of Ministers to issue policy and practice directions diminished the independence of the new tribunal.¹²

In 2015, the Parliament passed legislation to merge the Social Security Appeals Tribunal (SSAT) and the Migration Review Tribunal and Refugee Review Tribunal (MRT-RRT) into the AAT.¹³ That process aimed to create a 'coherent merits review framework' which 'harmonise[d] and simplify[ie]d procedures... where appropriate' without making 'significant changes' across the amalgamated Tribunal's varied jurisdictions.¹⁴ The amalgamation did not affect all Commonwealth external administrative review bodies – for example, the VRB and the Fair Work Commission (which considers workplace relations matters) were not amalgamated.

The AAT in 2023

The AAT is the Commonwealth's largest tribunal, both in terms of membership and scope. The Australian Administrative Law Policy Guide states that '[t]he AAT should be the merits review tribunal for all Commonwealth administrative decisions unless specific policy considerations support review conducted by an alternative body'.¹⁵

The AAT consists of the President and members who may be appointed as:

- Deputy Presidents (some Deputy Presidents may be assigned as the head of one or more divisions)
- Senior Members

¹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 6 March 1975, 1186 (Kep Enderby, Attorney-General).

¹¹ Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 14 September 1995), 142.

¹² Stephen Skehill, *Strategic review of Small and Medium Agencies in the Attorney-General's Portfolio* (Report, January 2012), 89.

<<https://webarchive.nla.gov.au/awa/20120618062251/http://pandora.nla.gov.au/pan/134692/20120618-1619/www.finance.gov.au/publications/strategic-reviews/attorney-general.html>>.

¹³ *Tribunals Amalgamation Act 2015* (Cth).

¹⁴ Explanatory Memorandum, *Tribunals Amalgamation Bill 2015* (Cth), 3.

¹⁵ Attorney-General's Department, *Australian Administrative Law Policy Guide 2017*, 14.

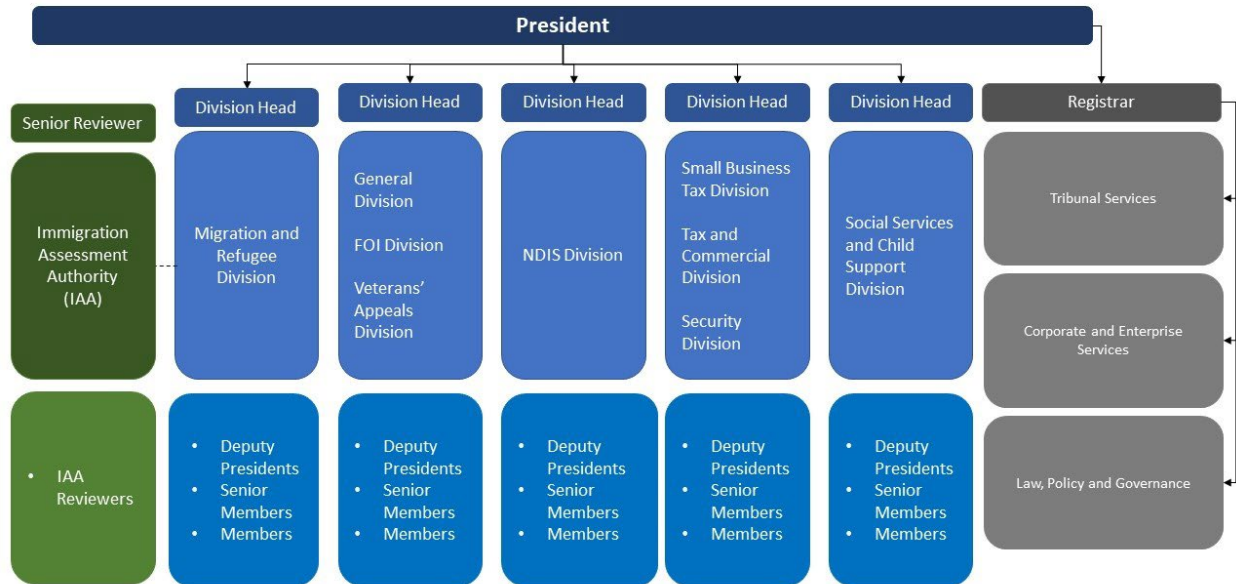
<<https://www.ag.gov.au/sites/default/files/2020-03/Australian-administrative-law-policy-guide.pdf>>.

- Members.

The Registrar of the AAT is a statutory office appointed by the Governor-General. The Registrar assists the President to manage the administrative affairs of the AAT.

The AAT manages its workload through 9 divisions, led by 5 division heads. Figure 1 provides a high-level outline of the current organisational structure of the AAT.

Figure 1: Current organisational structure of the AAT



Legislative framework

The AAT does not have a general review jurisdiction – it can only review decisions if an Act, regulation or other legislative instrument says that the AAT can review a certain decision. Currently, the AAT reviews decisions under more than 400 Commonwealth Acts and legislative instruments.

The *Administrative Appeals Tribunal Act 1975* (Cth) ('AAT Act') and [Administrative Appeals Tribunal Regulation 2015](#) (Cth) (AAT Regulation) establish the AAT and set out its ordinary powers and procedures. However, the AAT's powers and procedures can be varied by other laws which allow the AAT to review certain types of decisions. For example, the ordinary procedures set out in the AAT Act and Regulations are amended, and in some cases do not apply, for migration, social security and child support matters.

The jurisdiction, powers and procedures of the AAT to review migration or protection visa decisions, also known as the codes of procedure, are set out in the *Migration Act 1958* ('Migration Act') and the *Migration Regulations 1994* ('Migration Regulations'). Specifically:

- Part 5 of the Migration Act applies to the review of a range of migration-related decisions, including most decisions relating to the refusal or cancellation of visas, in the MRD. Before the 2015 amalgamation, it governed the procedures of the Migration Review Tribunal (MRT).

- Part 7 of the Migration Act applies to the review of a certain decisions about the refusal or cancellation of protection visas, in the MRD. Before the 2015 amalgamation, it governed the procedures of the Refugee Review Tribunal (RRT).

The codes of procedure are intended to support transparency and consistency of processes in relation to particular matters, to provide certainty and clarity to decision-makers and parties. This paper will indicate where requirements in the codes of procedure differ to other requirements.

In addition, there are specific procedures which only apply to the review of visa decisions relating to character, where the applicant is in Australia.¹⁶ These decisions are reviewed in the General Division.

For decisions about social security, the jurisdiction, powers and procedures of the AAT are modified by the *Social Security (Administration) Act 1999* (SS (Admin) Act). Specifically:

- Part 4 of the SS (Admin) Act sets out how decisions can be reviewed and the requirement for internal review prior to an application to the AAT.
- Part 4A of the SS (Admin) Act relates to the review of decisions by the AAT and includes provisions setting out how certain aspects of the review process operate as well as provisions disapplying and modifying sections of the AAT Act.

Additional provisions exist elsewhere in social security legislation that also modify AAT procedures in relation to decisions such as family assistance, child support, paid parental leave and student assistance.¹⁷

Commonwealth administrative review system

The AAT operates within a wider system of merits review at the Commonwealth level, which includes:

- Original decision making – including the legislative frameworks for decisions, processes and procedures that guide how decision makers make decisions.
- Internal merits review – where a decision is reconsidered by another, usually more senior, officer within the same agency. Internal review processes are established and operated by individual government departments. They can be formal, ad hoc or legislated, depending on the nature of the decision, and the department and should usually be accessed prior to seeking external merits review.
- External merits review – where the original decision is revisited by an external, independent decision-maker (such as the AAT).

The AAT exists alongside a number of other Commonwealth integrity agencies, such as the Commonwealth Ombudsman, whose role is to investigate complaints about Government actions, and the Office of the Australian Information Commissioner, whose role includes promoting access to, and protection of, information.

¹⁶ See procedures set out in the *Migration Act 1958*, ss 500(6A)-(6L) which relate only to decisions made under ss 501 and 501CA.

¹⁷ See, *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth); *Child Support (Registration and Collection) Act 1988* (Cth); *Farm Household Support Act 2014* (Cth); *Paid Parental Leave Act 2010* (Cth); *Student Assistance Act 1973* (Cth).

Recent reviews and recommendations

The AAT has been the subject of several reviews and inquiries since the 2015 amalgamation.

Metcalfe Review (2017)

The 2017 *Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal* (Metcalfe Review) considered the AAT's practices and procedures post-amalgamation and opportunities for harmonisation. The Review considered the AAT's practices and procedures in relation to making applications, giving, receiving and accessing documents, the power of tribunal members to remit decisions, the rules governing procedural fairness and oral decisions, and case management. It made both short and long term recommendations. The Metcalfe Review has not been published, but key findings are referenced in this Issues Paper.

Callinan Review (2018)¹⁸

In 2018, the Hon Ian Callinan AC KC, formerly a Justice of the High Court, completed a statutory review in accordance with section 4 of the *Tribunals Amalgamation Act 2015* (the 'Callinan Review'). The Callinan Review concluded the AAT was not functioning as desired post-amalgamation and that it remained siloed between different divisions, operated inconsistently in respect to different legislation and policies, and faced significant backlogs. The Review made 37 recommendations, including to simplify the membership structure, increase funding and require future appointees to be qualified lawyers (with some limited exceptions).

Senate Committee Report (2022)¹⁹

The Senate Standing Committee on Legal and Constitutional Affairs released its substantive interim report into the performance and integrity of Australia's administrative review system in March 2022.²⁰ Drawing on the Metcalfe and Callinan reviews, as well as its own public consultation process, the Senate Committee Report found that the AAT no longer enjoyed public confidence and was unable to achieve its legislated objectives. The report made three recommendations: calling for the re-funding of the ARC, the establishment of a merit-based appointment process for members, and the dissolution of the AAT and establishment of a new federal administrative review system.

¹⁸ IDF Callinan, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019)

<<https://www.ag.gov.au/legal-system/publications/report-statutory-review-tribunals-amalgamation-act-2015>>.

¹⁹ Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Performance and integrity of Australia's administrative review system* (Report, 30 June 2022)

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Adminreviewsystem>.

²⁰ While the committee was granted an extension to, and issued a final report on 30 June 2022, that report notes that the interim report 'enabled the committee to consider the issues raised in, and conclude its examination of, the terms of reference' and a re-referral to the 47th Parliament was not necessary: Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Performance and integrity of Australia's administrative review system* (Interim Report, 31 March 2022).

Part 1: Structure and Membership

1. Design

Nature of administrative review

'Tribunals are there to do different things from the courts, and in different ways, but with equal independence. In many respects, it is a more difficult task'.²¹

Tribunals can be administrative or civil. Administrative tribunals are concerned with executive actions of government. Civil tribunals are concerned with resolving private disputes. Because of Australia's constitutional separation of powers, federal tribunals, including the AAT, are only administrative. By contrast, all of the states and territories now have amalgamated Civil and Administrative Tribunals, known as CATs.

In 2012, Professor Creyke²² identified 5 essential features of tribunals:

- **Merits** – the ability to consider evidence up to the date of hearing and to work outside the policy parameters of public servants in order to reach the correct and preferable decision in all the circumstances.
- **Diverse membership** – specialist members provide greater legitimacy to decision making in areas that are technical or where an understanding of context is important, and replicate the expertise of the original decision-makers in the areas of activity under review.
- **Flexibility of process** – a tribunal is 'not bound by the rules of evidence but may inform itself on any matter in such a manner as it thinks appropriate' (AAT Act, s 33(1)(c)). In principle, tribunal processes can be as formal or informal as the particular matter demands. Members can make their own inquiries of the information relating to a decision, and can be attentive to user needs in how they conduct a particular hearing or matter.
- **Accessibility** – in a range of facets: availability and location of hearings, a customer service approach, information and support services provided, lodgement processes, and the ability to accommodate a range of applicants.
- **Cost effectiveness** – tribunals are cheaper than courts and are able to minimise costs through flexibility and simplicity of process and reducing the number of times parties need to attend the tribunal.

Commentators have found that the extent to which the current AAT embodies these features is mixed. For example, the Senate Legal and Constitutional Affairs References Committee concluded that 'the AAT has not been functioning in the fair, just, economical, informal and quick way that... it should'.²³

²¹ Andrew Leggatt, *Tribunals for Users - One system, one service: Report of the Review of Tribunals (2001)*, n 120, [1.14], cited in Robin Creyke, 'Tribunals – "Carving out the Philosophy of their Existence": The Challenge for the 21st Century' (2012) *AIAL Forum* No 71, 31.

²² Robin Creyke, 'Tribunals – "Carving out the Philosophy of their Existence": The Challenge for the 21st Century' (2012) *AIAL Forum* 71.

Key issues

From a user perspective, confidence in tribunal outcomes is influenced by the extent to which applicants feel that they have had a fair hearing, even if the outcome did not go their way. Some factors that may impact confidence in an administrative tribunal include the perceived independence from agency decision-makers, consistency and transparency in decision making, and the length of time to decide a matter. Additionally, many commentators agree that informal procedures are less intimidating and easier to navigate for unrepresented litigants which can also contribute to an applicant's sense of having had a fair hearing.²⁴ The ARC noted that the level of formality should vary according to the type of decision under review and the characteristics of the people for whom review is provided.²⁵

Tribunals also play a key role in maintaining the integrity of government programs, and safeguarding Australia's interests. Robust and efficient review process minimises opportunities and incentives for people who seek to improperly access programs, and to exploit administrative decision-making processes.

In designing the new body, it is important to consider how its powers, functions and procedures deliver on its core objective of providing administrative review. A key consideration is the degree to which processes in the new body can be made flexible and informal without compromising the robustness of processes and certainty for parties. In some circumstances, clearly defined processes will be preferred in order to ensure transparency and certainty. This paper invites consideration of specific matters that should be either retained, adjusted or enhanced in the new legislation to strike the correct balance between these considerations.

Discussion questions

1. What are the most important principles that should guide the approach to a new federal administrative review body?

Objectives

Section 2A of the AAT Act provides that, in carrying out its functions, the AAT must pursue the objective of providing a mechanism of review that:

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

The current objective clause was inserted by the *Tribunals Amalgamation Act 2015* (Cth) ('Tribunals Amalgamation Act'). Prior to that, the objective clause provided the review mechanism should be 'fair,

²⁴ DC Pearce, 'The Australian Government Administrative Appeals Tribunal' (1976) *University of New South Wales Law Journal* 1.

²⁵ Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 14 September 1995), 30.

just, economical, informal and quick’ (as per the current paragraph 2A(b)). In relation to new paragraphs 2A(a), (c) and (d), the Explanatory Memorandum stated:

The addition of these objectives reflects the diversity of the amalgamated Tribunal’s jurisdiction, which would range from simple to highly complex matters, and reiterates the importance of the Tribunal continuing to be, and to be seen to be, an independent forum for review of the merits of Government decisions.²⁶

The inclusion of accessibility, proportionality and accountability in the objectives reflects the wide range of matters of varying importance and complexity that come before the AAT, and that its practices must be responsive to this diversity. In particular, proportionality of procedures to the impact of the decision on an individual is important to ensure that the review system is appropriate, effective and efficient.

Key issues

The Government has stated that the new body should be user-focused, efficient, accessible, independent and fair. These aims are largely consistent with the current AAT’s objectives.

Views are sought on whether the current objectives are appropriate. State and Territory civil and administrative tribunals have generally adopted the ‘fair, just, economical, informal and quick’ element of the original AAT Act in their objectives.²⁷ Jurisdictions have also expanded upon these objectives. For example, the objectives of the *South Australian Civil and Administrative Tribunal Act 2013* (SA) include explicit references to accessibility – both in terms of ease of access, and in terms of practice:

- (a) in the exercise of its jurisdiction, to promote the best principles of public administration, including—
 - (i) independence in decision-making; and
 - (ii) natural justice and procedural fairness; and
 - (iii) high-quality, consistent decision-making; and
 - (iv) transparency and accountability in the exercise of statutory functions, powers and duties; and
- (b) to be accessible by being easy to find and easy to access, and to be responsive to parties, especially people with special needs; and
- (c) to ensure that applications are processed and resolved as quickly as possible while achieving a just outcome, including by resolving disputes through high-quality processes and the use of mediation and alternative dispute resolution procedures wherever appropriate; and
- (d) to keep costs to parties involved in proceedings before the Tribunal to a minimum insofar as is just and appropriate; and
- (e) to use straightforward language and procedures (including, insofar as is reasonably practicable and appropriate, by using simple and standardised forms); and
- (f) to act with as little formality and technicality as possible, including by informing itself in such manner as the Tribunal thinks fit; and

²⁶ Explanatory Memorandum, *Tribunals Amalgamation Bill 2015* (Cth), 19 [118].

²⁷ *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 6; *Civil and Administrative Tribunal Act 2013* (No 1) (NSW) s 3; *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 10; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3; *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8; *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) s 10; *State Administrative Tribunal Act 2004* (WA) s 9. The *Victorian Civil and Administrative Tribunal Act 1998* (Vic) does not have legislated objectives.

(g) to be flexible in the way in which the Tribunal conducts its business and to adjust its procedures to best fit the circumstances of a particular case or a particular jurisdiction.²⁸

Other state and territory tribunals reflect tribunals' role in promoting public trust in broader government decision-making. The *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') notes that the objectives of the Queensland Civil and Administrative Tribunal (QCAT) include 'to enhance the openness and accountability of public administration',²⁹ while the *ACT Civil and Administrative Tribunal Act 2008* ('ACAT Act') provides that an objective of the Act is to 'identify and bring to the Attorney-General's attention systemic problems in relation to the operation of authorising laws.'³⁰ By contrast, the objectives of the AAT are limited to 'promot[ing] public trust and confidence in the decision-making of the Tribunal.'³¹

Another consideration in the design of the new body is whether dispute resolution processes should be promoted in its legislated objectives. Recent decades have seen the rise and increasing reliance on dispute resolution mechanisms in the management and resolution of matters. This is discussed further at Dispute Resolution.

Discussion questions

2. Should the new federal administrative review body have different, broader or additional objectives from those of the current AAT? If so, what should they be?

Improving government decision-making

The AAT's predominant function is to review individual administrative decisions. Through this review function, and feedback mechanisms to government, the AAT can play an important role in improving broader decision-making practices by highlighting issues with the quality and consistency of government decisions.

The AAT Act also establishes the ARC. The ARC was established in 1976, based on a recommendation of the Kerr Committee, which noted that 'a permanent [ARC]... to carry on continuous research' into administrative decision-making was 'fundamental to the proposed system of administrative review'.³² The AAT Act provides that the membership of the ARC includes the President of the AAT, the Commonwealth Ombudsman, the President of the Australian Human Rights Commission, the President of the Australian Law Reform Commission, the Australian Information Commissioner, and at least three other members (AAT Act, s 49).

The ARC's purpose is to review the Commonwealth administrative law system, monitor developments in administrative law, inquire into the adequacy of procedures used by decision-makers and tribunals such as the AAT, and recommend improvements to the Minister.³³ The Minister can also refer matters to the ARC for consideration and report. The ARC may also inquire into the required qualifications of decision-

²⁸ *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8.

²⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(e).

³⁰ *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 6(h).

³¹ *Administrative Appeals Tribunal Act 1975* (Cth) s 2A(d).

³² Commonwealth Administrative Review Committee, Parliament of Australia, *Report* (Report, No 144, August 1971) [283-284, 390].

³³ References to 'the Minister' refer to the Minister who administers the AAT Act under the Administrative Arrangements Orders. This has historically been the Attorney-General.

makers and authorities engaged in review of administrative decisions, such as the AAT, and facilitate their training.

Between 1976 and 2015, the ARC produced 10 practice guides and 50 reports on topics including preparing statements of reasons; standards of conduct for Tribunal members; automated assistance in administrative decision making; administrative accountability; and information-gathering powers of government agencies. It also proposed specific amendments relating to the jurisdiction of the AAT. Most of the ARC's publications are available on the Attorney-General's Department's website at: [Administrative Review Council publications | Attorney-General's Department \(ag.gov.au\)](#). The ARC's published guidance material is still used by parliamentary scrutiny committees and seen as a benchmark for government agencies when developing legislation that raises administrative law issues.

In 2015, as part of the 2015-16 Budget and the Smaller Government Reform Agenda, the ARC was defunded and discontinued, although it continues to exist under the AAT Act.

Key issues

Both the Callinan Review and the Senate Committee Report recommended refunding the ARC, although the Callinan Review noted that 'the intended role of the Council may have changed'.³⁴ The Senate Committee Report found 'near-universal support' for re-instatement of the ARC.³⁵ Submitters noted that the ARC could play an important role in reflecting on new trends and systemic challenges in administrative law, such as monitoring the use of technology in government decision-making.

Re-establishing the ARC or a similar body could provide an ongoing oversight mechanism to ensure the new body is meeting its objectives. Such a body could also have a role in identifying and reporting on systemic issues identified in review decisions and making recommendations to the Attorney-General or relevant Minister on improvements needed to administrative decision-making frameworks.

There is also an opportunity to consider how the new legislation can strengthen the role of the administrative review body in assisting and encouraging government agencies to improve their administrative decision-making. The Northern Territory and South Australian tribunals have a legislated function of 'promot[ing] the best principles of public administration'.³⁶ The Australian Capital Territory's Civil and Administrative Tribunal includes a function of identifying and elevating systemic problems.³⁷ The QCAT may make written recommendations to heads of departments about the policies, practices and procedures which ought to apply to reviewable decisions.³⁸ While review tribunals can help to identify issues in government decision-making, the responsibility for ensuring that tribunal decisions inform future administrative decision-making practice rests with government agencies.

