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Senate Legal and Constitutional Affairs Committee
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ADMINISTRATIVE REVIEW TRIBUNAL BILL 2023 AND RELATED BILLS:
ANSWERS TO QUESTIONS ON NOTICE

Introduction

- [1] This submission contains my replies to questions on notice put to me by Senators in this Committee's hearing on Friday, 26 April 2024, in respect of the merits of and unresolved issues with the Administrative Review Tribunal Bill 2023 (**ART Bill**) and related bills. These answers respond to the ART Bill and related bills as of today's date.
- [2] I reiterate that my replies are entirely my own views expressed as a practising Barrister in constitutional law and public law, and as a lecturer and examiner in Australian constitutional law. Also, I was one of the Counsel Assisting the Callinan statutory review of the Administrative Appeals Tribunal (**AAT**) in 2018-2019, which has shaped some of my view of these issues.
- [3] My own concerns with the ART Bill as set out in my written submission¹ remain unaddressed and I urge Senators to take seriously, with the utmost of gravity, that they are being asked to make the largest change to federal administrative law since the creation of the AAT almost 50 years ago.² There is no point in abolishing the AAT for the ART if the ART operates in no better way – and in some instances significantly worse – in terms of respect for the rule of law.
- [4] Constitutionally, Executive Tribunals such as the AAT and the proposed ART sit in Chapter II (Executive) but operate in a manner better described as 'Chapter 2.5'. These executive tribunals are there not to replicate courts (with all of its hierarchy, process, rules of forms, costs, etc) but instead to be executive bodies that help improve, in substance, the fair and merit-based functioning of the executive government by administrative review. The Latin maxim of '*festina lente*'³ offers itself as a guide to how major reforms of government bodies should proceed albeit this is a maxim that has not been followed in the rushed way that the ART reform process produced the ART Bill, and, especially, in the failure to produce public

¹ Submission of G.A.F. Connolly of 07 March 2024.

² *Administrative Appeals Act 1975* (CTH) (**AAT Act**).

³ A maxim that translates as, '*hasten slowly*' – also used as a military maxim by senior naval and military officers to ensure that details are not missed, and key assumptions are properly tested.

exposure drafts that would have allowed many of these quite obvious issues and problems to be resolved before this version of the ART Bill passed the House of Representatives.

- [5] I will also respond to observations made by representatives of the Law Council of Australia in their hearing on Friday, 03 May 2024, as they do bear on my replies here.⁴

Senator Scarr: Litigation Supporter (s.67)

- [6] I have reviewed the proposed amendments and one of them address the key problems with the proposed creation of a ‘*litigation supporter*’ (or “guardian” in its prior guise). I would note that the Tribunal decides cases in a merits review process – and not in litigation in a court – so perhaps ‘*review supporter*’ would make more sense? I restate that my concerns about the ‘*litigation supporter*’ (**supporter**) role are as follows:
- A. for anyone to prudently undertake this role, they must be specifically protected in the ART Bill itself by way of statutory indemnities against any and all future liability for acts done by the supporter in good faith that are within the scope of the conferred authority;
 - B. the concept of a supporter understanding the “*personal and social wellbeing*” of a party (s.67(7)-(8)) is nebulous – and a party’s wellbeing itself may be viewed quite differently during the case from how it may be viewed after the case has been decided;
 - C. given the likelihood that supporters will be family members, to whom should they go for independent advice if there is a perceived or real conflict of interest? Should the presiding member have to be an advisor here? Has anyone thought through these obvious issues? This does boggle the mind; and
 - D. is the supporter to be considered to be competent, absent outside advisors, to determine whether their applicant should settle a case or appeal any decision to either the new ART guidance and appeals panel or to the federal courts – and in either case can the supporter seek legal, financial, or other advice, and, if so, who pays? Will there be an executive tribunal equivalent of a Suitors Fund or some other fund to compensate/indemnify the litigation guardian(s) for their time and for the intellectual and human costs of their discharge of this office? Has anyone thought any of this through?

This position, even if created from good intentions, paves a road to what will be, inevitably, unpleasant places. The litigation supporter will be

⁴ See Transcript published Proof Committee Hansard – Senate – 03 May 2024 at pages 1 to 10.

absent statutory protection/immunities, or potential sources of financial assistance and/or advice. This is no less than a very poorly drafted innovation and risks being made a dead-letter if enacted, as no sane person would consent to becoming the litigation supporter.

