



Law Council
OF AUSTRALIA

Statutory Review of the Tribunals Amalgamation Act 2015

The Hon Ian David Francis Callinan AC QC, Independent Reviewer

27 August 2018

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
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- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the following committees and constituent bodies for their assistance with the preparation of this submission:

- The Administrative Law Committee of the Federal Litigation and Dispute Resolution Section;
- The Migration Law Committee of the Federal Litigation and Dispute Resolution Section;
- The Administrative Appeals Tribunal Liaison Committee of the Federal Litigation and Dispute Resolution Section;
- The Commonwealth Compensation and Employment Law Committee of the Federal Litigation and Dispute Resolution Section;
- The Law Society of New South Wales;
- The Law Institute of Victoria; and
- The Victorian Bar.

Introduction

1. The Law Council of Australia welcomes the opportunity to make a submission regarding the matters raised in the Attorney-General Department's statutory review of the *Tribunals Amalgamation Act 2015* (Cth) (**Amalgamation Act**).
2. This submission is directed at the Terms of Reference (**ToR**) provided by the Attorney-General for the purposes of the statutory review as required by section 4 of the Amalgamation Act.
3. The following matters should be noted from the outset:
 - The Attorney-General's media release is headed 'Statutory Review of the Tribunals Amalgamation Act 2015'. Whilst this is a technically accurate description, it somewhat cloaks the broad nature of the ToR. It is noted that subsection 4(2) of the Amalgamation Act requires the review to consider the effect of the amendments made by that Act and 'any other related matter that the Minister specifies'. The ToR for the current review are broad in nature, and on one view almost invite a wholesale review of the Administrative Appeals Tribunal (**AAT** or **Tribunal**) and its role in conducting merits review of administrative decisions. For example, one of the ToR asks the reviewer to examine:

The degree to which legislation, processes, grounds, scope, and levels of review in, and from, the tribunal promote timely and final resolution of matters.
 - The statutory review is required by subsection 4(3) of the Amalgamation Act to be completed by 1 January 2019. The Independent Reviewer, the Hon Ian Callinan AC QC, is required to provide his report by 31 October 2018. This is a date just over three months since the review was announced, with less than one month provided for public submissions. It is unfortunate that a review of potentially such significance, given the ToR, is to be conducted within these time constraints.
 - It is noteworthy that one of the ToR explicitly asks about 'the extent to which decisions of the Tribunal meet community expectations'. The Law Council is aware of a number of recently politicised comments by Members of Parliament that are critical of the Tribunal, particularly in its role in reviewing migration decisions.¹
 - In this regard, the Law Council has previously raised concerns with politicised comments directed at the work of the AAT, noting that despite there being disagreement with certain decisions, courts and tribunals provide an important check upon the unlawful exercise of power and must remain independent.²
 - On 17 May 2018 the Law Council issued a media release in which it described comments made by the Minister for Home Affairs as 'unfortunate and [that they] had the potential to undermine the standing and independence of the

¹ See eg, 'Peter Dutton 'incredibly frustrated' with visa appeals by criminals', *Herald Sun*, 30 April 2018, online at <www.heraldsun.com.au/news/peter-dutton-incredibly-frustrated-with-visa-appeals-by-criminals/news-story/0d2a1a35243400b78b1122afd43fb6f>.

² See Law Council of Australia's submission to the Joint Standing Committee on Migration 'Review processes associated with visa cancellations made on criminal grounds' (11 May 2018), online at <www.lawcouncil.asn.au/resources/submissions/review-processes-associated-with-visa-cancellations-made-on-criminal-grounds>.

tribunal'.³ Prior to this, the Tribunal issued a statement on 27 April 2018 in which it corrected media coverage about several migration decisions.⁴

- Further, on 14 March 2018 the Minister for Home Affairs asked the Parliamentary Joint Standing Committee on Migration to inquire into and report on the review processes associated with visa cancellations made on criminal grounds. On 11 May 2018, the Law Council made a submission to that Committee and evidence was provided on behalf of the Law Council on 24 July 2018. At the time of writing, the Committee's report has not been finalised, however there is likely to be crossover between the outcomes of that inquiry and the current review.
4. Bearing this context in mind, it would be unfortunate if the present statutory review of the Amalgamation Act were to arrive at conclusions based on potentially incomplete or insufficient evidence or without the ability to engage in adequate consultation. In particular, the Law Council submits that it would be concerning if the review becomes a vehicle for scrutiny of the Tribunal's decision-making processes, with an undue emphasis on highly politicised areas such as visa cancellations on character grounds, which constitute only a small percentage of the AAT's overall workload.
 5. The Law Council notes that the jurisdiction of the Tribunal has expanded over time and particularly so in 2015 as a result of the Amalgamation Act in which a number of discrete, separate tribunals were incorporated into the existing structure of the Tribunal. This included the Migration Review Tribunal, the Refugee Review Tribunal and the Social Security Appeal Tribunal. As recorded in the Tribunal's 2016-17 Annual Report, the Tribunal finalised 42,224 applications in that financial year, and had exceeded its overall target of finalising 75 percent of cases within 12 months.⁵
 6. For the year ending 30 June 2018, there has been a particular increase in the Tribunal's migration workload due to an increase in lodgements, an increase in refusals and cancellations of visas at the Department of Home Affairs, together with a loss of experienced members whose contracts were not renewed, leading to a loss of experience and new members having to be trained to make decisions.
 7. As a final introductory point, it is noted that the AAT has played a central role in providing independent merits review for a broad range of government decisions for over 40 years. During that time the legal basis on which it operates has been clarified by a series of Tribunal decisions, judicial determinations and by a number of legislative changes.
 8. It is therefore submitted that a review that is broad in compass but limited in time should be cautious in reaching conclusions unless these are founded on soundly based research and due consideration and sufficient consultation.

The role of merits review

9. Merits review is a cornerstone of Australia's administrative law system and 'promotes the observance of the rule of law'.⁶ The Australian Government has a significant role in

³ Law Council of Australia, '*Minister's comments attacking independence of tribunal were unfortunate, should not be repeated*' (17 May 2018), online at <www.lawcouncil.asn.au/media/media-releases/minister-s-comments-attacking-independence-of-tribunal-were-unfortunate--should-not-be-repeated>.

⁴ Administrative Appeals Tribunal, '*Statement about recent media coverage*' (27 April 2018), online at <www.aat.gov.au/whats-new/statement-about-recent-media-coverage>.

⁵ Available at <www.aat.gov.au/about-the-aat/corporate-information/annual-reports/2016-17-annual-report>.

⁶ The Hon. Justice Pritchard, 'The Rise and Rise of Merits Review Implications for Judicial Review and for

the regulation of public life, and the administrative law system supports the government in delivering effective governance. The Law Council notes the following principles of merits review as set out by the Administrative Review Council (**ARC**):

The principal objective of merits review is to ensure that those administrative decisions in relation to which review is provided are correct and preferable:

- *correct – in the sense that they are made according to law; and*
- *preferable – in the sense that, if there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts.*

This objective is directed to ensuring fair treatment of all persons affected by a decision.