Publishing decisions is another way that tribunals can support improved government decision-making and increase transparency. All state and territory tribunals publish a selection of their decisions (with or

³⁴ IDF Callinan, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019), 141.

³⁵ Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Performance and integrity of Australia's administrative review system* (Interim Report, 31 March 2022), 82.

³⁶ *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 10(a); *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8(1)(a).

³⁷ *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 6(h).

³⁸ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 24(3).

without reasons).³⁹ Section 66B of the AAT Act allows the AAT to publish its decisions and reasons ‘by any means it considers appropriate.’ The AAT’s ‘Publication of Decisions Policy’ provides additional guidance on how the AAT will exercise its discretion, and sets targets for the proportion of written decisions to be published for the AAT’s divisions and particular categories of cases within divisions.⁴⁰ That Policy identifies that, in SSCSD and MRD, matters may be published after being selected at random or if they are decisions ‘of a particular interest (for example, cases dealing with novel or complex issues).’

Some evidence at the Royal Commission into the Robodebt Scheme has raised the importance of identifying systemic issues arising from the administrative review caseload in addition to dealing with individual matters. In this context, it is timely to consider how the design of the new review body might assist to achieve this.

A practical consideration in support of mechanisms to improve agency decision-making is what information should be collected by the new body, and how it might be analysed and used to help identify trends and opportunities for improvement. This could be through provision to agencies, provision to another body (for example, the ARC or similar body), or public reporting.

Discussion questions

3. Should the Administrative Review Council (ARC), or a similar body, be established in the new legislation? What should be its functions and membership?
4. How should the legislation creating the new body encourage or require government agencies to improve administrative decision-making in response to issues identified in decisions of the new federal administrative review body?

³⁹ The Western Australian State Administrative, Northern Territory Civil and Administrative Tribunal and QCAT establishing legislation specifically empowers those tribunals to publish their decisions.

⁴⁰ Administrative Appeals Tribunal, *Publication of decisions* (Policy, 24 September 2020) <<https://www.aat.gov.au/AAT/media/AAT/Files/Policies/AAT-Publication-of-Decisions-Policy.pdf>>.

2. Structure

Divisions and assignment of members

The AAT has always been organised in a divisional structure. Prior to the AAT's establishment, the Bland committee's final report noted that there was a proliferation of tribunals, and that fewer and larger tribunals would be more resource effective.⁴¹ The government, in establishing the AAT, '[modified] the Bland proposal for three different tribunals by creating a single tribunal with three divisions (General Administrative, Medical Appeals, and Valuation and Compensation)'.⁴² Today, there are nine divisions as depicted below.

Figure 2 – Current divisions of the AAT



*The Immigration Assessment Authority (IAA) is an independent authority to review 'fast track reviewable decisions' for decisions by the Minister, or delegate, to refuse to grant a protection visa to certain applicants. It is not a division of the AAT. Unlike the remainder of the AAT, decision-makers in the IAA (the Senior Reviewer and Reviewers) are APS staff and not statutory office holders.

The Minister may assign a Deputy President (AAT Act, s 17K(1)) to be a Division head, although a Division head is not required to be assigned. The powers and responsibilities of Division heads are described generally in the AAT Act as 'assisting the President in the performance of the President's functions by directing the business of the Tribunal in the Division' (AAT Act, s 17K(6)).

While each Division head has the same functions, in practice, Division heads perform their functions in different ways. For example, in some divisions and registries the Division head constitutes matters,⁴³ in others it is the Executive Deputy President, or another Deputy President or Senior Member to whom the power has been delegated. The role of Division heads is discussed in greater detail at page [31].

⁴¹ Committee on Administrative Discretions, Parliament of Australia, *Final Report* (Report, No 316, October 1973), 25 [125].

⁴² Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 14 September 1995), 179.

⁴³ 'Constituting' a matter refers to the process by which it is decided which member or members will be the reviewer in a matter, or will represent the AAT any other proceeding, see AAT Act, ss 19A-19B.

Members and Senior Members must be assigned to one or more divisions by the Minister, in consultation with the President (AAT Act, s 17C). However, the Minister is not required to consult the President prior to assigning Members. Deputy presidents are able to undertake work in any division (AAT Act, s 17C(1)). The AAT Act also requires the Minister responsible for assigning members to the AAT to consult the following Ministers before assigning an individual to a particular division:

Table 1 – Consultation requirements for assignment to Divisions of the AAT

Division	Consultation with
Migration and Refugee Division	the Minister administering the Migration Act (AAT Act, s 17D)
National Disability Insurance Scheme Division	the Minister administering the <i>National Disability Insurance Scheme Act 2013</i> (Cth) (AAT Act, s 17E)
Social Security and Child Support Division	the Minister administering the <i>Social Security (Administration) Act 1999</i> (Cth) (AAT Act, s 17G)
Taxation and Commercial Division	the Treasurer (AAT Act, s 17H)

Matters can be assigned to particular divisions of the AAT by legislation (for example, section 17B of the AAT Act requires certain matters to be heard in the Security Division, and sections 336N and 409 of the Migration Act requires matters are heard in MRD). Where the assignment of matters to a division is not prescribed by legislation, the President’s Direction on the Allocation of Business to Divisions of the AAT applies.⁴⁴ Matters are allocated to a member or members through a triage process, taking into account considerations outlined in the President’s Direction on Constituting the Tribunal.⁴⁵

Key Issues

The structure of the new body will need to support its efficient and cohesive operation, and ensure that it can respond flexibly to changing needs.

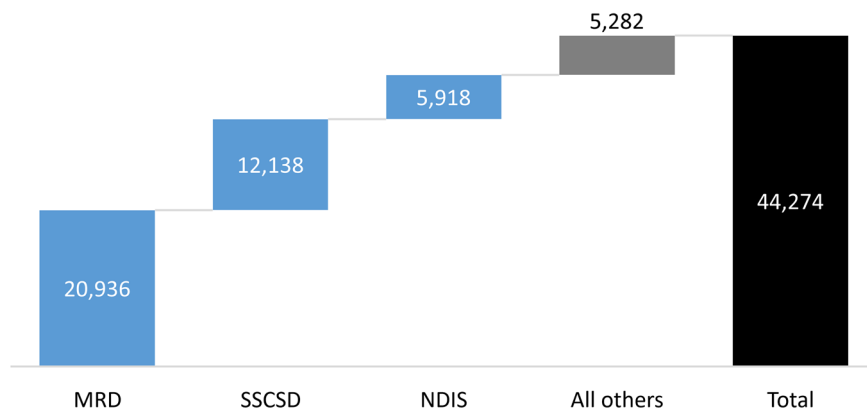
Though the AAT has always used divisions to delineate matters and practices, this type of structure can sometimes lead to inflexibility and inefficiency. The AAT Act prescribes the divisions and does not allow the President or the Minister to adjust the number or type of divisions to respond to changing workloads and needs.

⁴⁴ Administrative Appeals Tribunal, *Allocation of Business to Divisions of the AAT* (President’s Direction, 28 February 2019) <President-s-Direction-Allocation-of-Business-to-Divisions-of-the-AAT.pdf>.

⁴⁵ Administrative Appeals Tribunal, *Constituting the Tribunal* (President’s Direction, 14 July 2015) <<https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/President-Direction-Constituting-theTribunal.pdf>>.

The Callinan Review noted that some divisions are far busier than others and that ‘flexibility in the deployment of Members is desirable and likely to enhance harmonisation’.⁴⁶ In 2021-22, three of the nine AAT divisions saw nearly 90% of lodgements (see Figure 3).

Figure 3 – Matters lodged in the AAT in FY 2021-22, by divisions



There are several potential alternatives to the current approach:

1. Allow the new body (either the President or a group of members which includes the President) to prescribe divisions, or equivalent structures – this is similar to the approach taken by the Victorian Civil Administrative Tribunal (VCAT).
2. Legislate some divisions and allow the President to determine the others as needed.
3. Move away from a formal divisional structure and instead allow the new body to structure its work around practice groups or lists – similar to the model in operation within courts and the Queensland Civil and Administrative Tribunal, or the ‘streams’ approach adopted by the South Australian Civil and Administrative Tribunal.

A list or practice group model could lead to efficiencies and enhancements in operation. For example, this model could facilitate the greater development of expertise amongst members in particular practice groups and develop common approaches to the review of those matters. For example, instead of specific Security Division practices, protections for handling sensitive information could be applied to any matter involving national security information, including requiring matters to be heard by members and handled by staff with appropriate security clearances.

If legislated divisions are retained, consideration will need to be given to the process for assigning members to those divisions. One option is for members to be assigned to divisions by the President (rather than the Minister), as recommended in the Callinan Review, and to remove the requirements for ministerial consultation. This would give the President flexibility to move members as needed to accommodate the needs of the tribunal, subject to the relevant member having appropriate skills and expertise. Alternatively, the legislation could dispense with any requirement that members be formally

⁴⁶ IDF Callinan, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019), 10.

assigned to divisions. The President would then be able to constitute the tribunal for each matter as required.

Discussion questions

5. What structure would best support an efficient and effective administrative review body?
6. How flexible should the new body be in assigning members across the full spectrum of matters in the new body, and who should have the ability to assign or reassign members?
7. How can the legislation best provide for or support the application of different procedures for specific categories of matters?

Role of the judiciary

President

The Administrative Appeals Tribunal is directed by its President who must be a judge of the Federal Court of Australia (AAT Act, s 7(1)). Although the President must be a judge, the President does not exercise judicial power in their capacity of President.

The requirement for a judicial President was inserted into the Act in 1982. Prior to that, the President and Deputy Presidents of the AAT could be either:

- judges of a federal or state/territory court, or
- legal practitioners with at least five years' experience enrolled at the High Court, a federal court or a State/Territory Supreme Court.

The Administrative Appeals Tribunal Amendment Bill 2004 ('2004 Bill') proposed to expand the President's qualification requirements to allow for the appointment of a current or former judge of any federal court, or a former judge of any State or Territory Supreme Court, or a person who has been enrolled as a legal practitioner in Australia for at least five years. The Explanatory Memorandum noted that these qualification requirements were consistent with those for the President of the National Native Title Tribunal.⁴⁷

In its report on the 2004 Bill, the Senate Legal and Constitutional Legislation Committee identified that the 'strongest criticism' of the Bill related to the proposal to expand the qualifications for the President, with no submissions supportive of the proposal, and several strong opponents, including the ARC and the Law Council of Australia.⁴⁸ The Committee found that the judicial President was a key feature of the AAT that should be retained to ensure:

- the independence of the Tribunal from government

⁴⁷ Explanatory Memorandum, Administrative Appeals Tribunal Amendment Bill 2004 (Cth) 8
<https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r2084_ems_4374dee8-6350-4e2f-b333-1a5ca426bde1/upload_pdf/66415.pdf;fileType=application%2Fpdf>.

⁴⁸ Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Administrative Appeals Tribunal Amendment Bill 2004* (Report, March 2005) 6 [2.2].
<https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2004-07/aat/report/index>.

- the leader of the Tribunal has sufficient experience and status in decision-making
- strong coordination between the Tribunal and the Federal Court on matters relating to the same subject matter
- consistency with tribunals in other jurisdictions.

The 2004 Bill did not proceed.

The amalgamation process in 2015 considered, and ultimately retained, the requirement for a judicial President.

Judicial Deputy Presidents

The AAT Act allows for the appointment of judges of the Federal Court and of the Federal Circuit and Family Court (Division 1) as Deputy Presidents of the AAT (further discussion on the role of Deputy Presidents below).

Currently, the Minister is empowered to appoint a Judge of the Federal Court as the acting President (AAT Act, s 10(1)). As a matter of practice, this tends to be a judicial Deputy President of the AAT. This practical arrangement ensures that the acting President can transition smoothly into the role given their sound knowledge of AAT members, processes and procedures and that there is a pool of Federal Court judges available to act in the role of President as required.

Judicial members don't hear a large volume of matters (approximately 25 matters in the last two years). Judicial members are used for significant or sensitive cases (e.g. for cases where the decision under review was made personally by a Minister), and for taxation cases where the same taxpayer also has a Federal Court matter on foot.

Key issues

President

The current requirement that the President must be a Federal Court Judge has both symbolic and practical benefits, and has been considered numerous times by the Parliament and retained. Equivalent tribunals in the majority of states and territories are led by a judge of the relevant Supreme Court.⁴⁹ A Commonwealth deviation from this standard could affect perception of the standing of the new body.⁵⁰

A judicial President reinforces the independence of the new body from government. Having a judicial President as the head of the body provides legitimacy to its decisions as an appellate body, albeit one within the executive branch.

Practically, a President with judicial experience and a working relationship with the Federal Court streamlines interactions between the two bodies, particularly where there is significant overlap in subject matter considered by the AAT and the Federal Court. For example, the Chief Justice is required under subsection 44(3) of the AAT Act to consult the President in relation to whether an appeal from the

⁴⁹ Except for the ACT, NT and Tasmanian Tribunals.

⁵⁰ Note, however that the federal and state tribunal contexts are distinct: unlike at the federal level, there is no strict separation of judicial and executive powers at the state level, and so those tribunals may be empowered to exercise judicial functions. As such, the purpose and role of a judicial President may be different in state and territory tribunals.

AAT should be heard by a single judge or Full Court. In the past, AAT Presidents have also sat as a Judge on appeals from the AAT, particularly as part of a Full Court in cases that raise issues relating to the powers and operations of the AAT.

However, as the AAT (and new body) is not a court, it is not strictly necessary that the head of the body is a judge. Allowing a non-judicial President/head of jurisdiction would allow candidates to be recruited from a broader and more diverse pool of individuals with relevant skills and experience in management, tribunal operations, and administrative law.

If the requirement for a judicial President is retained, options could be considered to expand the eligibility pool for that role. This may include making judges of the Federal Circuit and Family Court of Australia (Division 1) eligible for appointment as President, or other current or former judges. Refinements could also be considered to ensure that Presidents are able and supported to perform, or at least transition between, their dual roles on the Federal Court (or other court) and the administrative review body.

Judicial Deputy Presidents

Possible options to define the role of the judiciary in the new body include:

1. retaining the current model and including judicial officers as members of the new body
2. not including provision for judicial members
3. creating a specified role for judicial members, which articulates their specific role and value to the body.

The appointment of sitting judges as AAT members offers excellence in decision-making, enhances the link between the AAT and the appellate courts, and promotes the independence and credibility of the institution. There is a long history of judicial members in the AAT. Practically, where highly contentious or political matters are brought before the tribunal (such as sensitive freedom of information or national security matters), there are significant benefits in being able to call upon a judicial decision-maker, both in terms of quality of decision-making, and to insulate the tribunal against any perception of bias.

On the other hand, administrative review bodies are not courts. Establishing the new body without judicial members may provide clarity as to its purpose, and reinforce the distinction between administrative and judicial review. Ultimately, parties will still be able to appeal decisions of the new body to the courts, and have their matter judicially reviewed.

The third option offers a pathway to include the experience and expertise of the judiciary in the new body within a defined role that can be structured around their particular skills and value to the organisation. Consideration of this option is related to consideration of the senior leadership structure and Deputy President role (see page 31).

Discussion questions

8. Should the requirement that the President be a Federal Court judge be retained? Should any modifications be made? For example, should the requirement be extended to include former judges or judges of other courts?
9. Should the new body have other judicial members and what should their role be?

3. Senior Leadership

President and Registrar

The President and Registrar are the two most senior positions in the AAT.

The President is the head of the AAT and is responsible for:

- the expeditious and efficient discharge of the AAT's business and for ensuring the AAT pursues its statutory objectives (AAT Act, s 18A), and
- managing the administrative affairs of the AAT (AAT Act, s 24A(1)).

The President holds a number of powers to support the operation of the Tribunal, such as the ability to give directions on the business of the tribunal (AAT Act, s 18B) and constituting the tribunal for matters (AAT Act, s 19A) (powers of the AAT are discussed further at page 52).

The President is not responsible for matters arising in relation to the AAT under the *Public Service Act 1999* (PS Act) and the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) (AAT Act, s 24A(2)). Broadly this includes general staffing, financial management, planning and performance requirements. However, the President is required to prepare an Annual Report on the 'management of the administrative affairs' (AAT Act, s 24R), which is distinct from the Registrar's PGPA Act reporting activities.

The Registrar is the agency head for the purposes of the PS Act (AAT Act, s 24N(2)(b)) and the Accountable Authority under the PGPA Act (AAT Act, s 24BA(c)). In effect, the Registrar is responsible for the corporate management of the AAT, including managing its APS staff.

Alongside this function, the Registrar assists the President to manage the administrative affairs of the AAT (AAT Act, s 24B). To support this function, the Registrar has responsibilities and powers in relation to the AAT's statutory functions, including giving notice of applications (AAT Act, s29AC) and making orders in relation to fees (*Administrative Appeals Tribunal Regulation 2016*, Part 6).

When the AAT was first established, the Act provided for a Registrar of the Tribunal (and Deputy Registrars and other officers, as required), employed as officers of the Australian Public Service, to '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'.⁵¹ Over time, the role was elevated to a statutory office and given increasing administrative responsibilities, reflecting the practices adopted by the courts.⁵²

The President may direct the Registrar regarding the exercise of their powers under Part IIIA of the AAT Act (management of the AAT), but not in relation to the Registrar's financial and staffing powers (AAT Act, s 24A(3)). The Registrar must consult with the President on financial and staffing issues (AAT Act, s 24A(4)).

⁵¹ *Administrative Appeals Tribunal Act 1975*, as at 28 August 1975
<<https://www.legislation.gov.au/Details/C2004A01401>>.

⁵² The *Courts and Tribunals Administration Amendment Act 1989* created the statutory office and specified a number of responsibilities; the *Tribunals Amalgamation Act 2015* more clearly defined and delineated the roles of President and Registrar, while the *PGPA (Consequential and Transitional Provisions) Act 2014* inserted section 24BA which formalised the Registrar's role as an Accountable Authority.

Key issues

The separation of responsibility for achieving the objectives of the AAT (the President) from the management and financial aspects (the Registrar) may, at times, create challenges for the AAT's senior leadership. Under current arrangements, while the Registrar is accountable for the performance of the agency, including appearing at Senate Estimates, a number of matters which directly contribute to performance are determined by the President (constituting matters, member performance, directions about the conduct of reviews). While the Registrar is required to consult the President in relation to the Registrar's functions, there is no reciprocal requirement.

There is potential for split accountabilities and responsibilities to result in areas where neither individual is able to exercise full control, or have full visibility, over certain matters. For example, while the Registrar is responsible for public service staff of the AAT, overall responsibility for member conduct is not clearly provided to either the President or the Registrar. This limitation, and options to resolve it, are discussed further at page 47.

A further consideration is whether the titles and legislative functions of the senior leadership team accurately reflect their roles and responsibilities. The Federal Court of Australia (Federal Court) and the Federal Circuit and Family Court of Australia (FCFCOA) both have separate statutory positions of Chief Executive Officer (CEO) and Principal Registrar, though the same individual may be appointed to both roles.⁵³ The respective responsibilities of the Chief Justice and the CEO and Principal Registrar of the Federal Court⁵⁴ are described in more detail than is currently contained in the AAT Act. Clear position titles and role descriptions support members and staff of the body and the public to understand how responsibilities are divided.

Discussion questions

10. What should be the role and functions of the President (or equivalent) of the new body? What qualifications and skills should be required?
11. What should be the role and functions of the administrative head(s) of the new body? For example, should there be a separate Principal Registrar and CEO?
12. What is the appropriate split of responsibilities and powers between these roles?

Deputy Presidents, Division heads and deputy Division heads

Deputy Presidents

Section 6 of the AAT Act creates the role of Deputy President, but does not specify its particular functions. In practice, Deputy Presidents are the most senior decision-makers at the AAT, other than the President, and are typically assigned to more complex matters. Deputy Presidents may also be assigned as Division heads (AAT Act, s 17K(1)) (see below).

⁵³*Federal Court of Australia Act 1976 (Cth) s 18C; Federal Circuit and Family Court of Australia Act 2021 (Cth) s 83 (FCFCA Act)*. Note that the CEO and Principal Registrar of the Federal Court of Australia is a PGPA Accountable Authority, in contrast to the CEO and Principal Registrar of the FCFCOA.

⁵⁴ Set out across *Federal Court of Australia Act 1976 (Cth) ss 18A, 18C-18D, 18Z*.

A person may be appointed as a Deputy President if they (AAT Act, s 7(2)):

- are a judge of the Federal Court or the Federal Circuit and Family Court (Division 1), or
- are enrolled as a legal practitioner and have been so enrolled for at least 5 years, or
- have, in the opinion of the Governor-General, special knowledge or skills relevant to the duties of a Deputy President.

At 30 March 2023, there were 24 Deputy Presidents at the AAT. Eight of these are judges. Of the 17 non-judicial Deputy Presidents, 5 are Division Heads and 6 are part-time members.

Division heads and deputy Division heads

Division heads are appointed by the Minister in consultation with the President and other relevant Ministers for that division. Division heads must be Deputy Presidents (AAT Act, s 17K). Currently, a Division head has been assigned for the General Division, MRD, NDIS Division, Small Business Taxation and Taxation & Commercial Divisions, and the SSCSD.

Division heads assist the President by directing the business of the AAT in a division (AAT Act, s 17K(6)).

