



Australian Government
Administrative Review Council

Administrative Review Council Migration Inquiry

Issues Paper

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Acknowledgement of Country

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 the Elders, past and present, and thank them for their ongoing contributions to the culture and prosperity of the Australian nation.

Glossary

Legislation

Abbreviation	Definition
AAT Act	<i>Administrative Appeals Tribunal Act 1975 (Cth)</i>
ART Act	<i>Administrative Review Tribunal Act 2024 (Cth)</i>
ART Bill	Administrative Review Tribunal Bill 2024
ART (CTP 1) Bill	Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Bill 2024
ART (CTP 1) Act	<i>Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024 (Cth)</i>
Migration Act	<i>Migration Act 1958 (Cth)</i>

Other terms

Abbreviation	Definition
AAT	Administrative Appeals Tribunal
AGD	Attorney General's Department
ART	Administrative Review Tribunal
Council	Administrative Review Council
EOT	Extension of time
GAP	Guidance and Appeals Panel

Department	Department of Home Affairs
IAA	Immigration Assessment Authority
IRT	Immigration Review Tribunal
MRD	Migration Review Division
MRT	Migration Review Tribunal
Parliamentary Committee inquiries	House of Representatives Standing Committee on Social Policy and Legal Affairs, Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 and Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into Administrative Review Tribunal Bill 2023 [Provisions] and related bills
RRT	Refugee Review Tribunal
Senate Committee	Senate Legal and Constitutional Affairs Legislation Committee
SPP	Special Procedural Provision, as defined in paragraph 1.4.

1. Introduction

1.1 On 4 March 2025, the then Attorney-General, the Hon Mark Dreyfus KC MP, wrote to the Chair of the Administrative Review Council ('Council') to request that the Council inquire into the amendments to the *Migration Act 1958* (Cth) ('Migration Act') in the *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Bill 2023* (Cth) ('ART (CTP 1) Bill'). The Attorney-General's request followed a recommendation made by the Senate Legal and Constitutional Affairs Legislation Committee ('Senate Committee') in its inquiry into the Administrative Review Tribunal Bill 2023 (Cth) ('ART Bill') and the ART (CTP 1) Bill:

The committee recommends that, on the establishment of the Administrative Review Council, the Australian Government should refer to the Council the amendments to the Migration Act 1958 in the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2024 and the matters raised in evidence to this committee regarding the operation of the Administrative Review Tribunal in relation to migration and asylum matters.¹

1.2 On 14 October 2024 the ART Bill and the ART (CTP 1) Bill were enacted as the *Administrative Review Tribunal Act 2024* (Cth) ('ART Act') and the *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (Cth) ('ART (CTP 1) Act'). The primary change effected by the Acts was the establishment of the Administrative Review Tribunal ('ART'), replacing the Administrative Appeals Tribunal ('AAT') as the peak federal merits review tribunal.

1.3 On 19 May 2025, the Council decided to inquire and report on this matter.

Scope

1.4 The terms of reference of the Council's inquiry are provided in **Appendix A**. By way of explanation, the Council's inquiry will examine procedure relating to review by the ART of migration and protection decisions. Specifically, the Inquiry will examine the desirability of amendments made to the Migration Act by the ART (CTP 1) Act. Most of these amendments re-enacted but streamlined existing provisions of the Migration Act specifically applying in review by the AAT of migration and protection decisions.² Some introduced additional provisions applying to ART review of migration and protection decisions, differing from those applying in the ART's other jurisdictional areas. Collectively, these migration related provisions in the ART (CTP 1) Act may be called the special procedural provisions ("SPPs"). In order to evaluate the SPPs, the Inquiry will consider the history and reasons for the introduction of the SPPs; their impact on procedural fairness in the review process; and the impact of merits review

¹ Parliament of Australia Senate Standing Committee on Legal and Constitutional Affairs *Administrative Review Tribunal Bill 2023 [Provisions] and related bills* Report (May 2024) Recommendation 2.

² These provisions were introduced much earlier, by the *Migration Reform Act 1992* (Cth) and the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth) and subsequent amending statutes. The 1992 provisions were intended to provide greater clarity and consistency to migration and protection decisions by eliminating the legal uncertainties that may arise from the common law principles of procedural fairness, while retaining fair, efficient and legally certain decision-making procedures: Explanatory Memorandum, Migration Legislation Amendment (Procedural Fairness) Bill 2002 2.

on primary decisions made in the Department of Home Affairs; and the ongoing impact of the SPPs with respect to the effectiveness and efficiency of review by the ART. The Inquiry will examine the justifications for and effectiveness of the SPPs, considered alone and within the ART more generally, and within the broader context of the federal system of administrative review. The SPPs that are the subject of inquiry are:

- (i) the exhaustive statement of the natural justice hearing rule: s 357A;
- (ii) information and invitation given by the ART: s 359A;
- (iii) time limitations on making an application for ART review: ss 347(3)–(5), 202(5), 500(6B);
- (iv) provision for issue of a conclusive certificate removing a reviewable decision from review by the ART: s 339;
- (v) requirements for the ART in drawing inferences when a new claim or evidence is raised in review of a reviewable protection decision: s 367A;
- (vi) provision for procedure under Migration Act to prevail over discretion as to procedure of the ART: s 357A(2A);
- (vii) requirements for hearing by ART of a reviewable protection decision to be in private, and non-disclosure of identifying information: s 367B, 369;
- (viii) provisions dis-applying rules under the ART Act for giving notice of a decision: ss 66(6), 127(4), 134(7B), 137M(4), 137S(3);
- (ix) provisions dis-applying the requirements under the ART Act for the primary decision-maker to give reasons on request for an ART reviewable decision: ss 66(7), 127(5), 137M(5), 137S(4), 197D(7), 500(6A);
- (x) provisions dis-applying and replacing certain provisions of the ART Act, relating to notice of ART applications for review, reasons for the decision, disclosure of documents to the ART and relief: ss 336P (except for s 336P(I), 374, 500(6FB);
- (xi) specific requirements relating to access by an applicant to documents: s 362A;
- (xii) restriction of the ability of the ART to have regard to documents: s 500(6H),(6J),(6K);
- (xiii) provision dis-applying facility for non-participating party to elect to participate in ART review: s 348A;
- (xiv) exclusion of the right to examine or cross-examine: s 366D;
- (xv) restrictions on relief available in ART review: ss 349, 500(6G),(6L),(6M)
- (xvi) restrictions on applications to the Guidance and Appeals Panel ('GAP') of the ART: s 500AA;
- (xvii) special provisions relating to the ART's statement of reasons for its decision and its notification: ss 368, 368A, 368B;
- (xviii) special provisions relating to reinstatement of an application for ART review: s 368C.

Making a submission

1.5 The Council invites submissions responding to the questions in this Issues Paper. You do not need to answer every question, and you are welcome to respond only to those questions that are relevant to you or your organisation.

1.6 You can provide a submission via the consultation webpage at <https://consultations.ag.gov.au/>. We encourage you to provide a response to the consultation questions through the online form. Alternatively, you may upload a written submission.

1.7 Submissions received will be handled by the Administrative Review Council Secretariat within the Attorney-General's Department and shared with the Council.

1.8 Consultation closes on **Tuesday, 27 January 2026**.

Publication of submissions

1.9 You can submit your response under your name or anonymously. Your submission may be published unless you request that your submission be kept confidential or if the Council considers that the submission should not be made public. The Council may also refer to responses, and the names of submitters (if provided) in its inquiry report.

1.10 The Council reserves the right not to publish submissions which contain personal information, inappropriate or defamatory content, or which may otherwise be unlawful to publish. The Council may also redact parts of published submissions if appropriate.

1.11 Please do not provide detailed information about personal legal matters or cases, or personal information relating to third parties. Please do not provide information that is the subject of legal restriction. Where that information is provided, the Council may not be able to consider your submission in its review. If we receive a high volume of identical or template responses we may publish a representative sample. Submissions may be subject to freedom of information requests, or requests from the Parliament.

1.12 Personal information shared through the consultation process will be treated in accordance with the *Privacy Act 1988* (Cth). 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. A Privacy collection notice, available on the consultation webpage, outlines how we will collect your personal information, how it will be used and who it may be disclosed to. By participating in the consultation, you are indicating you have read and agree to the Privacy collection notice.