Merits review also has a broader, long-term objective of improving the quality and consistency of the decisions of primary decision-makers. Further, merits review ensures that the openness and accountability of decisions made by government are enhanced.⁷

10. The Law Council strongly supports the role of merits review in the Australian administrative law framework, and endorses the view of the ARC that an effective review tribunal should improve the quality of future agency decision-making so as to benefit all Australians.⁸ This process is referred to in this context as the 'normative effect' of tribunal decisions, where the involvement of merits review leads to departmental decision-making that is consistent and equitable as between individuals in similar situations, and compliant with the rule of law.⁹
11. Removing or curtailing merits review can have numerous serious disadvantages, from impeding justice and distorting the Australian administrative system's functioning, to the financial and practical consequences including increased pressure on the courts (resulting in expense and delay), incorrect decision-making, decreased accountability and an inappropriate concentration of administrative power.
12. It is therefore critical that there be appropriate processes to test the correctness and appropriateness of administrative decisions affecting individual's interests. This ensures decision-makers act with care and are accountable for their decisions. In this regard, the importance of accountability is well recognised:

Accountability is fundamental to good governance in modern, open societies. Australians rightly see a high level of accountability of public officials as one of the essential guarantees and underpinnings, not just of the kinds of civic freedoms they enjoy, but of efficient, impartial and ethical public administration. Indeed, public acceptance of government and the roles of officials depends upon trust and confidence founded upon the administration being held accountable for its actions.¹⁰

Administrative Law' (2015) AIAL Forum 79, online at <www.aial.org.au/aial-forum-articles/the-rise-and-rise-of-merits-review-implications-for-judicial-review-and-for-administrative-law>.

⁷ Administrative Review Council, 'What decisions should be subject to merit review?' (1999), online at <www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx>.

⁸ Administrative Review Council, 'Better Decisions: Review of Commonwealth Merits Review Tribunals' Report No. 39 (1995), at 1, online at <www.arc.ag.gov.au/Documents/ARC+REPORT+39.pdf>.

⁹ Ibid.

¹⁰ Management Advisory Board and Management Improvement Advisory Committee, *Accountability in the Commonwealth Public Sector*, Report No. 11, AGPS, Canberra, 1993, 3.

13. In highlighting the need for a comprehensive, coherent and integrated system of Commonwealth administrative law, the ARC has noted that in general, review tribunals make a strong contribution to openness and accountability of government by providing persons affected by government decisions with a fair and open process for testing those decisions.¹¹

The role and objectives of the AAT

14. Whilst it is part of the Executive, the Tribunal provides for independent review of decisions subject to being required to follow lawful government policy unless ‘there are cogent reasons to the contrary’¹² and it must follow lawful directions given by a Minister where there is statutory power to give such a direction.¹³

15. The legislated objectives of the Tribunal are set out in section 2A of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) as inserted in 2015 by the Amalgamation Act, namely:

In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:

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

16. These objectives are referred to in the present review’s ToR. Specifically, in relation to objective (d) above, the ToR requests that the review have particular regard to:

- the extent to which decisions of the Tribunal meet community expectations; and*
- the effectiveness of the interaction and application of legislation, Practice directions, Ministerial Directions, guides, guidelines and policies of the Tribunal.*

17. The expression ‘community expectations’ in the ToR is not one that is found section 2A or elsewhere in the AAT Act.¹⁴ It is, however, found in Direction No. 65 ‘*Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*’, where ‘community expectation’ is a primary consideration in determining whether to exercise the discretion to cancel a non-citizen’s visa.¹⁵ Direction No. 65 addresses the ‘expectations of the Australian community’ in the following terms:

¹¹ Administrative Review Council, ‘*Better Decisions: Review of Commonwealth Merits Review Tribunals*’ Report No. 39 (1995), 20.

¹² *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 644-645. See also Kerrie O’Callaghan and Michelle Howard, ‘Promoting Administrative Justice: The Correct and Preferable Decision and the Role of Government Policy in the Determination’ (2013) 32 *University of Queensland Law Journal* 170.

¹³ See *Migration Act 1958* (Cth) section 499, and Direction No. 65, *Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*,

¹⁴ See Bernard McCabe, ‘Community Values and Correct or Preferable Decisions in Administrative Tribunals’ (2013) 32 *University of Queensland Law Journal* 103.

¹⁵ Direction No. 65, *Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*, online at <www.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf>.

*The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to cancel the visa held by such a person. Visa cancellation may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not continue to hold a visa. Decision-makers should have due regard to the Government's views in this respect.*¹⁶

18. In *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466, Mortimer J observed that in substance this consideration is adverse to any applicant (her Honour was referring to paragraph 13.3 of the Direction, which is set out in similar terms). Her Honour further observed that:

*...this is not a consideration dealing with any objective, or ascertainable expectations of the Australian community. It is a kind of deeming provision by the Minister about how he or she, and the executive government of which he or she is member, wish to articulate community expectations, whether or not there is any objective basis for that belief.*¹⁷

19. More generally, the legal effect of Direction No. 65 was considered by the Full Court of the Federal Court of Australia in *Jagroop v Minister for Immigration and Border Protection* [2016] FCAFC 48; 241 FCR 461.¹⁸

20. In the case of *Leha and Minister for Immigration and Indigenous Affairs* [2000] AATA 1054, Deputy President McMahon in considering an earlier version of the Ministerial Direction (Direction No. 17) stated that the Ministerial Direction in relation to community expectations:

*...could not possibly be a comprehensive statement, however. For example, as I have said elsewhere, there would be a general expectation in the community that the Act would be administered fairly and humanely.*¹⁹

21. In *Jupp and Minister for Immigration and Indigenous Affairs* [2002] AATA 458, Deputy President Block stated that the Ministerial Direction (No. 21):

... assumes (incorrectly) that there is an Australian community which thinks as one. The supporters of One Nation would have one view as regards immigration, and there is of course a very large diametrically opposed body of opinion in Australia. I construe this reference as being correctly made to middle-of-the-road reasonable members of the Australian community who do not hold extreme views one way or another. And I think that there is a further limiting factor and that is that one must import into that Australian community, knowledge of the evidence before me. If told only and concisely that a person incarcerated for armed robbery was seeking to come to live in Australia, there might well be a general view that this should not be allowed. On one facile view, these are the facts in this case. They entirely ignore the fact that the event happened nearly 20 years ago, since which time there has been a complete rehabilitation transforming a young drug-addicted

¹⁶ *Ibid*, at subsection 9.3(1).

¹⁷ *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466, [76].

¹⁸ See [57] and [78].

¹⁹ *Leha and Minister for Immigration and Indigenous Affairs* [2000] AATA 1054, [34].