This includes:

- providing leadership and guidance to members of the Division, including in relation to professional development needs
- developing strategies for managing caseloads and providing input into the creation and amendment of the President's Practice Directions
- overseeing the allocation of cases to members
- monitoring the performance of the Division
- leading high-level stakeholder engagement
- presiding over complex/significant/sensitive cases.

As noted above, divisions may operate in distinct ways as a result of the legislation governing the way that the AAT reviews decisions (for example, the MRD's procedures are heavily shaped by the requirements of the Migration Act), which may result in practical differences in how the Division head role is performed. The size and workload of the division may also impact the Division head's role.

Subsection 17K(5) provides that an assignment as a Division head cannot be revoked, and is for the full length of the member's appointment on the AAT. Division heads of the FOI Division, the NDIS Division, and the Security Division must meet the additional requirements for eligibility for assignment to those divisions set out in sections 17CA, 17E and 17F, respectively (AAT Act, s 17K(3)).

Deputy Division heads can be either Deputy Presidents or senior members. While there can only be one Division head for each division, there can be multiple deputy Division heads, in accordance with subsections 17K(1) and 17L(1) respectively. Although there have been deputy Division heads assigned in the past, currently, the AAT does not have any deputy Division heads.

The roles of Division head and deputy Division head were created in the 2015 amalgamation. The Explanatory Memorandum to that legislation noted 'this reflects the expansion in the workload of the

Tribunal as a consequence of the amalgamation and provides a structure for more specialised management of the workload of particular Divisions'.⁵⁵ The Explanatory Memorandum to the Tribunals Amalgamation Bill envisaged that deputy Division heads would only be required in larger divisions, such as the MRD and the SSCSD.⁵⁶

In practice, Division heads (and deputy Division heads) are also supported by 'Executive Members' and 'Practice Leaders' who undertake executive leadership functions and may oversee member teams, assist with the allocation of cases to members, make recommendations about professional development and generally provide assistance or guidance to members in discharging their statutory responsibilities. In some circumstances, Division heads and deputy division heads and executive members are supported by staff in performing their functions.

Key issues

The leadership structure of the new body should support its effective operation, accountability and transparency. There is considerable scope to clarify the overall leadership structure, the roles and functions of each position, and how they work together to ensure the body functions effectively.

There is an opportunity to consider whether the new body should retain the positions of Division head, or some equivalent, and what that role should be. This is closely linked to considerations of the overall structure of the new body. The role of Division head includes both directing the business of the division (at a high level), and presiding over the most complex matters. There may be merit in better defining the role and the balance of responsibilities.

One possibility would be to combine the current concepts of Division head and Deputy President to create a tier of experienced senior practitioners of the new body. This would support a 'practice group' or list model, with these senior positions providing technical expertise and guidance, hearing more complex cases and ensuring consistency and quality of decision-making practice.

Under this option, consideration could be given to whether more administrative functions associated with the operation of divisions could be performed by Senior Executive Service staff under the PS Act, oversighted by the Registrar and based on directions from the President. Employing Senior Executive Service staff to perform more administrative and managerial functions may be more efficient in terms of remuneration and recruitment processes. They could focus on case management support and the smooth operation of business within the Tribunal, with the President and practice leads focusing on decision-making standards and direction of members.

Discussion questions

13. Below the President (or equivalent), what should be the most senior level of membership in the new body and what should their primary responsibility be?
14. What aspects of leadership, management and administration should sit with the most senior levels of membership in the new body, and which should sit with APS leadership of the new body?

⁵⁵ Explanatory Memorandum, Tribunals Amalgamation Bill 2015 (Cth), 32.

⁵⁶ Explanatory Memorandum, Tribunals Amalgamation Bill 2015 (Cth), 33.

4. Members

Membership levels & remuneration

In addition to the President, there are 6 different levels of AAT Member. Table 2 below shows the non-judicial membership levels in the AAT, how many members are at each level, and their annual remuneration in the 2022-23 financial year.

Table 2 – Membership structure and remuneration of members in the AAT

Role	Qualifications	Total full-time remuneration ⁵⁷	Part Time daily rate ⁵⁸	Number of members in the AAT ⁵⁹
Non-judicial Deputy President	<ul style="list-style-type: none"> Enrolled as a legal practitioner with 5yrs experience, or in the opinion of the Governor-General, has special knowledge or skills relevant to the duties of a Deputy President. 	\$510,220	\$2,004	17
Senior member (level 1)	<ul style="list-style-type: none"> Enrolled as a legal practitioner with 5yrs experience, or in the opinion of the Governor-General, has special knowledge or skills relevant to the duties of a senior member or member. 	\$402,720	\$1,670	35
Senior member (level 2)		\$339,010	\$1,422	34
Member (level 1)		\$256,280	\$1,114	35
Member (level 2)		\$227,800	\$976	141
Member (level 3)		\$199,330	\$836	7

⁵⁷ Current amounts are set in the *Remuneration Tribunal (Judicial and Related Offices – Remuneration and Allowances) Determination 2022*. Note, remuneration of judicial members is in accordance with their judicial remuneration.

⁵⁸ Current amounts are set in the *Remuneration Tribunal (Judicial and Related Offices – Remuneration and Allowances) Determination 2022*.

⁵⁹ As at 30 March 2023.

The current membership structure is a result of the 2015 amalgamation. The amalgamation brought the former MRT-RRT and the former SSAT into the AAT, and consolidated all existing membership levels into a single structure. The AAT Act does not set out different functions for the different levels.

Key issues

The Callinan Review and the Senate Committee Report noted that the more complex cases were not always going to the more senior members.⁶⁰ The Callinan Review noted that ‘stratification of Membership of the AAT, in salary and otherwise, is a source of disharmony in the ranks of the Membership’.⁶¹ That Review recommended that the government seriously consider rationalising the member levels.⁶²

In designing the new body, there is an opportunity to simplify the membership structure and consolidate levels. There is also an opportunity to more clearly define the role and purpose of each level based on the needs of the new body. One possible structure for the new body’s membership (below the President) is outlined in Table 3 below.

Table 3 – Possible structure for the membership of the new body

Role	Purpose
Division head/Practice Group lead [depending on structure of new body]	Provides leadership for members in their division (including jurisdictional, development and pastoral issues), and assists the Senior Leadership in running the new body
Senior Member	Hears more complex cases, and assists Division head/Practice Group lead if required.
General Member	Hears the majority of cases

A simplified membership structure would reflect the membership structure of other state and territory tribunals, all of which provide for Deputy President-style senior management positions, and all of which (except for the Northern Territory), differentiate between ordinary and senior members.

Discussion questions

15. What should be the levels of membership in the new body, and what should be the roles, responsibilities and qualifications required at each level?

⁶⁰ IDF Callinan, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019), 124; Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Performance and integrity of Australia’s administrative review system* (Interim Report, 31 March 2022), 24.

⁶¹ IDF Callinan, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019), 180.

⁶² IDF Callinan, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019), 125.

Qualifications, expertise and sessional members

The Kerr Committee Report envisaged that an administrative review body would comprise a panel of judges, public servants and lay people.⁶³ The Bland Committee recommended that, at a minimum, more senior members of a general administrative tribunal should be legally qualified.⁶⁴ Prior to the 2015 amalgamation, Deputy Presidents of the AAT were required to be legally qualified. The *Tribunals Amalgamation Act* amended the AAT Act to remove this requirement, allowing deputy Presidents who were not legal practitioners to be appointed. This reflected the requirements for equivalent positions in the former MRT-RRT and SSAT.

Under subsection 7(3) of the AAT Act, a person is eligible to be appointed as a senior member or other member if:

- They have been enrolled as a legal practitioner of the High Court or any Supreme Court for at least five years; or
- The Governor-General considers they have special knowledge or skills relevant to the duties of a senior member or member.

The AAT Act does not define the term ‘special knowledge or skills’ or provide different qualification requirements for members and senior members.

Subsection 6(4) of the AAT Act provides that a member (other than a Judge) shall be appointed either as a full-time member or as a part-time member. Part-time members’ work arrangements are equivalent to casual employment, as they are remunerated according to a time-based payment.⁶⁵ As the legislation requires members to be appointed either full- or part-time, there is limited flexibility in moving between these arrangements. At 31 January 2023 there were 159 part-time members (excluding judicial Deputy presidents, who are all effectively part time). This equates to 57% of the total membership (excluding President and judicial Deputy presidents).

Given the breadth of matters that come before the AAT, members cannot be expected to have knowledge across every issue and legal framework that can arise. Members of the AAT may inform themselves on any matter in such manner as they think appropriate (AAT Act, s 43). This may include receiving evidence from experts, in accordance with the guidance contained within the President’s Guideline on Persons Giving Expert and Opinion Evidence.⁶⁶ The extent to which experts are engaged by parties varies according to their financial means and across the different types of matters in the AAT.

⁶³ Commonwealth Administrative Review Committee, Parliament of Australia, *Report* (Report, No 144, August 1971), 87.

⁶⁴ Committee on Administrative Discretions, Parliament of Australia, *Final Report* (Report, No 316, October 1973) 26-27.

⁶⁵ *Remuneration Tribunal (Judicial and Related Offices — Remuneration and Allowances) Determination 2022*. By contrast, members who are appointed as full-time members, can work part time hours, with their salary pro-rated in accordance s22 of the *Remuneration Tribunal (Judicial and Related Offices — Remuneration and Allowances) Determination 2022*.

⁶⁶ Administrative Appeals Tribunal, Guideline on Persons Giving Expert and Opinion Evidence (Guideline, 30 June 2014), Item 3 <<https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Guideline-Persons-Giving-Expert-and-Opinion-Evidence.pdf>>.

Tribunals in the ACT,⁶⁷ SA,⁶⁸ Victoria⁶⁹ and WA⁷⁰ can appoint expert witnesses (known as Tribunal appointed experts). However, the AAT Act does not provide a power to appoint an expert.

Key issues

Ensuring the new body is resourced by appropriately skilled and knowledgeable members is essential to its ability to deliver robust and high-quality review. There is an opportunity to consider a member should require (at each level), whether there is a need to clarify what ‘special knowledge or skills’ would make a person appropriately qualified, and whether alternative pathways to accessing specialist expertise should be investigated. There is also scope to consider what membership profile, including the proportion of full-time and other members, supports an efficient and flexible organisation.

Legal qualifications and ‘special knowledge or skills’

The Callinan Review recommended that as ‘[m]uch of the work of the AAT is difficult, factually and legally’, only legally-qualified members should be appointed to the body.⁷¹ The review noted that there may be an exception to this in taxation and commercial matters, where suitably experienced accountants could be appointed.⁷²

The Senate Committee Report noted that inquiry participants expressed diverse views on this question – some affirming the Callinan Review, others suggesting a ‘baseline quota of legally qualified members at any one time’, and others noting that as the AAT is not a court, there should be no requirement of formal legal qualifications for members. The Committee did not reach a conclusion on these issues.

Legal qualifications and training are undoubtedly useful in providing the expertise required to review decisions. However, requiring that members all have legal qualifications would be a departure from all other state and territory tribunals, which recognise that members with different knowledge or skills can bring valuable perspectives into tribunals.

Other than individuals with legal qualifications, there are two broad categories of member:

- persons who, while not legally qualified, have excellent decision-making skills and experience; and
- persons who have specific technical subject-matter expertise.

Having members who are not legally qualified reinforces that the body is not a court. When paired with a merit-based appointment process (discussed further at page 40), drawing from a wider field of candidates with expertise in general decision-making can ensure high quality review while attracting a more diverse cohort of members, to better reflect the broader Australian population.

⁶⁷ *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 97.

⁶⁸ *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 42.

⁶⁹ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 2 of Schedule 3.

⁷⁰ *State Administrative Tribunal Act 2004* (WA) s 64.

⁷¹ IDF Callinan, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019), 9.

⁷² IDF Callinan, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019), 9.

The AAT has previously noted that given its diverse jurisdiction, the ability to constitute the Tribunal to include members with relevant specialist skills has been beneficial to both the AAT and its users.⁷³ Under the current Act, members with ‘special knowledge or skills’ include members with experience and expertise in the fields of medicine, taxation, accounting, defence or public administration. These members can support better exploration of issues and decision-making in complex matters, or those involving technical or specialised issues. Where a specialist member is less experienced in decision-making, they can be paired with a more experienced decision-maker to provide additional support.

To ensure non-legal members are suitably qualified, legislation could set a threshold for eligibility, for example by specifying minimum professional experience across all member categories (similar to the 5 year enrolment requirement for legal practitioners in the AAT Act). Prior to amalgamation, the AAT Act required that if a person did not have legal qualifications, they must have at least five years’ experience at a high level in certain fields, or a university degree or equivalent qualification considered to have substantial relevance to the duties of a member.

In some jurisdictions with a similar membership structure, the legislation requires higher qualifications for appointment at higher levels. For example, the Western Australian *State Administrative Tribunal Act 2004* provides that while ordinary members require at least 5 years of legal experience, senior members require at least 8 years of legal experience.⁷⁴ The QCAT Act requires that ordinary non-legal members must have ‘special knowledge, expertise or experience’, whereas senior non-legal members must have ‘extensive knowledge, expertise or experience’.⁷⁵

Work patterns

Given the significant workload of the Tribunal, a greater proportion of full-time members may provide greater certainty and predictability for the new body to manage its workload.

Retaining a cohort of part-time members who are available for ad hoc work creates a general surge capacity across more routine matters, which can ensure that the new body is able to respond flexibly to changing and emerging priorities. Access to part-time arrangements can support a diverse and skilled membership, by giving the new body access to highly-skilled members and members with special expertise who may not be available to work on a full-time basis. It also provides a cost-effective way to ensure the Tribunal has access to the specialised knowledge it requires in low-frequency matters. On the other hand, if the new body has greater flexibility in assigning members to matters, this may provide a ready surge capacity without needing to retain as large a cohort of part-time members.

⁷³ Administrative Appeals Tribunal, Submission No 1.1 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Performance and integrity of Australia’s administrative review system* (29 June 2022), 14.

⁷⁴ *State Administrative Tribunal Act 2004* (WA) s117(3)-(4). While there is a slight difference in the expression of qualifications for non-legal members (‘extensive or special knowledge’ for ordinary members as opposed to ‘extensive knowledge’ for senior members), it is less clear how this distinction applies in practice.

⁷⁵ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 183(3)-(4).

It may be desirable to provide greater guidance around the expectations of part-time members. As noted in the Senate Committee Report, some part-time members did not make themselves available to undertake work in the AAT.⁷⁶

Other means of obtaining expertise

The Callinan review noted that ‘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’.⁷⁷ The purpose of a tribunal-appointed expert is ‘to enhance the case management powers of the Tribunal’ and ‘emphasise the paramount duty of an expert witness to the Tribunal’.⁷⁸ It provides a means to access expert opinion regardless of the financial position of the parties.

Given the role of the Tribunal in determining the correct and preferable decision in all the circumstances, it will often be useful and expedient for the member deciding the matter to have the requisite expertise, rather than appointing a separate expert to assist. However, there may be some matters where an expert opinion, such as a medical report, is useful and has not been obtained by a party. In these circumstances, the option of a tribunal-appointed expert could assist. There would be practical issues to consider such as how the expert witness should be paid, how they would be chosen, and the extent to which the expert's reports would bind the parties.

Discussion questions

16. Should all members be required to be legally qualified to be eligible for appointment?
17. What is the value of members holding specific expertise relevant to the matters they determine? Should the new body set particular criteria for subject-matter expertise (alongside more general qualifications)?
18. Should the new body have the ability to appoint experts to assist in a matter? If so, in what circumstances should this occur and what should be their roles?
19. Is there value in having members who are available to hear matters on an ad hoc basis (sessional members)? What role should they play?

⁷⁶ Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Performance and integrity of Australia’s administrative review system* (Interim Report, 31 March 2022), 93.

⁷⁷ IDF Callinan, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019), 126.

⁷⁸ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 7 of Schedule 3.

5. Appointments and reappointments

Appointments process

The President and Registrar of the AAT are appointed by the Governor-General (AAT Act, ss 6(1), 24C).

The Government has committed to establishing transparent and merits-based appointment processes for all positions of the new administrative review body. This includes the positions of all levels of non-judicial Member, together with the President and Registrar. In December 2022, the Government published new [Guidelines for appointing members to the AAT](#), which set out a transparent and merit-based process for the appointment of members. This includes seeking expressions of interest for vacancies at least every six months via public advertisement.

Under the Guidelines, an assessment panel will be convened to consider appointment of non-judicial members, comprising the AGD Secretary (or delegate) as Chair, the AAT President (or delegate), and one member nominated by the Attorney-General.⁷⁹ This reflects the Senate Committee's recommendation that an independent selection panel be established.⁸⁰ The panel will provide a report to the Attorney-General on all applicants and note which candidates are suitable to be appointed as members. The Attorney-General will use the report to make recommendations to Cabinet and to the Governor-General. The Guidelines do not apply to acting appointments, short-term extensions of appointments, and short-term reappointments, or the appointment of the President or Registrar.

Registrar

The Registrar is appointed by the Governor-General on the nomination of the President (AAT Act, s 24C). This process is intended to ensure a good working relationship between the President and Registrar, who must work very closely together to manage the AAT. It also reflects similar arrangements in the courts.⁸¹

Deputy President (judicial) members

The Guidelines contain a separate section governing the appointment and reappointment of judicial members of the AAT. It stipulates that the Attorney-General must consult with the AAT President and relevant Chief Justice before appointing or reappointing judicial members. This reflects that judicial members of the AAT are drawn from the federal courts, and their tenure as a member of the AAT will affect the court's operations.

Key issues

In establishing the new body, consideration should be given to who should be responsible for appointing members, the process that should be followed, and the role of ministerial discretion within that process.

⁷⁹ Attorney-General's Department, *Guidelines for Appointments to the Administrative Appeals Tribunal* (Guideline, 15 December 2022) <<https://www.ag.gov.au/legal-system/publications/guidelines-appointments-administrative-appeals-tribunal-aat>>.

⁸⁰ Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Performance and integrity of Australia's administrative review system* (Interim Report, 31 March 2022), 94.

⁸¹ For example, the Chief Executive Officer and Principal Registrar of the Federal Court is appointed by the Governor-General on nomination of the Chief Justice (*Federal Court of Australia Act 1976* (Cth) s18C(2)).

Under the current legislation, the Governor-General appoints AAT members. In practice, appointments are considered by the Attorney-General, Cabinet and Executive Council. The legislation does not specify the process to be followed in identifying or assessing candidates for appointment.

The Senate Committee Report noted that ‘concerns were repeatedly put forward in evidence that a lack of transparency and independence in the appointment process was significantly undermining the public credibility of the Tribunal’.⁸²

In establishing a new body, there is an opportunity to consider how the primary legislation can embed key aspects of a merit-based appointment process. For example, provisions could be modelled on the *Australian Human Rights Commission Legislation Amendment (Selection and Appointment) Act 2022* (Cth), which provides for a merit-based and publicly advertised appointment process for the President and Commissioners of the Australian Human Rights Commission. Five pieces of human rights legislation were amended to provide that these statutory officers ‘must not be appointed [unless] the selection of the person for the appointment is the result of a process that was merit-based; and included public advertising of the position’.⁸³

The Ontario *Adjudicative Tribunals Accountability, Governance and Appointments Act* provides that the selection process for members ‘shall be a competitive, merit-based process’ and that a person shall not be appointed unless they possess the required qualifications.⁸⁴ The Act also prevents a person from being appointed (or reappointed) without consultation with, and the recommendation of, the chair of the tribunal.⁸⁵

Other state and territory tribunals legislation include additional factors which Ministers must consider when recommending individuals for appointment. The QCAT Act requires that the Minister have regard to the following matters:

- (a) the need for balanced gender representation in the membership of the tribunal;
- (b) the need for membership of the tribunal to include Aboriginal people and Torres Strait Islanders;
- (c) the need for the membership of the tribunal to reflect the social and cultural diversity of the general community;
- (d) the range of knowledge, expertise and experience of members of the tribunal.⁸⁶

⁸² Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Performance and integrity of Australia’s administrative review system* (Interim Report, 31 March 2022), 44.

⁸³ *Age Discrimination Act 2004* (Cth) s 53A(2); *Australian Human Rights Commission Act 1986* (Cth) ss 8A(1)-(2), 46MC(2); *Disability Discrimination Act 1992* (Cth), 113(2); *Racial Discrimination Act 1975* (Cth) s29(2); *Sex Discrimination Act 1984* (Cth) 96(2).

⁸⁴ *Adjudicative Tribunals Accountability, Governance and Appointments Act 2009*, SO 2009, c 33, Sch 5, s 14(1).

⁸⁵ *Adjudicative Tribunals Accountability, Governance and Appointments Act 2009*, SO 2009, c 33, Sch 5, s 14(3).

⁸⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 183(5)(a)-(d).

Discussion questions

20. Should the requirement for a transparent and merit-based selection process for members, including the Senior Leadership of the body, be incorporated in legislation? What elements should be included?
21. Should the legislation require the Minister to consult the President before appointing or reappointing members?
22. What guidelines or procedures (similar to the present Guidelines for appointing members to the AAT) would support a transparent and merit-based appointment process?

Duration of appointments and reappointments

The President can be appointed for up to 7 years, with the option for reappointment (AAT Act, s 8(3)). There are no limits to the number of times a President can be re-appointed – so long as they remain a judge of the Federal Court.⁸⁷ In practice, this means the President cannot be appointed beyond the age of 70 years.