1.13 The Privacy collection notice, available below, outlines how we will collect your personal information, how it will be used and who it may be disclosed to. To participate in the consultation, either via the online survey or by providing feedback via email, you must confirm that you have read and agree to the Privacy collection notice.

List of questions

Aspects of the primary decision-making process

1. What is your experience with the primary decision-making process relating to visas in the Department of Home Affairs ('Department'), including but not limited to:
 - (a) submitting a complete application;
 - (b) the number of departmental officers handling a visa application; and
 - (c) timeliness of decisions?
2. What do you expect of the primary decision-making process?

3. Are there any changes to primary decision-making that you consider could improve the process?

Tribunal review

4. What is your experience in relation to time limits applying for review of migration or protection decisions in the ART?
5. What is your experience with the provisions governing when adverse information must be disclosed to an applicant?
6. What is your experience with requesting the Department to provide access to documents it has given to the ART for the purpose of the review?
7. What are your views as to the fairness of the process in the ART's review of migration and protection decisions?
8. What is your experience in relation to:
 - (a) raising new claims in the review by the ART;
 - (b) receiving notification of decisions;
 - (c) applying for reinstatement of a decision?
9. Do the current procedures for review of migration and protection reviewable decisions promote the ART's objectives under the ART Act? What changes could be made to improve implementation of the objectives?
10. Are there any changes that could be made to the current procedures for migration and protection decision-making in the ART to improve the process or outcomes for individuals?

Access to the Guidance and Appeals Panel (GAP)

11. What is your experience with the current procedures for access to the GAP in the migration and protection jurisdictional areas?
12. How appropriate are the current procedures in enabling emerging and significant issues to be addressed through the GAP and in promoting consistency in ART decision-making in the migration and protection jurisdictional areas?
13. How effectively do the current procedures support consistency in ART decision-making?

Other special procedural provisions

14. What is your experience with any of the Special Procedural Provisions ('SPPs') applying in the ART? This includes the operation of sections 357A and 359A, and other sections listed in paragraph 1.4 (Scope). Have you found that the SPPs enable matters to be resolved in a timely and effective manner?
15. Have you experienced any changes to how migration and protection matters are being carried out in the ART, compared with the former AAT? If so, what are these changes?
16. What aspects of the SPP arrangements for statutory hearing procedures are working well?

17. Are there any changes that could be made to the SPPs to improve or better support the timely and effective resolution of matters in the migration and protection jurisdictional areas?
18. When questions or issues about the SPPs arise in an ART hearing, are they easy to resolve?

2. Background

Administrative Review Tribunal and review of migration and protection decisions

2.1 The ART Act states the following objectives of the ART:

9 Objective

The Tribunal must pursue the objective of providing an independent mechanism of review that:

- (a) is fair and just; and*
- (b) ensures that applications to the Tribunal are resolved as quickly, and with as little formality and expense, as a proper consideration of the matters before the Tribunal permits; and*
- (c) is accessible and responsive to the diverse needs of parties to proceedings; and*
- (d) improves the transparency and quality of government decision-making; and*
- (e) promotes public trust and confidence in the Tribunal.³*

2.2 This differs from the objective of the former AAT in that it emphasises the need to respond to the diverse needs of parties in the ART process, and recognises the important role of the ART in promoting the transparency and quality of government decision-making.⁴ The objective of resolving applications quickly and informally, is balanced against the need for the ART to properly consider each matter before it.⁵

2.3 The ART (CTP 1) Act altered some broader structural aspects of the review of migration and protection decisions. The ART CTP 1 Act substantively consolidated former Parts 5 and 7 of the Migration Act. It abolished the Immigration Assessment Authority ('IAA'), which had existed within the administrative structure of the AAT since April 2015,⁶ determining only 'fast track' applications for visas which were automatically referred to it. By its constitution the IAA lacked the independence of the AAT and its procedures were more restrictive than the SPPs. The statutory procedural provisions raised complex questions of interpretation and their relationship to common law principles of procedural fairness, generating numerous disputes culminating in High Court decisions.⁷ The remaining very small number of 'fast track' cases have been absorbed into the general ART caseload. There is no need for the Inquiry to consider the IAA further.

³ ART Act s 9.

⁴ *Administrative Appeals Tribunal Act 1975* (Cth) ('AAT Act') s 2A; Revised Explanatory Memorandum ART Bill 36–37.

⁵ Revised Explanatory Memorandum ART Bill 36.

⁶ Schedule 2 to the ART Act repealed Part 7AA of the Migration Act, abolishing the IAA.

⁷ See, for example, *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439; *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76.

2.4 With regard to procedures for obtaining review, and the procedure applying in the review process in the ART, the ART (CTP 1) Act largely replicated existing specialised provisions applying in review of migration and protection decisions. From the 1990s, special procedures for AAT review of migration decisions were provided for in Part 5 of the Migration Act. Very similar special procedures for review of protection decisions were provided for in Part 7 of the Migration Act. The ART CTP 1 Act removed Part 7 and streamlined the provisions of the two Parts into what are now the SPP provisions in Part 5 of the Migration Act, applying in both the migration and protection jurisdictional areas of the ART.⁸ The President of the ART has made practice directions about procedure in the migration and protection jurisdictional areas, giving further detail as to how many of the SPPs operate.⁹ An overview of the history of migration and protection merits review provisions is provided in **Appendix B**.

Migration and protection decisions reviewable in the ART

2.5 There are eight jurisdictional areas established in the ART for merits review of decisions. They include a migration jurisdictional area and a protection jurisdictional area.¹⁰ These two jurisdictional areas replace the former Migration and Refugee Division of the former AAT.¹¹

2.6 In its migration jurisdictional area the ART reviews ‘reviewable migration decisions’, which broadly include decisions refusing, cancelling or suspending visas other than protection visas (such as student visas, spouse visas and business visas).¹² In its protection jurisdictional area, the ART reviews ‘reviewable protection decisions’ which broadly are decisions concerning protection visas. Protection visas are granted on the basis that the applicant is a refugee under the Refugees Convention as amended by the Refugees Protocol and satisfies certain other criteria.¹³

2.7 The President of the ART has discretionary powers to refer an ART proceeding or an ART decision to the GAP.¹⁴ These discretionary powers are considered in more detail below.

2.8 The Council’s Inquiry is limited to evaluation of how the SPPs operate in the review of these migration and protection reviewable decisions. However, the Council welcomes views on the appropriateness or effectiveness of the SPPs in their form prior to the enactment of the ART Act and the ART (CTP 1) Act as special provisions regulating procedure in the AAT in its Migration and Refugee Division. Comparison with the procedures that ordinarily operate in the other jurisdictional areas of the ART, without the modifications of the ART Act effected by the SPPs, may also be instructive. The Council’s evaluation of the SPPs will be guided by the objectives of the ART.

⁸ Revised Explanatory Memorandum ART Bill 4.

⁹ Administrative Review Tribunal Practice Direction No 2 of 2025: Common Procedures Practice Direction (16 April 2025) para 4.9; Administrative Review Tribunal Practice Direction No 2 of 2025: Migration, Protection and Character Practice Direction (21 May 2025).

¹⁰ ART Act s 196(1)(a), (1)(c), (1)(e).

¹¹ AAT Act s 17A(b); Revised Explanatory Memorandum ART Bill 175.

¹² Migration Act s 338.

¹³ Migration Act s 338A.

¹⁴ ART Act ss 122, 123, 128.