*person into a responsible family man. I believe that the Australian community, so informed, would expect me to interpret the Direction in a humane fashion.*²⁰

22. The AAT's role is to make the correct or preferable decision based on the applicable law, facts and evidence.²¹ In *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, the Full Federal Court pointed out that 'the question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before them. The question for the determination of the Tribunal is whether that decision is the correct or preferable one on the material before the Tribunal'.²² This promotes the objective of justice being done and seen to be done.
23. Constraining the powers of a merits review body will only drive people to the Courts as has occurred with the Immigration Assessment Authority (**IAA**). As further detailed below, the fast track process and the highly restrictive scope of merits review of primary decisions concerning 'unauthorised maritime arrivals' has not resulted in expedition but has clogged up the Federal Circuit Court lists to the extent that in some registries judicial review applications lodged at the present time will not be heard until 2020. Prior to the introduction of the IAA, the introduction of the privative clause into the *Migration Act 1958* (Cth) (**Migration Act**) in 2001 resulted in numerous applications to the High Court in its original jurisdiction.
24. In *Re Visa Cancellation Applicant and Minister for Immigration and Citizenship* [2011] AATA 690, the then AAT President repeated and expanded on comments the Tribunal had made on the same day in *Re Rent to Own (Aust) Pty Ltd v Australian Securities and Investments Commission* [2011] AATA 689 about the role of the Tribunal when considering a discretionary power and deciding what is the 'preferable' decision. The President commented on the role of community standards and expectations in the decision-making process and in the articulation of tribunal reasons. He encouraged the articulation of such factors in reasons for decision. He also pointed out that that the Minister had exercised his statutory power in a number of cases to set aside Tribunal decisions not to cancel a visa and did not highlight 'a supposed competition or conflict between a Minister and the Tribunal'.²³ The President added:

*Where the Tribunal makes a final decision within power; where the Minister makes a final decision within power, they are both contributing to good administration.*²⁴

25. The Law Council suggests that it is important that these comments be borne steadily in mind. It would be unfortunate if this review were driven to conclusions based on a small number of outcomes or issues (accepting that these are of appropriate public interest) that do not represent the vast bulk of the work done by the Tribunal. Nevertheless, there are some matters that may need to be addressed. A number of these are discussed below.

²⁰ *Jupp and Minister for Immigration and Indigenous Affairs* [2002] AATA 458, [7(m)].

²¹ *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) ALD 158; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589.

²² *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589.

²³ *Re Visa Cancellation Applicant and Minister for Immigration and Citizenship* [2011] AATA 690, [91].

²⁴ *Ibid.*

Objectives of the Amalgamation Act

General comments on Tribunal amalgamation

26. The Law Council understands that the justifications for the amalgamation of multiple tribunals are to:
- make the tribunal system coherent;
 - ensure that tribunals are independent of their sponsoring departments;
 - improve the training of members; and
 - enable unrepresented users to participate effectively and without apprehension in tribunal proceedings.²⁵
27. Amalgamation also fulfils a need for a ‘central administrative justice focal point’ for the tribunal system to take account of the interests of users, and to achieve a ‘whole-of-government approach...by locating tribunals and administrative justice policy and administration in a single government department’.²⁶ Amalgamation is further justified as it helps avoid fragmentation of the system, variability of standards of review, lack of consistency in appointments, budgets, training and appraisal of members, as well as lack of support for users.²⁷
28. It should be recognised that harmonisation cannot be complete. To adopt only one procedure would be to compromise what might be adjustments or modifications to that procedure that would assist in the better management and disposition of matters within each Division. President Downes noted in 2006, on the 30th anniversary of the Tribunal, that:
- ... jurisdiction-specific guides enable ... the Tribunal to identify how its procedures will usually operate in that jurisdiction without hindering the flexibility necessary to manage individual cases appropriately. The guides will assist to ensure that the case management process is best adapted to the nature of the case.*²⁸
29. In this regard, the AAT has in place a number of practice directions, guides, guidelines and a policy that deals with the publication of decisions. First, there is a General Practice Direction given under section 18B of the AAT Act. This Direction took effect on 1 July 2015. There are three other Practice Directions that apply to all Divisions, these are:
- ‘Giving Documents or Things to the AAT’ effective 2 August 2018;
 - ‘Allocation of Business to Divisions of the AAT’ effective 12 October 2017; and
 - ‘Constituting the Tribunal’ effective 20 July 2015.
30. There is a further Practice Direction that operates in Divisions other than the Migration and Refugee Division (**MRD**):

²⁵ Sir Andrew Leggatt, *Tribunals for Users: One System, One Service: Report of the Review of Tribunals* (The Stationery Office, 2001), 5.

²⁶ Administrative Justice and Tribunals Council (AJTC), *Welsh Committee Review of Tribunals Operating in Wales (2010) ‘Core Recommendations’ 2-4, ‘Other Recommendations’ 4-7.*

²⁷ *Ibid*, ‘Executive summary and Recommendations’, 1.

²⁸ Garry Downes, ‘Making the AAT more relevant – reflections on its 30th anniversary’ (2007) 59 AIAL Forum 67.

- 'Lodgement of Documents under sections 37 and 38AA of the AAT Act' effective 1 July 2015.
31. There is also a Practice Direction and two President's Directions that apply explicitly to the MRD:
- 'Migration and Refugee Matters' effective 2 August 2018;
 - 'Conducting Migration and Refugee Reviews' effective 2 August 2018; and
 - 'Prioritising Cases in the Migration and Refugee Division' effective 2 August 2018.
32. There is a Practice Direction that applies to the National Disability Insurance Scheme Division:
- 'Review of National Disability Insurance Scheme Decisions' effective 1 July 2015.
33. There are two Practice Directions apply to the Social Services and Child Support Division (**SSCSD**):
- 'Child Support Review Directions' effective 1 July 2015; and
 - 'Lodgement of Documents under Section 37 and 38AA of the AAT Act in the Social Services and Child Support Division' effective 15 May 2018.
34. There is a Practice Direction that applies to the Taxation and Commercial Division:
- 'Review of Taxation and Commercial Decisions' effective 1 July 2015.
35. There are three Practice Directions apply to the General and Other Divisions:
- 'Freedom of Information' effective 1 July 2015;
 - 'Timing of Requests under section 50A of the Archives Act 1983 or section 60A of the Freedom of Information Act 1982' effective 1 July 2015; and
 - 'Taxation of Costs' effective 1 July 2015.
36. In addition to the above Practice Directions, the Tribunal has also published two Guides:
- 'Guide to Social Services and Related Jurisdiction' effective 1 July 2015; and
 - 'Guide to the Workers' Compensation Jurisdiction' dated 14 July 2015.
37. Six Guidelines have also been published:
- 'Persons Giving Expert and Opinion Evidence' dated 30 June 2015;
 - 'Use of Concurrent Evidence in the AAT' dated 30 June 2015;
 - 'Alternative Dispute Resolution (**ADR**) Guidelines' dated June 2006;
 - 'The Duty to Act in Good Faith in ADR Processes at the AAT' effective 11 December 2013;
 - 'Confidentiality in Alternative Dispute Resolution Processes' effective 17 April 2014; and
 - 'Conciliation Preparation Toolkit' issued 17 April 2014.
38. Finally, a Policy concerning 'Publication of decisions' is dated 27 June 2018.
39. It is significant to observe that a number of these documents, and in a particular a number of documents that apply to the MRD, have been in existence for only a short time. Indeed, the Practice Direction and two President's Directions that apply to this

Division became effective after this Review was instigated. The effectiveness of these operational documents will need to be assessed over time.