The Registrar can be appointed for up to 5 years, and is eligible for reappointment (AAT Act, s 24F). The AAT Act does not limit how many times the Registrar can be reappointed.

Under section 8 of the AAT Act, a member can be appointed to the AAT for up to 7 years, with no restriction on reappointments. In practice, appointments have ranged from 2 to 7 years. In some instances, members have been reappointed at relatively early stages in their terms (for example, renewed for 7 years at the same level after serving only 2 years of an existing 7 year term).

Key issues

Terms of appointment

Certainty of term is critical to maintain the independence of the tribunal. It ensures that members cannot be removed for making decisions that individuals in government disagree with, and contributes to stability and leadership in the organisation. There is an opportunity to consider how terms of appointment should be structured and what the criteria for reappointment should be, in order to ensure that decision making remains of a high quality and members are performing well.

The current limit of 7 years for a term of appointment is consistent with some other Commonwealth statutory bodies (e.g. the Australian Human Rights Commission, the VRB and the Australian Competition Tribunal). Other Commonwealth bodies set a limit of 5 years for appointments (e.g. the Copyright Tribunal, Repatriation Commission and Australian Competition and Consumer Commission). Both a 5 or 7 year term is long enough to be outside the political cycle. Seven year terms were supported by the Law Institute of Victoria and others during the Senate Legal and Constitutional Affairs Committee's report on the Tribunal Amalgamations Bill 2014.⁸⁸

There has been considerable support for legislating a fixed-term appointment, removing the discretion for a member to be appointed for a short period. A challenge with this approach is that it would limit the

⁸⁷ *Administrative Appeals Tribunal Act 1975* (Cth) Act s 8(4).

⁸⁸ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Tribunals Amalgamation Bill 2014* (Report, March 2015), 13.

ability to appoint members for shorter terms in order to respond to a surge caseload, reducing the new body's responsiveness to changes in its workload and needs.

An alternative to a single, fixed term may be to appoint all new members for a shorter initial period (say 2 years), with a potential 5 year extension (or whatever the balance of the decided term would be), subject to effective performance in the role and organisational needs. This model would retain the ability for the new body to bring on members for shorter periods (to assist with surge caseloads), while also allowing high performing members to continue beyond their initial term. However, while not extending a member is not the same as termination (discussed at page 49), it would be essential to avoid any perception that the government could interfere with the independence of members. Consideration would need to be given to the degree of discretion available to the decision-maker and the basis for decisions about re-appointment. Shorter initial appointments may limit the number of candidates who may be interested in seeking appointment to the body.

Reappointments

The AAT Act does not provide specific guidance on the process to be followed for re-appointing members.

There are two broad types of reappointments:

- A short-term extension or reappointment, usually responding to an organisational need, such as the member's familiarity or involvement with a longer-running matter, and to cover gaps while a selection process is conducted.
- Substantive reappointment to the body for a new term.

The AAT Act does not currently allow for appointments to be extended, although in practice this is achieved through reappointments. In the new legislation, it may be useful to provide an arrangement for a short-term extension for members to enable the conclusion of a particular matter. Alternatively, the NSW *Civil and Administrative Tribunal Act* allows members whose terms have expired to finalise cases.⁸⁹ Such provisions may assist to reduce delays for applicants associated with a new member having to 'read in' to a matter.

Timing for reappointments could also be considered, to address concerns about members terms being renewed at early stages. For example, the legislation could specify that members are only eligible for reappointment at their current level in the final year of their original terms. Guidelines could be developed on whether a person seeking reappointment or appointment at a higher level would be required to participate in an open selection process or some other process to be eligible, and what objective performance criteria should be considered in that process.

A further issue for consideration is whether there should be maximum potential term for members, including any reappointment period. For example, preventing a member from serving more than 2 consecutive terms (potentially a 10 to 14 year total period – if a 5 to 7 year term is the standard). This approach could bolster the independence of Tribunal members, by removing any incentives for them to make decisions that are preferred by the government. It also ensures that the membership of the body

⁸⁹ *Civil and Administrative Tribunal Act 2013* (NSW) Sch 2 cl 8.

is refreshed at a regular intervals, supporting organisational renewal. However, term limits also curtail the ability of the body to retain the deep expertise that a member obtains over multiple terms.

Discussion questions

23. What is the appropriate term of appointment for members, the President and the Registrar (or equivalent)? Should terms be fixed, and should there be a maximum number of reappointments?
24. What should be the process and criteria for reappointment of members? How should past performance be assessed to inform reappointment or appointment at a higher level?

Conflicts of interest and outside employment

Conflicts of Interest

The AAT manages actual or potential conflicts of interest in accordance with the requirements of the AAT Act as well as the common law requirements relating to actual and apprehended bias. The Conduct Guide for AAT Members states that '[m]embers should act impartially so that their actions are not biased and do not give rise to an apprehension of bias'.⁹⁰

Under subsection 14(2) of the AAT Act, a member has a conflict of interest in relation to a proceeding before the Tribunal if the member has any interest, pecuniary or otherwise, that could conflict with the proper performance of their functions in relation to the proceeding.

Where a member has a conflict of interest, they must notify all parties to the proceedings and the President (or the Minister, if the President has the conflict). The member is not able to play any further role in the proceeding unless the parties and President (or Minister) consent (AAT Act, s 14(1)). If the President becomes aware of a member's conflict of interest in a matter, they may direct the member not to take part in the proceeding, or to disclose the conflict.

If a member (other than a judicial member) fails to comply with the AAT Act's provisions for managing conflicts of interest without reasonable excuse, the Governor-General may terminate their appointment (AAT Act, s 13(2)(e)). This has never occurred. The Governor-General is also able to terminate the appointment of a member if they have a pecuniary interest in an immigration advisory service (AAT Act, s 13(3)).

The Code of Conduct for AAT Members expands on the concept of a disclosable 'conflict of interest' and is intended to promote full disclosure of interests as they arise. The Code of Conduct states that members 'should disclose any personal, financial or business interests, memberships or associations related to any AAT proceeding and where appropriate disqualify themselves from any involvement in that proceeding'.⁹¹ The Code of Conduct also provides that members should not use their position as a Tribunal member to gain any advantage or benefit, including accepting gifts or hospitality which could

⁹⁰ Administrative Appeals Tribunal, *Conduct Guide for AAT Members* (22 May 2015) <<https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Conduct-Guide-for-AAT-Members.pdf>>.

⁹¹ Administrative Appeals Tribunal, *Conduct Guide for AAT Members* (22 May 2015).

reasonably be perceived to compromise their impartiality.⁹² A limitation in the current approach is that the Conduct Guide is guidance only and is not enforceable.

Outside Employment

Under section 11 of the AAT Act, a member, unless they hold an office or appointment in the Defence Force, must not:

- if a full-time member – engage in paid employment outside the duties of his or her office without the President’s approval;
- if a part-time member – engage in any paid employment that, in the President’s opinion, conflicts or may conflict with the proper performance of his or her duties.

The Governor-General is able to terminate a non-judicial members’ appointment if they fail to meet these requirements (AAT Act, s 13(2)(d)). This has never occurred. Additionally, the AAT has not always been aware of the outside employment of part-time members.

Key issues

A robust and transparent process for managing actual and perceived conflicts of interest is essential in maintaining public confidence in an independent review body.

The Senate Legal and Constitutional Affairs Legislation Committee noted that the AAT’s process for managing conflicts of interest relies heavily on individual members to identify and disclose conflicts. The AAT has commenced a process to improve member declarations, by introducing ‘a declaration process for new members and an annual declaration process for existing members relating to these and other relevant obligations’.⁹³

There is an opportunity in the design of the new body to bolster existing provisions on conflicts of interest. For example, the President could be required to inform the Minister of a failure to disclose a conflict of interest, to allow consideration of whether their appointment should be terminated in accordance with paragraph 13(2)(d) of the AAT Act. Provisions which allow the President a more active role in member conduct and performance (discussed in the context of performance management at page 47) may also assist in management of conflicts of interest.

Conflicts of interest can arise where a member is employed part-time and engages in outside employment. For example, a member may be appointed for special knowledge and skills in a field in which they continue to work alongside their membership of the tribunal. This may be a particular challenge where the knowledge gained as a member could potentially create an advantage or tension with the other role. While the AAT Act allows members to be terminated for having a pecuniary interest in an immigration advisory service (if they are assigned to MRD), that provision does not apply to any other industries (e.g. tax advisory, lobbyists or insurance).

A further consideration is whether the legislation should impose limitations on members’ ability to appear as advocates or representatives or expert witnesses before the tribunal while serving as a member, or for a prescribed period after their appointment concludes. Sections 25A and 25B of the

⁹² Administrative Appeals Tribunal, *Conduct Guide for AAT Members* (22 May 2015).

⁹³ Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Performance and integrity of Australia’s administrative review system* (Interim Report, 31 March 2022) 51.

Victorian Civil and Administrative Tribunal Act 1998 prevent members and former members (within 2 years of the conclusion of their appointment) from appearing before the Tribunal in matters without the VCAT President's approval. Many professions have existing codes of conduct which would also limit the ability of members to concurrently determine matters in the AAT.

Discussion questions

25. How can the current legislative requirements and processes for managing conflicts of interest, actual or perceived, be enhanced for the new body?
26. What interests or outside employment of a member could give rise to an actual or perceived conflict of interest in a matter. What consequences for the member should follow from such a conflict?
27. Should members be prevented from appearing as a representative or an expert witness in matters in the tribunal while they are members or for a period after their term as member concludes?

6. Performance management and removal of members

Performance and conduct management

In the context of this chapter, performance management can relate to:

- The member's professional performance (i.e. the member's ability to perform the core functions as a decision-maker, such as conducting hearings and making decisions, their integrity and impartiality).
- The member's personal conduct (i.e. the member's behaviour in the workplace and in conducting reviews, including maintaining a safe and respectful environment free from bullying, harassment and discrimination).

The AAT Act does not contain any provisions directly relating to performance management of members, other than the termination provisions (outlined at page 49). In lieu of clear legislative authority, the AAT relies on internal policies and guidelines, such as the Conduct Guide for AAT Members,⁹⁴ to monitor member performance and identify and address performance issues. The Conduct Guide for AAT Members is guidance only and is not enforceable.

In practice, members' workload and performance are managed in formal and informal ways by the President, Division heads, Deputy Presidents or Senior Members in designated roles. The AAT maintains a Member Professional Development Program to develop member competencies specific to the AAT and comprises induction, mentoring, professional planning and development, division specific professional development and the member curriculum (which itself is a set of skills and capabilities members require).⁹⁵

Complaints about member conduct are managed within the AAT in accordance with internal policies (including a specific policy on harassment, bullying and discrimination). The AAT's internal policies set out both informal and formal processes to resolve complaints, including the option to engage an external investigator. However, there are legislative limitations on the extent to which the conduct requirements can be enforced, even in circumstances where a complaint is substantiated.

Creating a safe work environment requires good practice at all levels, supported by a robust legislative framework. The following factors are all critical to effective workplace responses to bullying, discrimination and harassment:

- a preventative culture, including effective, timely and targeted education and training
- trauma-informed support for employees
- complaints processes that are confidential, transparent and fair
- a range of potential proportionate outcomes when complaints are substantiated.

⁹⁴ Administrative Appeals Tribunal, *Conduct Guide for AAT Members* (22 May 2015).

⁹⁵ Administrative Appeals Tribunal, *Annual Report 2021-22* (Report, 23 September 2022), 91 <<https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR202122/AAT-Annual-Report-2021-22.pdf>>.

Under the present legislation, the options available to the President to respond to member misconduct and poor performance are very limited.

Performance management of judicial members

The federal courts are currently each responsible for responding to complaints about the conduct of serving judges. The Government is lending separate consideration to the merits and design of a federal judicial commission as a transparent and independent means to address complaints about the conduct of judges.⁹⁶

Performance management of staff

Staff of the Tribunal (including the Registrar) are employed under the *Public Service Act 1999* (Cth)⁹⁷ and as a result are subject to the procedures under that Act. The Registrar's functions and role as Accountable Authority for the AAT provide the authority for the Registrar to manage staff performance and conduct issues, in accordance with internal policies and the *APS Code of Conduct*.

Key issues

Ensuring that members of a review body are performing well and behaving appropriately is essential to maintaining public confidence and a positive workplace culture. Bullying, harassment and discrimination are unacceptable in any context. The Government has committed to ensuring that the new review body is a safe work environment.

One option is to provide clearer powers for senior leadership in the new body to manage the performance and conduct of members. The NSW *Civil and Administrative Tribunal Act 2013 (No 2)* specifies that it is a function of the President to manage tribunal members, including undertaking performance management for members,⁹⁸ and the *Victorian Civil and Administrative Tribunal Act 1998* similarly empowers the President to 'direct... the professional development and continuing education and training of members', including directing members to participate in training.⁹⁹

There is also scope to lend legislative authority to a code of conduct. The *State Administrative Tribunal Act 2003* (WA) empowers the President to determine a code of conduct, and require compliance by non-judicial members.¹⁰⁰

Another option is to introduce a more prescriptive complaint handling process into the legislation governing the federal administrative review body. This could be modelled on section 581A and related provisions of the *Fair Work Act 2009* (Cth) ('FW Act'), to give the body authority and flexibility to deal with complaints made both internally and externally about member conduct.

In considering a robust system for professional performance management, it is important to balance the need for independence in decision-making and the need for high-quality decisions that meet public expectations and contribute to an effective system of administrative review.

⁹⁶ Attorney-General's Department, *Scoping the Establishment of a Federal Judicial Commission* (Discussion Paper, January 2023) <https://consultations.ag.gov.au/legal-system/federal-judicial-commission/supporting_documents/discussionpaper.pdf>.

⁹⁷ *Administrative Appeals Tribunal Act 1975* (Cth) s 24N.

⁹⁸ *Civil and Administrative Tribunal Act 2013* (NSW) s 20.

⁹⁹ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 38A.

¹⁰⁰ *State Administrative Tribunal Act 2004* (WA) s 121(3).

Discussion questions

28. How should the legislation empower the new body to manage and respond to issues relating to member performance and conduct?

Suspension and removal of members

Section 13 of the AAT Act governs the termination of non-judicial members. Under this provision, the Governor-General may terminate a member's appointment on presentation of an address from both Houses of Parliament for proved misbehaviour or physical or mental incapacity. This provision mirrors the grounds for removal of a federal judge¹⁰¹ – an exceptionally high threshold, and one which has never been met.

In addition to this, the Governor-General is also empowered to remove a member on the basis of:

- bankruptcy and related grounds (AAT Act, ss 13(2)(a)(i)-(iv))
- absence without leave (AAT Act, ss 13(2)(b)-(c))
- engaging in outside employment without requisite approvals (AAT Act, s 13(2)(d))
- failing to appropriately disclose conflicts of interest (AAT Act, s 13(2)(e))
- having a direct or indirect pecuniary interest in an 'immigration advisory service' (AAT Act, s 13(3)).

These provisions have never been used. In addition to legislative thresholds, there must be an appropriate and effective system or process in place to facilitate the reporting and identification of such issues, investigate transparently and fairly, and determine the possible range of consequences, including removal from appointment.

The AAT Act does not have any provisions for the suspension of members. These were removed in the 2015 amalgamation, on the basis that the President's ability to constitute the Tribunal effectively enables them to suspend a member (by not assigning them to any matters).¹⁰² In practice, there would be a significant financial impact associated with this course of action.

Removal of the Registrar

Section 24K of the AAT Act provides the grounds for termination of the Registrar. The Governor-General may terminate the Registrar's appointment on the same grounds as for the general membership, but without the involvement of Parliament.

Removal of judicial members (including the President)

There is no mechanism in the AAT Act to terminate the appointment of a judicial member for any reason, including the President. The only circumstances in which a Judge would cease to be a member of the Tribunal is if:

- the person ceases to be a Judge (AAT Act, s 8(4)); or
- the person resigns their appointment in accordance with section 15 of the AAT Act.

¹⁰¹ *Australian Constitution* s 72(ii).

¹⁰² Explanatory Memorandum, *Tribunals Amalgamation Bill 2015* (Cth), 28 [212].

Section 72 of the Constitution provides that the only means by which a federal judge may be removed from office is ‘by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity’. The threshold for ‘proved misbehaviour or incapacity’ is very high and a parliamentary process could only be initiated in the rarest of circumstances.

Matters relating to the removal of judges are not otherwise considered in this paper. Further details about the federal courts’ complaint-handling processes and the removal of judges are set out in the discussion paper, *Scoping the establishment of a federal judicial commission*.¹⁰³

Key issues

The AAT Act sets a very high threshold for the removal of members. Given the role of members in reviewing the decisions of the executive, it is appropriate that members are guarded against the possibility of undue interference with their tenure and security in the role. This promotes independence in decision-making and public confidence in the body.

There are circumstances, however, where a member’s appointment may need to be terminated in order to protect the reputation and proper functioning of the body. The legislation should provide the grounds and processes for removal of a member or senior leader in such circumstances.

The Queensland Civil and Administrative Tribunal allows the Governor in Council (on recommendation from the Minister) to remove a member for a broader range of grounds, including (but not exhaustively):

- physical or mental incapacity
- performing member’s duties carelessly, incompetently or inefficiently
- engaging in conduct that would warrant dismissal from the public service if the member were a public service officer
- committing an indictable offence.¹⁰⁴

The AAT Act does not explicitly allow or require the President (or Registrar) to notify the Minister of member conduct that may engage a ground for termination. It is unclear whether the President has ever provided advice to Government that grounds exist for the termination of a member. This creates a disconnect between the President’s role in managing member conduct, and that of the Minister and Governor-General in considering the termination of members. By contrast, both Queensland and New South Wales legislation provide that Presidents of tribunals are empowered to advise the Minister in relation to the removal of members.¹⁰⁵

The inability to suspend or stand-down members limits the ability of the President (or Senior Leadership) to take interim action when serious issues have been raised. By contrast, if the President of

¹⁰³ Attorney-General’s Department, *Scoping the Establishment of a Federal Judicial Commission* (Discussion Paper, January 2023).

¹⁰⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 188.

¹⁰⁵ *Civil and Administrative Tribunal Act 2013* (NSW) s 20(1)(e); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 172.

the Fair Work Commission (FWC) is managing a complaint about a member, they may ‘take any measures that the President believes are reasonably necessary to maintain public confidence in the FWC, including (but not limited to) temporarily restricting the duties of the FWC Member’.¹⁰⁶

Discussion questions

29. What are the appropriate grounds, thresholds and process for suspending or terminating the appointment of a member? Who should be responsible for suspending or terminating the appointments of members?

¹⁰⁶ *Fair Work Act 2009* (Cth) s 581A.

Part 2: Powers and Procedures

This part of the paper examines the powers and procedures that should be available to the new body throughout the typical life cycle of a matter, from its beginning to its conclusion and any post-hearing processes. There is a tension between the degree to which processes in the new body can be made flexible and informal while balancing the need for robustness of procedures and certainty for parties. This tension is relevant to a range of processes and procedures canvassed in this part of the paper. The following questions invite consideration of how the sometimes competing considerations of flexibility and certainty, informality and rigour, and access and efficiency should be balanced in developing the legislation for the new body. They also invite consideration of the relative benefits of simplicity and harmonisation, on the one hand, and procedures that are tailored to particular types of application, on the other.

7. Making an application

Lodgement requirements

There are over 400 pieces of primary legislation that confer power on the AAT to review certain government decisions.¹⁰⁷ Anyone whose interests are affected by one of those decisions may apply to the AAT for review (AAT Act, s 27), except where the standing requirement has been modified for certain classes of decisions (e.g. certain tax and migration decisions).¹⁰⁸ When the government makes a decision that can be reviewed by the AAT, it is required to notify any person whose interests are affected of the decision and their review rights (AAT Act, s 27A).

An application is intended to give the AAT the information it needs to take the matter forward. An application to the AAT must usually:

- identify the decision being contested
- provide a statement of reasons as to why the decision was not correct or preferable¹⁰⁹
- meet the time limit, and
- be accompanied by any prescribed fee (AAT Act, s 29).

In relation to the first criterion, the AAT's application forms usually seek the following details: the applicant's name, the type of decision, the decision-maker, the decision reference number, and the date the decision was received.¹¹⁰ Without that information, the AAT cannot identify or proceed with a matter.

Certain types of decisions also attract other application criteria. For example, an application about a paid parental leave decision relating to an employer requires a statutory declaration verifying the application. In general, applications can only be made if internal agency reviews have been exhausted

¹⁰⁷ Administrative Appeals Tribunal, Website page - What type of decisions can the AAT make? <<https://www.aat.gov.au/about-the-aat/learn-more/what-type-of-decisions-can-the-aat-make>>.

¹⁰⁸ *Taxation Administration Act 1953* (Cth), s 14ZZB; *Migration Act 1958* (Cth) ss 347, 411.

¹⁰⁹ Not required in the MRD, *Migration Act 1958* (Cth) ss 312, 347.

¹¹⁰ Administrative Appeals Tribunal, Website forms page, <<https://www.aat.gov.au/resources/aat-forms>>.

(e.g. most tax assessments and decisions can be reviewed by the AAT, but only after the Commissioner of Taxation has reviewed it (*Taxation Administration Act 1953* (Cth), s 14ZZ)).

Key issues

Lodging an application is often a person's first experience with the AAT. The process for lodging an application and applying for review should be simple. In 2021-22, the AAT reported that its most recent annual user experience survey found that the 'process for applying for a review was generally considered to be easy'.¹¹¹ Nevertheless, views are sought on the criteria for making an application to ensure there are no barriers to accessing the new body.

