

13 May 2023

Attorney-General's Department
3/5 National Circuit
BARTON ACT 2600

Dear Sir/Madam,

Administrative Review Reform - Issues Paper

The Institute of Public Accountants (**IPA**) welcomes the opportunity to provide comments on the *Administrative Review Reform – Issues Paper (Issues Paper)*.

The IPA is one of the three professional accounting bodies in Australia, representing over 50,000 members and students in Australia and in over 100 countries. Approximately three-quarters of the IPA's members work in or are advisers to small business and small to medium enterprises.

The IPA members interact primarily within the small business tax division and the tax and commercial divisions of the Administrative Appeals Tribunal. Accordingly, our responses to select questions from the Issues Paper are with reference to these divisions within the Administrative Appeals Tribunal

Responses to specific questions in the Issues Paper are provided in the appendix to this document.

If you would like to discuss our comments, please do not hesitate to contact me at vicki.stylianou@publicaccountants.org.au.

Yours sincerely



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APPENDIX

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

We consider that the principles expressed at section 2A of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) remain relevant to the system of a merits review body. In our view, the Government's proposed objectives for the new body - to be 'user-focused, efficient, accessible, independent and fair' - reflect and complement the existing framework.

We agree with the proposal for the legislative objectives to include a reference to the new body promoting dispute resolution processes. The AAT Act¹ currently provides for the referral of applications to a range of alternative dispute resolution processes including mediations, conciliations, and neutral evaluations.

Particularly within the tax and commercial division of the AAT, these avenues contribute to an efficient management of applications by the early identification of disputed issues, clarity of respective parties' position on those issues and, if not able to be resolved at that time, assists the parties in directing its resources to progress through to a determination by the AAT.

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

We consider the objectives of the current AAT are sound and should be supplemented by those identified above in response to question 1.

Question 3: Should the Administrative Review Council (ARC), or a similar body, be established in the new legislation? What should be its functions and membership?

The new legislation should establish the ARC or a body with comparable functions of overseeing or inquiring into the work of the AAT. The role of the ARC (or similarly constituted body) would form an integral part of ensuring the integrity and efficacy of the system of merits review in Australia.

Prior to its abolition, the ARC was empowered to review the Commonwealth administrative law system, monitor developments and recommend to the Attorney-General improvements that might be made to the system. This notion of continuous review and improvement has been referred to as reflective of administrative law's goals to generally enhance government decision-making².

¹ Section 34A of the *Administrative Appeals Tribunal Act 1975* (Cth)

² Bedford, Narelle, 'The Kerr Report's vision for the Administrative Review Council and the (sad) modern reality', 21 May 2021, Australian Public Law.

We observe that each of the most recent reviews of the AAT, being the Callinan Review³ and the Senate Committee Report⁴, recommended the reinstatement of the ARC to, amongst other things, “...ensure that our system of administrative review is as effective and significant in its protection of the citizen as it can be”.

Question 4: How should the legislation creating the new body encourage or require government agencies to improve administrative decision-making in response to issues identified in decisions of the new federal administrative review body?

At present, the AAT is empowered to affirm, vary or set aside and remit the particular decision that it is reviewing. By virtue of its functions, it necessarily may observe trends in administrative decision-making that may warrant an examination of the government agencies whose decisions are the subject of review.

It is acknowledged that the AAT provides statistics in its annual reports about the outcome of applications by reference to each division. However, this annual reporting may not necessarily disclose trends in administrative decision-making that warrant further examination within the agency responsible for those decisions. The legislation creating the new body may consider including powers of the President of the AAT to provide a report to the ARC, or similar body, of any observations that may reveal a more systemic issue of the agency decision-maker.

The reinstatement of the ARC, or a similar body, empowered with responsibility to facilitate the training of administrative decision-making will supplement this recommendation.

Question 51: How should hearings be conducted to ensure that they are accessible, informal, economical, proportionate, just and quick?

To meet these objectives, we consider hearings should follow the current sections 32, 33, 33A, 34A and 34J of the AAT Act. That is, consistent with:

- Section 32: representation should be permitted at hearings to ensure they remain accessible to applicants. This is particularly the case for vulnerable applicants that may find engaging with the new body challenging.
- Section 33: hearings should be conducted with as little formality and technicality. It is acknowledged, in the tax and commercial division of the AAT, that many matters before it involves complex matters of law and facts (including the provision of expert evidence). However, the flexibility inherent within section 33 of the AAT Act should be retained even for complex matters.

³ Hon I Callinan AC KC, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 23 July 2019, at [1.27]).

⁴ Legal and Constitutional Affairs References Committee, ‘The Performance and Integrity of Australia’s Administrative Review System’ (Report, March 2022).

- Section 33A: the new body should retain the discretion to allow a person to participate in a hearing by telephone or by other digital means. This will ensure hearings are accessible, lower cost, proportionate, and efficient.
- Section 34J, the new body should also retain the discretion to conduct a hearing ‘on the papers’. There are instances where adjudication of an application without requiring an appearance by parties is appropriate, especially if the matter involves a question of law interpretation and where the facts are not in dispute. It is noted that a review ‘on the papers’ can, in an appropriate case, promote economical determination of cases.

Question 61: What services would assist parties to fully participate in processes under the new body and improve the user experience? Which of these services should be provided:

- a. by departments and agencies**
- b. by the new body**
- c. by other organisations.**

In our experience, many decisions that are reviewed by the AAT have followed some mechanism of internal review within the respective department or agency. However, once an application is made for external review by the AAT the proceeding is generally managed by an officer within the department or agency with experience in the practice and process of the AAT.

It would assist to maintain the system of early case management, as experienced in the tax and commercial division of the AAT, by encouraging the parties to attend an early conference to discuss the respective positions and where efforts should be made towards early dispute resolution.

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

We consider the new body should retain the discretion to refer matters to alternative dispute resolution procedures as a first step after receiving an application. Such procedures should retain the ability to be conducted on a confidential basis that encourage candor by both the applicants and the representatives from the government department or agencies.

In our view, doing so may improve the efficiency of the new body by providing a mechanism for the parties to assess the respective strengths and weaknesses of the decision under review at the earliest opportunity and identify those applications that may be resolved without necessitating a resource-intensive hearing.