



Law Council
OF AUSTRALIA

Office of the President

8 August 2024

Ms Sara Samios
First Assistant Secretary
Administrative Review Taskforce
Attorney-General's Department
3–5 National Circuit
BARTON ACT 2600

By email: AATreformenquiries@ag.gov.au

Dear Ms Samios

Administrative Review Tribunal Rules 2024 (Exposure Draft)

1. The Law Council of Australia welcomes the opportunity to respond to the Attorney-General's Department's public consultation on the draft Administrative Review Tribunal Rules 2024 (the **draft Rules**).
2. Given the short timeframe to consult with our membership, and noting the Tribunal's commencement date of 14 October 2024, this submission is limited to preliminary comments about specific aspects of the draft Rules.
3. I acknowledge the assistance of our Federal Administrative Law Reform Working Group in the preparation of this response, in addition to that of the Law Society of New South Wales and the Law Society of Western Australia.

Election notices

4. Section 64(2)(b) of the *Administrative Review Tribunal Act 2024* (Cth) (**ART Act**) expressly provides a power to make rules about the publication of election notices.
5. Section 10 of the draft Rules requires the Tribunal to publish validly given election notices. The Consultation Paper states:

Publication is mandated to ensure that there is clarity and transparency for users of the Tribunal and the general public as to the kinds of matters for which a decision-maker has elected not to participate.¹

¹ Attorney-General's Department, *Administrative Review Tribunal Rules 2024* (Consultation Paper, July 2024) 4.

6. We support the Tribunal’s publication of election notices that are provided in accordance with section 60 of the ART Act. Nonetheless, we suggest that section 10 of the draft Rules should:
 - prescribe the mode of publication (e.g., on the Tribunal’s website); and
 - set a timeframe for publication.
7. We appreciate that decision-makers may choose to communicate their intention not to participate in a proceeding or Tribunal case event through their website, and/or by way of direct communication with individual applicants. However, this communication may not always occur promptly, or at all.
8. By amending section 10 of the draft Rules to prescribe the mode of publication by the Tribunal, and set a timeframe within which this must occur, the Tribunal’s prompt notification to the parties to the proceedings—and the general public—of an election notice would be guaranteed.

Participation of non-participating parties

9. As drafted, sections 12(1) and 12(2) do not prescribe conduct. Instead, they state that the Tribunal “may” have regard to the matters listed when deciding whether to allow (or order) a decision-maker to participate in a proceeding or Tribunal case event under sections 62 or 63 of the ART Act.
10. We consider that sections 12(1) and 12(2) should not remain in their current form in the draft Rules. There are two alternate approaches that could be taken, depending on the Commonwealth’s policy intent:
 - (a) Change “may” to “must” in sections 12(1) and 12(2). This amendment would enforce a consistent approach for Tribunal decisions (requiring that the matters specified are taken into account), but would not dictate that the Tribunal reach a particular outcome. The Tribunal would remain free to attribute weight to the matters listed, as it sees fit, depending on the circumstances.
 - (b) If the intention of sections 12(1) and 12(2) is to merely suggest (but not prescribe) matters that may be taken into account—set out these matters separately in policy guidance materials, not the draft Rules.

Entitlement to fees and allowances

11. Section 13(1) of the draft Rules prescribes fees to be paid for a witness to comply with a summons and give evidence. Pursuant to section 13(1)(a), this fee must be equivalent to the amount of wages, salary or fees that are not paid to the witness through their occupation, because they appear before the Tribunal.
12. While noting that this provision largely replicates what already exists in section 13 of the *Administrative Appeals Tribunal Regulation 2015*, we are conscious that the potential for unreasonably high fees needing to be paid by parties appears to be at odds with the nature of the Tribunal as a no-costs jurisdiction by default,² especially when considering its objectives of accessibility, and resolving applications with as little expense as possible.³

² Revised Explanatory Memorandum, Administrative Review Tribunal Bill 2024 (Cth) [771].

³ See *Administrative Review Tribunal Act 2024* ss 9(b)-(c), 51.

13. We suggest the discretion of the Tribunal to determine the fee amount payable in section 14(5) could extend to a discretion to take into account what is reasonable in the circumstances of the case.

Expanded powers for Registrars

14. We acknowledge that there are several powers under the ART Act that are intended to be exercised by Registrars, and we appreciate that these expanded powers may aid in the efficient operation of the Tribunal.
15. For instance, section 17(2) of the draft Rules provides for Registrars to make decisions determining the validity of review applications made under the *Migration Act 1958* (Cth). We are not opposed to this new power being given to Registrars, noting that it may reduce the lengthy timeframe typically taken to determine validity. Further, we note that validity is a jurisdictional fact that is subject to reassessment on judicial review, in order to correct error.
16. However, we submit that the power under section 359A(1) of the Migration Act should not be available to Registrars, as is currently proposed in section 17(1) of the draft Rules. Section 359A(1) is a codification of the natural justice hearing rule, as follows:

Subject to subsections (2) and (3), the Tribunal must:

- (a) give to the applicant, in a way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review; and*
 - (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and*
 - (c) invite the applicant to comment on or respond to it.*
17. To ensure that a meaningful process occurs under section 359A(1), the invitation for the applicant to comment or respond should be drafted by the Tribunal member who is deciding this matter, not a Registrar.
 18. No justification is provided in the Consultation Paper for why this power should be extended to Registrars. However, if the rationale is that exercising power under section 359A(1) of the Migration Act can be a burdensome administrative task that Tribunal members should be relieved of, we respectfully submit that this in itself is not a sufficient justification. We are also concerned about the possibility that this authorisation could be deemed to be *ultra vires* to the ART Act. We, therefore, seek clarity from the Department on the rationale for this proposed extension of power.

