Submission by Assistant Professor Narelle Bedford to the Statutory Review of the Amalgamated Administrative Appeals Tribunal

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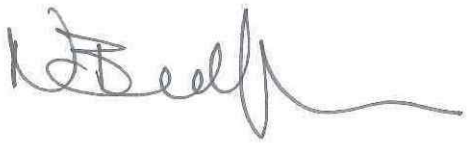

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Introductory comments

1. I welcome the opportunity to make a submission to the Statutory Review of the amalgamated Administrative Appeals Tribunal.

2. This submission is intended to be made public.

3. I am currently an Assistant Professor in the Faculty of Law at Bond University, where I research and teach in the field of administrative law. Prior to becoming an academic, my professional career experience was in administrative law. Therefore, I have professional expertise in the subject matter of this inquiry. My comments and recommendations below are based on my expertise in administrative law issues.

Generally about merits review

4. I wish to commence this submission by stressing the importance of merits review as part of the Australian administrative justice system. In the last reporting year, the AAT received 51,426 applications for review. This is a significant number. It vindicates the imperative identified in the Kerr Report that individuals want the opportunity to have government decisions reviewed on their merits.

5. For ease of reference, I have aligned my submission to individual terms of reference as set by the Attorney-General in establishing the parameters of the statutory review and each is addressed in the same order as issued by the Attorney-General.

Term of reference: *Whether the objectives of the TA Act have been achieved*

6. The concept of a modern amalgamated Commonwealth review tribunal was comprehensively considered and proposed by the Administrative Review Council in *Better Decisions: Review of Commonwealth Merits Review Tribunals* (1995 Report No 39). The *Tribunal Amalgamation Act* was the final implementation of a significant component of the *Better Decisions Report* in what eventuated to have been a long and tortuous process taking from 1995 until 2015 to be actualised.

7. One of Australia's leading authorities on merits review, Professor Robin Creyke, made a detailed analysis of the positives and negatives of the amalgamation as implemented by the *Tribunal Amalgamation Act* in her article titled 'Tribunal Amalgamation 2015: An Opportunity Lost?' (2016) 84 *AIAL Forum* 54. I support and endorse her analysis.

Term of reference: ***The extent to which the Tribunal operates as a truly amalgamated body, and whether any existing levels of separation are necessary and appropriate***

8. I question whether true amalgamation has been achieved given the continued existence of separate review bodies such as the Veterans Review Board (VRB). The logic of amalgamation should be applied in a rigorous and coherent manner to all review bodies. At the time of the *Tribunal Amalgamation Act* the government gave no clear justification for the preserved existence of the VRB beyond stating simply that it would be maintained. There is no distinction to be drawn as to why the veterans' jurisdiction could not be absorbed into the AAT as a first and second tier review process as currently successfully operates in the social security jurisdiction.

9. The Immigration Assessment Authority (IAA) presents a similar logic gap, with the successful integration of the former Migration Review Tribunal and Refugee Review Tribunal. The IAA stands apart and separate from the AAT as evidenced by the maintenance of its own distinct website. Its fast track process by nature raises concerns of the practical ability to afford procedural fairness and meet the objectives of 'fair' and 'just' required by s2A of the AAT Act. Additionally the different nomenclature of titles for those performing IAA functions, such as Senior Reviewer, generates confusion and inconsistency with all other AAT appointees. Tribunal amalgamation was specifically conceived to address the disadvantages of public confusion and inconsistency and thus the continued existence of the IAA as a separate and distinct part of the AAT is not true amalgamation. I submit it should be abolished and its functions performed by the AAT in a manner which upholds procedural fairness and promotes consistency in review functions with other matters reviewed by the Migration and Refugee Division.

Term of reference: ***Whether the Tribunal is meeting the statutory objectives contained in section 2A of the Administrative Appeals Tribunal Act 1975***

10. Merits review provides a mechanism of review that is simultaneously required by statute under s2A of the *AAT Act 1975* (Cth) to be accessible, as well as fair, just, informal, economical and quick (amongst other requirements of proportionality and confidence in decision-making). These statutory objectives apply across all divisions of the AAT. It has been recognised that these statutory objectives may be difficult to satisfy simultaneously in reality (for example, there are tensions between just and quick), and this provides a delicate on-going task for the AAT. This was most recently recognised in the recent AAT decision by Justice Thomas and Deputy President McCabe in *RBPK and Innovation and Science Australia* [2018] AATA 1404 (10 May 2018). At paragraph 11, they observed in passing '(Those aspirations may be in tension with each other; balancing them requires an exercise of judgment)'. I submit that the AAT is aware of the challenges presented by detailed and competing statutory objectives and is managing these aims appropriately.