40. The Law Council notes principles, first propounded by Justice Kevin Bell as President of the Victorian Civil and Administrative Tribunal (**VCAT**), that amalgamated tribunals should strive to:
- improve access to justice;
 - facilitate the use of technology;
 - implement measures to increase alternative dispute resolution programs to help parties reach agreement quickly;
 - streamline the administrative structures of tribunal to improve their efficiency;
 - develop and maintain flexible, cost-effective practices; and
 - introduce common procedures for all matters while retaining the flexibility to meet the needs of parties in specialised jurisdictions.²⁹
41. These principles are not set out explicitly in the Amalgamation Act (which has no stated objectives), but they can be discerned from the Explanatory Memorandum for the Tribunals Amalgamation Bill 2014, in which it was said variously that the measures are intended to:
- streamline and simplify the Commonwealth merits review system and improve access to justice by fostering greater awareness of the Tribunal's function;
 - produce the coherent merits review framework that was envisaged when the AAT was established in 1976;
 - establish a sound institutional framework for the amalgamated Tribunal, which would preserve its independence and the expertise of its members;
 - seek to harmonise and simplify procedures applicable to merits review where appropriate, but ... also provide for flexibility in rules and diversity in approaches across the amalgamated Tribunal's varied jurisdictions [by preserving] successful processes and features of the existing tribunals;
 - preserve other procedures that are essential to maintaining fair and efficient reviews in the migration and refugee, and social services and child support, jurisdictions;
 - ensure that merits review of government decision-making is accessible no matter where an applicant to the Tribunal may be located, including by modernising provisions related to hearings by electronic means, which promotes accessibility; and
 - preserve alternative dispute resolution processes currently in place, which are a core component of the AAT's function and contribute to an economical, informal and quick review process.³⁰
42. These principles are addressed in turn below.

Streamlining and simplifying the national tribunal system

43. The Law Council notes that amalgamation has streamlined and simplified the Commonwealth merits review system by amalgamating Commonwealth tribunals with

²⁹ Justice Kevin Bell 'One VCAT: *President's Review of VCAT*', cited in Linda Pearson 'The Vision Splendid: Australian Tribunals in the 21st century' Ch 8 in Anthony J Connolly, Daniel Stewart (eds) 'Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce' (The Federation Press, 2015), 161 at 168-9.

³⁰ Explanatory Memorandum to the Tribunals Amalgamation Bill 2014, 2-4.

high volume applications. This was effected with the addition to the AAT of the other major Commonwealth tribunals extant on 30 June 2015, namely, the Migration Review Tribunal, the Refugee Review Tribunal, the IAA, and the Social Security Appeals Tribunal.

44. Simplification was achieved by co-locating these tribunals in a single registry in each of the capital cities, a move which has now been completed, and by publicising the amalgamation through media outlets, speeches and on its website. These moves have assisted merits review to become more accessible to Australians as illustrated by the significantly increased lodgements in 2016-17 across the three principal Divisions of the Tribunal, namely the General Division (**GD**), the MRD, and the SSCSD. During this period, lodgements for the GD were up 11 percent; for the MRD, up 52 percent; and for the SSCSD, up 34 percent.³¹
45. Another possible reason for the increase in lodgements in the MRD may be a reported drop in the standard of decision-making at first instance in the Department of Home Affairs and the lack of transparency and communication between primary decision-makers and applicants or applicants' representatives. It is understood that the Department has moved to a 'global decision-making framework' which means no one case officer handles an application from start to finish. A visa application is worked on by several officers, some of whom are located in the Department's overseas posts and the ability to email or telephone a case officer has been significantly limited.
46. It is further understood that the Department of Home Affairs has directed case officers to summarily refuse applications that are not accompanied by all necessary documentation. Although the Code of Procedure that applies to primary decisions in Subdivision AB (sections 51A to 69) of the Migration Act permits that approach, it is inherently procedurally unfair and simply shifts the decision to the AAT, and as such there is no time or cost saving. Anecdotal evidence from practitioners is that even where primary applications are supported by complete documentation and legal submissions, primary decision-makers may refuse them on poorly reasoned grounds. The AAT is seen by many as the only place where applicants are able to receive procedural fairness and a proper consideration of their applications.
47. Despite the benefits of streamlining under a single Tribunal, the Law Council has a notable concern with the efficiency of the Tribunal in processing cases in the MRD. There are significant delays within the Division and there is a concern that matters are not being reviewed in a manner that is 'economical, informal and quick' as required by the Amalgamation Act.³² The Law Council believes that an increase in funding and Tribunal members is critical to ensuring the Tribunal can function as efficiently as possible.
48. The Law Council understands that the Tribunal will be implementing directions hearings and improved triaging measures within the MRD. In addition, the Law Institute of Victoria has put forward the following initiatives that may help to increase efficiency within the Division:
 - The implementation of triaging initiatives like those found in the GD. For example, a telephone directions hearing line could be established or applicants could have a preliminary hearing with a registrar to resolve less complex matters. This may help to ensure that cases without merit are filtered

³¹ AAT Annual Report 2016-2017, '2016-17 Annual Report - At a glance', online at <www.aat.gov.au/about-the-aat/corporate-information/annual-reports/2016-17-annual-report>.

³² *Tribunals Amalgamation Act 2015* (Cth), paragraph 2A(b).

out early in the process. It is understood that directions hearings were held at the MRD in NSW, however have been discontinued, and has not been adopted in the MRD in other jurisdictions. Advice from practitioners in this jurisdiction is that the directions hearings were of limited utility as the Members presiding over the review were not in a position to determine the matters at issue. Some training in this procedure for Members and Tribunal case teams would be helpful in expediting reviews.

