ACCOUNTABILITY
ROUND TABLE

Submission by the Accountability Round Table on Administrative Review Reform

The Accountability Round Table (ART) is dedicated to improving standards of accountability, transparency, ethical behaviour, and democratic practice in Commonwealth and State parliaments and governments across Australia.

Members have backgrounds in politics, the law, education and research, public administration and journalism. Further details can be found at https://www.accountabilityrt.org.

We have considered the Issues Paper and have met with the review Secretariat to give our views on some of the issues we believe critical and where we have expertise. This submission follows up on the matters we raised and discussed with the Secretariat.

Of the matters raised in the Issues Paper (which the numbers below reference) , this submission focusses on –

1	Principles of merits review
3	The Administrative Review Council
4	Feedback to Government
15-29	Membership
58	Tiers of review
60-66	Support to parties
Other	Resourcing

We also offer some specific proposals in relation to the migration and refugee caseload – and to the relevance of treaties to which Australia is a party.

Catching up with our Past

In 1982, Australia became only the fourth country to enact Freedom of Information Laws. It was part of a set of integrated mutually supportive administrative law reforms that included an Ombudsman, the Administrative Appeals Tribunal (AAT), requirements on public servants to give reasons for their decisions and simplified judicial review of those decisions. The reforms constituted one of the best governance and accountability reforms enacted absent a scandal.

Unfortunately, that was as good as it got. We should now seek to not only return to return to the standards set then but to go beyond those practices – this time integrated into our integrity framework.

Principles of Administrative Review on the Merits

We consider the fundamental principles of a body established to review administrative decisions on the merits should be **independence**, **expertise** and **transparency**.

The review body and its members should be **independent** and be seen to be independent of the government and the agencies making primary decisions. Independence of decision-making can only be assured if to the greatest extent practicable appointment and budgetary decisions are independent of government.

As the body will be standing in the place of the primary decision-maker, its members must have or have access to at least the same level of subject-matter and legal **expertise** avai;able to the primary decision-maker. This is essential for the credibility of the tribunal to all parties.

For the same reasons it must ensure **transparency** of decision-making by ensuring members are disinterested in the matter being review, by affording parties the chance to put their case including by providing suitable interpreter and other assistance, by being able to test assertions by decision-makers and those seeking review, and by giving reasons for decisions.

The Administrative Review Council

When operating, the Administrative Review council filled an important role in the administrative law system – it provided to the Attorney-General and the government a continuing assessment of the operation of the system and by means of periodic inquiries, recommendations for improving or extending the system. The ART recommends re-funding the Council and appointing a diverse range of people with background and expertise in the principles of administrative law, the major areas of jurisdiction, and general government decision-making.

The Council could form the basis of a broader Governance Reform Council as previously recommended by ART to advise on the overall state of governance and the operation of integrity agencies. (See Integrity Now on our website, and summarised in the Appendix, for ART's recommended governance reforms and a description those reforms.)

Feedback to Government

The ART suggests that the legislation should provide for the AAT, when it perceives a pattern of decision-making that in its view indicates the possibility of maladministration or repeated errors of law or policy understanding by decision-makers, then it should have the power to refer its concerns to the head of the relevant agency, or to the relevant integrity agency for more systemic review. See also below, Tiers of Review

Membership

The ART agrees that a transparent and merit-based selection process should be legislated. Our recommendation is that an independent Integrity Agencies Appointments Body should vet all proposed appointments before they are made, and if any appointments are made contrary to the advice of this body the relevant Minister be required to table their reasons in Parliament. Judicial Members, unless they are already judges, should be appointed by a Judicial Appointments Commission.

Terms should be for 5 to 7 years and, to maximise the appearance of impartiality not be renewable. A previous member could be considered for a further appointment, through the normal process after a gap of 5 years.

Tiers of Review

As a general rule, the legislation should provide for internal review of its decisions, other than for decisions made by a panel chaired by a presidential-level member. This apart from providing a greater guarantee of consistent decisions by making individual members aware that their decisions are reviewable, also better allows for patterns of problematical decisions by primary decision-makers to come to senior members' attention and thus providing a mechanism for feedback to government agencies (see above).

Support for Parties

If the decision-maker is represented legally at a review hearing, the legislation should provide that the appellant be given the option to be represented also. Funding should be available to assist means-tested appellants with the cost of representation.

Interpreter services should be provided through the Tribunal, and cultural sensitivity training provided to members.

Resources for the Tribunal

The Tribunal should be given a guaranteed minimum budget over a rolling 5 year period. Additional funding should be tied to changes in case load in the various jurisdictions according to formulas agreed in advance between the Department of Finance and the Tribunal. It is understood that short-term funding is already being provided to clear case backlogs. This may give an indication of the formulas required in a least the larger jurisdictions.