Intentions in relation to the special procedural provisions

- 2.9 In understanding intentions in enacting the SPPs in the ART (CTP 1) Act, the context of the enormous caseload for migration and protection review should not be overlooked. Review of migration and protection reviewable decisions represents 91% of the ART's total caseload.¹⁵ This is in line with the high volume of decision-making in the Department. While the overall proportion of visas refused and cancelled is small, the large number of decisions means that a significant number of matters proceed to external review.¹⁶ During the 2024–25 period, the Department finalised decisions concerning 9,453,100 temporary and permanent visas and 30,465 onshore protection visas.¹⁷ Approximately half of all review applications to the Tribunal are related to Home Affairs portfolio decisions,¹⁸ and migration is reported to be the most litigated area of Commonwealth decision-making.¹⁹
- 2.10 The intention in establishing the jurisdictional areas of the ART was both to support more harmonised practices and procedures and to provide greater flexibility across the ART for the hearing of matters and in the assignment of Member resources.²⁰ This extended to the flexibility of the ART President to establish one or more lists as subareas within a jurisdictional area, grouping similar types of decisions or matters together at discretion.²¹
- 2.11 The general provisions in the ART Act relating to constitution of the ART and appointment of Members were intended to support the reduction of delays and backlogs by simplifying processes and procedures for ART Members and registry staff, enabling Members to be more flexibly allocated to hear a range of matters across the ART and to respond to caseload demands.
- 2.12 The general procedural powers conferred on the ART gave broader discretion than was the case under the former AAT Act. The discretionary powers relating to hearing and case management processes in the ART were in general intended to increase access to justice and promote the right to a fair and public hearing and the right to an effective remedy.²² Powers conferred on the ART included power to give notices, hold directions hearings and conferences, refer matters to dispute resolution and other ART 'case events'. In addition, the ART was given broad dismissal and directions powers. The Revised Explanatory Memorandum for the ART (CTP 1) Bill states that in relation to migration provisions, the intention in enacting the ART Act

¹⁵ Administrative Review Tribunal [ART Caseload Report](#) (August 2025) 1.

¹⁶ Australian Government Department of Home Affairs *Administration of the Immigration and Citizenship Programs* (October 2025) 5; Administrative Review Tribunal [ART Caseload Report](#) (August 2025) 1.

¹⁷ Australian Government Department of Home Affairs *Administration of the Immigration and Citizenship Programs* (February 2025) 5, 37.

¹⁸ Attorney-General's Department Submission No 6 to House of Representatives Standing Committee of Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023* (January 2024) (repeated in the Attorney-General's Department Submission No 21 to Senate Standing Committee on Legal and Constitutional Affairs *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023* (January 2024)) ('Attorney-General's Department Submission') 11.

¹⁹ Australian Government Department of Home Affairs, *Review of the Migration System* (March 2023) 177.

²⁰ Revised Explanatory Memorandum ART Bill 175.

²¹ ART Act s 196(2)(a); Revised Explanatory Memorandum ART Bill 176.

²² Revised Explanatory Memorandum ART Bill 14, referring to ART Act Pt 4 Div 5–6.

and the ART(CTP 1) Act, is to 'significantly improve the experience of those seeking review of government decisions'.²³ However, this is qualified in the Revised Explanatory Memorandum by the statement that the intention in relation to review of migration and protection decisions is to 'efficiently and effectively manage the high volume of reviewable migration and protection decisions'.²⁴ In these jurisdictional areas the ART would have more flexibility.

2.13 These general procedural powers of the ART were expressed in the ART Act to be available in all jurisdictional areas, with qualifications in the intelligence and security jurisdictional area. However, in relation to the migration jurisdictional area and the protection jurisdictional area the ART (CTP 1) Act provided for extensive dis-application and replacement of those general procedural powers. The ART (CTP 1) Act replicated provisions of the existing Parts 5 and 7 of the Migration Act, which had modified certain discretionary powers of the AAT in its Migration and Refugee Division. Many of those provisions displace common law procedural fairness or restrict the content of a fair hearing, by complex requirements relating to notice, access to information and opportunities to present a case. Some restrictive provisions were added to those that existed. These migration and protection related provisions in the ART (CTP 1) Act are the SPPs, which restrict procedural rights and opportunities of applicants in the migration and protection jurisdictional areas.

2.14 In 2015, when migration and protection review was transferred to the AAT, the creation of the specialised Migration and Refugee Division was justified on the basis that it is 'essential to managing the large and varied [migration and protection] caseload'.²⁵ It was also noted at the time that separate procedures for migration and protection matters were required to maintain fair and efficient review, as they would provide certainty for the AAT and its users and promote consistency in decision-making.²⁶ Departmental reports had acknowledged that migration and protection applicants are likely to face particular challenges when accessing the merits review system.²⁷

2.15 The Revised Explanatory Memorandum notes that there were 'unique policy drivers in the immigration caseload' that warranted additional procedural restrictions on applicants as justifications underpinning the previous system for migration and protection reviews.²⁸ The Revised Explanatory Memorandum states that the aim is to 'standardise the availability of Tribunal powers and procedures for migration and protection matters, supporting consistency and collaboration across the Tribunal'.²⁹ This is a reference to the streamlining of former Parts 5 and 7 of the Migration Act which contained similar parallel SPPs applying to migration and protection review respectively in the AAT. The SPPs in the current Part 5 of the Migration Act,

²³ Revised Explanatory Memorandum ART (CTP 1) Bill 1, 88.

²⁴ Revised Explanatory Memorandum ART (CTP 1) Bill 1, 88.

²⁵ Revised Explanatory Memorandum Tribunals Amalgamation Bill 2014 (Cth) 4.

²⁶ Revised Explanatory Memorandum Tribunals Amalgamation Bill 2014 (Cth) 4; Department of Home Affairs Submission to Attorney-General's Department, *Statutory Review of the Tribunals Amalgamation Act 2015* 2.

²⁷ Australian Government Department of Home Affairs [Review of the Migration System](#) (March 2023) 76, 82, 176; Department of Home Affairs *Rapid Review into the Exploitation of Australia's Visa System* (March 2023) 26–28.

²⁸ Department of Home Affairs Submission to Attorney-General's Department, *Statutory Review of the Tribunals Amalgamation Act 2015* 4.

²⁹ Revised Explanatory Memorandum ART (CTP 1) Bill 62.

inserted by the ART CTP 1) Act, apply to ART review of both migration and protection reviewable decisions. However, the statement as to standardisation does not explain why the procedures of the ART are to be different in its migration and protection jurisdictional areas by comparison with other jurisdictional areas. The Government's submission to the Senate Committee stated that the SPPs were considered essential given the volume, distinct nature, certainty of a person's visa status and complexity of visa-related decisions.³⁰

3. Key issues

Absence of internal review in the Department of Home Affairs

- 3.1 A decision made by the Department to refuse, cancel or not to cancel a visa is final and cannot lawfully be changed or corrected internally.³¹ There is no provision for an applicant to seek internal review or reconsideration. Without the option of internal review, an individual who is the subject of a primary migration or protection decision by the Department can only seek review directly by the ART.³²
- 3.2 At general law a decision-maker who forms a view that his or her decision is infected by jurisdictional error, may treat the decision as invalid and no decision at all.³³ This leaves the decision-maker free to re-exercise the power, this time lawfully. It is departmental policy that a departmental officer must seek legal advice before revisiting a final decision, notwithstanding a view that it is affected by legal error.³⁴ This approach reinforces that review by the ART is generally the only option available to an individual who is the subject of a migration reviewable decision or a protection reviewable decision.

Aspects of the primary decision-making process

- 3.3 Certain aspects of the primary decision-making procedure raise questions about the degree of flexibility afforded to applicants and the reasons for delay. These include the requirements for submitting a valid application, the number of departmental officers involved in processing the application and timeliness in making decisions.
- 3.4 Currently, decision-makers are encouraged to promote 'lodgement of complete applications' when considering whether to grant or refuse a visa, noting that 'processing times can be

³⁰ Attorney-General's Department submission No 6 to House of Representatives Standing Committee of Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023* (January 2024) 12.

³¹ Migration Act ss 67(4), 138(4).

³² Migration Act s 347.

³³ *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

³⁴ *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; Jurisdictional error and legal advice must be sought in PAM3-GenGuideA-Visa application.

influenced by the volume and quality of visa applications received, as the Department is able to process decision-ready applications more efficiently'.³⁵ Departmental policy specifies that an individual should generally be given only one opportunity to fix an incomplete application, which involves the issue to the applicant of a 'request for further information'. This approach is based on a view that any corrections required can be quickly and easily resolved.³⁶

3.5 The application form for a visa is lengthy, between 15 and 34 pages, and requires a wide range of information to be provided. The length and complexity of the application form may present challenges for many applicants and potentially lead to confusion. There is an issue as to the reasonableness of allowing an applicant a single opportunity to rectify mistakes, oversights or inadequacy of detail.