- Directions from the Tribunal requesting a short summary of issues could be provided to applicants at an early stage in the process.
 - Applicants could be provided with an expected timeframe for hearings. It is understood that applicants may receive a request for further information or an invitation to attend a hearing after not receiving any correspondence from the Tribunal for several months or years. The timeframe to respond to these requests may be as short as 1 to 2 weeks, and applicants/practitioners may not have the resources or capacity to respond to these requests on short notice with hearings only able to be postponed in exceptional circumstances. Being provided with an expected timeframe would enable applicants/practitioners to better respond to requests, and for represented applicants will ensure that client expectations are also managed.
 - There may be scope for more consistent timeframes across the divisions of the Tribunal. Here it is understood that the MRD is the only division not capable of providing for extensions of time to lodge certain forms of review.
49. Another factor that needs to be considered is the role of representatives in the Tribunal and in the MRD in particular. There are inconsistent procedures that apply to reviews done under Part 5 (migration decisions) and Part 7 (protection visa decisions) of the Migration Act. Applicants seeking review under Part 5 of the Migration Act are entitled to be assisted by another person albeit that assistant is not entitled to present arguments or to address the Tribunal unless the Tribunal is satisfied there are exceptional circumstances.³³ There is no right to any assistance for review applicants under Part 7 of the Migration Act. Review applicants under Part 7 are an especially vulnerable group, however given the complexities of migration law, both cohorts may benefit from legal representation as does the Tribunal itself. Unrepresented applicants in courts and tribunals do impact adversely on the efficiency of these organisations.
50. Similarly, a review applicant under Part 5 of the Migration Act is entitled to have access to written material before the Tribunal, subject to certain limitations.³⁴ There is no such right to review applicants under Part 7, and access to documents must be done via a Freedom of Information (FOI) request. If the documents requested relate to a Departmental file, the review applicant must lodge their FOI request with the Department of Home Affairs. This serves to prolong the review process considerably.
51. It is submitted that reviews of migration and refugee decisions should be subject to the same procedures in relation to the right to be assisted and to have access to information before the Tribunal.

A coherent merits review framework

52. Amalgamation has gone a considerable distance towards producing the coherent merits review framework that was envisaged when the AAT was established in 1976.

³³ *Migration Act 1958* (Cth), section 366A.

³⁴ *Ibid*, section 362A.

The Tribunal now comprises all the high-volume merits review tribunals in the one body, with the notable exception of the Veterans' Review Board. At the same time, the Law Council notes that there are merits review tribunals with a less sizeable caseload which remain outside the Tribunal's umbrella. These include the Australian Competition Tribunal and the Defence Force Discipline Appeal Tribunal, to name the most prominent. In the view of the Law Council, each of these tribunals has particular characteristics which mean they are not appropriately located under the AAT's jurisdiction.

53. However, the Law Council has a concern about the imbalance in size of the caseloads of the three major divisions of the amalgamated tribunal. An imbalance of this nature would not have been envisaged by the Kerr Committee or the Bland Committee from the caseload of other tribunals when the Tribunal was first established, and an amalgamated tribunal proposed.³⁵ In particular, the 2016-17 figures indicate that the MRD and SSCSD lodgements in combination are 14 times the number of the former Tribunal, whose caseload is now largely reflected in the figures for the GD.³⁶
54. The concern is that the larger divisions will potentially dominate the smaller division, receive the lion's share of resources, and will inhibit retention of features of the existing GD. This was a concern expressed in relation to the comparable proposal to amalgamate tribunals in New South Wales.³⁷ The Law Council considers that a close watch should be kept on the position over the forthcoming period.

Institutional frameworks to preserve the Tribunal's independence and expertise

55. The Law Council accepts that the Amalgamation Act has established a sound institutional framework to preserve the expertise of its members. It is submitted that in general, the Tribunal has members with expertise over the many areas of jurisdiction covered by the Tribunal. The Law Council notes, however, that for occasional calls for expertise not possessed by the Tribunal's members, or for short-term spikes in applications, there may be scope for consideration should be given to a facility for the Tribunal to make temporary appointments.
56. The Law Council also notes that a number of recent non-reappointments of members has led to a loss of skills and expertise within the Tribunal. Further, allocation of members to areas in which they have little to no experience can lead to decisions that are legally incorrect or, although possibly legally correct at one level of abstraction, are not preferable based on the evidence before the Tribunal.

Independence and the appointment process

57. Appointments and reappointments to the AAT should be seen to be non-political to ensure public confidence in the institution and the soundness of decision-making. The Law Council notes that recent appointments to the Tribunal have been for five years and more. However, there was a time during which members were appointed for far shorter periods. The Law Council is concerned that appointing members for a limited period carries with it the potential to damage the perceived independence of the Tribunal because it may be apprehended that members whose reappointment is imminent could be concerned about deciding adversely to government agencies. This

³⁵ Commonwealth Administrative Review Committee Report Commonwealth Parliament, Paper No 144, 1971 (Kerr Committee report); Final Report of Committee on Administrative Discretions Commonwealth Parliament, Paper No 56, 1973 (Bland Committee Final Report).

³⁶ AAT Annual Report 2016-2017, '2016-17 Annual Report - At a glance'.

³⁷ Report 49 of the NSW Legislative Council, Standing Committee on Law and Justice, Opportunities to consolidate tribunals in NSW, (2012) at [3.47].

would tend to undermine the public perception in the fair and impartial administration of justice.

58. Functions and responsibilities of Tribunal members require specialised legal knowledge and skill, and the Law Council contends that any person appointed to become a member of the Tribunal should be capable of demonstrating the legal skills and knowledge required to perform the duties required of AAT members.
59. The Law Council has a general concern about whether there is a sound framework which sufficiently protects the independence of Tribunal members. Australian tribunals are expected to exhibit impartiality and fairness. Public confidence in the integrity of any tribunal may be undermined if it is seen to be vulnerable to indirect governmental influence.
60. The Law Council notes the 1995 report of the ARC '*Better Decisions: Review of Commonwealth Merits Review Tribunals*' (**Better Decisions report**) which commented on the inquiry into appointments to the then Immigration Review Tribunal and called for 'more open and merit-based selection and appointment processes for all tribunals', noting that '[s]uch processes would minimise the scope for speculation about the basis upon which members have been selected'.³⁸
61. Open selection means appointments following public advertisement (which lists the selection criteria) from a pool of persons who successfully pass a preliminary assessment of suitability and interview. There would be a register of those who met the criteria and merit-based selection would mean that appointments would be made solely from those listed on the register. Although some of these requirements are met by the appointment processes for some tribunals, there are many examples of tribunals appointment, including at the Tribunal, which fall short of such a process.
62. The Law Council notes that in England and Wales, an independent Judicial Appointments Commission selects candidates for judicial office in courts and tribunals.³⁹ The use of such a body does not obviate ministerial appointments, however, the Appointments Commission reviews the processes and policies for making and reviewing appointments and for handling grievances and appeals, and provides an independent filter for the appointments process which makes it harder for political appointments to occur.⁴⁰
63. In Ontario, Canada the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009* includes the following elements relevant to the appointments processes for 'adjudicative tribunals':
 - the selection process must be a competitive, merit-based process and various criteria to be applied in assessing candidates are provided for in the statute (subsection 14(1));
 - the relevant minister must make the selection process public (subsection 14(3)); and
 - no person is to be appointed without consultation with and a recommendation by the tribunal chair (subsection 14(4)).
64. In Australia, an alternative approach has been adopted in Victoria. Here, the former President of VCAT, Justice Kellam, developed a draft protocol under consideration by

³⁸ Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39 (1995), [4.34].