Term of reference: ***The objective to promote public trust and confidence in the decision-making of the Tribunal***

11. In assessing whether the AAT promotes public trust and confidence in the decision-making of the Tribunal, it is essential to bear in mind the central role performed by the AAT in upholding accountability over government decision-making. It is part of our system of checks and balances. The AAT is itself subject to the checks and balances of the court system. Assiduous care should be taken to reflect carefully on the very low rate of AAT decisions being overturned by the federal courts and High Court when taken on appeal. These statistics are available on the public record in the AAT's annual reports. This important evidence-based fact confirms that the AAT is undertaking its role in accordance with law and that the public should be confident and have trust in the AAT.

12. Further, it is crucial to acknowledge the value of the AAT as an independent forum. The AAT facilitates access to justice by conducting merits review of government decisions and thereby permitting ordinary people to have their voice heard as their matter is reviewed by an independent, expert body. The availability of independent review in and of itself increases public confidence in government decision-making, as by being subject to scrutiny it shows the government's commitment to transparency.

13. However, recently the media and some Ministers have been openly critical of the AAT. It is these occurrences that undermine the public trust and confidence rather than the performance of the AAT itself. It is not appropriate that the AAT should have to enter the public debate and defend itself in the face of such open and at times robust criticisms. This is the task that should appropriately belong to the Attorney-General as the first law officer. The political reality of the modern Attorney-General often leaves these important responsibilities unfulfilled. This conundrum requires a nuanced and delicate response so that there is a public voice for the AAT. Acting President Logan in the AAT decision of *Singh (Migration)* [2017] AATA 850 (16 June 2017) took the opportunity to address some of these concerns at paragraph 17; 'it means that, inevitably, there will be tension from time to time between Ministers and others whose decisions are under review and it…They can be lessened if each element of our system of government understands and respects the role of the other'.

14. Public confidence in the AAT should recognise that merits review was designed to have a normative impact on public administration and decision-making. This means that the AAT has a broader role beyond conducting individual reviews. The AAT was designed to have a system wide-impact on government decision-making leading to improvements in decision-making. This benefit is achieved by the AAT reviewing government decisions and providing guidance to decision-makers on the interpretation of statutes and the application of legislation and policies to facts. These AAT decisions would then be followed by future decision-makers so it will in turn lead to improved government decision-making. Any assessment of whether the AAT has public trust and confidence must include recognition of this key role of the AAT and not be unbalanced by reflections on individual reviews.

15. The AAT's role in enhancing good government, often referred to as a normative role was carefully considered in a recent AAT decision by Justice Thomas and Deputy President McCabe in *RBPK and Innovation and Science Australia* [2018] AATA 1404 (10 May 2018). At paragraph 12 they stated that 'Overlaying all that is the need for the Tribunal to adequately perform the unique role cast for it in Australia's system of administrative law: the Tribunal must be an advocate for good government, a function it discharges by modelling good decision-making behaviour in individual cases'.

16. Additional statements on this vital role performed by the AAT can be found in *JWTT and Commissioner of Taxation* [2017] AATA 1612 (3 October 2017). At paragraph 14, the AAT explained that 'The Tribunal is also an independent generalist decision-maker informed by its expertise in good government. That means the Tribunal's findings of fact and analysis of the law might be quite different from the original decision-maker. Indeed, the possibility of that occurring underlines the point of merits review'.

17. Historical guidance on the topic of AAT efficiency can be found in Justice Brennan's address and associated article titled 'The Future of Public Law: the Australian Administrative Appeals Tribunal' (1977-1980) 4 *Otago Law Review* 286. This is complemented by Justice Mason's article on 'Administrative Review: The Experience of the First Twelve Years' (1988-1989) 18 *Federal Law Review* 122.

Term of reference: *The extent to which decisions of the Tribunal meet community expectations*

18. At the outset, the inherent difficulty in defining and accurately identifying public expectations must be acknowledged. The previous AAT President Justice Downes addressed this challenge in the 2011 decisions of *Rent to Own (Aust) v Australian Securities and Investments Commission* [2011] AATA 689 (6 October 2011) and *Visa Cancellation Applicant and Minister for Immigration and Citizenship* [2011] AATA 690 (6 October 2011).

19. I note that the topic of community values and expectations was directly analysed in a merits review context in an article by Deputy President McCabe titled 'Community Values and Correct or Preferable Decisions in Administrative Tribunals' (2013) 32 *University of Queensland Law Journal* 103.

20. I refer the statutory review to my public submission of 13 June 2018 made to *the Joint Standing Committee on Migration on Review Processes Associated with Visa Cancellations made on Criminal Grounds*. I explicitly accept that this is a complex area in reviewing decisions and the relevant policy does require the AAT to make the types of assessments referred to in the above paragraph. The public controversy which has arisen in this particular jurisdiction however does not mean that the AAT is not meeting community expectations. What it does reflect is the diversity of community opinions and expectations that can be amplified by inflammatory and divisive media coverage.