The Migration and Refugee Caseload

The government has announced that approximately 19,000 people holding Temporary Protection Visas (TPV) or Safe Haven Enterprise Visas (SHEV) will be transitioned to permanent visas.

Labor Policy Platform before the 2022 election was that Labor would create an independent Refugee Review Tribunal and abolish the Immigration Assessment Authority (IAA). The Tribunal will allow for procedurally fair, simple, affordable and accessible processes and procedures, including in relation to adverse credibility findings, for the review of refugee-related decisions.

The IAA was not fit for purpose, and was "stacked" with Coalition personnel for the principal purpose of rejecting as many visa applications by refugees as possible. Many of the 12,000 who were rejected were on the same boats and faced the same risks as those who were accepted. Furthermore, the Coalition's cancellation of Legal Aid resulted in many applicants filing documents and appearing unrepresented. Many others resorted to incompetent or unscrupulous migration agents who let them down. This resulted in many appeals in circumstances where applicants were denied natural justice.

It is now well-established that the precautions in place under Sovereign Borders enable boats to be turned back while ensuring the integrity of our migration program. In these circumstances, there is no longer any justification for pursing the draconian and inhumane consequences of the regime which commenced in July 2013 when Kevin Rudd as Prime Minister stated that "if you come by boat without a visa, you won't be settled in Australia."

The new form of the Administrative Appeals Tribunal (AAT) whatever it takes, will be faced with tens of thousands of applications and appeals, most of which result from the unfair and inhumane processes which were in place under the Coalition government. Fast Track processing was intended to deny justice wherever possible. This government must find an alternative to enable the new body to function in a fair and efficient manner.

One possibility would be to replace all previous bridging visas with a system under which all applicants have a *prima facie* entitlement to a permanent visa with the government able to oppose any application when security or personal characteristics are alleged to exist which would justify rejection of that visa. Such rejections should be based on serious allegations, not the deeply unjust character test at work under the Coalition where people with traffic violations spent years back in detention.

Most of those who arrived after July 2013 would, by now, be well-known to migration personnel and grounds for rejection of visas should be well-established. Most of those in this category were Hazara from Afghanistan or victims of the regimes in Iran or Sri Lanka. Many were rejected, particularly from Sri Lanka, on the basis of foreign affairs department Country Reports, which can be a poor basis for decision making (See KK & RS (Sri Lanka) country guidance decision of the UK Upper Tribunal). Often DFAT reports are formed on the basis of local employees' information with many coming from the ethnic majority that does not recognise the rights or complaints of the minority fleeing the country.

The result is that the new tribunal must be established with resources and funds allocated to undo long years of indefinite torment, limbo and pain established under the Coalition government deliberately to intimidate refugees and asylum seekers. These include:

(i) tribunal members must be selected by an independent selection panel (see earlier);
(ii) tribunal members must be trained to understand the impact of trauma on memory and the cultural barriers to revealing horrific information to interrogatory strangers;
(iii) interpreters must be carefully selected with an eye to ethnic tensions in the homeland, and there must be appropriate support personnel since this will involve reliving of highly traumatic events for applicants;
(iv) many applicants experienced violent sexual abuse and torture;
(v) DFAT reports on country status must be carefully cross-checked for unreliability of sources;
(vi) it is essential that any such tribunal permit new information to be introduced.

The 12,000 in the legacy caseload have now been in limbo for a decade or more, many stuck in expensive legal appeals against unjust findings from a broken process.

The Minister (Andrew Giles) has stated that people who have received negative determinations should continue with court processes and Ministerial Intervention Requests. This is totally unacceptable in a situation where the government accepts that many of the negative determinations resulted from an unfair process without procedural fairness, and where appeal rights and presenting new information are both very limited. Without a robust review process for these cases, people with genuine claims for protection will not receive a fair and proper hearing, and will be refouled if returned to their homeland.

Given that the rest of the world is dealing with a growing crisis of displacement, there are not many places able to take people that Australia is rejecting on this arbitrary and unjust basis. The courts already face a backlog accrued over the Covid19 era and removing this aspect of the workload would streamline justice for all.

Only the substitution of an entirely new process, as proposed above will enable Australia to ensure the security of our borders as well as the integrity of our migration program, and the provision of decent treatment to all asylum seekers in our midst.