³⁹ *Constitutional Reform Act 2005* (UK).

⁴⁰ Robin Creyke 'Tribunals and Access to Justice' (2002) 2 *Queensland Law and Justice Journal* 64, 77-78.

the incumbent government, relating to the selection, appointment, and reappointment processes for VCAT. This form of semi-formal agreement on the issue is an assurance that the processes will be more open and merit-based.

65. The Law Council understands that agreement was reached between the former President of the AAT and the then Attorney-General that there would be a protocol governing appointments to the Tribunal. That protocol, it is understood, was that notice of upcoming need for appointments and recommendations for appointment is provided by the President to the Attorney-General some six months prior to positions becoming vacant. Only in the event of a shortfall in recommended appointments can the Attorney-General fill the positions with suitable candidates, and if there still remains a shortfall, there is to be open advertising.
66. This protocol does not fully realise the principles accepted in ARC's Better Decisions report, the report which recommended that amalgamation occur. In that report, the ARC observed:

4.25 There is overwhelming support for a rational and transparent selection and appointment process, and for the proposition that more broadly-based consultation in that process is likely to assist in ensuring merit-based appointments. Some suggested that otherwise the conclusion would remain open that appointments were being made for reasons other than merit.

...

4.28 The existence of concerns about independence, whether or not correctly based in fact, can itself damage the credibility of individual tribunals and the tribunal system, whereby undermining the function that tribunals were established to perform.

67. The Law Council again notes its concern that there has been public disquiet about the degree of independence of recent appointments and criticism of the Tribunal.⁴¹ The Law Council is concerned that unjustified criticism of the merits review function of the Tribunal, particularly any suggestion that the Tribunal is not acting with independence, has the potential to undermine the public perception of the legitimate role of merits review, and weakens the rule of law.

Two Tiers of administrative review

68. More generally, in terms of the Tribunal's institutional framework, the Law Council notes that second tier review is available in veterans' appeals, and the first tier, the Veterans' Review Board (**VRB**), is not a tribunal within the AAT structure.
69. The quality which justifies two tier review in income support and veterans' matters is that each is a high-volume jurisdiction and claims can be dealt with more expeditiously by the Tribunal first tier or the VRB in light of the particular procedures adopted in those jurisdictions. However, within the Tribunal, having two tiers of review has led to multiple classes of members, with different levels of remuneration.⁴² Different classes

⁴¹ Law Council of Australia 'Minister's comments attacking independence of tribunals were unfortunate, should not be repeated' (17 May 2017); "John Handley, 'Citizenship and power: Appeals tribunal must remain independent, The Age (13 June 2017); Ben Doherty, 'Judge defends independence of courts in wake of Dutton comments The Guardian (20 June 2017); Michael Koziol 'George Brandis clears out 'infuriating' Administrative Appeals' The Age (29 June 2017).

⁴² Remuneration Determination 2017/09, Table 2A.

of membership also inhibits use of all members to handle matters across the Tribunal's jurisdiction.

Harmonisation of procedures while maintaining diversity

70. The Law Council accepts the need for some level of flexibility to meet the particular needs of parties in specialised jurisdictions. However, there is an equal objective to harmonise and simplify procedures applying to merits review where appropriate.
71. The Law Council notes that the first objective has been met by the authorisation under the AAT Act of the maintenance of separate procedures for matters in the MRD and the SSCSD, and to a lesser extent, the Security Division and the National Disability Insurance Scheme Division. These distinctions are reflected also in the General Practice Direction, Part 3 which sets out the Directions and Guides applying to classes of applications. This retention of differences between the key divisions (the MRD, the SSCSD and the GD) is facilitated by the appointment of a Deputy President to head each of these Divisions. The Law Council notes that for the most part, this authorisation is appropriate and is working well.
72. The second objective is effected by the President's authority under section 18B of the AAT Act to give written directions for the arrangement of business, including the procedures of the Tribunal. This power can ensure consistency in matters of procedure. The Law Council notes, however, that the President must consult the head of any Division likely to be affected by a direction prior to its implementation. This provision in practice can mean the exercise of the directions power is vetoed or delayed, to the detriment of the benefits of harmonisation. There may be scope to re-evaluate this process to ensure it is achieving the desired balance between harmonisation and diversity.

Accessibility of merits review

73. The Law Council observes that it is pleasing to see the Tribunal's advances towards synthesis of the legacy information technology (IT) systems, and the take up of IT developments to ensure that applications to the Tribunal are accessible. It is understood that online applications are now occurring in 50 percent of GD matters; 80 percent of MRD matters; and 60 percent of SSCSD matters. The encouragement and facilitation of use of these technology systems is a significant step towards ensuring that merits review of government decision-making is accessible no matter where an applicant to the Tribunal may be located.
74. Accessibility has also been markedly improved by having only one registry in each capital city, however it is important that applicants located outside of metropolitan locations have easy access to the Tribunal. In this regard, the use of telephone and video facilities is to be encouraged. The Law Council notes input received by the Law Society of NSW that the Tribunal only sits face-to-face in Sydney, and that there should be encouragement given to consider the use of regional sittings similar to the District Court of NSW to promote improved access.
75. The Law Council acknowledges that barriers to further improvements exist. These include the failure to adopt a single IT system for accessing the Tribunal, and the need to increase the take up of electronic lodgement. The Law Council notes that lodgement by hard copy file is still used in the MRD. This is in contrast with the position in the GD where, for example, the Department of Home Affairs provides material electronically to the Tribunal, thus promoting capacity and capability to deal with matters Australia-wide. The Law Council notes that care is needed to ensure the

whole file is being provided by the agency otherwise these benefits will not be realised.