Fees for application to the Tribunal

19. The fee structure, as set out in Subdivision B of Division 2 of the draft Rules, appears to be largely suitable.
20. In particular, we note that, under section 22 of the draft Rules, no additional fee is payable by an applicant in circumstances where the President has referred a decision

to the guidance and appeals **panel**.⁴ This is appropriate, given that panel matters are designed to be vehicles for better decision-making in the Tribunal generally, rather than benefiting only the individual parties in a matter.

21. However, as noted in the Consultation Paper, the fees in Subdivision B of Division 2 of the draft Rules do not apply to fees for certain applications made under the Migration Act—these will continue to be dealt with under the *Migration Regulations 1994* (Cth).⁵
22. As we highlighted in our submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs in response to its inquiry into the ART Bills, applications for migration and refugee matters are subject to disproportionately higher fees, compared to other matters.⁶ The current application fee, as set by the Migration Regulations,⁷ was more than \$3300 as at January 2024, and poses a severe restriction on access to justice for migrants and individuals seeking protection visas. This fee is approximately three times higher than the standard fee of \$1121, as prescribed in section 21(1) of the draft Rules.
23. Applicants to the Migration jurisdictional area will be no better financially resourced than other individuals who are applying to the Tribunal's other jurisdictional areas. In fact, as many migrants do not have permission to work in Australia, they are already subject to a unique financial penalty. It is unacceptable that they should be subject to additional financial penalties in order to access merits review in the Tribunal.
24. Further, we understand that the current processes in the Migration and Refugee Division of the AAT are generally less expensive and time-consuming to run, and require fewer Tribunal resources, compared to other Divisions. This is because multiple cases can be heard in quick succession and presided over by the same Tribunal member, as part of a multi-applicant hearing list.⁸ As such, it is counterintuitive that the application fees are higher.
25. Any suggestion that higher fees for these matters play a utilitarian role in reducing the number of applicants is not justified empirically. In the 2022–23 financial year, a total of 19,050 applications were lodged in the Migration and Refugee Division of the Administrative Appeals Tribunal (**AAT**),⁹ a significantly higher number than any of the other Divisions, including:
 - the Social Services and Child Support Division, with 12,260 applications lodged;
 - the National Disability Insurance Scheme Division, with 4271 applications lodged;
 - the General Division, with 3937 applications lodged; and
 - the Taxation and Commercial Division, with 791 applications lodged.¹⁰

⁴ Ibid ss 128, 130(2).

⁵ Attorney-General's Department, *Administrative Review Tribunal Rules 2024* (Consultation Paper, July 2024) 9.

⁶ Law Council of Australia, *Administrative Review Tribunal Bills 2023* (Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, 2 February 2024) <<https://lawcouncil.au/resources/submissions/administrative-review-tribunal-bills-2023>> 51-52.

⁷ *Migration Regulations 1994* (Cth) regs 4.31B, 4.31BA, 4.31BB.

⁸ See Administrative Appeals Tribunal, *Handbook for Interpreters* (October 2020) <<https://www.aat.gov.au/AAT/media/AAT/Files/Policies/Handbook-for-Interpreters.pdf>> [60].

⁹ Administrative Appeals Tribunal, *Annual Report 2022-23* (2023) <<https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR202223/Administrative-Appeals-Tribunal-Annual-Report-2022%e2%80%9323.pdf>> 28, 33.

¹⁰ Ibid 28.

26. This is a significant missed opportunity to implement a more equitable and proportionate approach to application fees in the Tribunal. We recommend that this approach be reconsidered. In the interim, the application fee that is set by the Migration Regulations should be reviewed as a matter of priority.¹¹

Requesting documents in custody of a court

27. Courts cannot be subject to subpoenas or summonses to produce documents by another court or a tribunal. However, there are situations where it is appropriate for a party to proceedings in the Tribunal to request documents that are in the custody of a court.¹²
28. The draft Rules do not account for parties seeking production of documents, or things, in the custody of a court. The draft Practice Directions (released for consultation in July 2024 by the AAT) also do not account for this.
29. It would, therefore, be advantageous if the Rules and/or Practice Directions provided clarity on the process for a party (or their representative) to seek the production of documents in court custody. We have recently raised this matter with the AAT in our feedback on the draft Practice Directions.

Contact

30. We thank the Department for its close engagement with the Law Council to date, and would be pleased to continue to assist in the lead up to the commencement of the Tribunal.
31. If the Department requires any further information or clarification, please contact

[REDACTED]

Yours sincerely



Greg McIntyre SC
President

¹¹ Law Council of Australia, *Administrative Review Tribunal Bills 2023* (Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, 2 February 2024) <<https://lawcouncil.au/resources/submissions/administrative-review-tribunal-bills-2023>> 51-52.

¹² *The Rules of the Supreme Court 1971* (WA) r 2, and the Consolidated Practice Directions of the Supreme Court of Western Australia paras 33-35 provide examples of how to address this.