Statement of reasons

A statement of reasons for the application is required for all matters other than migration and protection visa decisions heard in the MRD (AAT Act, s 24Z). The AAT can give notice to the applicant to amend the statement if, for example, the AAT considers the statement does not clearly identify why the applicant believes the decision is not the correct or preferable decision (AAT Act, s 29AB).

The AAT Act does not specify what should be included in the statement of reasons. The AAT's 'Guide to applying for review' requires the statement to outline briefly why the applicant wants to have the decision reviewed. For example, the applicant may think the decision is wrong and a different decision should be made, or the information the applicant provided was not taken into account, or the law was not applied correctly.¹¹²

Noting that the AAT is intended to be informal and that many applications are lodged by self-represented parties from diverse backgrounds, views are sought on whether a statement of reasons should be required for an application to the new body. If it is required, a further consideration is whether there should be more guidance on the content.

Time limit for applications

Currently, application time limits vary for different types of decisions, as outlined in Table 4 below. The AAT may extend the time limit on the applicant's request, including in circumstances where the time limit has expired (AAT Act, s 29(7)). This might occur where the agency has not immediately provided written reasons for the decision. The power to extend the time limit does not apply for most decisions about migration or protection visa applicants, and for some other types of decisions (AAT Act, ss 24Z, 29).

¹¹¹ Administrative Appeals Tribunal, Annual Report 2021-22 (Report, 23 September 2022), 32.

¹¹² Administrative Appeals Tribunal, Application for Review of Decision (Form) - including Guide for Applying for Review <<https://www.aat.gov.au/AAT/media/AAT/Files/Forms/Application-for-Review-of-Decision-Individual.pdf>>.

Table 4 – General time limits for application to the AAT

Time limit*	Types of decisions**
No limit [^]	Centrelink first review
60 calendar days	Workers compensation, taxation, veterans' affairs
28 calendar days	FOI, NDIS, child support, national security, commercial, many general division matters
21 calendar days	Migration and protection visa applicants ^{^^}
7 working days	Protection visa applicants in immigration detention

* Days from date of receiving notice of the decision.

** The time limit applies to most, but not all, decisions in these areas.

[^] No legislated limit for lodgement of most matters, but date of effect provisions encourage applicants to lodge within 13 weeks.

^{^^} For migration decisions in the MRD, time limits vary depending on the type of decision under review and whether the visa applicant is in immigration detention or outside Australia. They range between 2 working days, 7 working days, 21 calendar days, 28 calendar days and 70 calendar days.

A number of submissions to the Callinan Review recommended increasing the time limits for migration and protection visa matters.¹¹³ These submissions argued that short time limits and restrictions on the AAT's ability to grant an extension may reduce access to merits review for individuals.

A person whose visa is cancelled or refused and applies for review of that decision is usually given a bridging visa with limited rights, allowing them to legally stay in Australia while the review is underway. Ensuring that reviews occur efficiently helps maintain the integrity of the migration system by ensuring that non-citizens who are in Australia without a valid visa depart Australia promptly and do not remain in immigration detention or on a bridging visa for extended periods of time awaiting review decisions.

The majority of social security decisions have no legislated time limit.¹¹⁴ This is because of the nature of social security entitlements and benefits, where an individual's payment eligibility may fluctuate throughout their lifetime. However, if more than 13 weeks has elapsed between the decision being

¹¹³ Refugee Council of Australia (Callinan Review, 94), Kingsford Legal Centre (Callinan Review, 108), and Refugee Legal (Callinan Review, 109).

¹¹⁴ Administrative Appeals Tribunal, 'Centrelink time limits' (Website page) <<https://www.aat.gov.au/apply-for-a-review/centrelink/first-review-by-the-aat/time-limits>>.

made and the application for review being lodged, any favourable decision will usually be backdated to the date of the application rather than the date of the original decision.

AAT members have a general power to set the date their decision comes into effect (AAT Act, s 43(6)). However, this power is modified for decisions in the MRD and the SSCSD.¹¹⁵ The power is limited by social security legislation in relation to Tier 1 social security decisions (but not Tier 2 decisions).¹¹⁶ This difference in powers between the two tiers of the AAT can result in inconsistency in outcome depending on whether tier 2 review is pursued by a party.

Application fees

Currently, application fees vary for different types of matters. For matters that are not exempt from fees, the fee is usually \$1,011 (see Table 5 below). This fee is indexed to inflation.

Table 5 – General fees for application to the AAT

Fee	Types of decisions*
Exempt from fee	Workers compensation, NDIS, veterans' affairs, child support first review, Centrelink^
\$100	Certain tax decisions^^
\$543	Any other small business taxation decision
\$1,011	FOI^, other tax decisions^, commercial, national security, child support second review, general division matters
\$1,940	Protection visa decision**
\$3,153	Migration visa decision**

* Fees applies to most, but not necessarily all, decisions in these areas.

^ Exceptions apply

^^The \$100 fee applies where the amount of tax in dispute is less than \$5,000, the decision relates to a request to be released from paying a tax debt or a request to extend the time for lodging a taxation objection has been refused.

** MRD only

¹¹⁵ For example, Migration Act 1958 (Cth) ss 368, 430.

¹¹⁶ Social Security (Administration) Act 1999 ss 147, 180 and Explanatory Memorandum, Tribunal Amalgamations Bill 2015 (Cth), 131; see also *Child Support (Registration and Collection) Act 1988* ss87AA(2), 95N(2).

For most types of applications in the AAT, fees can be reduced to \$100 if the applicant has a concession card, is under 18, receives assistance to study, is in receipt of legal assistance, is in detention, or is in financial hardship (AAT Regulation, reg 20, 21). This does not apply to migration or protection visa decisions in the MRD. Many State and Territory Tribunals also provide fee reductions or exemptions, for example if the applicant has a healthcare or concession card,¹¹⁷ is in receipt of legal assistance,¹¹⁸ or meets the criteria for financial hardship.¹¹⁹

The fee for migration matters in the MRD is generally \$3,153. There are some exceptions, for example, there is no fee if the applicant is seeking review of a bridging visa decision that resulted in them being placed in immigration detention. The fee can be halved if the AAT considers the amount would cause the applicant severe financial hardship (Migration Regulations 1994, reg 4.13). There is no concession for protection visa matters.

Migration and protection visa matters in the MRD have two other unique rules. Across all other divisions, the AAT has the discretion to charge a single application fee where related matters lodged by the same applicant can be grouped together (AAT Act, s 23). This discretion is not available in the MRD (AAT Regulation, reg 19). Instead, applicants themselves can choose to combine their matters if they are in the MRD, which would result in a single application fee (Migration Regulations 1994, reg 4.12, 4.31). Additionally, in all other divisions, where an applicant is successful the application fee is reduced to \$100. This is not open to applicants in the MRD. Instead, there is no charge to an applicant who is successful in a visa protection matter, and successful migration matters result in a 50 per cent reduction in the application fee.

Consequences of application not meeting requirements

The AAT Act does not specify the consequences of failing to comply with the application requirements. Section 69C gives the Tribunal discretion to dismiss an application if the relevant fee has not been paid. However, this does not apply to the MRD.

In the recent Federal Court case *Miller v Minister for Immigration, Citizenship and Multicultural Affairs*,¹²⁰ the applicant had failed to provide a statement of reasons within the time limit, in accordance with paragraph 29(1)(c) of the AAT Act. The Full Court held that the application was not valid in the absence of a statement of reasons and that consequently, the AAT had no jurisdiction to hear and determine the matter.

Views are sought on whether the legislation for the new body should specify the consequences of not complying with the lodgement requirements and provide powers for the body to deal with the application accordingly. For example, the legislation could provide that an application that has not met

¹¹⁷ ACT Civil and Administrative Tribunal, Website page – ACAT fees <<https://www.acat.act.gov.au/fees-and-forms/acat-fees>>.

¹¹⁸ NSW Civil and Administrative Tribunal, Website page – NCAT fees <<https://www.ncat.nsw.gov.au/forms-and-fees/fees-at-ncat.html>>.

¹¹⁹ NT Civil and Administrative Tribunal, Website page – NTCAT fees <<https://ntcat.nt.gov.au/getting-started/fees>>; Queensland Civil and Administrative Tribunal, Website page – QCAT fees <<https://www.qcat.qld.gov.au/resources/fees-and-allowances>>.

¹²⁰ [2022] FCAFC 183. At the time of writing, special leave has been sought to appeal in the High Court.

the requirements is invalid and must be dismissed, whether immediately or following an opportunity to rectify the application.

Discussion questions

30. How can the new body ensure that application methods and processes are accessible to all those seeking review? For example,
- What should be the requirements to lodge an application? Should a statement of reasons by the applicant be required? Should different requirements apply to particular types of applications or to particular cohorts?
 - What should be the time limits for making an application? Should these be consistent across all matters? In what circumstances should the new body be able to grant an extension of time or set the date of effect of a decision?
 - Are application fees at an appropriate level? Are current criteria for reduced fees or fee exemptions appropriate? Should the rules relating to fees and fee refunds be harmonised? What other arrangements should apply to fees? For example, should application fees be refunded to successful applicants and how may success be judged?
31. What should be the consequences of failing to comply with application requirements, including non-payment of fees, and what powers does the new body need to manage non-compliant applications effectively?

Lodgement methods

Individuals can lodge an application with the AAT in a variety of ways, depending on the type of matter and the division in which it will be heard. Of special note is that first tier reviews of Centrelink and Child Support decisions can be initiated through an oral application by phone call or in-person to a registry of the AAT (AAT Act, s 29). The AAT records this type of application in writing and processes it in the same way as a written application.

In the MRD, an application must be in the approved form (but substantial compliance is sufficient). In other divisions, an application may be made by completing a form but may also be made by email, fax or letter. Applications can be made online in all divisions.

Data from the AAT for the 2021-22 financial year shows that the SSCSD received 5,762 applications by phone (47 per cent of its total), and 5,467 online (45 per cent of its total). The MRD received 19,013 online applications (91 per cent of its total), while all the other divisions combined received 7,382 applications online (66 per cent of their combined totals).¹²¹

¹²¹ Data provided to AGD by the AAT.

Key issues

Oral applications are not allowed by most State and Territory tribunals.¹²² SACAT allows oral applications only in urgent circumstances¹²³ (through rules made by the President).¹²⁴ On the other hand, some State and Territory Supreme Courts provide for oral applications where the applicant meets certain criteria.¹²⁵

Oral applications are a longstanding feature of social security review.¹²⁶ The SSCSD often engages with vulnerable and disadvantaged individuals. Oral applications help make the AAT more accessible for those applicants. Oral applications can also be useful in ensuring a robust application, as a tribunal officer can immediately seek further information or assist to redirect an application if the person is not, or not yet, eligible to seek AAT review. This must be balanced with the extra resourcing required in the AAT that enables the oral application to be taken by a tribunal officer.

Views are sought on whether other types of applicants, other than social security and child support applicants, should be able to lodge an oral application such as applicants with poor written English literacy. If this approach is adopted, the eligibility criteria for lodging an oral application and processes for recording oral applications would need to be very clear. A tribunal officer should be able to assess quickly whether or not a matter can be lodged orally and then clearly and simply explain that assessment to the applicant.

The Callinan Review proposed ‘that all applications be in writing in an approved form.’¹²⁷ Approved forms could assist with the efficiency of administrative processes in the new body.

Online application processes can also enhance efficiency. An online system can be used both to guide applicants through the process step by step, and ensure that information isn’t inadvertently missing from an application. Victoria and South Australia already have online-only lodgement.¹²⁸ Use of online forms can also open up possibilities such as greater automation in data capture and triaging information. These opportunities will be considered in the development of the new case management system.

Discussion questions

32. What methods of lodgement should be permitted? To what extent should lodgement methods be harmonised for all applications?
33. Which applicants or categories of applicant should be able to lodge an application orally (noting the workload/resources involved and the need for clear criteria)?

¹²² For example, Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 67.

¹²³ See, the South Australian Civil and Administrative Tribunal Rules 2014 (SA) r 13.

¹²⁴ See, South Australian Civil and Administrative Tribunal Act 2013 (SA) s 94.

¹²⁵ For example, Court Procedures Rules 2006 (ACT) s 6016.

¹²⁶ Explanatory Memorandum, Tribunal Amalgamation Bill 2015 (Cth), 15, 48.

¹²⁷ IDF Callinan, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019), 72.

¹²⁸ Based on state and territory tribunal websites.

8. Case management, directions and conferencing

This section of the paper considers what powers should be available in the new body to ensure that it can progress matters in an accessible, informal and efficient manner. This includes powers to hold case conferences, gather information, deal with information and make orders in the course of pre-hearing processes.

Case Management and Conferencing

Conferencing is available in most divisions at the AAT. It is not available in MRD and has limited use in the SSCSD and Security Division. This is because the decision-making agency is not required to participate in review in the MRD or the SSCSD, which limits the opportunity for conferencing between parties in these divisions.

Conferencing is listed as a form of ADR in the AAT Act and is one of the most common tools used for dispute resolution and case management at the AAT. While used to help resolve or narrow two-party disputes, it can also be a useful tool in the management of one-party matters (such as matters before the SSCSD). This is because conferencing provides an opportunity to discuss the matter with an applicant, set a timetable for next steps and the provision of information and documents, and, if appropriate, invite the applicant to consider whether to proceed or withdraw their application.

Conferencing is usually conducted by conference registrars, and can also be conducted by members or senior staff.¹²⁹ Conference registrars are required to be legally qualified. They work in all divisions of the AAT except for the MRD. Those who conduct conciliations must also be accredited mediators. Parties to a matter may be directed by the AAT to participate in conferencing and have an obligation to do so in 'good faith' (AAT Act, s 34A).

Conferences provide a forum to:

- discuss issues and identify evidence required in preparation for a hearing
- attempt to obtain an agreed resolution between parties (where possible)
- explore the potential referral of the matter to dispute resolution.¹³⁰

Further discussion on the role of dispute resolution at the AAT can be found at chapter 10 of this paper.

Key issues

Views are sought on how case management tools can be most effectively used in the new body for the efficient management and resolution of cases, including whether case management processes should apply more consistently across different types of matters. This includes whether additional aspects of the case management function could be delegated to staff of the new body beyond what already exists. Consideration should also be given to how facilitative or prescriptive these additional powers should be, and what specific functions should be available to staff and what functions should only be performed by members.

If made available across all matters, case conference processes would need to be adjusted for matters where only the applicant appears, such as at the SSCSD and the MRD.

¹²⁹ Administrative Appeals Tribunal, *Annual Report 2021-22* (Report, 23 September 2022), 71.

¹³⁰ Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2009) 248.

Noting that the role and functions of conference registrars could be expanded in the new body to expedite the resolution of matters, views are sought on whether conference registrars should have particular skills or training. For example, conference registrars could be required to have legal qualifications, skills in dispute resolution or other relevant experience.

Discussion questions

34. What powers should the new body have to use case conferencing (or other forms of managing a matter) for the effective and efficient management and resolution of cases? Are there matters for which case conferencing is not appropriate?
35. What should be the role and functions of conference registrars (or equivalent) in the new body? Should conference registrars have particular skills or training, for example legal qualifications or skills in dispute resolution?

Power to issue directions and hold directions hearings

The procedure of the AAT and the way a matter progresses through the AAT are at the discretion of the AAT, unless set out in the AAT Act, other legislation or other legislative instruments (AAT Act, s 33(1)). Other than in the MRD (AAT Act, s 24Z), this means the AAT can issue directions with the intention of keeping matters on track and ensuring they progress promptly.

Where the hearing of a proceeding has not commenced, a person holding a directions hearing in relation to a proceeding, the President, an authorised member or an authorised officer can issue a direction. Where the hearing of a proceeding has commenced, the presiding member or any other member authorised by the presiding member can issue a direction (AAT Act, s 33(2)).

The President or an authorised member may hold a directions hearing in relation to a proceeding (AAT Act, s 33(1A)). A directions hearing may be held by telephone or by any other means of electronic communication (such as video conferencing) with the approval of the tribunal, except in applications heard in the Security Division which relate to an adverse or qualified security assessment made by the Australian Security Intelligence Organisation (ASIO) and applications to review a decision of the Treasurer under the *Foreign Acquisitions and Takeovers Act 1975*, s 130N(a). These proceedings must be heard in person (AAT Act, s 33A).

The AAT can issue different types of directions to keep a proceeding on track, including:

- requiring a party to provide information in relation to a proceeding
- requiring a person who made the decision to provide a statement of the grounds on which an application will be resisted at hearing
- requiring a party to the proceedings to provide a statement of matters or contentions upon which reliance will be placed
- limiting the number of witnesses who can be called on to give evidence
- requiring witnesses to give evidence at the same time (concurrent evidence),
- limiting the time for giving evidence or making oral submissions, or
- limiting the length of written submissions (AAT Act, s 33(2A)).

The power to issue directions or hold directions hearings is not available in the MRD (AAT Act, s 24Z).

The Full Court of the Federal Court recently decided that the AAT does not have the power under s 33 of the AAT Act to issue a direction requiring a person to undergo a psychiatric medical examination against their will.¹³¹

The Tribunal may dismiss an application for review if the applicant does not comply with a direction (AAT Act, s 42A(5)). Other than dismissing a matter, the AAT does not have legislative power to sanction parties for non-compliance with a direction. However, the AAT does have administrative mechanisms, such as requiring the non-complying person to appear before the Tribunal to explain their actions, complaints to agencies or legal firms and referrals to regulatory bodies.

The power to dismiss a matter for failure to comply with a direction should only be exercised sparingly and only in the clearest of cases.¹³² Usually several instances of non-compliance and a failure to demonstrate steps taken to comply are required before the Tribunal will dismiss an application. The AAT can reinstate a matter that has been dismissed for non-compliance, if the Tribunal believes the matter has been dismissed in error (AAT Act, s 42A(10)). There are no enforcement mechanisms available for non-compliance with a direction by a respondent.

Key issues

The power to issue directions enables the AAT to manage matters and help them progress by requiring parties to file documents or undertake certain actions. Holding directions hearings enables the AAT to, among other things, determine the readiness of matters for hearing, deal with procedural issues and to discuss evidence and the timetable for next steps.

The powers to issue directions or hold a directions hearing are not available in the MRD (AAT Act, s 24Z). The Callinan and Metcalfe reviews both recommended that the powers to issue a direction or hold a directions hearing should be available for migration matters to provide the AAT with better and more flexible tools to control proceedings, reduce delay in review processes and assist the AAT to fulfil its statutory objectives.¹³³

The Callinan Review also recommended that section 33A(2) of the AAT Act be repealed or amended to permit directions hearings of a procedural nature to be heard by telephone (or video conference) in proceedings in the Security Division relating to adverse or qualified security assessments made by ASIO.¹³⁴

Legislation in Queensland and Victoria allows tribunals in those jurisdictions to take a number of actions against a party who unnecessarily disadvantages another party through conduct such as not complying with an order or direction.¹³⁵ In these circumstances, the relevant tribunals can:

- determine the proceeding in favour of the applicant and make any appropriate orders,¹³⁶
- order that the party causing the disadvantage be struck from the proceeding,¹³⁷ or
- order that the party causing the disadvantage must compensate the other party for any reasonable costs incurred unnecessarily.¹³⁸

¹³¹ *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v LPSP* [2023] FCAFC 24

¹³² *Re McGrath and Inspector General in Bankruptcy* [2011] AATA 27 at [20].

¹³³ IDF Callinan, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019), 81-82.

¹³⁴ IDF Callinan, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019), 25.

¹³⁵ See, VCAT Act s 78(2) and QCAT Act s 62(2).

¹³⁶ See, VCAT Act s 78(2)(b) and QCAT Act s 62(2)(b).

¹³⁷ See, VCAT Act s 78(2)(b) and QCAT Act s 62(2)(b).

¹³⁸ See, QCAT Act s 62(2)(c).

There is an opportunity in the design of the new body to bolster existing provisions in the AAT Act to make and enforce directions. The legislation for the new body could expand the directions powers to all types of matters, such as migration matters. There is also an opportunity to consider whether any additional powers should be made available to the new body to take preliminary action prior to, or instead of, dismissing a matter where a party has failed to comply with directions. This may include powers similar to those available in Queensland or Victoria, or other options such as excluding information that has not been provided in accordance with a direction.

Discussion questions

36. What directions making powers should be available for the new body? Should these powers be available to the new body for all matters? Who should be able to exercise them?

37. What powers should the new body have to address non-compliance with directions?

Interlocutory processes and proceedings

The AAT Act provides for a number of processes and proceedings that are incidental to the main proceeding for review of a decision, referred to in this paper as ‘interlocutory processes and proceedings’. These include:

- an application for an extension of time to apply for a review (discussed above),
- an application to be joined as a party to the proceedings
- orders that relate to confidentiality (discussed below)
- stay orders of a decision, and
- an application to dismiss a matter (discussed below).¹³⁹

In most matters, where an application for review of a decision has been made to the Tribunal, any other person whose interests are affected by the decision may apply in writing to the Tribunal to be made a party to the proceedings. The Tribunal may, in its discretion, make that person a party to the proceedings (AAT Act, s 30(1A)). A person may not apply to be made a party to MRD proceedings.