76. The Law Council has been made aware of limitations in the MRD's online system, in that if a review applicant engages or changes their representative from the time the online application was lodged, there is no capacity to transfer or share the electronic file. All correspondence, submissions or documents must then be either delivered to the Tribunal in hard copy or emailed. The Tribunal recently introduced an auto receipt function for its email address and this is to be commended.
77. A further identified issue relates to applications that have been misfiled. For example, in the case of a visa cancellation matter mistakenly filed in the MRD rather than the GD, the Law Council is aware of instances where the error has not been discovered until after the time period in which to lodge a valid application has ceased, resulting in the applicant being deprived of jurisdiction and losing access to merits review.
78. In relation to fees, MRD applicants must now pay the full review fee at the time they submit a review application accompanied by a fee reduction request. Prior to amalgamation, it was the practice of the Migration Review Tribunal to accept applications without the application fee. If an applicant did not satisfy the Registrar that they were suffering severe financial hardship they were given the opportunity to pay the fee within a reasonable time. The present requirement defeats the purpose of giving relief to impecunious applicants.
79. Subsection 347(1) of the Migration Act provides that the application must be made on the approved form, within the prescribed time and accompanied by the prescribed fee (if any). Regulation 4.13(4) of the *Migration Regulations 1994* provides that if a Registrar or Deputy Registrar is satisfied that payment of the fee has caused or is likely to cause severe financial hardship, they can determine that half of the prescribed fee is payable. The case of *Braganza v Minister for Immigration and Multicultural Affairs* (2001) 106 FCR 364 decided that if the Registrar does not agree to reduce the fee, the applicant had to be given a reasonable opportunity to pay the fee even if the time limit for lodging a review application had expired by the time the Registrar made their decision. It is recommended that the previous practice be resumed.
80. Further, there is a concern that the increase in application fees and the removal of a full fee waiver for financially disadvantaged applicants presents a significant barrier to accessing merits review. The Law Council considers such barriers may be in conflict with the Tribunal's objective to remain 'accessible', as outlined in s 2A(a) of the AAT Act. The Law Council suggests that a full fee waiver for disadvantaged applicants should be reinstated and the current rate of fees be reviewed in line with the Tribunal's statutory objectives.
81. Finally, in relation to accessibility and facilities, the Victorian Bar has noted its concern that, at least in Melbourne, the accommodation for the Tribunal is not adequate. In particular, in respect of tax hearings, there are reportedly fewer hearing rooms available that are suitable for a typical tax case than there were in the previous Tribunal premises. It is noted that tax cases tend to be conducted on an adversarial basis in a manner similar to contested litigation in the Federal Court. The available hearing rooms tend to have limited seating for the parties, witnesses and others who wish to attend a hearing. If more than a few people attend a hearing, it is common for them to have to stand while the hearing takes place.

Alternative dispute resolution

82. The use of ADR processes was pioneered by the Tribunal in dispute resolution in Australia and its work has been widely replicated in other tribunals and courts. The multiple forms of ADR in use – conferencing, mediation, neutral evaluation, case appraisal, conciliation and other procedures – are a core component of the Tribunal’s function and contribute to an economical, informal and quick review process for those Divisions that have embraced it.⁴³

The extent to which the AAT operates as a truly amalgamated body

83. The Amalgamation Act has streamlined and simplified the Commonwealth merits review system and the Law Council supports endeavours to harmonise procedures across the Tribunal where appropriate.
84. The Law Council has concerns with the separate treatment given to the IAA within the Tribunal, which operates in a significantly different manner to other Divisions with limited procedural fairness and highly restricted opportunities in which applicants are able to present their claims. Established in 2014, just before the amalgamation, the IAA operated as a specialist tribunal within the RRT. The IAA continues to operate as a tribunal within a tribunal, albeit now the AAT. There does not appear to be any justification for this structure in terms of procedure or the limited assignment of members to the IAA.
85. The procedures of the IAA, set out in Part 7AA of the Migration Act, are significantly different from the general procedure of the Tribunal. The Law Council submits that decisions to refuse any class of protection visas should be capable of being reviewed by the MRD rather than the IAA. The MRD provides for an opportunity to present arguments and responses to the issues adverse to the person about whom a decision has been made. In contrast, the IAA provides a limited form of review as there is no right to a hearing and new information can only be considered in exceptional circumstances.
86. The Law Council holds strong concerns in relation to the fairness of this process and the significant risks it creates for an extremely vulnerable cohort of applicants. The truncated review procedure at the IAA has not resulted in the expedition processing of protection visa applications by ‘unauthorised maritime arrivals’ as many have sought judicial review at the Federal Circuit Court of adverse decisions which has resulted in an increase in Court hearing schedules such that a judicial review application lodged in August 2018 is not likely to be heard until 2020.
87. Again, there does not appear to be any justification for this difference and Law Council believes that the IAA should be abolished. If the jurisdiction is sufficiently different from that exercised in the MRD, and special procedures are justified, the IAA could be replaced by a separate division of the Tribunal with its own specialist procedures, albeit observing principles of procedural fairness and natural justice.

⁴³ *Administrative Appeals Tribunal Act 1975* (Cth), Part IV, Division 3.

Timely and final resolution of matters

Grounds and scope review

88. The review's ToR provide for a general question about the extent to which the grounds and scope of review facilitate timely and final resolution of matters. It is necessary first to ask what is meant by 'grounds' and 'scope' of review.
89. The Tribunal stands in the shoes of the original decision-maker to review the relevant decision and arrive at a decision that is correct or preferable. In undertaking that task, subject to statutory intervention, it can have regard to material and evidence that was not before the original decision-maker.⁴⁴
90. The phrase 'correct and preferable' or 'correct or preferable' is not used in the AAT Act other than in the context of the insufficiency of a statement of reasons.⁴⁵ This scope of review when the Tribunal approaches its task is clear from authority. The *Queensland Civil and Administrative Tribunal Act 2009* (Qld) states explicitly that the purpose of review is for the Queensland Civil and Administrative Tribunal to reach the correct and preferable decision.⁴⁶ That could be made explicit in the AAT Act but there would not seem any reason why that is necessary. The phrase 'correct or preferable' is used by the High Court,⁴⁷ and it is clear that the role of the Tribunal is to reach a decision that is correct in law and where there is a discretion to be exercised, to do so as to reach the preferred outcome. The Law Council does not consider that any changes need be made to the AAT Act in this regard.
91. In the view of the Law Council, it is important that the general nature of the scope for review be maintained and that limitations on that scope or on the grounds for review are not introduced so as to hamper the important role of the Tribunal in correcting factual and legal error and in reaching the preferred decision from a range of decisions based on the most up-to-date evidence that it is before it with the benefit of submissions (including oral argument) and legal representation where that is available.

External rights of appeal/review

92. An issue potentially raised in one of the ToR is the degree to which review by the Federal Court of Australia 'promote[s] timely and final resolution of matters'. In this regard, section 44 of the AAT Act permits appeals to the Court on a question of law, however there are some exceptions: namely, certain migration decisions (see section 43C) and certain decisions of the SSCSD Division (subsection 44(1A)).
93. The issue of what is 'a question of law' can be vexed (see the specially constituted Full Federal Court judgment in *Haritos v Commissioner of Taxation* [2015] FCAFC 92). However, one thing is clear: the removal of a statutory right to appeal on a question of law would do little to quell the review of Tribunal decisions as the route of review via the constitutional writs would be available and non-excludable.⁴⁸ It is true that this form

⁴⁴ See *Shi v Migration Agents Registration Authority* [2008] HCA 31.

⁴⁵ *Administrative Appeals Tribunal Act 1975* (Cth), section 29AB.

⁴⁶ *Ibid*, subsection 20(1).

⁴⁷ See *Shi v Migration Registration Agents Authority* (2008) 235 CLR 286 at [35] (Kirby J), [98] Hayne and Heydon JJ [128] (Kiefel J); and recently in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 at [94] and [96] (Gordon and Nettle JJ).

