CARINA FORD
IMMIGRATION LAWYERS

1 October 2025

Sent by email: LegCon.Sen@aph.gov.au

Attn: Monika Sheppard
A/g Committee Secretary

Dear Ms Sheppard

Submission - Inquiry into the *Administrative Review Tribunal and Other Legislation Amendment Bill 2025* (Inquiry)

1. We refer to the above and thank you for the invitation extended to Carina Ford Immigration Lawyers to provide the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) with this submission as part of the Committee's Inquiry.

2. Carina Ford, in her capacity as co-chair of the Migration Committee, Law Council of Australia has previously provided feedback as part of the Law Council of Australia's response to Inquiry. As such, this submission on behalf of Carina Ford Immigration Lawyers will be limited specifically to providing an Applicant's and Applicant's representative's perspective about the legislative impacts of deciding migration decisions 'on the papers', in particular in relation to student visas ,but also other visas given the proposed bill also includes the ability to add other subclasses of visas in relation to the proposed bill changes outlined in paragraph 3 and 4.

3. The Administrative Review Tribunal and Other Legislation Amendment Bill 2025 would amend section 106 of the *Administrative Review Tribunal Act 2024* to expand the circumstances in which the Administrative Review Tribunal (**ART**) may make a decision without holding an oral hearing.

4. The Bill would also amend the *Migration Act 1958* to require the ART to make decisions in relation to applications for review of certain kinds of reviewable migration decisions

without conducting an oral hearing. The proposed amendments would include a review procedure set out in new Division 4A of Part 5 of the Migration Act.

5. We will address our concerns in further detail below.

6. In summary, Carina Ford Immigration Lawyers is concerned by the Administrative Review Tribunal (**ART**) Amendment Bill's removal of the opportunity for an oral hearing for certain groups of Applicants, on the basis that it will:

    a. Impact the quality of decision making in the Student Visa cohort;
    b. Decrease transparency in the decision making of the ART;
    c. Ultimately increase work for ART Members/decision makers;
    d. Increase the caseload of the Federal Circuit and Family Court of Australia (**FCFCOA**), and potentially the Federal Court; and
    e. Impact unrepresented Applicants or Applicants who have limited representation at the ART.
    f. Impose changes that are not proportionate to the loss of a right of a hearing, where we believe that the claimed efficiency is to the detriment of the other objectives of the ART.

Increase in Student Visa Applications at the Administrative Review Tribunal

7. It is acknowledged that there has recently been an increase in student visa refusal decisions (and therefore, applications to the ART to review student visa applications). However, we submit that it is imperative to look at circumstances regarding what may have caused the increase in refusals and ART reviews before making the proposed amendment, or at the very least to seek such information from the Department of Home Affairs as to why there has been an increase in refusals.

8. From our experience, there have been a number of factors that have contributed to a spike in applications and, subsequently, refusals. Firstly, the changes introduced on 1 July 2024 to certain subclasses (such as visitor visas and Subclass 485 visa applications) prohibited an Applicant's ability to lodge a student visa as the holder of certain visas after that date. This, we note resulted in a sharp influx of Student Visa applications prior to the changes on 1 July 2024, and has now, months later, added to the increase in ART review applications as a number of these applications have gone on to be refused. Prior to and after this change, a significant number of pending applications were refused, on the basis of applicants being held to not be a 'genuine temporary entrant' / 'genuine student' due to applicants swapping from a 485 or visitor visa to a student visa. The aim of these changes

was to stop "visa hopping", but prior to these changes commencing, there were already a considerable number of applications pending and lodged prior to the changes coming into effect.

9. Secondly, the changes to the Genuine Student criteria (formerly known as the Genuine Temporary Entrant criteria) on 23 March 2024, also contributed to an increase in refusals. Additionally, the qualifying age for the subclass 485 dropped from 45 to 35 subject to a few exemptions, which in turn led to a significant number of student visa applications from applicants who were no longer able to apply for the 485 visa.

10. Thirdly, that as a result of the COVID 19 Pandemic, there were a large number of student visa holders who had not departed Australia, and many that had extended their student visas as a result.