An application for review of a decision does not affect the operation of the decision or prevent the taking of action to implement the decision (AAT Act, s 41(1)). However, a person may apply to the Tribunal for an order to stay or otherwise affect the operation or implementation of a decision to which the application relates (AAT Act, s 41(2)). The Tribunal cannot issue a stay order until the decision maker has been given a reasonable opportunity to make a submission to the Tribunal about the matter (unless due to the urgency of the matter, it is not practicable for the decision maker to be given this opportunity) (AAT Act, s 41(3) and s 41(5)). Some divisions of the AAT (such as the SSCSD and MRD) do not allow for stay orders.

Key issues

The interlocutory procedures provided for in the AAT Act are integral to the processing of an application for review in some divisions.

¹³⁹ Note there are other interlocutory powers in the AAT Act such as s 37(1A) to shorten the time to lodge a document and s 42A(8) and 42A(10) application to reinstate an application.

The AAT Act provisions do not operate in the MRD. Rather the provisions in Part 5 and Part 7 of the *Migration Act 1958* apply to proceedings in the MRD and they operate quite differently to the provisions in the AAT Act.

Discussion questions

38. Should any other interlocutory processes and proceedings be available in the new body?

Expedited review

In accordance with the objectives of the AAT, matters should be decided in a manner that is quick, efficient and proportionate to the circumstances. Efficiency of review reduces timeframes for decisions, supports genuine applicants to access just outcomes and minimises opportunities for exploitation of the system. In designing the new body, views are sought on whether there may be a place for expedited processes for certain caseloads involving relatively straightforward matters.¹⁴⁰

Circumstances in which expedited measures are currently utilised

Currently, there are a range of circumstances in which measures are available to expedite AAT matters.

The AAT's General Practice Direction provides that the Tribunal can expedite a review process if it is satisfied that the matter requires an urgent determination (clause 4.9). The types of cases that might be suitable for expedited review include, but are not limited to, cases:

- with significant commercial ramifications
- relating to accreditation, licensing or registration to undertake regulated activities, and
- where the applicant is suffering financial hardship.

Clause 4.15 provides that the Tribunal must be satisfied of the following to expedite a review:

- the decision has significant implications for a party
- the application requires an urgent determination
- the outcome of the review turns on one or more discrete questions of law, or requires factual findings that can be conveniently made having regard to available or readily obtainable evidence which can be considered within an expedited timeframe, and
- the Tribunal's objectives in s 2A cannot be met by making orders staying or otherwise affecting the operation or implementation of the decision under review.

The Tribunal can also expedite the review of the following:

- A decision to refuse to grant an applicant a visitor visa and the applicant's stated purpose for the visit is to participate in an event of special family significance (Migration Regulations, r 4.23)
- A decision to cancel the applicant's visa (other than a bridging visa) (Migration Regulations, r 4.24)
- A decision to refuse to grant an applicant a substantive visa where the applicant is in immigration detention (Migration Regulations, r 4.25)

¹⁴⁰ IDF Callinan, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019), [1.25].

- A case identified as high priority in the *President’s Direction – Prioritising Cases in the MRD*. The highest priority is given to applications:
 - Involving persons in immigration detention,
 - Where there is a question of whether the AAT has jurisdiction to conduct a review, and
 - Where a member or officer determines there are compelling reasons to prioritise the application
- NDIS decisions where a fast track hearing is requested by the applicant, if the applicant will have all the relevant information ready by the date of the hearing and the Tribunal is satisfied that a fast track hearing would not disadvantage the applicant or the NDIA (see *Practice Direction – Review of NDIS Decisions*), and
- If the Tribunal considers that the issues for determination can be adequately determined in the absence of the parties and the parties consent to dispense with a hearing (not applicable in the MRD or s 39A proceedings in the Security Division) (AAT Act, s 34J).

Expedited Review in the Immigration Assessment Authority (IAA)

The IAA currently reviews certain protection visa decisions. It has several features of expedited procedures, including:

- A person cannot apply for review directly to the IAA. Fast track applicants who have been refused a protection visa and are entitled to a review are automatically referred to the IAA (Migration Act, s 473CA).
- The Secretary (or his or her delegate) must give to the IAA the review material at the same time, or as soon as reasonably practicable after, the decision is referred to the IAA.
- The IAA conducts a review ‘on the papers’. Generally, it only considers review material provided to it by the Secretary without considering new information or interviewing the referred applicant (Migration Act, ss 473DB & 473DC).
- The IAA can only consider new information if there are ‘exceptional circumstances’ justifying its consideration, and the new information could not have been provided at the time of the initial decision, or is ‘credible personal information’ which, had it been known, may have affected the initial consideration of the claim (Migration Act, s 473DD).

A number of submissions to the Senate Legal and Constitutional Affairs References Committee raised concerns about the adequacy of merits review available in the IAA.¹⁴¹

In 2021-22, the median timeframe for finalised cases in the IAA was 7 weeks from referral to decision.¹⁴² During the same reporting period, the median timeframe for finalised cases in the MRD was 107 weeks. Approximately 27% of cases in the MRD were finalised within 12 months.¹⁴³

¹⁴¹ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Performance and integrity of Australia’s administrative review system* (Interim Report, 31 March 2022). For example, the Australian Human Rights Commission submitted (Submission 3, 24 November 2021) that people affected by migration decisions should have the same substantive and procedural rights as anyone else who seeks a review of a decision by government.

¹⁴² Administrative Appeals Tribunal, *Annual Report 2021-22* (Report, 23 September 2022), 83.

¹⁴³ Administrative Appeals Tribunal, *Annual Report 2021-22* (Report, 23 September 2022), 38.

At the time of writing, the IAA is funded to the end of the 2022-23 financial year with future arrangements under consideration by the Government.

Key issues

Views are sought on whether there are opportunities for the new review body to expedite the resolution of matters, either for particular categories of matter or in particular circumstances.

Expedited review measures may assist to ensure that the nature of the review is proportionate to the matter in question. It may be appropriate in cases where the nature of the decision is binary (for example, the applicant may or may not be granted a particular type of license, waiver, visa or social security payment), where alternative dispute resolution is not suitable and where the matter can only be resolved by a final decision or by either party withdrawing from the matter. A key potential benefit of expedited review arrangements is achieving quicker outcomes for applicants.

Powers or procedures to expedite the resolution of matters could include, for example, the power to dispense with a hearing and determine the issues ‘on the papers’, set benchmarks around the length of time that matters should take to progress through a review process, or set time limits around the provision of new information (while being mindful of the need to afford procedural fairness). Views are also sought on whether, and what, particular types of matters might lend themselves to expedited review.

Discussion questions

39. What powers or procedures should be available to the new body to expedite the resolution of matters? Are there specific types of matter which could benefit from expedited review processes?

9. Information provision and protection

Provision of information

Under s 37 of the AAT Act, a decision-maker must lodge all documents in their possession relevant to the review within 28 days of an application being made. The decision-maker is also subject to an ongoing requirement to file any relevant documents that subsequently come into their possession (AAT Act, s 38AA). The decision-maker must provide a copy of the documents lodged under section 37 or 38AA of the AAT Act to any other party to the proceeding (AAT Act, s 37(1AE)). These sections do not apply to the MRD or to a proceeding in the Security Division to which section 39A of the AAT Act applies.¹⁴⁴

In the MRD, the provisions in Part 5 and 7 of the Migration Act apply.¹⁴⁵ The Secretary of the Department of Home Affairs must give a statement about the decision under review to the AAT within 10 working days after being notified of the application. The decision-maker must also give all documents in their possession that they consider relevant to the review to the AAT 'as soon as practicable' after being notified of the application. The Secretary of the Department of Home Affairs is not required to give a copy of the documents provided to the AAT to the applicant.¹⁴⁶ An applicant seeking review of a protection visa decision can request a copy of the documents in the AAT's file under the *Freedom of Information Act 1982* or under Chapter 12 of the Australian Privacy Principles guidelines.¹⁴⁷ An applicant seeking review of a migration decision that is not a protection visa decision may request during the review, and is entitled to have, access to any written material given or produced to the Tribunal for the purposes of the review (Migration Act, s 362A).

The rules for giving documents to the AAT or a person other than the AAT are set out in the AAT Act, Regulations and Practice Directions.¹⁴⁸ The Practice Directions provide that a document may be provided by delivering, faxing, mailing or emailing it to a registry.¹⁴⁹ In the MRD, the rules for provision of documents are set out in the Migration Act, Migration Regulations and AAT Practice Directions.¹⁵⁰

¹⁴⁴ AAT Act ss 24Z, 37(1AAA); s 37(1) has also been modified by the *Taxation Administration Act 1953*, s 14ZZF(1)(a), by the *Foreign Acquisitions and Takeovers Act 1975* s 130N(c) and *Australian Crime Commission Act 2002* s 36S(c).

¹⁴⁵ In particular, Migration Act ss 352, 418.

¹⁴⁶ AAT's Submission to the Callinan Review, 11.

¹⁴⁷ AAT, *Migration and Refugee Division Practice Direction* (Practice Direction, 1 March 2023), item 3.8 <<https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Migration-and-Refugee-Division-Practice-Direction.pdf>>.

¹⁴⁸ See, AAT Act s 68; AAT Regulation regs 16-18 and AAT, *Giving Documents or Things to the AAT* (Practice Direction, 4 December 2020).

<<https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Practice-Direction-Giving-Documents-or-Things-to-the-AAT.pdf>>.

¹⁴⁹ AAT, *Giving Documents or Things to the AAT* (Practice Direction, 4 December 2020)

<<https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Practice-Direction-Giving-Documents-or-Things-to-the-AAT.pdf>>.

¹⁵⁰ *Migration Act 1958* s 379AA-379G & s 441AA-441G; Migration Regulations regs 4.11, 4.31, 5.02; AAT, *Giving Documents or Things to the AAT* (Practice Direction, 4 December 2020).

For most divisions, procedures and timeframes for ‘deemed receipt’, or the presumption that a document has been received by a person once it has been handed, posted, faxed, delivered or sent electronically, are set out in the AAT Regulation, the *Acts Interpretation Act 1901* and the *Evidence Act 1995*.¹⁵¹ In the MRD, the Migration Act specifies when a document is taken to have been received by the AAT or by another person.¹⁵² The main difference is that aspects of deemed receipt are subject to the contrary being proved under the *Acts Interpretation Act 1901* or evidence sufficient to raise doubt about the presumption being adduced under the *Evidence Act 1995*. In the MRD, a person can only show they received a document at a later time in circumstances where the AAT made an error when sending it in accordance with a prescribed method but the person received the document nonetheless (Migration Act, ss 379C & 441C).

Summons and information gathering powers

The AAT Act provides that the AAT may summon a person to appear before it to give evidence or produce any document or other thing specified in the summons (AAT Act, s 40A(1)). In the MRD, the Migration Act provides that the AAT can summon a person to appear to give evidence or produce a document or a thing to the AAT but only if that person is in Australia (Migration Act, ss 363(3), 4 & 427(3)). While the restriction on summoning a person outside of Australia in other divisions is not specified in the legislation, the limitation is implied.¹⁵³

There are some specific legislative powers and obligations in relation to giving information and conducting investigations in the MRD and SSCSD that are not available in other divisions of the AAT.

In the MRD:

- The AAT can get any information it considers relevant from a person, but if it gets such information, it must consider the information in making the decision on review (Migration Act, ss 359 & 424).
- If the AAT has information that would be the reason, or part of the reason, for affirming the decision that is under review, it must put the particulars of the information to the applicant and invite them to comment on it (Migration Act, ss 359A, 359AA, 424A & 424AA).
- The requirements for the written invitation and time periods for responding to an invitation are prescribed. The AAT can make a decision about the application without seeking further information or comments if the applicant does not respond in time. This includes where the AAT has extended time to provide a response (Migration Act, ss 359C & 424C).
- An applicant in a matter in the MRD can request the AAT obtain written evidence from a person, or request that a person appear to give evidence. The AAT must have regard to the request but is not required to comply with it (Migration Act, ss 361 & 426).

<<https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Practice-Direction-Giving-Documents-or-Things-to-the-AAT.pdf>>.

¹⁵¹ AAT Regulation, reg 18 (electronic service of documents), *Acts Interpretation Act 1901*, s 29 and *Evidence Act 1995*, s 160 (service of documents by post).

¹⁵² See, *Migration Act 1958* ss 379C, 441C (when a person other than the Secretary is taken to have received a document), ss 379D, 441D (when the Secretary is taken to have received a document).

¹⁵³ IDF Metcalfe, *Final Report of the Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal* (Report, July 2017), 62.

- The AAT can require the Secretary of the Department of Home Affairs to arrange for the making of an investigation or medical examination for the purposes of the proceeding, and to give the Tribunal a report of that investigation or examination (Migration Act, ss 363(1)(d) & 427(1)(d)).

These provisions are intended to codify procedural fairness requirements, unlike in other areas of the AAT that are subject to common law procedural fairness rules.

In the SSCSD:

- The AAT can require the Child Support Registrar to exercise their power to obtain information, documents and answers to questions from a person (*Child Support (Registration and Collection Act) 1988*, ss 95J & 120).
- The AAT can ask the CEO of Services Australia to exercise their power to obtain information or documents that the AAT is satisfied a person has in their custody or control.¹⁵⁴
- The AAT may, by written notice, require a person to give to the AAT information that is relevant to a review.¹⁵⁵

Key issues

Provision of documents

The Metcalfe Review recommended that the requirements for providing documents and information to the AAT and parties should be harmonised, including for first and second review.¹⁵⁶ It also recommended a standardised power for the AAT to compel persons to give information or evidence by issuing a summons.¹⁵⁷

Procedural fairness issues can arise where a party to a review does not have access to all of the documents relating to the review. Arrangements for accessing documents should also be timely and simple for the parties and the tribunal.

Views are sought on what powers the new body should have to gather information, the requirements for providing documents to the new body and to other parties, and whether these powers should be standardised for all types of matters. Simpler and more efficient procedures in this area and the inclusion of statutory timeframes for production of documents could help reduce delays. For example, if the information is requested under FOI, the need to request and await FOI decisions for material in protection matters can contribute to delays. The ability to accept new documents from the applicant could also be limited to a certain period of time before a hearing, to avoid delays to proceedings while documents are shared and perused by parties and members.

¹⁵⁴ See, *A New Tax System (Family Assistance) (Administration) Act 1999* s 120; *Paid Parental Leave Act 2010* s 231; *Social Security (Administration) Act 1999* s 166.

¹⁵⁵ See, *A New Tax System (Family Assistance) (Administration) Act 1999* s 119; *Child Support (Registration and Collection) Act 1988*, s 95H; *Paid Parental Leave Act 2010* s 230; *Social Security (Administration) Act 1999* s 165A.

¹⁵⁶ IDF Metcalfe, *Final Report of the Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal* (Report, July 2017), Recommendation B.1, 51.

¹⁵⁷ IDF Metcalfe, *Final Report of the Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal* (Report, July 2017), Recommendation D.2, 66.

Discussion questions

40. What documents should respondents be required to provide the new body in relation to the original decision, and in what timeframes? Should these provisions be standardised across all matters?
41. What powers should the new body have to compel departments, agencies, applicants, or third parties to provide documents, information or evidence? Should these powers be available across all matters?
42. What documents and information should the Tribunal share or not share with applicants?

Information protections – the need to protect sensitive or confidential material

Information protections in general proceedings

AAT hearings are public by default (AAT Act, s 35(1)).¹⁵⁸ The AAT may order that all or part of a hearing is to be private (AAT Act, s 35(2)) or that certain information (such as information revealing the identity of a party or witness to the proceeding, or information that comprises evidence in the proceeding), cannot be published (AAT Act, ss 35(3)-(4)). In considering whether to make such an order, the AAT is required to consider a number of factors including the principle that hearings should be held in public (AAT Act, s 35(5)). Proceedings relating to protection visa decisions must be held in private (Migration Act, s 429). Other hearings held in private include all hearings in the SSCSD, and some tax matters on request.

Section 35 of the AAT Act does not apply to proceedings in the MRD. Sections 352, 378 and 440 of the Migration Act set out similar but not identical powers of information protection for those proceedings. Provisions in the Migration Act relating to Ministerial certificates limit whether the AAT can provide certain information to an applicant (Migration Act, ss 375A, 376 & 438).

The AAT must comply with any confidentiality and secrecy requirements under other Acts that confer jurisdiction on it, such as not identifying an individual party or other persons in certain types of matters, including most child support cases, reviews of Centrelink decisions in the SSCSD and tax cases heard in private.

There are also circumstances where Ministers may seek to limit access to information in AAT matters in order to protect the public interest, including:

- Attorney-General certificates preventing disclosure of information contrary to the public interest (AAT Act, ss 36(1), 36B(1) & 39B).
- Ministerial certificates preventing the disclosure of information contrary to the public interest under other legislation, such as the *Foreign Acquisitions and Takeovers Act 1975* (s 130H) and the *Australian Crime Commission Act 2002* (s 36L).
- Attorney-General intervention to prevent the answering of a questions where the information disclosed in the answer would be contrary to the public interest (AAT Act, ss 36A & 36C).¹⁵⁹

¹⁵⁸ This does not apply to proceedings in the Security Division to which section 39A of the AAT Act applies, these proceedings are dealt with below. Section 35 does not apply in the MRD (AAT Act s 24Z).

¹⁵⁹ Section 36A was added by the *Administrative Appeals Tribunal Amendment Act 1977* (Cth), and the Digest of that Bill noted that it was 'designed to give a protection to witnesses before the Tribunal in relation to questions similar to that given by section 36 in relation to documents and information.'

- Ministerial certificates preventing the disclosure of information that would be contrary to the public interest in the MRD (Migration Act, ss 375A, 376 & 438).

The Independent National Security Legislation Monitor is currently reviewing the *National Security Information (Criminal and Civil Proceedings) Act 2004*, including its potential application to tribunal proceedings, which could lead to a more consistent approach to the management of national security information in proceedings. The results of that review will be considered in framing national security information protections for the new body.

Security Division

The Security Division reviews:

- adverse or qualified security assessments issued by ASIO
- decisions made by the National Archives of Australia relating to access to ASIO documents under the Archives Act
- preventative detention orders issued or extended under the *Criminal Code Act 1995* (Cth)
- decisions made by the Treasurer under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) that a national security risk exists in relation to an action, and
- adverse criminal intelligence assessments made by the Australian Criminal Intelligence Commission.

Security Division proceedings invoke specific protections, although these vary depending on the applicable legislative provisions for that type of matter. There are also practical issues associated with hearing security classified matters, including a need for security classified facilities, IT systems and cleared staff.

Proceedings about adverse security assessments in the Security Division must be private (AAT Act, ss 35(6) & 39A(5)). The parties to the proceeding are the Director-General of Security and the applicant, but the Commonwealth agency, State or authority of a State to which the assessment is given is entitled to adduce evidence and make submissions (AAT Act, s 39A(2)). The Director-General of Security has the onus of presenting all information available to the Tribunal, whether favourable or unfavourable to the applicant (AAT Act, s 39A(3)). There are detailed rules about who may be present during proceedings, the order of proceedings and the disclosure of information to parties and witnesses. Similar provisions apply to the review of decisions under Subdivision C of Division 2A in Part II the *Australian Crime Commission Act 2002* and Division 4 of Part 7 of the *Foreign Acquisitions and Takeovers Act 1975*.

Key issues

The principle of open justice requires that hearings should generally be conducted in public and that information should be publicly accessible, in order to inspire public confidence in the administration of justice. The fair hearing rule, which underpins procedural fairness, requires the disclosure of ‘credible, relevant and significant’ information that affects the rights and interests of the applicant.¹⁶⁰

Private hearings, non-disclosure orders and public interest certificates, by restricting public or party access to information, may affect the principle of open justice and an individual’s right to a fair hearing. However, these limitations can be justified in certain circumstances – for example, where disclosure

¹⁶⁰ *Kioa v West* (1985) 159 CLR 550, 587.

would threaten national security, have adverse consequences for vulnerable individuals, or deter an applicant from seeking external review of a decision if the result is to have their identity and personal details made available to the general public. Views are sought on how these competing considerations should be balanced in the new body.

There can be inconsistency in whether a matter is heard in the Security Division or other divisions of the AAT currently, even where matters involve sensitive information. For example, Comcare claims involving intelligence personnel are not automatically directed to the Security Division. The Comprehensive Review of the Legal Framework of the National Intelligence Community found that ‘protections and procedures relating to national security information should be consistent when the AAT is reviewing decisions involving national security information and should not be discretionary’.¹⁶¹

Discussion questions

43. By what criteria should the new body allow private hearings or make non-disclosure/non-publication orders?
44. Should all matters involving sensitive national security information have a common set of protections and processes? What should those protections be?

10. Resolving a matter

Dispute Resolution

Alternative Dispute Resolution (ADR) has been a feature of the AAT's pre-hearing processes since it was established in 1976. Harry Whitmore, a member of the Kerr Committee, suggested at the time that ADR was tied to the AAT's legislated objectives to be informal and quick, stating:

*'... a rigid adherence to standard adversary techniques of fact-finding would be disastrous. Informality and expedition will probably be assisted by the provision made for conferences which may settle matters without need for a hearing.'*¹⁶²

In 1995, the ARC stated that the AAT had pioneered the use of ADR as an evolving principle for dispute resolution in administrative review.¹⁶³

Currently the types of ADR available at the AAT are conferencing (discussed earlier at Case Conferencing), conciliation, mediation, case appraisal and neutral evaluation.¹⁶⁴ Compared to conferencing, the other forms of ADR are not as widely used. For example, conciliation and mediation are only used in two-party reviews, usually following an initial conference, such as for NDIS, taxation and workers compensation matters.¹⁶⁵ Case appraisal and neutral evaluation are probably the least used form of ADR at the AAT. They involve advisory processes in which an AAT member or officer (in some matters both) assist the parties to resolve the dispute by providing a non-binding opinion.¹⁶⁶

ADR is available in most divisions at the AAT (AAT Act, ss 34 & 34H) but not in most types of Security Division matters (s 34) and proceedings in the MRD (s 24Z). It is also fairly limited in the SSCSD, usually only occurring in child support cases with 2 individual parties.¹⁶⁷ This is because the decision-making agency is not required to attend for matters in MRD and SSCSD. In considering whether dispute resolution processes should be available for these matters, the question of agency participation will need careful thought.