3.6 Different decision-makers that may handle parts of a visa application before a decision is made. A departmental officer other than the primary decision-maker may undertake health and character checks.³⁷ Some aspects of the decision depend on receipt of assessment or advisory reports from external government agencies or experts, such as medical officers of the Commonwealth and ASIO.³⁸ This may contribute to a delay in reaching a final primary decision.

3.7 The Department reports that 'new policy settings, promoting lodgement of complete applications and streamlining processes' will result in processing times fluctuating,³⁹ and refers to 'time taken to assess increased lodgement volumes and in some programs ministerial direction'.⁴⁰ However, even with limitations on opportunities for applicants to complete or amend their applications, the processing of applications may take longer than expected. For example, processing times for visa applications from 1 July 2024 to 31 December 2024, by comparison with the same period in 2023–24, increased from 7 months to 10 months for partner visas (first stage); Student visas increased from 17 days to 40 days; and from 16 days to 48 days for temporary resident (skilled) visas.⁴¹

3.8 Unexplained delay in primary decision-making may discourage or deter an applicant from pursuing ART review.

³⁵ Australian Government Department of Home Affairs *Administration of the Immigration and Citizenship Programs* (February 2025) 6; Australian Government Department of Home Affairs *Administration of the Immigration and Citizenship Programs* (October 2025) 5, 18; Australian Government Department of Home Affairs Annual report 2024–25 (October 2025) 57; Migration Act s 46.

³⁶ Assessing visa application validity/invalidity in PAM3-GenGuideA-Visa application.

³⁷ Ministerial delegation and the role of officers in PAM3-GenGuideA-All visas-Visa application procedures.

³⁸ Migration Regulations pt 5 div 5.9 sch 4 pic 4002, reg 2.25A; Ministerial delegation and the role of officers in PAM3-GenGuideA-All visas-Visa application procedures.

³⁹ Australian Government Department of Home Affairs *Administration of the Immigration and Citizenship Programs* (February 2025) 6.

⁴⁰ Australian Government Department of Home Affairs Annual Report 2024-25 (October 2025) 57.

⁴¹ Australian Government Department of Home Affairs *Administration of the Immigration and Citizenship Programs* (February 2025) 6.

3.9 It is a function of the Principal Registrar of the ART to collect statistics, as part of the corporate and registry services of the ART.⁴² It was suggested to the Standing Committee of Social Policy and Legal Affairs in its inquiry that the ART could share with agencies data on primary decisions that are overturned. This would assist agencies to identify and address patterns in the quality of primary decision-making.⁴³

3.10 The quality and accuracy of primary decision-making affects the volume of review applications made to the ART, and in turn the ART's ability to manage its caseload. The Council is interested in feedback on the primary decision-making processes in the Department, and whether and how they could be improved. The Council is also interested in feedback regarding the extent to which applicants or practitioners who assist them are aware of steps taken by the Department to improve its processes.

Council consideration and questions

3.11 The Council seeks views on whether there are any steps, including statutory amendments, that could be taken to improve the quality and timeliness of primary decision-making in granting or refusing visas, including amendments that could reduce the number of decisions that progress to external review.

3.12 The Council also seeks views as to whether there are any aspects of the primary decision-making process or policy settings that may affect applicants' decisions about whether to pursue merits review in the ART.

Questions

1. What is your experience with the primary decision process in Home Affairs of making decisions with respect to visa applications, including but not limited to:
 - (a) submitting a complete application;
 - (b) the number of departmental officers handling a visa application; and
 - (c) timeliness of decisions?
2. What do you expect of the primary decision-making process?
3. Are there any changes that you consider could improve the process?

⁴² ART Act s 226(2)(m); Revised Explanatory Memorandum ART Bill 210.

⁴³ Kaldor Centre Data Lab Submission No 11 to House of Representatives Standing Committee of Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023* (January 2024) 5.

Access to review and limits on review powers

- 3.13 The key forms of review are merits review and judicial review. Merits review allows for review of the facts, not just correction of legal error, and is generally intended to be simpler, quicker and cheaper. It is the preferred review option for most people. The scope for judicial review of migration and protection decisions falls outside the terms of the Inquiry. In some instances, applicants must apply for judicial review or Ministerial intervention if the ART lacks jurisdiction to review a decision.⁴⁴
- 3.14 However, merits review jurisdiction can only be conferred by statute. Not all migration and protection decisions are reviewable by the ART. When a decision is reviewable by the ART, the Act under which the decision is made can modify or exclude the procedures that normally apply in the ART. Such modification or exclusion has been common in migration review.
- 3.15 The entitlement to seek review by the ART and the time within which an application must be lodged, differs for applicants in migration and protection matters, by comparison with the generally applicable provisions. There are also special provisions relating to the ability to request and be provided with information relevant to the review and decision. This section focuses on these two procedural areas. While within the Inquiry's terms of reference, and matters on which the Inquiry will report, the following topics are not specifically addressed in this Issues Paper: procedural modifications relating to examination and cross-examination of witnesses; hearings in private and non-publication of protection decisions; and the issue of certificates in the national interest.⁴⁵

Timeframes

- 3.16 Ordinarily, and in most ART jurisdictional areas, an application for review must be lodged within 28 days of the making of the reviewable decision.⁴⁶ The general time for lodging an application for review of migration and protection reviewable decisions is 28 days from the date of notification of the decision.⁴⁷ There are significant exceptions. In the case of a decision to refuse or cancel a visa based on character grounds, the time limitation of 9 days remains.⁴⁸ This was not changed by the latest amendments to the Migration Act. The time limitation for applicants in detention was increased from 2 to 14 days by the *Administrative Review Tribunal (Miscellaneous Measures) Act 2025* (Cth).⁴⁹
- 3.17 There is no provision for seeking an extension of time to apply for ART review of migration or protection reviewable decisions. The existing provisions express exclusion of extensions

⁴⁴ Migration Act s 351.

⁴⁵ Migration Act s 339, 366D, 367B, 369; For example, the procedure for notifying an applicant of a decision and whether reasons for the decision are to be given: Migration Act s 66(6)-(7), 127(4)-(5), 134(7B), 137M(4)-(5), 137S(3)-(4), 197D(7), 202(5), 336P, 347(3)-(5), 500(6A)-(6B).

⁴⁶ ART Act s 18(3).

⁴⁷ Migration Act s 347(3)(b).

⁴⁸ Migration Act former and current s 500(6B).

⁴⁹ Migration Act s 347(3)(a). For the former provision, see *Migration Regulations 1994* (Cth) ('Migration Regulations') former reg 4.10(2)(a).

of time are maintained.⁵⁰ By contrast, in other jurisdictional areas, the ART has a discretionary power to extend the time for lodging an application for review.⁵¹

3.18 The Revised Explanatory Memorandum for the ART (CTP 1) Bill states that the intention in fixing these time limitations is to promote clarity, consistency and accessibility of review across jurisdictional areas of the ART and to expedite review.⁵² The government's submission to the Senate Committee was that the policy choice of a 9-day time limitation upon ART review of character decisions should be maintained because '[t]he expedited review ... to be as efficient as possible, while also being fair, reflects the sensitive nature of [character related visa] matters'.⁵³ The 9 day period for applicants in detention is stated to 'reflect the prioritisation of resolving the immigration status of unlawful non-citizens...[and] provides [detainees] the opportunity to consider their review rights and to access review, while minimising the amount of time spent in detention. It also minimises the opportunity for exploitation of the review timeframe to delay departure from Australia.'⁵⁴

3.19 An opposing view is that there was a missed opportunity to improve procedural fairness and to reduce disparities between access to ART review of migration and protection decisions and access to ART review of other types of decisions.⁵⁵ It seems likely that the time limitations applying to review of character decisions and decisions affecting applicants in detention may leave some people unable to seek review or obtain assistance in preparing an application.⁵⁶ The time limitations may operate to increase barriers to administrative review for a group of applicants who in any event may face difficulty in making an application to the ART without assistance.⁵⁷

3.20 The Council seeks feedback on the current time limitations on seeking ART review of migration and protection reviewable decisions, as well as the restrictions on seeking extensions of those time limitations.