11. Fourthly, based on our experience, very few student visa applications receive requests for further information to clarify issues, particularly in relation to genuine student assessments and finance requirements. This means that numerous applications which could have been approved if further information had been a. requested and b. provided are simply immediately refused.

12. As such, while we have seen an increase in applications to the ART as a result of the above changes, we will now also start to see a decrease in initial applications and ART views given the above changes have now come into effect. Their impact will take time to be realized, but the point is that a sharp decrease in initial student visa applications necessarily leads to a reduction in associated review applications.

13. At the very least, the data needs to be analyzed as to whether there is likely to be an increase in student visa refusals longer-term such that these proposed changes to the ART are actually warranted. It is noted that according to the Department's own data *"the six months from 1 July 2024 to 31 December 2024 saw a* ***decrease of 27.8 per cent in the number of Student visa applications lodged****, when compared with the same period in 2023-24."*[1] (our emphasis)

<u>Time of Decision Refusal Reasons</u>

[1] https://www.homeaffairs.gov.au/research-and-stats/files/student-temporary-grad-program-report-dec-2024.pdf

14. A major concern with removing the Applicant's ability to attend an oral hearing is where there has been a change in the their circumstances between the refusal of the visa and decision of the ART.

15. An Applicant's circumstances at the time of the decision of the Department are often vastly different to their circumstances at the time in which the ART make a decision on the review application. An oral hearing gives Applicants the opportunity to update the ART with such circumstances.

16. From our experience, Student Visa applications are often refused at the Department stage on the basis of the following:

    a. Failure to maintain a Confirmation of Enrolment (CoE);
    b. Failure to meet the financial / funds requirement;
    c. Failure to undertake or provide evidence of undertaking medical examinations;
    d. Failure to meet the Genuine Student / Genuine temporary entrant requirement; and
    e. Public Interest Criteria 4020.

17. As such, even if a visa was refused on one particular criteria at the Department stage, the ART often proceeds to consider *all* of the criteria for the grant of the student visa as part of the review process, regardless of the initial reason for refusal.

18. This is an onerous task for a decision maker to do properly and lawfully 'on the papers' and without an oral hearing. Therefore, not only do we submit that this actually has the potential to increases the work for the decision maker, it may lead to repeated requests to applicants, and any gains made in the time saved from not running a hearing will be lost once further information is requested.

<u>The importance of independence of the ART in overseeing decisions of the Department</u>

19. In our experience, there are frequently errors made in assessing Student Visa applications at the Department level, and therefore the ART is a further check against decisions of the Department, which are often infected by jurisdictional error.

20. The example below is an excerpt from recent correspondence from the Department after we had requested that a decision be vacated on the basis that the decision record was factually wrong (and therefore had fallen into clear jurisdictional error):

> *We are satisfied that the officer considered all information available in accordance with the relevant legislation and policies, and that mention in the*

decision record of 'no history of travel to Australia' is an administrative error whereby the delegate certainly was aware of the applicant's previous travel as part of their assessment and that this should have been worded as such in the decision record.'

21. From our experience, despite there being a clear error in a decision, the Department is highly unlikely to 'vacate' a decision to refuse based on a legal error, and therefore the ART is the Applicant's only chance at having the decision rectified. An oral hearing assists decision makers in understanding the error and obtaining further information and or evidence from the Applicant to make an informed decision.

'Genuine Student' Requirement

22. We submit that the application of the 'Genuine Student' policy requirement is *discretionary* and therefore, 'on the papers' decision making, without an oral hearing, may result in an increase in affirmations at the ART. This is analogous to what occurred with the Immigration Assessment Authority (IAA).

23. Given the discretion, ART decision makers may be required to seek further information from Applicants before being able to make an informed decision, which is the opportunity that an oral hearing provides. In the event that the ART is required to issue requests for further information, this could take a significant amount of time to issue to the Applicant. The Applicant would then be given the opportunity to respond, and provided a timeframe to do so. In the event that the information does not address what the ART decision maker requires, or should that information trigger a further request, then the decision maker would then have to repeat the process. We submit that this is inefficient, when such queries could be addressed at an oral hearing when applicants are asked to provide supporting documents and submissions prior to the hearing.