Recognition of International Commitments in Merits Review by the AAT's successor and Judicial Review by the Courts

Administrative law needs to recognize the growing importance of international law and the rule of law in international affairs. Australia has generally been a good international citizen, signing up to most of the major international treaties and conventions negotiated since the Treaty of Versailles and committing itself to the International Rules Based order and the Rule of Law in international affairs. Treaties signed and ratified by the Executive government (preferably following parliamentary scrutiny) do not become a part of domestic law until legislated by the parliament.

However, the commitments that Australia makes through the Executive should not stand for nothing in the absence of such legislation. When the Executive Government has made a commitment by signing and ratifying a treaty, officials of that government should take that commitment seriously. It would be deeply ironic if a promise made by the Australian government to the world was construed not to apply to those within our borders. It should be a highly relevant consideration for the exercise of entrusted power and both elected and appointed officials should be subject to judicial review for a failure to do so.

Indeed, in *Teoh's case*, the High Court went further. They held that signing a treaty could give rise to a legitimate expectation that the treaty would be honoured by the relevant government minister. Governments have sought to nullify Teoh and the High Court has walked back from it.

We suggest a reversal in direction. Elected and appointed officials of the Australian executive government should assume that all Australia's treaty commitments have been made in good faith and act accordingly. Even if the Australian government that signed the treaty had not intended to honour it, this is not something that they would readily plead in either court or tribunal.[1] And it is not something any court should entertain.

We recommend that legislation should make it very clear that treaties Australia has signed and international law in general, are highly relevant considerations for the exercise of entrusted power and both elected and appointed officials should be subject to judicial review for a failure to do so. Officials and courts should also consider the deliberations of international bodies, especially international courts.

Given the threat of climate change, administrative and judicial review of key ministerial decisions that affect greenhouse emissions should be extended with international climate agreements being recognized as particularly "relevant considerations."

10 May 2023

[1] This would build on *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 High Court of Australia

APPENDIX
REFORM UNDER ART'S INTEGRITY NOW!

The problems that this reform seeks to address cannot be solved by the input of a single discipline, nor can they be solved within a single reform or a single institution. Like the proposed NACC they will only work well if part of a number of mutually supportive reforms and institutions such as those considered here. These form elements of a larger 'ethics regime', 'ethics infrastructure', 'National Integrity System' and an 'Integrity and Accountability System' or 'Integrity framework'[2] that include a combination of institutions and agencies, watchdogs, NGOs, laws, norms and incentive mechanisms

The need for other reforms is clearly recognized in the other current and recent parliamentary enquiries into electoral matters, parliamentary standards, NACC and the role of parliament in going to war. Such reforms need to be co-ordinated so that they are mutually reinforcing rather than potentially contradictory. ART's proposals in its 2021 proposal 'Integrity, Now!' identifies 20 major reforms.

Seven of ART's proposed reforms (1-7) make government more accountable to parliament, and must be at the heart of the integrity system. These include oversight of: delegated legislation, treaties, spending, going to war, improving question time, committee resources and accountability of ministerial staff.

Another eight reforms (8-15) help parliament to make government accountable: the NACC is the first. Others include non-partisan appointments (in other agencies as well as the NACC) assessment of integrity risks, restoring judicial review, strengthening the right to know, judicial commission, and guaranteed funding for integrity agencies.

Five reforms (16-20) increase the accountability of politicians by: Enforcing a ministerial code; addressing truth in politics, money in politics, media reform, and preventing government's abuse of its power to get re-elected (pork barrelling, voter suppression, election timing) which includes many of the issues covered in this submission, especially in judicial review.

ART recommends the adoption of the 'lesson not learned' from the Fitzgerald reforms.[3] Fitzgerald recommended the establishment of an enduring 'Electoral and Administrative Reform Commission' and gave it a comprehensive agenda of 20+ reforms to consider. EARC was effectively tasked with reviewing every aspect of governance in Queensland and making recommendations to Parliament (recommendations that were generally very hard to ignore) and to develop an expertise in such reforms and a strong understanding of the need for new and reformed institutions to understand the other's roles and the ways in which they could be mutually supportive. It completed the agenda in six years (effectively two terms). The result was the 'ethics regime'/'national integrity system'/'integrity framework' that came to be seen as international best practice. But rather than engaging in a series of regular reviews EARC was closed down and scandals led to short term reviews such as Hon Anna Bligh's 'Integrity and Accountability Round Table' in 2009-10 and the second Fitzgerald report in 2022.

[2] The various terms have been suggested respectively by many including Sampford (1991), OECD (1996), Jeremy Pope first CEO of TI HQ in Berlin(1998), Hon Anna Bligh (2009) and Hon Mark Dreyfus QC (2022

[3] Sampford, Charles, 'From Deep North to International Governance Exemplar' (2009) 18 *Griffith L. Rev.* 559-575