⁴⁸ See *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; and *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30.

of review may be narrower, but this would provide a poor reason for removing or tampering with the general right of appeal for error of law.

94. The Law Council is not aware of any compelling reason to change the current Tribunal provisions dealing with the right of appeal for error of law, rather the focus ought to remain on ensuring the merits review process is fair and accessible.

Internal rights of appeal/review

95. It has been noted above that there may be good practical reasons for retaining the two-tier structure for the mass volume SSCSD jurisdiction.
96. In New South Wales, the *Civil and Administrative Tribunal Act 2013* (NSW) makes provision for appeals of non-interlocutory decisions to an Appeal Panel as of right on questions of law and with leave on any other grounds (subsection 80(2)). The Law Council does not see the need for an equivalent regime within the federal tribunal system. To introduce such an appeal mechanism may be to add complexity and delay to the existing framework.

Tribunal funding

97. The final item in the list of the ToR calls for a consideration of the arrangements for funding the operations of the Tribunal, including ensuring consistent funding models across divisions.
98. A Note to the Financial Statements for the Tribunal's 2016-17 Annual Report in respect of the line item 'Revenue from Government' states that:

The variance against Revenue from Government is due to the demand-driven funding model in place in the Migration and Refugee Division, inherited from the Migration Review Tribunal and Refugee Review Tribunal at amalgamation. The funding model is based on appropriation at budget for finalising 18,000 decisions per annum, adjusted for any variances above (additional appropriation) or below (handing back appropriation) that number, at Portfolio. Additional Estimates Statements (PAES). The Migration and Refugee Division finalised 18,905 decisions in 2016-17.

99. The Law Council has a concern that funding based on the number of 'finalised' matters is not a sound basis on which to allocate funding to an independent tribunal charged with reaching correct or preferable decisions in individual cases that come before it. First, if the aim is to make the Tribunal more efficient, while consistent with the provision of adequate resourcing for the Tribunal members to perform their statutory roles, there are better ways that that can be done. For example, this could include measures such as encouraging greater use of ADR and trialling and adopting appropriate practice management tools. Secondly, such a basis for funding is likely to encourage 'gaming' of the system. This is a well-known result in many fields of endeavour of otherwise well-intentioned policies based around metrics. Thirdly, it singles out one division of the Tribunal for special funding measures. This is not consistent with harmonising and amalgamating tribunal practices and procedures.
100. The appropriate funding for a body such as the AAT is driven by a number of matters, many of which are beyond the control of the Tribunal itself. These include the extent and nature of jurisdiction given to the Tribunal; the quality of government decision-making; the propensity of decisions to be challenged; the rate of success of applications; the processes used to manage each case from those akin to adversarial

to ones that are much more informal and flexible in nature; and the nature and quality of representation of parties before the Tribunal.

101. The Law Council has concerns with an introduction of a demand-driven funding model that does not recognise these matters and that might inadvertently strike at the role that the Tribunal plays in promoting fair and consistent decision making by primary decision-makers.

Efficiency issues

102. A consistent justification for allocating jurisdiction to tribunals is that they are more efficient than courts. Tribunals' statutory objectives commonly include efficiency.⁴⁹ As McCabe observed:

Most of the statutes [establishing our larger tribunals] ... address the desirability of minimising costs to users. Tribunals typically provide a lower-cost experience for users through lower filing fees, simpler forms and flexible processes that are generally designed to be understood by litigants in person. They favour less formal hearing processes that focus or limit the scope of hearings, and they may dispense with 'in-person' hearing processes that focus or limit the scope of hearings, and they may dispense with 'in-person' hearings altogether in appropriate cases. Australian tribunals have also pioneered the development of alternative dispute resolution processes as part of their mission to provide cheaper mechanisms for dispute resolution and review.⁵⁰

103. The Law Council observes that many of these objectives have been adopted by the Tribunal, most notably by amalgamation itself which has reduced the number of premises, the back-office functions such as finance, human resources, payroll and IT officers needed, as well as limiting the number of libraries, front offices, signage and webpages required.
104. Another significant advantage of tribunals, including the AAT, has been the use of members with expertise in particular areas of jurisdiction of the Tribunal. Where expertise is lacking, it would assist with efficiency, as earlier recommended, if the AAT Act is amended to permit, when appropriate, the employment of members with that expertise on a temporary contract, rather than on a full-time or sessional basis. Also, importantly, the AAT Act permits hearings on the papers in appropriate cases.⁵¹
105. The Victorian Bar has advised that in most taxation cases, Tribunal members with appropriate experience and expertise are allocated to the hearing. However, there have reportedly been instances where a Tribunal member who lacks expertise in taxation law has been allocated to hear a tax case, resulting in unnecessary delay in delivering judgment, and in some cases, errors that an experienced taxation practitioner would not make.
106. As noted above, further efficiencies may be achieved by greater use of ADR, by harmonising the databases on which the various divisions rely, and by encouraging increased use of electronic lodgement of documents. Implementation of these suggested recommendations would further enhance the efficiency of the Tribunal, consistently with all of the statutory objectives.

⁴⁹ *Administrative Appeals Tribunal Act 1975* (Cth), paragraph 2A(b).

⁵⁰ Bernard McCabe 'Perspectives on Economy and Efficiency in Tribunal Decision-Making' (2016) 85 AIAL Forum 40.

⁵¹ *Administrative Appeals Tribunal Act 1975* (Cth), section 34J.

The Administrative Review Council

107. As a final, but important, matter, the Law Council wishes to take this opportunity to comment on the role of the ARC.

108. The ARC is a statutory body created in 1975 by the AAT Act. It is part of the 'new' administrative law along with the streamlined judicial review provided by the *Administrative Decisions (Judicial Review) Act 1977* (Cth), the Ombudsman and freedom of information, and privacy reforms. As recorded on its website:

The role of the Administrative Review Council 'is to ensure that our system of administrative review is as effective and significant in its protection of the citizen as it can be'.⁵²

109. However, over a number of years the ARC was starved of funds before its functions were consolidated into the Attorney-General's Department in 2015 as part of smaller government initiatives. The Minister for Finance in fact announced on 11 May 2015 that the ARC would be abolished.

110. But it has not been abolished. At least it exists on the statute book including its functions; its capacity to hold inquiries and produce reports; and an obligation under section 58 of the AAT Act to prepare and provide to the Minister an Annual Report each year.

111. The ARC is moribund in practical terms although that would not be appreciated by someone who reads the AAT Act. It is submitted that the ARC served a very important purpose in the development of ideas around administrative law issues. Its reports were intensively researched and highly respected. Ironically, the matters the subject of the ToR, or many of them, are just the sort of matters that would have attracted research, inquiry and report by the ARC.

112. The Law Council considers that the ARC should be brought back to life. Not only would that be consistent with the rule of law given the terms of the AAT Act require it to exist and operate, but it would serve a great deal of good for Australia's administrative law system.

⁵² See <www.arc.ag.gov.au>.