24. It is our view that addressing the Genuine Student criteria in writing is onerous where an Applicant is not given an opportunity to attend a hearing, particularly if an Applicant is unrepresented, or has difficulties with English. It can be extremely difficult for unrepresented Applicants to understand and address the criteria thoroughly, and an oral hearing gives applicants this opportunity.

Decision Making of the ART

25. From our experience, having run many apprehended bias cases, we note that some decision makers can become highly cynical or 'burnt out' when dealing with the same type of visa applications for an extended period of time. This has resulted in a number of

apprehended bias cases being successfully run in the FCFCOA and FCA (an example being *Sharma v Minister for Immigration and Border Protection* [2017] FCAFC 227 (22 December 2017)).

26. We submit that subjecting ART Members to decide multiple student visa review applications 'on the papers' and without an oral hearing will necessarily impact the quality of the decision making even further and simply increase the caseload at the FCFCOA.

27. Respectfully, we submit that the decision-making process is likely to become less transparent, as decision makers would have far less contact with Review Applicants and will inevitably make decisions on the basis of information in writing, which may, for various reasons, be vague or generic. This is also at a time when AI is starting to be used progressively in the legal profession. There is a real concern that AI could be used in circumstances where Members are being set rigid targets to finalise a high number of written decisions with comparable factual scenarios. A hearing makes a decision-maker consider the particular circumstances of the individual, and leads to a fairer and more equitable decision-making process.

28. The quality of the decision making, we submit, may be compromised given the potential lack of evidence or information before the decision maker at the ART. Alternatively, the lack of hearing deprives the member of the ability to resolve factual queries which could easily be resolved in a hearing by simply asking a question of the applicant, rather than issuing request(s) for further information.

<u>Student Visa (Pre Hearing) Form</u>

29. Without an oral hearing, we submit that decision members would rely on, in even further detail, the Student Visa (pre-Hearing) form which is sent to Applicants prior to their matter being set down for hearing.

30. From our experience, unrepresented Applicants often rush to complete these forms, and treat it simply as an administrative form and not as formal evidence to be relied upon in their matter.

31. Even if the current pre-Hearing form were not used, we assume that some generic request for information will be created, potentially based only on the reasons for visa refusal. Based on experience, we assume further that a member is unlikely to have been constituted to the matter at the time this form is sent out.

32. Without an oral hearing, the Tribunal is unable to subsequently confirm any information that may require clarification. The Tribunal could request further information in writing, however depending on how much information is required, it is, we submit, more efficient to simply set down an oral hearing to obtain this information or to clarify the information outlined in the form.

33. Moreover, the level of expertise of legal representatives at the ART varies greatly. Often, Applicants pay for a representative (or purported representative) to lodge the ART application who limit their services to lodgement and allow applicants to 'fend for themselves' post lodgement. Often Applicants are left with no formal representation for the duration of the ART process and therefore have no assistance with completing the Student Visa form, or in responding to correspondence from the ART.

34. While Student Visa Applicants are required to provide evidence of meeting the English language requirement, the Student Visa Form asks complex questions and uses language that may require interpreting.

35. It is evident that Applicants do not always understand pre-hearing forms sent to them, as per the decision in *LLR24 v Minister for Immigration and Citizenship (No 2) [2025] FedCFamC2G 1227* (6 August 2025). Again, an oral hearing is the opportunity to clarify the Applicant's evidence.

Migration Fraud

36. From experience, some Applicants experience migration fraud at the application stage by registered or (more frequently) unregistered representatives, purporting to be migration agents.

37. From our experience, Applicants often are unaware of this until the ART proceedings and in some cases, even later. As such, allowing for Applicants to attend oral hearings gives Applicants the opportunity to correct information or raise concerns regarding how their matter was dealt at the Department.