⁵⁰ Migration Act s 347(5), excluding the extension of time provision in s 19 of the ART Act.

⁵¹ ART Act s 19.

⁵² Revised Explanatory Memorandum ART (CTP 1) Bill 12-13.

⁵³ Attorney-General's Department submission No 6 to House of Representatives Standing Committee of Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023* (January 2024) 13.

⁵⁴ Attorney-General's Department submission No 6 to House of Representatives Standing Committee of Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023* (January 2024) 12.

⁵⁵ Migration Act s 500(6B); Law Council of Australia Submission No 28 to House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023* 60.

⁵⁶ Law Council of Australia Submission 28 to House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023* (January 2024) 20; Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023* (February 2024) House of Representatives Report 3.34, 58.

⁵⁷ Daniel Ghezelbash, Mia Bridle and Keyvan Dorostkar, "The Administrative Review Tribunal Bill: A missed opportunity for ending migration exceptionalism and creating a unified approach for administrative review", *Australian Public Law Web Page* (20 March 2024).

Question

4. What is your experience in relation to time limits applying for review of migration or protection decisions in the ART?

Fairness in review

Limitation on requirement to disclose adverse information

- 3.21 Giving a person whose interests are affected by a decision a reasonable opportunity to know the case against them and respond, is the core requirement of the hearing rule of common law procedural fairness.⁵⁸ Disclosure of adverse information is one element of the hearing rule. Procedural fairness and the disclosure requirement operates generally in the ART.⁵⁹ However, s 359A(1) is a very specific statutory provision for a different procedure in the migration and protection jurisdictional area with respect to disclosure.
- 3.22 Section 359A(1)(a) of the Migration Act provides that the ART must give to an applicant, in the way the ART considers appropriate in the circumstances, clear particulars of any information that the ART considers would be the reason, or part of the reason, for affirming the decision that is under review. The ART is to ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review and invite the applicant to comment on it.⁶⁰ The disclosure requirement does not cover information that is not specifically about the applicant or another person, or that the applicant gave, or that is 'non-disclosable information'.⁶¹
- 3.23 The requirements of s 359A differ from those applying generally in other jurisdictional areas of the ART. The central section is s 55(1) of the ART Act, which provides that the ART must ensure that each party to a proceeding is given a reasonable opportunity to: (a) present the party's case; (b) access any information or documents to which the ART proposes to have regard in reaching its decision; and (c) make submissions and adduce evidence.⁶² This procedural requirement reflects the basic requirement of what common law procedural fairness ordinarily requires in administrative decision-making, including in the ART.⁶³ The basic idea of the hearing rule of procedural fairness is that an individual whose interests will be affected by a decision should be informed of the case against him or her and should have a reasonable opportunity to present a case. By comparison with s 55 of the ART Act, the requirements of s 359A are in important respects reduced (in limiting the kind of information

⁵⁸ *Kioa v West* (1985) 159 CLR 550.

⁵⁹ ART Act ss 23-30, 49-56.

⁶⁰ Migration Act s 359A(1)(b), (c).

⁶¹ 'Non-disclosable information' referred to in s 359A(4)(c), is defined in s 5 of the Migration Act. See also Revised Explanatory Memorandum ART CTP 1 Bill 11.

⁶² Migration Act s 359A(1).

⁶³ *Sullivan v Department of Transport* (1978) 20 ALR 323 at 342.

required to be disclosed) and in some respects enhanced (such as requiring the applicant to understand the information the ART discloses).⁶⁴

3.24 The government's submission to the Senate Committee was that s 359A(1) supports the 'efficient operation of the system of migration and protection reviews and in circumstances where factual information has already been exhaustively considered in the review application or tribunal hearings'.⁶⁵ However, when the ART reviews a departmental decision, there is no earlier tribunal hearing and there could be no exhaustive consideration in the applicant's application for ART review of the information withheld under s 359A(1).

Applicant's request for access to written material before ART

3.25 Section 362A of the Migration Act provides that an applicant is entitled to request the Department to provide access to written material given by the Department to the ART, for the purposes of the review.⁶⁶ The Department has a duty to provide the material requested. However, this is subject to s 375A (allowing the Minister to issue a certificate that it is contrary to the public interest for the information to be disclosed other than the ART) and s 376 (also allowing for the issue of a certificate but giving the ART a discretion to disclose the information to the applicant).

3.26 In other jurisdictional areas of the ART ordinarily s 23 of the ART Act applies. Lodgement of an application for review triggers a duty of the decision-maker to lodge with the ART a statement of reasons for the decision and the relevant documents in its possession.⁶⁷ This requirement makes unnecessary court-like processes of discovery. It works with other procedural provisions in the ART Act that reflect what common law procedural fairness would in any event require. It ensures disclosure by the decision-maker to the ART of relevant documents and the applicant is then entitled to access them under s 55(1)(b) of the ART Act. Usually the decision-maker automatically and at the same time, provides the reasons statement and the bundle of 'T documents' to the applicant as well as the ART.

3.27 The government's submission to the Senate Committee states that s 362A is intended to provide 'a standardised, simplified and expedited system for access to Tribunal files for all review applicants who request a copy'.⁶⁸ Further, given the volume of migration and protection matters, the request-based approach 'provides the appropriate balance between equity, fairness and accessibility, and the efficient and effective use of Government resourcing'.⁶⁹

⁶⁴ See *Minister for Immigration and Citizenship v Kumar* (2009) 238 CLR 448; *AYX16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 326.

⁶⁵ Attorney-General's Department Submission, 10.

⁶⁶ Migration Act s 362A; Revised Explanatory Memorandum ART (CTP 1) Bill 80.

⁶⁷ ART Act s 23.

⁶⁸ Attorney-General's Department Submission, 13.

⁶⁹ Attorney-General's Department submission No 6 to House of Representatives Standing Committee of Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023* (January 2024) 13.

- 3.28 An opposing view is that applicants in the migration and protection jurisdictional areas should be entitled to automatic disclosure of a reasons statement and bundle of T-documents in the same manner as applicants in other jurisdictional areas, subject only to the generally applicable provisions limiting disclosure of documents affected by security or public interest immunity. Whether this routinised approach has greater resource implications may need to be established.
- 3.29 The Council seeks feedback on whether s 362A requiring an applicant to *request* documents from the Department has been effective and fair. In particular, the Council seeks feedback on whether providing access to documents only in response to a request takes into account when and how applicants may become aware there is information that they should request.

Exhaustive statement of the natural justice hearing rule

- 3.30 Subsections 357A(1) and (2C) provide that Division 4 of Part 5 (ss 357A–367B) and ss 374, 375, 375A, 376 and Division 7 (so far as they relate to Division 4) of the Migration Act (called the ‘relevant provisions’) are an ‘exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with’, and do not require the ART to observe any principle or rule of common law relating to the matters the relevant provisions deal with’. If there is any inconsistency with certain stated provisions of the ART Act (including s 55) the relevant provisions in the Migration Act prevail.⁷⁰
- 3.31 While s 359A, together with s 362A, appears to be intended to operate as a substitute for what would be part of the content of the hearing rule of procedural fairness, s 357A makes very general provision as to whether the hearing rule applies at all in review by the ART of migration and protection reviewable decisions. The exclusion operates where the provisions of the Migration Act have ‘dealt with the matter’. Beyond those matters, common law procedural fairness may be implied to supplement the procedural provisions in the Migration Act. However, there appears to be limited scope for that where the ‘relevant provision’ is inconsistent with one of the identified sections of the ART Act, and one of those is s 55. The extent of the exclusion of procedural fairness effected by previous versions of s 357A has been the subject of voluminous litigation, and subsequent amendments of the section.⁷¹ The current version of s 357A also raises complex issues of interpretation.
- 3.32 The Revised Explanatory Memorandum states that s 357A ‘is intended to enhance the Tribunal’s ability to efficiently and effectively manage the high volume of reviewable migration and protection decisions, while providing fairness to genuine applicants’.⁷² The government’s submission to the Senate Committee, in support of retention of this SPP, was that it ‘provides

⁷⁰ Migration Act s 357A(2A).