Term of reference: *The effectiveness of the interaction and application of legislation, Practice directions, Ministerial Directions, guides, guidelines and policies of the Tribunal*

21. It would be appropriate to conduct a comprehensive review of the amount of Practice Directions, Ministerial Guidelines, guides, guidelines and policies of the AAT which are in existence, including those for the IAA. This would provide an empirical basis for the consideration of whether there is a coherent approach to these items. The subtle distinctions between Practice Directions, guides, guidelines and policies may not be understood by AAT users and indeed has the potential to create confusion. A stated aim of amalgamation was simplification and coherence and I submit that the effectiveness of these items could be enhanced by a thorough analysis based on empirical data.

22. Furthermore, the impact of Ministerial Guidelines necessitates careful balancing. There is an established body of jurisprudence on the impact of government policy on the independence of AAT reviews. It would be interesting to chart if there has been a growth in the volume of Ministerial instruments and in which areas they predominantly exist.

Term of reference: ***The degree to which legislation, processes, grounds, scope, and levels of review in, and from, the Tribunal promote timely and final resolution of matters***

23. On the basis of publicly available information published in the AAT Annual Report on matters on hand and length of time from application to completion, I submit that the AAT's legislation and processes do promote the achievement of the timely and final resolution of matters. I do not support the introduction into legislation of specific timeframes for matters, as this power should rest within the authority of the AAT President to manage according to prevailing circumstances.

Term of reference: ***Whether the Tribunal's operations and efficiency can be improved through further legislative amendments or through non-legislative changes***

24. Matters of economy and efficiency in AAT operations must be guided by the views of the AAT itself. Any views expressed should be accorded priority. The importance of the AAT President maintaining the flexibility to allocate resources and adapt to prevailing circumstances must be central in any consideration of legislative amendments or non-legislative changes.

25. I note that Deputy President McCabe has also published on the topic of efficiency in his article 'Perspectives on Economy and Efficiency in Tribunal Decision-Making' (2016) 85 *AIAL Forum* 40.

Term of reference: whether the arrangements for funding the operations of the Tribunal are appropriate, including ensuring consistent funding models across divisions

26. The ability of the AAT to function optimally is tied to suitable funding. As with matters of economy and efficiency, funding considerations must be primarily based on the views of the AAT itself. Funding in this context is taken to incorporate both financial and staffing/Member appointments.

27. There are future challenges facing the AAT which must be addressed and supported by suitable funding allocations. The growing occurrence of automated decisions is one example. The use of this technology by Centrelink has generated an increased workload for the AAT and this has funding implications. I refer my submission dated 21 April 2017 to the Senate Standing Committee on Community Affairs on *the Design, Scope, Cost-benefit Analysis, Contracts Awarded and Implementation associated with the Better Management of the Social Welfare System Initiative*.

28. Another contemporary example of a new jurisdiction with a vast potential for high-volume jurisdiction in the AAT is the National Disability Insurance Scheme (NDIS). The NDIS is a complex and unique piece of legislation with its integration of actuarial concepts and economic implications, as the AAT will need to have an appropriate cohort of appointed Members with expertise and skills to perform the review task.

29. The issue of appointment of members is relevant in this context and more broadly for the efficient operation of the AAT. This is important for the independence of the AAT and the statutory objective of maintaining public confidence in tribunal decision-making. The particular burden inevitably placed on AAT members who are subject to fixed term appointments with uncertainty surrounding their re-appointment was duly recognised by Acting President Logan in *Singh*, when at paragraph 18 he stated; 'For those members who do not enjoy the same security of tenure as judges, that may call at times for singular moral courage and depth of character.'

30. I note the monologue prepared by Professor O'Connor on *Tribunal Independence* published by the Australian Institute of Judicial Administration in 2014. I support and endorse her analysis.

31. The absolute exemplar of demise due to inadequate funding is the Administrative Review Council (ARC). The ARC has a critically important role in the administrative justice landscape and was initially created based on the original vision of Kerr Committee. Its legacy is a series of reports drawing on the combined wisdom of many administrative law experts and practitioners. I use the word demise deliberately even though the ARC still exists in Part V of *AAT Act*. Recent government decision has seen this once prominent institution

totally de-funded and left with vacant appointments as appointees' terms expire. The value gained from ARC reports far exceeds the minimal cost savings obtained from withdrawing its funding. The ARC could have a standing role to inquire into reviews of institutional architecture and other topical administrative justice issues that arise. Rather than having inquiries and resulting reports splintered across distinct bodies, the logic of amalgamation should be applied to this area so that one central body already in existence is given proper funding to perform its statutory tasks and generate a coherent and easily locatable body of analysis.

32. I note that Justice Kenny has published an article supporting the ARC in her article titled 'The Administrative Review Council and Transformative Reform' in *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce*, Anthony J Connolly and Daniel Stewart eds (Federation Press 2015).

Concluding comments

I am available and willing to participate in any public hearings should that be of assistance. My preferred location would be Brisbane.

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