Key issues

The majority of AAT matters in the divisions and types of cases in which ADR is used will undergo at least one conference or other ADR event, with the majority of matters being resolved prior to a final decision by the AAT on the merits.¹⁶⁸ The Callinan Review recommended extending the availability of ADR

¹⁶² Whitmore, H., and Aronson, M., *Review of Administrative Action*, The Law Book Company, Sydney, 1978, 24, cited in the Hon. Justice Garry Downes AM, 'Professor Harry Whitmore lecture, The Tribunal Dilemma: Rigorous Informality', 17 September 2008.

¹⁶³ Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 14 September 1995) 54-55.

¹⁶⁴ ADR and the types available are defined under subsection 3(1) of the AAT Act.

¹⁶⁵ Administrative Appeals Tribunal, 'Alternative ways to reach an agreement', (Website page) <<https://www.aat.gov.au/about-the-aat/learn-more/alternative-ways-to-reach-an-agreement>>.

¹⁶⁶ Administrative Appeals Tribunal, 'Neutral Evaluation Process Model', (Website page) <<https://www.aat.gov.au/AAT/media/AAT/Files/ADR/Neutral-Evaluation-process-model.pdf>>.

¹⁶⁷ Also see, *Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021*, Explanatory Memorandum, 17.

¹⁶⁸ Administrative Appeals Tribunal, *Annual Report 2021-22* (Report, 23 September 2022), 70-71.

processes to all AAT Divisions.¹⁶⁹ This recommendation led to extending the availability of conferencing to the SSCSD in circumstances where there are two parties, neither of which are the decision-making agency.¹⁷⁰

Though ADR is generally seen to facilitate the early resolution or case management of a matter in a cost-effective way, it may not always be appropriate. For example, it may not be suitable where expediency is required or if the respondent department has concerns for public safety or security. If the new body were to expand the availability of ADR for all matters, it would not need to make it mandatory. Rather, as currently the case in the AAT, the new body could be free to apply it where it was appropriate.

The NDIA began piloting an Independent Expert Review (IER) Program in October 2022. The IER program practices a form of dispute resolution similar to neutral evaluation whereby a panel of independent experts review NDIS matters and provide non-binding recommendations for resolution. The NDIA will typically implement these recommendations where both parties agree unless it finds a substantial reason for not doing so.¹⁷¹ The IER program indicates that dispute resolution processes can be effective for the expedient resolution of matters, where it is applied strategically and is tailored to the caseload. It also raises the interesting possibility that such processes could be situated outside the AAT, as part of internal review or as a key input to tribunal decision-making.

Discussion questions

45. What types of dispute resolution should be available in the new body?
46. Should dispute resolution be available across all types of matters? Are there matters where it may be less appropriate? Should some methods of dispute resolution only be made available for particular types of matters?
47. What additional powers or procedures should be introduced to increase the accessibility and availability of dispute resolution in the new body? Who should be able to refer a matter to dispute resolution?

Finalising an application before a hearing

In Divisions other than the MRD, the AAT may dismiss an application without proceeding to review if it is satisfied that the decision is not reviewable by the AAT (AAT Act, s 42A(4)). For a proceeding in the SSCSD, an officer can be authorised to dismiss an application (AAT Act, s 42A(4A)). In the MRD, the AAT can dismiss an application if it considers that it does not have jurisdiction.

In Divisions other than the MRD, s 42C of AAT Act provides that the AAT can make a decision in accordance with an agreement reached by the parties. This agreement can be reached at any stage of the proceedings. Where this occurs, the AAT can make a decision without holding a hearing or if a hearing has commenced, without completing the hearing. Similarly, in all Divisions other than the MRD,

¹⁶⁹ IDF Callinan, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019), Measure 30, p 22.

¹⁷⁰ See, Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Act 2022.

¹⁷¹ NDIS, 'An improved approach to dispute resolution', (Website page) <<https://www.ndis.gov.au/about-us/legal-matters/improved-approach-dispute-resolution>>.

s 34D of the AAT Act provides that if, in the course of alternative dispute resolution, agreement is reached by the parties, the AAT can make a decision in accordance with those terms (AAT Act, s 34D(2)).

The AAT Act provides that where all parties consent, the AAT may dismiss the application (AAT Act, s 42A(1)). If the proceedings are in the SSCSD, the consent of an agency party is not required (AAT Act, s 42A(1AAA)). The Migration Act does not contain a provision for dismissal of a matter with the consent of the parties in the MRD.

At any stage of a proceeding for review of a decision, other than a proceeding in the SSCSD or the MRD, the AAT may remit a decision for reconsideration to the person who made it (AAT Act, s 42D). The original decision-maker must affirm, vary, or set aside and substitute the decision (AAT Act, s 42D(2)). If the decision-maker affirms the decision, the proceeding resumes (AAT Act, s 42D(8)). If the decision-maker varies or sets aside and substitutes the decision, the applicant may decide whether to proceed with or withdraw the application (AAT Act, ss 42D(3) & 42D(4)).

In Divisions other than the MRD, the AAT may dismiss an application if an applicant fails to appear at a directions hearing, an ADR process or a hearing of the proceeding (AAT Act, s 42A(2)). The AAT may direct any other party (who is not the decision maker) who failed to appear that they cease to be a party to the proceeding (AAT Act, s 42A(2)). The AAT may re-instate an application if it considers it appropriate to do so (AAT Act, s 42A(9)). There are similar powers in the MRD (Migration Act, ss 362B & 426A).

Under s 42A(1A) of the AAT Act, an applicant may discontinue or withdraw an application at any time. If a proceeding is in the SSCSD and is not a child support first review, the person may notify the AAT orally of the withdrawal or discontinuance and the person who receives the notification must make a written record of the day of receipt (AAT Act, s 42A(1AA)). The provisions in the AAT Act do not apply in the MRD and the Migration Act does not expressly deal with withdrawal of an application.¹⁷²

The AAT may dismiss an application that is frivolous, vexatious, misconceived or lacking in substance, has no reasonable prospect of success or is otherwise an abuse of the process of the AAT (AAT Act, s 42B(1)). This does not apply to applications in the MRD.

Under s 42B(2) of the AAT Act, if the AAT dismisses an application and a party to the proceeding applies, the AAT may give a written direction that the applicant must not, without leave of the AAT, make a subsequent application.

Key issues

Currently only members can approve consent orders under s 34D and s 42C of the AAT Act, which can cause delays between parties reaching agreement and the AAT making the decision. This is particularly a problem in the NDIS Division. One way of addressing this delay in the new body is to authorise non-members of the new body (such as conference registrars) to decide consent orders.

Similarly, only members currently have the power to remit a matter and these powers are not available in the MRD or SSCSD. Caseloads could be reduced and timeframes improved in the new body by allowing non-members to remit simple matters for reconsideration in certain circumstances (such as when new information becomes available), or if these powers were extended to all types of matters.

¹⁷² AAT, 'Ending a Review Without a Hearing' (Website page) <<https://www.aat.gov.au/steps-in-a-review/migration-and-refugee/migration/ending-a-review-without-a-hearing>>.

There are some differences with the way the provisions relating to dismissal and withdrawal operate across different matters and it is appropriate to consider whether these differences are necessary.

Another issue to consider is the powers available to the AAT to deal with a matter that has no reasonable prospects of success or is made without any serious purpose (i.e. frivolous or vexatious). Those types of matters may take up considerable time and resources for both the AAT and parties involved. Views are sought on whether the existing powers to dismiss an application under section 42B of the AAT Act are appropriate and whether additional powers could be made available to the new body to manage applications that are frivolous or vexatious.

Discussion questions

48. What powers should the new body have to resolve a matter before hearing? Which of these powers should be conferred on non-members? Should these powers be standardised across all matters?

49. What powers should the new body have to manage applications that are frivolous or vexatious?

Hearings

Type of hearing

Hearings provide an opportunity for the parties to ‘present their case’ by giving evidence and making arguments directly to the decision-maker. Hearings can occur in person, by telephone or by video, depending on the circumstances.

The AAT may conduct a hearing via telephone or by other electronic means (AAT Act, s 33A). In the MRD, the AAT can permit an applicant to appear by telephone, CCTV or ‘any other means of communication’ (Migration Act, ss 366 & 429A). Video or telephone hearings may be less stressful or intimidating for applicants, making merits review more accessible. However, some applicants might not feel that the full extent of their matter can be dealt with virtually.

The AAT can dispense with a hearing – in other words, it can decide the matter on the papers – in circumstances where the parties consent and where the member hearing the matter is satisfied that the issues for determination can be adequately determined in the absence of the parties (AAT Act, s 34J). In the SSCSD, the consent of the agency party is not required (AAT Act, s 34J). In the MRD, the AAT can decide the matter on the papers if it considers it should decide the review in the applicant’s favour on the basis of the material before it, or if the applicant consents to the AAT deciding the review without the applicant appearing (ss 360 & 425 Migration Act).

Flexibility in conducting hearings

Hearings are intended to be less formal than court proceedings. They are conducted in accordance with Practice Directions, which are flexible rather than prescriptive, and may be changed as the President sees fit (AAT Act, s 18B).¹⁷³ The AAT is also not bound by the rules of evidence but ‘may inform itself on any matter in such manner as it thinks appropriate’ (AAT Act s 33(1)(c); Migration Act ss 353 & 420). It can receive hearsay or second-hand evidence that might be ruled inadmissible in proceedings in a court – it is up to the AAT to decide what weight should be given to such evidence. The AAT may also

¹⁷³ See, Administrative Appeals Tribunal, ‘Practice directions, guides and guidelines’, (Website page) <<https://www.aat.gov.au/resources/practice-directions-guides-and-guidelines>>.

determine the scope of the review of a decision by limiting the issues, questions of fact and evidence that it considers (AAT Act, s 25(4A)).

Key issues

In designing the new body, it is necessary to consider the different ways that members may reach a decision, and whether there are opportunities for simpler and more efficient and accessible pathways to be created. There is also an opportunity to consider how hearings should be conducted so that they are flexible, informal and accessible to the wide variety of applicants and other parties who seek review of administrative decisions, including whether hearings should be by video or telephone by default, except in specified circumstances.

Discussion questions

50. In what circumstances should the new body be able to dispense with a hearing?
51. How should hearings be conducted to ensure that they are accessible, informal, economical, proportionate, just and quick?

11. Decisions and appeals

Decisions

Issuing of decisions and reasons

The AAT issues its decision in writing and may give reasons for its decision either orally or in writing, except in the Security Division.¹⁷⁴ However, in family assistance, paid parental leave, social security and student assistance first review proceedings, the AAT can only give oral reasons for decisions if the decision under review is being affirmed.¹⁷⁵ The reasons for a decision to vary or set aside and substitute the decision under review must be in writing.¹⁷⁶

Where oral reasons for a decision are given, a party may request a written statement of reasons. In the SSCSD and MRD, parties have 14 days after oral reasons are given to make this request.¹⁷⁷ In all other divisions of the AAT, parties have 28 days after written notice of the decision is given to request written reasons.¹⁷⁸

Once the AAT receives a request for a written statement of reasons it has 14 days in the MRD and SSCSD and 28 days in all other divisions of the AAT to provide a written statement of reasons.¹⁷⁹

According to AAT data relating to matters finalised in 2015-16, across all divisions, written statements of reasons were requested in 27% of matters where oral reasons for a decision were given.¹⁸⁰ The AAT received 266 requests for written statements of reasons and 125 of those requests were in the MRD.¹⁸¹

Where the AAT gives reasons for its decision in writing, those reasons must include findings on material questions of fact and a reference to the evidence or other material on which those findings were based (AAT Act, s 43(2B)). In the MRD, the AAT's written statement of decision must include reasons for its decision, findings on material questions of fact, reference to evidence on which findings of fact were based and the day and time the statement was made (Migration Act, ss 368(1), 368D(2), 430(1) and 430D(2)). In all other divisions, the AAT's decision must provide a written notice setting out the party's appeal rights (AAT Act, s 43(5AA)).

¹⁷⁴ AAT Act 1975 (Cth) s 43, Migration Act ss 368-368D; ss 430-430D.

¹⁷⁵ A New Tax System (Family Assistance) (Administration) Act 1999 (Cth) s 126(1); PPL Act s 235(1); Social Security (Administration) Act 1999 s 178(1); Student Assistance Act 1973 s 318(1).

¹⁷⁶ IDF Metcalfe, *Final Report of the Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal* (Report, July 2017), 110.

¹⁷⁷ Child Support (Registration and Collection) Act 1988 (Cth) s 95P(3); A New Tax System (Family Assistance) (Administration) Act 1999 (Cth) s 126(4); PPL Act s 235(4); Social Security (Administration) Act 1999 (Cth) s 178(4); Student Assistance Act 1973 (Cth) s 318(4); Migration Act 1958 (Cth) ss 368D(4), 430D(4); Migration Regulations 1994 (Cth) regs 4.27B, 4.35G.

¹⁷⁸ AAT Act 1975 (Cth) s 43(2A).

¹⁷⁹ Migration Act 1958 (Cth) ss 368D(4)-(5), 430D(4)-(5); Child Support (Registration and Collection) Act 1988 (Cth), s 95P(3); A New Tax System (Family Assistance) (Administration) Act 1999 (Cth) s 126(4); PPL Act s 235(4); Social Security (Administration) Act 1999 (Cth) s 178(4); Student Assistance Act 1973 (Cth) s 318(4); AAT Act s 43(2A).

¹⁸⁰ IDF Metcalfe, *Final Report of the Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal* (Report, July 2017), 113.

¹⁸¹ IDF Metcalfe, *Final Report of the Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal* (Report, July 2017), 113.

For security assessment reviews, under s 43AAA, the AAT must provide a written copy of its findings to the applicant, the Director-General of Security, the Commonwealth agency, State or authority of the State and ASIO Minister. The AAT may also provide the Director-General and Minister with any comments it wishes to make on matters relating to procedures and practices of the ASIO that have come to its attention in the review. Similar provisions apply to the review of decisions under the *Australian Crime Commission Act 2022*, s 36N and the *Foreign Acquisitions and Takeovers Act 1975*, s 130K.

Key issues

Issuing written reasons for decision can be time consuming and contributes to backlog within the AAT.¹⁸² The AAT has indicated that it takes on average 21 days in the General Division, 8 days in the MRD and 10 days in the SSCSD to give a written statement of reasons, after receiving a request from a party where oral reasons were given.¹⁸³ The Metcalfe review recommended standardising procedures in the SSCSD so that the AAT can provide oral reasons for any type of decision.¹⁸⁴ The report found this would improve efficiency and enhance access to justice for applicants who have difficulties understanding written English.

Other than in the MRD (see Migration Act, ss 368D; 430D), the content of oral decisions is not prescribed.¹⁸⁵ Case law has demonstrated that the AAT is not permitted to vary the reasons that were given orally in any substantive way. In practice, the written statement of reasons that the AAT produces is generally a transcript of the oral reasons. Written reasons allow parties to clearly understand how and why the AAT has arrived at its decision. This assists government decision-makers to identify issues in their processes and facilitates improved government decision making.¹⁸⁶

Discussion questions

52. What should be the requirements and timeframes for issuing oral and written reasons for decision in the new body?
53. How can the new body achieve quality, consistency, accessibility and simplicity in explaining the reasons for a decision?

Appeals and questions of law

If a party believes an AAT decision is wrong, they can appeal the decision to a court by way of a statutory appeal or application for judicial review. Parties may appeal to either the FCFCOA, the Federal Court of Australia (Federal Court) or the High Court depending on the type of decision being appealed. In

¹⁸² IDF Metcalfe, *Final Report of the Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal* (Report, July 2017), 110.

¹⁸³ IDF Metcalfe, *Final Report of the Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal* (Report, July 2017), 114.

¹⁸⁴ IDF Metcalfe, *Final Report of the Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal* (Report, July 2017), 111.

¹⁸⁵ IDF Metcalfe, *Final Report of the Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal* (Report, July 2017), 112.

¹⁸⁶ Administrative Appeals Tribunal, 'Writing Reasons for Judgment or Decision', 3 May 2007, <<https://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pres/writing-reasons-for-judgment-or-decision>>.

addition, some decisions of the AAT may be appealed to another division of the AAT in specific types of matters. This notable feature in the appeal process of certain AAT matters is discussed further in ‘Second tier of review’.

For decisions other than those relating to visas under the Migration Act, a party has 28 days to appeal to the Federal Court on a question of law from final decisions of the AAT (AAT Act, ss 43C, 44(1) & 44(2A)).¹⁸⁷ A party to a child support first review may in some instances appeal to the FCFCOA (Division 2) (AAT Act, s 44AAA).

The Court can hear and determine the appeal and may make such an order as it thinks appropriate. For example, it can make an order affirming or setting aside the decision of the AAT, or an order remitting the case to be heard and decided again, either with or without the hearing of further evidence (AAT Act, s 44(5)). The Court may make findings of fact if it is not inconsistent with the AAT’s findings. The Court may have regard to the evidence given in the AAT and further evidence (AAT Act, s 44(8)).

An appeal to the Court does not affect the AAT’s decision or prevent the implementation of the decision (AAT Act, s 44A(1)). However, the Court may make an order staying the implementation of the AAT’s decision or part of the decision (AAT Act, s 44(2)).

The AAT may, with the agreement of the President, refer a question of law arising in a proceeding to the Federal Court for decision (AAT Act, s 45(1)). The AAT may do so on its own initiative or at the request of a party to the proceeding.

Migration decisions made under the *Migration Act* are subject to different appeal pathways and timeframes for appeal under Part 8 of the Migration Act.¹⁸⁸ For a large number of appeals relating to migration decisions, the question is whether there was jurisdictional error.

Parties have 35 days to appeal migration and protection decisions to the FCFCOA (Division 2). They also have 35 days to appeal character-related and other visa decisions to the Federal Court.

Key issues

The significant number of appeals from decisions of the AAT to a court (particularly migration decisions) contributes to a backlog in the courts. The AAT has suggested introducing pre-hearing processes in the MRD, similar to the other divisions of the AAT.¹⁸⁹ While noting that there are different drivers for lodging judicial review applications in relation to migration decisions, the Metcalfe Report suggested that the increased availability and use of pre-hearing processes may make applicants feel as though they have a greater opportunity to participate in the decision-making process, and therefore feel as though they have more control over the outcome, which could lead to a reduction in appeals.¹⁹⁰

¹⁸⁷ Under s44AA of the AAT Act, the Federal Court may, with some limitations, transfer an appeal to the Federal Circuit and Family Court (Division 2).

¹⁸⁸ Administrative Appeals Tribunal, *Annual Report 2021-22* (Report, 23 September 2022), Table 33, p 74.

¹⁸⁹ IDF Metcalfe, *Final Report of the Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal* (Report, July 2017), 72.

¹⁹⁰ IDF Metcalfe, *Final Report of the Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal* (Report, July 2017), 126.

The short timeframe for a party to appeal a decision from the AAT to a court can create practical issues for the parties. Presently, an appeal must be lodged within 28 days of receiving an AAT decision (or 35 days for migration decisions) (AAT Act, ss 44(2A), 44AAA(2)(a); Migration Act, s 477). This may not provide parties with sufficient time to consider or to seek legal advice on whether to appeal.¹⁹¹ Both the AAT and the former Department of Human Services previously recommended extending the timeframe to lodge an appeal to 28 days after a party receives the written statement of reasons, rather than 28 days after receiving the decision.¹⁹²

The power to refer a question of law to the Federal Court is rarely used. This is because only a small number of matters are amenable to it: the facts must be agreed between the parties, and the nature of the case must be such that the issue of law can be clearly distilled and determined.

It is worth considering how the new body might be able to clarify legal issues to guide the consistent and expedient resolution of matters where similar questions arise. This could include consideration of the role of judicial members and senior leadership in determining which questions of law might be referred to the Federal Court. For example, steps could be taken to identify and resource test cases, as currently occurs in taxation matters. It is also worth considering how this might operate in high-volume migration and social security matters where the respondent agencies do not appear.

In the MRD, the AAT may be directed to comply with a 'guidance decision' in reaching a decision under review, unless the facts or circumstances of the decision under review are clearly distinguishable from the facts or circumstances in the guidance decision (Migration Act s 420B). 'Guidance decisions' are intended to provide a mechanism to facilitate the consistent and expeditious resolution of like cases. In practice, they are not currently used by the AAT.

¹⁹¹ IDF Metcalfe, *Final Report of the Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal* (Report, July 2017), 114.

¹⁹² IDF Metcalfe, *Final Report of the Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal* (Report, July 2017), 114.