⁷¹ For recent High Court reference to these issues, which has arisen in relation to a variety of similar provisions in the Migration Act, see *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 at [50]–[64]; *DVO16 v Minister for Immigration and Border Protection* (2021) 273 CLR 177 at [48].

⁷² Revised Explanatory Memorandum ART (CTP 1) Bill Item 151.

certainty and clarity to applicants and gives effect to the principle that a person should be given, and invited to comment on, adverse information which is “credible, relevant and significant” to the decision being reviewed’.⁷³

3.33 The words ‘credible, relevant and significant’ describe the kind of information, from a source other than the applicant, which is ordinarily required to be disclosed as part of the content of a fair hearing.⁷⁴ Subsection 55(1)(b) of the ART Act reflects this aspect of common law procedural fairness. The words are not part of the text of s 357A(1). Sections 359A and 362A do not guarantee such disclosure and may be inconsistent with s 55 of the ART Act. Rather, s 357A aims to exclude common law requirements and allow only for disclosure as required by s 359A or s 362A (and other sections to which they refer, such as those concerned with ‘non-disclosable information’). An item of information that is credible, relevant and significant may or may not in the circumstances of a case be disclosed or disclosable on request.

3.34 The Government’s submission to the Senate Committee states that retention of the exhaustive statement provision is intended to ‘promote consistent decision making by the Tribunal and Courts, while ensuring applicants are given a fair opportunity to present their case.’⁷⁵ Proponents of s 359A(1) also contend that it seeks to strike a balance between putting an applicant on fair notice and maintaining a manageable process that does not require excessive disclosure of material the Department holds in relation to the applicant and gives to the ART.

3.35 An opposing view is that previous versions of s 357A unnecessarily limited and complicated the process of review in the AAT.⁷⁶ Such provisions are difficult to apply in practise and raise complex issue of interpretation. They have had substantial resource implications for AAT members and staff, including training and a vast additional manual.⁷⁷ The previous versions of ss 357A, 359A and 362A did not lead to a reduction in judicial review applications but rather increased it, with no correlated reduction in the success rate in judicial review.⁷⁸ Data indicates

⁷³ Attorney-General’s Department submission No 6 to House of Representatives Standing Committee of Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023* (January 2024) 12.

⁷⁴ *Kioa v West* (1985) 159 CLR 550, *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 152.

⁷⁵ Attorney-General’s Department submission No 6 to House of Representatives Standing Committee of Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023* (January 2024) 10.

⁷⁶ Administrative Appeals Tribunal Submission No 1 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the performance and integrity of Australia’s administrative review system* (24 November 2021) 18.

⁷⁷ Law Council of Australia Submission No 28 to House of Representatives Standing Committee of Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023* (2 February 2024) 54.

⁷⁸ Kaldor Centre Data Lab Submission No 11 to House of Representatives Standing Committee of Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023* (January 2024) 11.

that the number of applications for judicial review of migration and protection decisions has 'steadily increased over time.'⁷⁹

- 3.36 The Council seeks feedback on whether the exhaustive statement provision in s 357A is in line with the objectives of the ART and whether if individuals are given a reasonable opportunity to present their case before an adverse decision is made.

Provision of documents, remittal and cancellation reviews

- 3.37 Subsections 500(6H) and (6J) provide that where an applicant in Australia seeks review by the ART of a visa refusal on the character ground under s 501 of the Migration Act or a refusal to revoke a cancellation under s 501CA(4) of the Migration Act, there are limitations on the ART's ability to consider oral or written evidence supporting the applicant's case. The evidence must be provided to the Minister at least two business days before the hearing (excluding directions hearings), unless the documents were already supplied under specific provisions. Additionally, the ART can require the Minister to provide relevant documents, and the Minister must comply within the time specified.⁸⁰

- 3.38 For certain migration or protection visa decisions, the ART can set aside the decision and send it back (remit it) for reconsideration, with directions.⁸¹

- 3.39 When a person in Australia applies to the ART for review a visa cancellation or refusal on the character ground under s 501 or a refusal to revoke a cancellation under s 501CA(4), the ART cannot hold a hearing (other than a directions hearing) or make a decision for at least 14 days after the Minister is notified of the application.⁸² If the ART has not made a decision or otherwise disposed of the matter (say by dismissal or withdrawal) within 84 days of the person being notified of the original decision, it is taken to have affirmed the reviewable decision, unless certain procedural actions, like dismissal or withdrawal, have occurred during that time.⁸³

- 3.40 The Council seeks views as to whether the deemed affirmation provision is an appropriate provision for the ART as a merits review tribunal. Views are also sought as to whether time limitation provisions are drafted with adequate attention to the potential time that may reasonably elapse between notification of the applicant and the matter being ready for a hearing and the time required for the ART member to prepare reasons for decision, including the resourcing of the ART.

⁷⁹ Kaldor Centre Data Lab Submission No 11 to House of Representatives Standing Committee of Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023* (January 2024) 8.

⁸⁰ Migration Act s 500(6K). The document provisions were considered in *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430.

⁸¹ Migration Act s 349.

⁸² Migration Act s 500(6G). These provisions were considered in *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430.

⁸³ Migration Act ss 500(6L), (6M). These provisions were considered in *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430.

Council consideration and questions

3.41 To summarise the SPPs discussed in paragraphs 3.22 to 3.41 above, the Council seeks views and information about the experience of applicants and their representatives with respect to the fairness of the process in migration and protection review proceedings in the ART. In particular, the Council seeks views on the operation of s 359A, which provides for but limits the ART's duty to disclose to an applicant (potentially adverse) information that is relevant to the applicant's case in the ART. Views are also sought on the appropriateness of having a special provision in s 362A requiring an applicant to request the Department to disclose documents it has provided to the ART for the purpose of the review, rather than the current procedure where an agency automatically provides the documents relevant to the ART review to the ART and to the applicant. Views are also sought on the desirability and effectiveness of the 'exhaustive statement of the requirements of the natural justice hearing rule' in s 375A. One issue is the impact of these and other SPPs on the management of the ART's caseload in the migration and protection jurisdictional areas and any apparent consequential impacts on the rate of applications for judicial review. This includes views as to whether these SPPs enable the ART to pursue its objectives of providing review that is accessible, fair and responsive to the diverse needs of parties to proceedings.

Questions

5. What is your experience with the provisions governing when adverse information must be disclosed to an applicant?
6. What is your experience with requesting the Department to provide access to documents it has given to the ART for the purpose of the review?
7. What are your views as to the fairness of the process in the ART's review of migration and protection decisions?

New claims and re-instated applications for review

Raising new claims on review

3.42 An applicant seeking a protection visa is required by s 367A of the Migration Act to raise all claims when making the application for the primary decision, to ensure that the Department can be as accurate and efficient as possible in making the primary decision.⁸⁴

3.43 This SPP is new; first introduced by the ART (CTP 1) Act. It applies where, in relation to an application for ART review, the applicant raises a claim or presents evidence that was not

⁸⁴ Revised Explanatory Memorandum ART (CTP 1) Bill, Item 171; Attorney-General's Department submission No 6 to House of Representatives Standing Committee of Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023* (January 2024) 11–12.

presented before the primary decision was made. Here the ART 'is to draw an inference unfavourable to the credibility of the claim or evidence if the ART is satisfied that the applicant does not have a reasonable explanation why the claim was not raised or the evidence was not presented, before the primary decision was made'.⁸⁵ The words 'reasonable explanation' are not defined. ART Members have a discretion to be exercised in the circumstances of each case to determine what constitutes a reasonable explanation. Section 367A therefore does prohibit an applicant from providing new material to the ART.⁸⁶

3.44 The government's submission to the Senate Committee is that s 367A contributes to the integrity of the onshore protection status determination process. The criteria for the grant of a protection visa requires that at the time of application an applicant makes specific claims about why Australia's protection obligations are satisfied in his or her case.⁸⁷

3.45 An opposing view is that in providing for the drawing of inferences, s 367A is overly prescriptive.⁸⁸ However, there is a flexibility in the provision that may create uncertainty or difficulty for an applicant in understanding what may be accepted as a reasonable explanation. There may also be a concern that an unrepresented applicant may fall foul of s 367A without being aware of the section and how it operates. It is not for the ART Member to give advice to an applicant as to how to present his or her case.