Senator Scarr/Senator Shoebridge:

Chapter III Judicial Officer as Chapter II Executive Tribunal President

- [7] Out of an abundance of caution, I made note in the hearing to follow up this issue, albeit it does not appear in the Transcript.
- [8] I reiterate my submission that having a Chapter III judge preside over a Chapter II executive tribunal is fraught with constitutional validity issues. Arguments made around the office of President of either the AAT or the ART being valid when filled by a Chapter III judge, following some exotic principle of ‘*persona designata*’⁵ are, frankly, foolish, given that the AAT Act⁶ and the ART Bill⁷ both mandate that the President is to be a serving judge of the Federal Court of Australia. The statutory designation is of a judge as a judge serving in an executive office, not of a person who may also be a judge. Further, the assumption that is being made, that current or future High Courts will be less rather than more aggressive in their defence of the separation of powers – and of the clearest of demarcations between those who execute and those who adjudicate – is nothing less than a heroic one.
- [9] None of what I say about this issue is any adverse reflection on any past or current President of the AAT. It is simply a terrible idea in 2024 to legislatively conscript a Chapter III judge to preside over a Chapter II tribunal when there are any number of alternative presidential models for a tribunal, including that of a recently *retired* Chapter III judge. Quite apart from the fact that the one person is simultaneously capable of wielding executive and judicial power (which, arguably, is something only the Monarch could ever, possibly, legitimately do), it is a very bad result for the rule of law to position a Chapter III judge in a structure in which that Chapter III judge will answer to the Chapter II Attorney-General of the day on not just the Tribunal’s operation but on various “*human resources manager*” functions.⁸ This is especially so where Chapter II’s Attorney-General has a substantial influence over appointments to and promotions within the courts of Chapter III. It surprises me – and this issue increasingly worries me – that such an obvious Chapter II/III constitutional problem for executive tribunals will not be understood and remedied by the Parliament’s legislators in Chapter I.

⁵ Where a person is considered as an individual not as a member of a class.

⁶ AAT Act, s.7(1).

⁷ ART Bill, s.205(3).

⁸ See the Submission of G.A.F. Connolly of 07 March 2024, at [18](B).

- [10] I refer the Senate, again, to the like constitutional validity dangers of the ART's power to issue 'advisory opinions' provided for by s.288 as I set out in my submission.⁹ In the current structure, the President (while serving as a Chapter III judge) will preside over an executive tribunal which will be, potentially, issuing advisory opinions on matters or questions referred to it under Commonwealth legislation and/or instruments. It would be hard to conceive of the circumstances where the ART would issue an advisory opinion that was not signed by or published at the direction of the President. The High Court has long held that advisory opinions are not fit subjects for the Chapter III courts to provide¹⁰ – and the Federal Court of Australia to which any President will belong is a Chapter III court. It seems absurd that the President will be the one person simultaneously able to issue and not issue advisory opinions, depending on what capacity the President is serving in on any given day.

Law Council of Australia Submission

- [11] Representatives of the Law Council appeared before this Senate Committee on last Friday.¹¹ I noted this exchange with Senator Shoebridge and the witness from the Law Council of Australia, Mr Woulfe, in relation to the question of Chapter III judges serving as president of a Chapter II tribunal:

Senator SHOEBRIDGE: Of course, that's often the basis upon which the Supreme Court judges are given, effectively, executive powers under terror laws, and they notionally don't do them in their capacity as a Supreme Court judge but in some other capacity. In this case, though, it's not really a personal capacity, is it? It's quite a distinct statutory office and a parallel statutory office—and expressly parallel—with the chapter III appointment. That may not be an issue for the reasons you say.

Mr Woulfe: The reason we don't quite see it as an issue is because the qualification for appointment, being the appointment as a judge of the Federal Court of Australia, is a condition precedent. It's the antecedent step that gets you through the door, so to speak, but you're not acting as a chapter III judge when you're the president of the Administrative Appeals Tribunal or the Administrative Review Tribunal in that context. So, it's probably in the area of personal capacity, even though the judicial appointment is the antecedent qualification.

Senator SHOEBRIDGE: Do you see them as sufficiently functionally distinct that the issue won't arise?

⁹See the Submission of G.A.F. Connolly of 07 March 2024, at [18](D).

¹⁰ *In re Judiciary and Navigation Acts* (1921) 29 CLR 257

¹¹ Senate Proof Committee Hansard, Friday, 3 May 2024, pages 1 to 10.

Mr Woulfe: They're functionally distinct insofar as the performance of the role, but the interplay between the two offices is useful and helpful, particularly in the context of appeals on a question of law to the Federal Court of Australia. For example, under the current regime in the Administrative Appeals Tribunal Act, if there's an appeal on a question of law from a deputy president who is not a judge, then there's a liaison between the Chief Justice of the Federal Court of Australia and the President of the Administrative Appeals Tribunal, to ascertain whether the matter should go to a full court rather than a single judge. That interplay is useful because the two judicial officers know the court, but the President also knows the tribunal and can bring that liaison to bear, even though the appointment in the tribunal is a separate one.

- [12] I restate the reservations that I set out above and note, also, the obvious constitutional validity issues that will arise because of the adverted to ‘*interplay*’ between the tribunal and the courts. Our separation of powers means, and the only ‘*interplay*’ for which our written and entrenched Constitution provides is, a polity where the Executive *executes* the laws of the Commonwealth (including through a merits review process in relation to decisions made by the Commonwealth’s officers that involve neat judgments of policy) and the Judicature *adjudicates* the laws made under the Constitution, including questions of law and their application to particular facts. It is a cardinal error to mistake these two fundamental and thus separate constitutional organs for interchangeable ‘*interplayers*’.
- [13] Please contact me if I can be of further assistance to the Senate.

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