The Immigration Assessment Authority (**IAA**) Decision Making experience

38. As you may be aware, the IAA conducted 'on the papers' assessments for approximately 9 years. During this time, only a small number of applicants were ever in fact interviewed by the IAA. The result of this 'on the papers' decision making was an impact on the quality of decision making, evident in the substantial number of successful FCFCOA and FCA applications remitted back to the IAA (and now, ART) on the basis of being infected by jurisdictional error.

39. The 'on the papers' decision making seen at the IAA resulted in a significant increase in FCFCOA applications, many of which remain pending and have not had a final hearing at the FCFCOA due to the significant backlog in applications in that forum.

40. The extremely quick IAA decision-making process (including the limited ability for Applicants to provide further information or evidence), introduced in the name of efficiency, resulted in such decisions being infected by jurisdictional error, as the 'quick' processing by the IAA often resulted in information or evidence being missed or not assessed accurately.

41. Over time, our experience was that the IAA simply started to accept the new information, but then found other reasons why the decision should be refused.

42. It is submitted by the Government that the proposed changes are different because they will allow new information, however in our view this does not fix the issues addressed above, and neither does it assist the Tribunal with issues of determining credibility. Our concern is that, with nowhere else to turn, Applicants will invariably turn to an already monstrously overburdened FCFCOA and so removing the right to a hearing will not resolve the problems that this measure purports to address.

43. The impact on the Courts needs to be considered, particularly if the affirm rate increases at the ART. The cost of running a Court matter is significantly higher than running a Tribunal matter, in terms of public spending and also in terms of the access to justice generally where the Court is disproportionately involved in migration matters.

Cost of ART Applications

44. Currently, the ART application fee for migration matters is $3,580 which we submit, in part, covers the costs involved with the ART holding an oral hearing.

45. If the plan to remove oral hearings for Student Visa Applicants is effected, we submit that this fee must be reviewed, given that the ART would not then be required to cover costs to in fact hold an oral hearing. It would be grossly unfair for this cohort to pay the same ART fee as others (and we note far in excess of the visa application charge for an actual student visa application of $2,000) for a limited service. Proportionately, this is unfair and is not providing equal access to justice for those who are affected by primary level decision-making.

Applying the Proposed Amendments to other Visa Cohorts

46. Given the concerns raised above, we submit that incorporating the proposed changes to other visa applications/cohorts at the ART is of **significant** concern. With respect, we

advise against the proposed changes for the Student Visa cohort, let alone other visa cohorts/applications reviewed by the ART.

47. Oral hearings at the Tribunal give applicants a reasonable opportunity to present their case before a decision is made. An applicant can speak in their own words or language (with the use of an interpreter), respond to written evidence provided, address potential adverse information and have their arguments heard by the member. It provides applicants with the right to be heard, in circumstances where initial decision makers at the Department level frequently make poor decisions, particularly where matters of discretionary interpretation are concerned. The retention of oral hearings also also falls within the ART's own objectives, being:

As per the Administrative Review Tribunal Act 2024, our objective is to provide an independent mechanism of review that:

- *is fair and just*
- *ensures that applications to the Tribunal are resolved as quickly, and with as little formality and expense, as a proper consideration of the matters before the Tribunal permits*
- *is accessible and responsive to the diverse needs of parties to proceedings*
- *improves the transparency and quality of government decision-making*
- *promotes public trust and confidence in the Tribunal.*

Recommendation

48. We do not support the proposed amendments relating to removing the right to a hearing, or the ability to add other subclasses of visas to remove the right to a hearing.

49. Instead of removing the right to attend an oral hearing for an Applicant, we recommend the following:

    a. Improving the quality of the decision making at the Department stage, which would reduce the overall number of review applications lodged with the ART. This can be achieved by the Department formally requesting further evidence and information from Applicants at the Department stage before making a decision;
    b. Consider undertaking a more holistic approach (without the need for this legislative change) in addressing the reasons for increases in applications to the ART, which includes looking at the impact it will have on applicants impacted by the changes, the causes of the increases, whether the proposed time efficiencies are in fact correct and the impacts it will have on the Federal courts.