Reinstating an application

3.46 Section 368C of the Migration Act makes special provision relating to applications for reinstatement of ART proceedings where the ART has dismissed the application for review on the ground that the applicant did not appear, failed to comply with an order, or the application was frivolous or vexatious.⁸⁹ In those circumstances the ART has a discretion to reinstate the application or confirm the dismissal decision.⁹⁰ If the applicant does not apply for reinstatement within 28 days, then the ART must confirm the dismissal decision.⁹¹ This SPP broadly replicates the former provision relating to reinstatement of AAT migration or protection review proceedings, save for the 28 day period.⁹²

3.47 Section 368C dis-applies the provision that otherwise would apply, being s 102 of the ART Act.⁹³ Under s 102 the ART may re-instate an application on its own initiative, if the ART

⁸⁵ Migration Act s 367A(2).

⁸⁶ Attorney-General's Department submission No 6 to House of Representatives Standing Committee of Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023* (January 2024) 12.

⁸⁷ Attorney-General's Department submission No 6 to House of Representatives Standing Committee of Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023* (January 2024) 12.

⁸⁸ Law Council of Australia Submission No 28 to House of Representatives Standing Committee of Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023* (2 February 2024) 57.

⁸⁹ Migration Act s 368C(2); ART Act ss 99, 100, 101.

⁹⁰ Migration Act s 368C(3).

⁹¹ Migration Act s 368C(5).

⁹² Migration Act former ss 362B, 426A.

⁹³ Migration Act s 368C(1).

considers that the proceeding was dismissed in error.⁹⁴ After the expiration of 28 days from the dismissal, the ART may reinstate the proceeding if satisfied that special circumstances justify it.⁹⁵

3.48 The Revised Explanatory Memorandum states that the more restrictive provision in s 368C is necessary ‘to ensure that the reinstatement powers operate consistently with the relevant visa frameworks...and ensure [the procedure] operates consistently with the ‘finally determined’ framework and support clarity in relation to a person’s visa status’.⁹⁶

3.49 An opposing view is that restrictions upon reinstatement of applications for review may operate as an additional barrier to access for applicants who may experience difficulties in preparing and presenting their case.⁹⁷

3.50 The provision empowering the ART to extend the deadline for reinstatement of application is also disappplied for migration and protection matters.⁹⁸ The timeframe cannot be extended. The Revised Explanatory Memorandum states that the purpose of this restriction is to ensure the procedures for reinstatement operate consistently with the ‘finally determined’ framework and support clarity in relation to a person’s visa status.⁹⁹ An opposing view is that the power to extend the deadline for reinstatement is a common feature in judicial proceedings, and there needs to be a reason for a different approach in the ART. This SPP imposes an additional barrier for applicants when seeking review of decisions.

3.51 The Council seeks feedback on whether the procedure for reinstatement as it applies to migration and protection review, and the related limitation on the extension of time are consistent with the objectives of the ART.¹⁰⁰

Notification procedures

3.52 Also new are SPPs relating to the ART’s notification of its decisions and reasons for decisions. The ART must make clear, written decisions with dates and times that cannot be changed and notify the applicant and Minister within 14 days.¹⁰¹ If the ART dismisses a review application, it must notify parties clearly and in writing.¹⁰² Where a decision is given orally it must be followed by written reasons. These quite complex provisions appear to displace the generally applicable provisions for the ART to notify its decision and give reasons for its decision orally or in a statement of reasons (with provision for a party to request a statement where reasons were given orally).¹⁰³

⁹⁴ ART Act s 102(2).

⁹⁵ ART Act s 102(4).

⁹⁶ Revised Explanatory Memorandum ART (CTP 1) Bill item 171.

⁹⁷ Migration Act s 368C(5).

⁹⁸ Migration Act s 368C(5).

⁹⁹ Revised Explanatory Memorandum ART CTP 1 Bill 97.

¹⁰⁰ ART Act s 9.

¹⁰¹ Migration Act ss 368, 368A.

¹⁰² Migration Act s 368B.

¹⁰³ ART Act ss 111–114.

3.53 These SPPs clarify when decisions may be given orally, with written reasons given later. Otherwise, the question may be asked as to why the ordinary provisions of the ART Act should not operate. The Council invites views as to the usefulness of these SPPs.

Council consideration and questions

3.54 The Council seeks views and information about the experience of applicants and representatives in raising new claims on review, and in applying for reinstatement of a review proceeding that has been dismissed, including whether any changes are desirable. The Inquiry will be considering whether these SPPs allow the ART to meet its statutory objectives.

Questions

8. What is your experience in relation to:
 - (a) raising new claims in the course of the ART review;
 - (b) receiving notification of decisions;
 - (c) applying for reinstatement of a decision?
9. Do the current procedures for review of migration and protection reviewable decisions promote the ART's objectives under the ART Act? What changes could be made to improve implementation of the objectives?
10. Are there any changes that could be made to the current procedures for migration and protection decision-making in the ART to improve the process or outcomes for individuals?

Access to the Guidance and Appeals Panel

President's own-initiative referral

3.55 An applicant for ART review of a migration or protection reviewable decision cannot apply under s 123 of the ART Act for referral by the President of the ART's decision to the GAP.¹⁰⁴ Parties to proceedings in all other jurisdictional areas are entitled to make such an application.¹⁰⁵ The non-availability of an appeal to GAP does not affect the ability of an applicant to seek judicial review, provided that is available under Part 8 of the Migration Act. This does not affect the President's separate discretionary power, with an application having

¹⁰⁴ Migration Act s 500AA (save that a referral may be made of a reviewable decision made under Pt 3 of the Migration Act with respect to migration agents and migration assistance.

¹⁰⁵ ART Act s 123(2).

been made, to refer an application for review (prior to the ART making a decision in the proceeding) to the GAP.¹⁰⁶

3.56 The President may make a referral if satisfied that: (i) the application raises an issue of significance to administrative decision-making; and (ii) it is appropriate in the interests of justice that the ART be constituted by the GAP for the purposes of the proceeding in relation to the application.¹⁰⁷ A decision made by the GAP is a ‘tribunal guidance decision’, to which Members of the ART must have regard in matters with similar facts or issues.¹⁰⁸

3.57 The government’s submission to the Senate Committee states that this limitation prevents any unnecessary delay to finalisation of the applicant’s use of avenues of review.¹⁰⁹ An opposing view is that it is a barrier to access to administrative review that is not raised in relation to applicants in other jurisdictional area, where the same justification could be offered.

Council consideration and questions

3.58 The Council is seeking views as to whether it is desirable to adopt a different approach to applications for referral under s 123 of the ART Act in the migration and protection jurisdictional areas.

Questions

11. What is your experience with the current procedures for access to the GAP in the migration and protection jurisdictional areas?
12. How appropriate are the current procedures in enabling emerging and significant issues to be addressed through the GAP and in promoting consistency in ART decision-making in the migration and protection jurisdictional areas?
13. How effectively do the current procedures support consistency in ART decision-making?

Other Special Procedural Provisions

3.59 The discussion above focused on some of the key SPPs. It is not a complete consideration of all the SPPs listed in the Terms of Reference (**Appendix A**). The Council invites views relating to the other SPPs, which will all be addressed in its final report.

¹⁰⁶ ART Act s 122.

¹⁰⁷ ART Act s 122(1)(b).

¹⁰⁸ ART Act s 110.

¹⁰⁹ Attorney-General’s Department submission No 6 to House of Representatives Standing Committee of Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023* (January 2024) 13.

Council consideration and questions

3.60 The Council seeks views on the effectiveness and fairness of the SPP provisions in the ART (CTP 1) Act and whether they promote the objectives of the ART.

3.61 The Council also seeks views as to whether any other amendments could be made to improve the procedures for ART review of reviewable migration and protection decisions.