Discussion questions

54. Are there ways to streamline appeal processes and pathways to reduce the overall duration of a matter?
55. What should be the timeframes for lodging an appeal from a decision of the new body? Should this date be from the receipt of a decision, or the receipt of written reasons for decision?
56. When and how should the new body be able to refer a question of law to the Federal Court of Australia? Are there other ways for the new body to seek clarity on unsettled matters (such as guidance decisions or decisions by an appeal panel within the new body) and how should these be used?
57. What processes should be in place to ensure the new body refers questions of law to the Federal Court in appropriate circumstances?

Second tier of review

Administrative review and a second tier of review

The AAT currently has a mixed model of review. The majority of decisions reviewable by the AAT are only able to be reviewed once by the AAT, with the only option for further review being an appeal to a court on an error of law. However, there are some types of matters that provide for two layers of external administrative review:

- Centrelink decisions (which include decisions about family assistance, farm household support, paid parental leave and social security) and certain child support decisions are first reviewed in the SSCSD, with second-tier review available in the General Division.¹⁹³
- The Veterans' Review Board (VRB) provides external merits review of certain decisions relating to benefits for current and former members of the Australian Defence Force and their dependants, with decisions of the VRB appealable to the Veterans' Appeals Division of the AAT. Some Veterans decisions though are directly appealable to the AAT following internal review.¹⁹⁴
- Decisions under the *Freedom of Information Act 1982* can be reviewed by the Information Commissioner, with those decisions appealable to the FOI Division of the AAT.

The availability of a second tier of review within the AAT for social security decisions arises from the amalgamation of the then SSAT into the AAT in 2015 which created the SSCSD and preserved two-tier review. The preservation of these distinct procedural features from amalgamated bodies was described as 'crucial to managing the workload of their respective jurisdictions [within the AAT]'.¹⁹⁵

All state and territory civil and administrative tribunals other than VCAT and TASCAT feature some form of second tier review for most decisions.¹⁹⁶ Procedures for appeal vary between the different state and

¹⁹³ It should be noted that for various social security matters the Department may initiate second-tier review as the applicant, typically to seek review of a first-tier decision.

¹⁹⁴ See further, *Military Rehabilitation and Compensation Act 2004*; *Veterans' Entitlements Act 1986*; *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*.

¹⁹⁵ Explanatory Memorandum, *Tribunals Amalgamation Bill 2015 (Cth)*, 13.

¹⁹⁶ VCAT and TASCAT decisions can only be appealed to a relevant appellate Court.

territory tribunals but all generally feature time limits, restrictions on evidence not given at first review, with appeals usually conducted before senior members or presidential members of these bodies.¹⁹⁷

The UK Tribunal also features a second tier of review for administrative decisions. In the UK the second review tier is called the 'Upper Tribunal' and operates more like an appellate court, only considering appeals through grant of leave and only on substantive errors of law.¹⁹⁸ The UK model is more similar to the one proposed by the ARC in 1995 than the mixed model of review in the AAT today.

The ARC's 1995 Better Decision Review proposed a second tier of review for the AAT. It recommended a structure of subject specific divisions providing core merits review for matters (first tier). The decisions of this first tier would then be subject to review, through grant of leave, by a general 'review' division or panel (second tier) responsible for identifying and correcting manifest errors of fact and/or law.¹⁹⁹

The ARC observed that second tier review would give particular attention to cases 'involving an important issue or principle of general significance' that could have a 'normative effect' on government decision making.²⁰⁰ The ARC recommendation was not implemented.

Key issues

The Callinan Review recommended removing the second tier of review for SSCSD decisions noting it was 'discordant with the single opportunity for review in other Divisions'.²⁰¹ The Callinan Review also noted that second tier review at the AAT is usually undertaken by a single AAT member (in the General Division) of another member's decision (in SSCSD) and it wasn't clear why one member's decision should be any more preferable than another member's decision. Providing second tier review by multi-member panels could be considered impractical from a resourcing perspective.

In the new body, existing tiers of review could be collapsed or maintained. Alternatively, the availability of a second tier of review could be expanded.

A 2022 interim report into dispute resolution for the NDIS was completed before the Government announced that it would abolish the AAT and replace it with a new federal administrative review body. The interim report suggested that two-tier review should be made available through the creation of an external review body for NDIS matters or a second tier of review in the AAT.²⁰² The Government welcomed the interim report exploring long-term solutions to resolve NDIS disputes early in the review process. In considering the role of a second tier of review and other questions about process and procedure, views are sought on matters that were raised in the interim report.

¹⁹⁷ For further details please refer to the relevant state or territory civil and administrative tribunal website.

¹⁹⁸ See *Tribunals, Courts and Enforcement Act 2007* (UK), ch 2 & 3.

¹⁹⁹ B Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 14 September 1995), 142.

²⁰⁰ Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 14 September 1995), 146-148.

²⁰¹ IDF Callinan, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019), 13 & 159-160.

²⁰² The interim Report on 'Long Term Options for Dispute Resolution under the National Disability Insurance Scheme' was publicly released on 22 March 2023 and is available online at <<https://www.dss.gov.au/disability-and-carers-programs-services-for-people-with-disability-ndis-appeals/interim-report-on-long-term-options-for-dispute-resolution-under-the-national-disability-insurance-scheme>>.

A second tier of review in the new body could operate more formally and be determined by more senior members. Access could be confined, through the requirement to seek leave, to matters raising significant or complex issues. However, its existence could help to ensure that first tier review across the new body is informal, accessible and quick, and that lawyers and contradictors are not generally required. It would also be possible for the President to be given an own motion power to refer matters to the second tier. This may avoid the situation identified in hearings held by the Royal Commission into the Robodebt Scheme where significant decisions about the automated debt recovery program were not referred to second review, which may have given greater visibility of issues with the scheme.

Efficiencies could also be gained by empowering the Tribunal to refer matters to the more formal second tier review process at the outset, without the need for first tier review. This could be done, for example, where the matter raises complex, significant or unsettled issues and the decision is likely to have a normative or guiding effect on similar matters.

Discussion questions

58. Should a second, more formal tier of review be available in the new body, either for specific types of matter or across all matters? For example, should there be an appeals mechanism within the new body for complex matters or matters raising systemic issues?
- a. If available, how should the second tier of review operate and how should it be accessed? For example, should the President be able to refer a matter of their own motion? Should leave be required to appeal?
 - b. Should some matters be referred to a second tier of review from the outset and in what circumstances should this occur?

12. Supporting parties with their matter

Representation

Other than in the SSCSD and MRD, parties to proceedings in the AAT may appear in person or be represented by another person (AAT Act, s 32(1)(a)). The Migration Act outlines specific arrangements for representation in the MRD (Migration Act, s 366A, 366B and 427(6)). Part 3 of the Migration Act also sets out limitations on the types of persons who can provide ‘immigration assistance’. Although there is no right to a representative when appearing before the tribunal, an applicant may have an assistant present in non-protection migration matters. In practice, the AAT does allow a representative to be present in migration and protection matters.

The agency party to a proceeding in the SSCSD may appear in person or be represented by another person (AAT Act, s 32(1)(b)). However, in practice, the agency party does not participate in reviews in the SSCSD. Currently, the agency party must seek permission to make oral submissions to the AAT (AAT Act, s 39AA). The AAT also has the power to require the agency party to make oral submissions, although this occurs infrequently. The AAT occasionally requests written submissions from the agency party.

A non-agency party to a proceeding in the SSCSD can only be represented by another person with the permission of the Tribunal. A representative does not need to be a legal practitioner. A person may also appear on behalf of a party as a support person or non-legal advocate (AAT Act, s 32(2)).

Key issues

The objectives of the AAT require that it provide a mechanism of review that is, among other things, accessible and informal (AAT Act, s 2A). Ideally, most applicants should be able to access fair and just administrative review without needing representation. The use of legal representation can lead to an increase in the formality of proceedings. If an applicant is unrepresented against a lawyer for a respondent, there can be an imbalance. However, legal representation, or representation by a support person, can improve access to justice for vulnerable parties and enhance the effectiveness and efficiency of the review process.²⁰³ The AAT and the parties are generally assisted by representatives – whether lawyers, disability advocates, migration agents or tax agents – who provide capable representation.

The Metcalfe Review noted that an applicant who is represented in the AAT is three to four times more likely to access documents under the *Freedom of Information Act 1982* or section 362A of the Migration Act.²⁰⁴ The ARC Better Decisions Review recognised the important role of representatives, legal or non-legal, in facilitating access to justice and assisting applicants who appear before review tribunals, recommending that applicants in review tribunals should be entitled to be represented or assisted in

²⁰³ Law Council of Australia, *Access to Justice*, (Website page) <<https://www.lawcouncil.asn.au/justice-project/access-to-justice>>.

²⁰⁴ IDF Metcalfe, *Final Report of the Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal* (Report, July 2017), 58.

any dealings with the tribunal. The review also recommended that the role, and any limitations placed on the role of representatives, should be left to the discretion of tribunals.²⁰⁵

Historically, there have been concerns about the overall quality of representation in tribunals.²⁰⁶ Where representatives are not subject to regulation by a peak body or professional organisation, the AAT does not have a power to refer any misconduct or remove them from the proceeding. In designing the new body, there is an opportunity to consider whether there should be restrictions on who can appear as a representative in the new body. Views are sought on whether leave should be required for representatives (whether legal or non-legal), and whether the new body should have the power to rescind leave or remove a representative if they are not acting in the applicant's best interests.

Discussion questions

59. Should there be a requirement in the new body to seek leave to appear with representation? If so, should this extend to all matters or a specific category of matters?

60. Should there be requirements or a code of conduct for representatives to ensure representatives act in the best interests of a party? How should this be enforced?

Support services

Support services can contribute to the right to fair process in executive decision-making and the objective of resolving disputes fairly, informally, efficiently, quickly and cheaply.²⁰⁷ Many people who seek administrative review may need support to understand or properly participate in the process. This could be due to a variety of factors such as age, disability, mental health, language barriers, economic disadvantage, and experiences of family and domestic violence or other types of trauma. Ensuring all users can fully participate and access review of decisions that affect them is critical to Australia's system of administrative review.

Examples of support services include:

- outreach and information services
- culturally safe services for people from culturally and linguistically diverse backgrounds
- interpreter services
- legal and other advice services
- flexibility with use of technology to provide information, and
- reasonable adjustments such as hearing loops or AUSLAN interpreters.

Subsection 2A(a) of the AAT Act currently provides that an objective of the tribunal is to be accessible but does not specify any obligations or requirements to promote accessibility.

²⁰⁵ Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 14 September 1995), 62 (Recommendations 22 and 23).

²⁰⁶ Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 14 September 1995), 64.

²⁰⁷ Garry Downes, 'Tribunals in Australia: Their Roles and Responsibilities' (2004) Reform 84; Virginia Bell, 'Balancing informality with natural justice and the work of tribunals' (The Whitmore Lecture, 21 April 2021).

Queensland, Western Australia, the Northern Territory, and Tasmania all stipulate the tribunal is to 'facilitate access to its services'²⁰⁸. The *South Australian Civil and Administrative Tribunal Act 2013* (SA) also provides that the tribunal 'is to facilitate access to its services' (s 7(1)) but goes further to provide the tribunal 'is to be accessible by being easy to find and easy to access, and to be responsive to parties, especially people with special needs' (s 8(1)(b)). The *Queensland Civil and Administrative Tribunal Act 2009* (Qld) provides that the tribunal must 'ensure the tribunal is accessible and responsive to the diverse needs of persons who use the tribunal' (s 4(e)).

In NSW the objectives include a responsibility for the tribunal 'to ensure that the Tribunal is accessible and responsive to the needs of all of its users' (*Civil and Administrative Tribunal Act 2013 No 2* (NSW), s 3(c)). Additionally, s 38(5) provides that the tribunal is to take appropriate measures to assist parties by ensuring they understand the nature of the proceedings and have a reasonable opportunity to be heard.

The *Victorian Civil and Administrative Tribunal Act 1998* (Vic) places an obligation on the registrar to provide reasonable assistance (s 32AA). It should be noted that both Victoria and the ACT do not refer to accessibility in the primary legislation. However, both of these jurisdictions have a Human Rights Act.

Key issues

Enhancements to support services may improve access to justice for users. While some of these services may be appropriately provided by the new body, there is also a question about what role departments, agencies and other organisations should play in assisting their users to access advice and representation in relation to an application for administrative review, including through funding targeted support services.

A range of services could be considered. For example:

Ease of access to information

- Maintaining the general, public-facing procedural information that is available to users on the AAT website (currently available on the AAT website).
- Providing 'click-through' online services which asks parties questions about their matter and automatically generates a tailored document with all relevant information.
- Employing dedicated Liaison Officers to provide procedural information to specific groups of people, including First Nations People and people with a disability. Liaison Officers help parties understand what is required of them, clarify information, and connect parties with external legal support if required.
- Expanding the AAT's community outreach program for the purpose of increasing awareness of the role of merits review and the new tribunal. This could be targeted to key streams of the AAT's work, such as migration or NDIS decisions.

Equitable access to tribunal processes

- Expanding legal assistance for tribunal matters
- Expanding access to other advisory and support services

²⁰⁸ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 4(a); *State Administrative Tribunal Act 2004* (WA) s 10; *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 9(1); *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) s 9(1).

- Ensuring all facilities are accessible, including physical premises, ICT systems and documents. For example, improving computer systems to ensure capability for computer systems to read scanned documents aloud.
- Maintaining the interpreter services currently offered by the AAT and ensuring that information about accessing the tribunal is provided in a range of languages.
- Ensuring that the new body has the capacity to adjust its services towards accessibility for specific users.

Consideration should be given to funding and resourcing for the provision of support services. Access to support services can lead to a more efficient review process which can result in cost savings for the review body. For example, the Small Business Tax Concierge, run by the Australian Small Business and Family Enterprise Ombudsman, assists small business to appeal taxation disputes to the AAT. The service provides unrepresented small businesses with legal advice and helps direct appropriate cases to the AAT. The Ombudsman is also able to refer appropriate cases to the Inspector General of Taxation and Taxation Ombudsman or Australian Taxation Office.

Reflecting accessibility requirements and other support in legislation

The current AAT Act does not have specific protections for vulnerable or at-risk applicants or parties, such as those experiencing domestic or family violence or other forms of abuse, or for whom contact with tribunal processes may be psychologically challenging.²⁰⁹ It is worth considering how the processes of the new body can ensure safety in these circumstances, including in terms of how information is collected and published and in mechanisms for dispute resolution and participation in hearings.

The AAT Act does not legislate any support programs or services. An option for consideration is whether the new legislation should contain a positive obligation to promote accessibility, similar to the obligation provided for in a number of state and territory Acts. This positive obligation encourages the provision of wrap around services and promotes a culture of support for users within the tribunal's operations.

²⁰⁹ The MRD has practice directions and guidelines on vulnerable persons which can be viewed on the AAT website, <<https://www.aat.gov.au/landing-pages/practice-directions-guides-and-guidelines/guidelines-on-vulnerable-persons>>.

Discussion questions

61. What services would assist parties to fully participate in processes under the new body and improve the user experience? Which of these services should be provided:
 - a. by departments and agencies
 - b. by the new body
 - c. by other organisations
62. How can the new body (or ancillary services) enhance access for vulnerable applicants?
63. How can the new body protect the safety and interests of applicants who have experienced or are at risk of trauma or abuse? For example, what special processes may be needed in relation to information protection, participation in dispute resolution and hearings for at-risk applicants?
64. Should the legislation place an obligation on the new body to promote accessibility for all users?

Litigation guardians

A litigation guardian conducts legal proceedings on behalf of a person who, as a result of a legal disability, is unable to understand the nature and possible consequences of the proceedings or to provide adequate instruction for the conduct of proceedings. A litigation guardian must be over 18 years of age, have no interest in the proceeding adverse to the interest of the person they represent, must fairly and competently conduct the case for the person they represent and have consented to act as the litigation guardian.²¹⁰ The litigation guardian stands in the shoes of the party as if they were the party.²¹¹

Although the AAT Act allows a party to be represented by another person in most divisions, it does not provide for the appointment of a litigation guardian. In contrast, Part 3.5 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) allows for the nomination and appointment of litigation guardians in certain matters. In the FCFCOA, a litigation guardian may be appointed at the request of a party, or on the FCFCOA's own motion. Where an appropriate person cannot be found, the FCFCOA may seek appointment of a litigation guardian from the Attorney-General as provided under the Rules.

There are established models for the appointment of litigation guardians in the NCAT, ACAT and SAT. In NSW, NCAT can appoint a litigation guardian at the request of a party to proceedings or of their own motion. After seeking consent from the party, the tribunal will seek to appoint a known friend or relative as the litigation guardian. Alternatively, NCAT can request a litigation guardian be appointed from a panel managed by the NSW Department of Communities and Justice.²¹² In the ACT, ACAT can appoint a litigation guardian by order where required. Alternatively, a litigation guardian already appointed under Territory law may continue to represent the party at the tribunal.²¹³

²¹⁰ Federal Circuit and Family Court of Australia, *Family Law: Litigation Guardians*, (Website page) <<https://www.fcfoa.gov.au/fl/litigation-guardians>>.

²¹¹ Office of the Public Advocate, *Litigation guardian*, (Website page). <<https://www.publicadvocate.vic.gov.au/guardianship-and-administration/litigation-guardian>>.

²¹² NCAT Guideline 2 'Representatives for people who cannot represent themselves (GALs)', December 2021.

²¹³ ACT Civil and Administrative Tribunal, *Litigation guardian*, (Website page) <<https://www.acat.act.gov.au/what-to-expect/representation-and-advice/litigation-guardian>>.

Key issues

Access to justice and fair process in executive decision making requires that a party to proceedings understands:

- the significance of the proceedings
- what decision they are seeking
- that the decision maker requires facts that can be proved to be put before them
- that there might be legal expenses incurred, and
- that they might not be successful.²¹⁴

A person with disability may need extra support to understand the proceedings in order to achieve access to justice and fair process. Wherever possible, this support should be provided in a manner that empowers and enables the person to exercise choice and control in relation to the proceedings and participate in their own capacity.

In rare cases, a party may be unable to meaningfully participate in proceedings without a representative. In circumstances where a party cannot find or engage their own representative, or their representative withdraws or is removed from the proceedings, a matter may be unable to continue. This can result in the matter being held in abeyance. An ability to appoint a litigation guardian on the tribunal's own motion, accompanied by appropriate safeguards, would ensure that a claimant is still able to access administrative review in these circumstances.

Should the new body be given the power to appoint a litigation guardian where necessary, views are sought on the operation of the power, including the mechanism for appointment, options for support prior to appointment of a litigation guardian, appropriate safeguards, requirements for appointees and funding options.

Discussion questions

65. How can the new body ensure that a party with a disability is supported to participate in proceedings in their own capacity?
66. Should the new body be able to appoint a litigation guardian for a party where necessary? If so, what should the requirements and process be for the appointment of a litigation guardian?

Other matters

Discussion questions

67. Do you have any other suggestions for the design and function of a new administrative review body?

²¹⁴ Federal Circuit and Family Court of Australia, *Family Law: Litigation Guardians*, (Website page) <<https://www.fccoa.gov.au/fl/litigation-guardians>>.

Glossary

Legislation

Abbreviation	Definition
AAT Act	<i>Administrative Appeals Tribunal Act 1975</i>
AAT Regulation	<i>Administrative Appeals Tribunal Regulation 2015</i>
Migration Act	<i>Migration Act 1958</i>
PPL Act	<i>Paid Parental Leave Act 2010</i>
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013</i>
PS Act	<i>Public Service Act 1999</i>

Reports

Abbreviation	Definition
ARC Better Decisions Review	The Administrative Review Council's 1995 Better Decisions: Review of Commonwealth Merits Review Tribunals
Bland Report	The 1973 Report of the Committee on Administrative Discretions led by Sir Henry Bland C.B.E.
Callinan Review	The 2018 statutory review under section 4 of the <i>Tribunals Amalgamation Act 2015</i> led by The Hon Ian Callinan AC KC
Kerr Report	The 1971 Report of the Commonwealth Administrative Review Committee led by the Hon Justice John Kerr C.M.G.
Metcalf Review	The 2017 Review of Legislative Options to Harmonise Procedures in the Administrative Appeals Tribunal led by Mr Andrew Metcalfe AO

Senate Committee Report	The 2022 Senate Legal and Constitutional Affairs Legislation Committee's Interim Report on the performance and integrity of Australia's administrative review system
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Regular Terms

Abbreviation	Definition
2015 amalgamation	The 2015 amalgamation of the AAT and the MRT-RRT and SSAT
AAT	Administrative Appeals Tribunal
ADR	Alternative Dispute Resolution
ARC	Administrative Review Council
APS	Australian Public Service
Code of Conduct	Conduct Guide for AAT Members
FCFCOA	Federal Circuit and Family Court of Australia
Federal Court	Federal Court of Australia
FOI	Freedom of Information
former-MRT-RRT	The former Migration Review Tribunal and Refugee Review Tribunal
former-SSAT	The former Social Security Appeals Tribunal
IAA	Immigration Assessment Authority
MRD	Migration and Refugee Division of the AAT
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme
NTCAT	Northern Territory Civil and Administrative Tribunal

QCAT	Queensland Civil and Administrative Tribunal
SAT	State Administrative Tribunal (WA)
SACAT	South Australian Civil and Administrative Tribunal
SSCSD	Social Services and Child Support Division of the AAT
TASCAT	Tasmanian Civil and Administrative Tribunal
Tier 1 review	First external merits review of a government decision
Tier 2 review	Second external merits review of a government decision
VRB	Veterans' Review Board
VCAT	Victorian Civil and Administrative Tribunal