Questions

14. What is your experience with any of the SPPs applying in the ART? This includes the operation of sections 357A and 359A, and other sections listed in paragraph 1.4 (Scope). Have you found that the SPPs enable matters to be resolved in a timely and effective manner?
15. Have you experienced any changes to how migration and protection matters are being carried out in the ART, compared with the former AAT? If so, what are these changes?
16. What aspects of the SPP arrangements for statutory hearing procedures are working well?
17. Are there any changes that could be made to the SPPs to improve or better support the timely and effective resolution of matters in the migration and protection jurisdictional areas?
18. When questions or issues about the operation of the SPPs arise in an ART hearing, are they easy to resolve?

Appendix A: Terms of Reference

1. Background

- 1.1. The Administrative Review Council ('Council') has resolved to inquire and report on the operation of migration related provisions in the *Administrative Review Tribunal Act 2024* (Cth) (ART Act) and *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (Cth) ('ART (CTP1) Act').
- 1.2. The Council's decision responds to a request made by the Attorney-General on 4 March 2025 that the Council inquire into this matter. The Attorney-General's request referred to a recommendation of the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Administrative Review Tribunal Bills, dated 13 May 2024, that the matter be the subject of inquiry by the Council when it was re-established.

2. Scope

- 2.1. The Inquiry will examine procedure relating to ART review of migration and protection decisions. Specifically, the Inquiry will examine whether amendments made in 2024 to the *Migration Act 1958* (Cth) at the time of the establishment of the Administrative Review Tribunal (**ART**) are appropriate. Some of the amendments were only formal, but continued existing procedural restrictions that applied in review by the Administrative Appeals Tribunal (**AAT**) of migration and protection decisions. Other provisions in the ART(CTP1) Act introduced new procedural requirements to apply to review of such decisions by the ART. The Inquiry will consider the impact of ART review on primary decisions in the Department of Home Affairs, including aspects of Departmental and first-instance decision-making processes, the history and rationale for the introduction of special provisions for procedure in migration review, including the impact of such provisions on affording procedural fairness in review by the ART. The inquiry will also consider the ongoing impact of the current provisions, including with regard to the effectiveness and efficiency of review. The question posed for the Inquiry is whether it is desirable to retain the provisions, considered individually and as part of the scheme for merits review of migration and protection decisions.
- 2.2. In the Inquiry, the Council will consider the following provisions affecting procedure for review by the ART, which were dealt with in the ART(CTP1) Act, to which the Senate Committee referred:
 - (vi) the exhaustive statement of the natural justice hearing rule: section 357A;
 - (vii) information and invitation given by the ART: section 359A;
 - (viii) time limitations on making an application for ART review: sections 347(3)-(5), 202(5), 500(6B);
 - (ix) provision for issue of a conclusive certificate removing a reviewable decision from review by the ART: section 339;
 - (x) requirements for the ART in drawing inferences when a new claim or evidence is raised in review of a reviewable protection decision: section 367A;

- (xix) provision for procedure under Migration Act to prevail over discretion as to procedure of the ART: section 357A(2A);
- (xx) requirements for hearing by ART of a reviewable protection decision to be in private, and non-disclosure of identifying information: sections 367B, 369;
- (xxi) provisions dis-applying rules under the ART Act for giving notice of a decision: sections 66(6), 127(4), 134(7B), 137M(4), 137S(3);
- (xxii) provisions dis-applying the requirements under the ART Act for the primary decision-maker to give reasons on request for an ART reviewable decision: sections 66(7), 127(5), 137M(5), 137S(4), 197D(7), 500(6A);
- (xxiii) provisions dis-applying and replacing certain provisions of the ART Act, relating to notice of ART applications for review, reasons for the decision, disclosure of documents to the ART and relief: sections 336P (except for s 336P(I), 374, 500(6FB);
- (xxiv) provision making specific requirements relating to access by an applicant to documents: section 362A;
- (xxv) provisions restricting ability of ART to have regard to documents: section 500(6H),(6J),(6K);
- (xxvi) provision dis-applying facility for non-participating party to elect to participate in ART review: section 348A;
- (xxvii) exclusion of the right to examine or cross-examine: section 366D;
- (xxviii) restrictions on relief available in ART review: sections 349, 500(6G),(6L),(6M)
- (xxix) restrictions on applications to the Guidance and Appeals Panel (**GAP**) of the ART: section 500AA;
- (xxx) special provisions relating to the ART's statement of reasons for its decision and its notification: sections 368, 368A, 368B;
- (xxxi) special provisions relating to reinstatement of an application for ART review: section 368C,

2.3. The following are not within the scope of the Inquiry:

- (i) the making of applications for legal or financial assistance: section 336P(2)(I);
- (ii) restriction on production of protected information or documents to a parliament: section 378; and
- (iii) Part 8 of the Migration Act dealing with judicial review of migration and protection decisions and referral of questions of law by the ART to the Federal Court and the amendments made by the ART(CTP1) Act to Part 8.

3. Consultation

- 3.1. The Council will consult publicly on the issues outlined in the Terms of Reference. The Council may invite and publish submissions and seek information from Government agencies and other persons or bodies.
- 3.2. The Council will seek the views of a broad range of stakeholders, including:
- (i) legal assistance service providers and advocacy organisations that provide support to people receiving and seeking review of migration and protection, including protection matters.
 - (ii) relevant Australian Government agencies and authorities
 - (iii) academics, researchers and members of the broader legal profession with expertise in migration and protection matters.

4. Timeframe

- 4.1. The Council will aim to deliver a report on the Inquiry to the Attorney-General by December 2026.

Appendix B: History of migration review

Migration Review Tribunal and Refugee Review Tribunal

Prior to 2015, review of migration and protection matters were undertaken by the Migration Review Tribunal ('MRT') and Refugee Review Tribunal ('RRT') respectively.

The RRT was established in 1993 to provide determinative and independent review of protection matters. The aims of the RRT were to provide credible independent review of protection decisions at a lower cost, which in turn would lead to a reduced number of unsuccessful applicants making judicial review applications.¹¹⁰

The MRT was established in 1999, merging the former Migration Internal Review Office (which provided internal review of migration decisions) and the Immigration Review Tribunal ('IRT'). The primary aim of the MRT was to streamline merits review for migration decisions by abolishing internal review and establishing an independent external review tribunal for all migration matters.¹¹¹

In 2006, the MRT and RRT were merged as a single agency, MRT-RRT, for internal financial governance purposes.¹¹²

2015 Tribunal amalgamation

On 1 July 2015, Parliament passed legislation to merge the Migration Review Tribunal and Refugee Review Tribunal (MRT-RRT) into the AAT.¹¹³

The amalgamation of the MRT-AAT into the AAT aimed to streamline the Commonwealth merits review system and improve access to justice.¹¹⁴ The policy intention behind an amalgamated AAT was to enhance the efficiency and effectiveness of Commonwealth merits review jurisdictions and support high quality and consistent Government decision that did not materially affect the rights of Tribunal users.¹¹⁵ The amalgamation aimed to create a coherent merits review framework which harmonised and simplified procedures where appropriate, without making 'significant changes' across the amalgamated AAT's jurisdictions.¹¹⁶

As part of the amalgamation, the MRT-RRT was abolished and replaced by the Migration Review Division ('MRD'), which had jurisdiction to review all migration and protection decisions.¹¹⁷

¹¹⁰ Explanatory Memorandum, Migration Reform Bill 1992, 8–12.

¹¹¹ Explanatory Memorandum, Migration Legislation Amendment Bill (No. 1) 1998, 18.

¹¹² Financial Management and Accountability Amendment Regulations 2006 (No. 7) reg 3.

¹¹³ *Tribunals Amalgamation Act 2015* (Cth).

¹¹⁴ Revised Explanatory Memorandum Tribunals Amalgamation Bill 2014, 2.

¹¹⁵ Department of Home Affairs Submission to Attorney-General's Department, *Statutory Review of the Tribunals Amalgamation Act 2015* 2.

¹¹⁶ Revised Explanatory Memorandum Tribunals Amalgamation Bill 2014, 3.

¹¹⁷ *Tribunals Amalgamation Act 2015* (Cth) s 17A.

The Immigration Assessment Authority ('IAA') was also established in 2015 and became an independent authority within the MRD to review decisions relating to persons who were subject to the fast-track assessment process.¹¹⁸

¹¹⁸ *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) s 473JA.

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All information in this publication is correct as at November 2025