

Inquiry into the ART bills

Response to questions on notice

Bill Browne

March 2024

Thank you for the opportunity to appear before the inquiry into the Administrative Review Tribunal bills on 15 March 2024. I took three questions on notice.

Senator SCARR: There was a submission received from the Deputy President of the AAT, Dr Dragovic, dated 7 March 2024. Section 3 of that submission is headed 'Weakening of member independence', and it discusses the powers of the president under the new bill. I would be happy to hear any thoughts or concerns you have at the moment, but I would be very interested if each of you—including you, Mr Watson—could have a look at those provisions and the powers of the president and raise any thoughts you have as to whether or not the provisions could operate to weaken the independence of a member. Do you have any thoughts on that issue now?

Dr Denis Dragovic makes a reasonable point. “Benchmarking” (according to Justice Callinan a “target” by stealth) could lead to pressure to rush certain cases, perhaps refugee cases – especially if the Administrative Review Tribunal (ART) is under-resourced. There is a risk that members who refused to sacrifice due process and a fair hearing for the sake of institutional targets could face sanction or, potentially, termination.

On the other hand, under-performance of members has been identified as a serious problem of the Administrative Appeals Tribunal (AAT). The 2022 Senate administrative review inquiry heard of members who were incapable of doing their jobs,¹ which was grossly unfair to applicants.

Perhaps an improved appointments process can head off the risk of under-performing members. If not, a termination process for under-performance (more readily available

¹ Anonymous authors (2022) *Submissions 34 and 35*,
https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Ad_minreviewsystem/Submissions

than an address of both houses) may still be needed – but perhaps it can be moderated so that it applies only in cases of gross incompetence, and cannot be abused to capture those who are appropriately thorough and diligent.

It is worth noting that the ART bills strengthen member independence in other ways, such as through the fixed term of appointment which avoids members being appointed for short periods with the implication that re-appointment is conditional.

Senator SCARR: A submission has been made by Narelle Bedford, who's an assistant professor from Bond University. Again, I am happy for each of you to take this on notice. This is in relation to what happens to existing members of the AAT who perhaps are not reappointed, and her submission states in paragraph 18:

I note there is an existing determination of the Remuneration Tribunal which applies to all statutory office holders which permits a 12 month salary payment to be made in the event of earlier termination. For the integrity and independence of all statutory office holders, not just tribunal members, this determination must be adhered to. Any purported attempt to reduce the payment period must be resisted ...

There's a concern that, under the transitional provisions, that Remuneration Tribunal determination would not apply in the context of the existing AAT members. I'm happy for you to take that on notice, but I think it becomes part and parcel of the question of making sure that the existing members of the AAT are treated with due process and fairness. Do any of the witnesses have any comments in relation to that question in the first instance? Again, I'm happy for you to take it on notice. Mr Browne?

I do not think the cost of paying 12 months' salary to terminated AAT members is too onerous, given the importance of replacing the AAT with a tribunal that works better and with qualified and independent members staffing it.

That said, the 12 months' salary payment for statutory office holders presumably is intended to protect individual office holders from political pressure and the disruption of their finances; in this case, where the change has been flagged for a long time, affects a class of statutory office holders not an individual, and is not being done to exert political pressure, I think an argument could be made that a shorter period is reasonable and does not deny natural justice to terminated members.

Senator SHOEBRIDGE: What do we do about the process that's happened to date? There's been an administrative process churning around in the background to consider the existing AAT members and to consider fresh appointments in order to get things ready for an early start for this panel. What would we need to see to be satisfied about that process? Should that be reflected in the bill, maybe in the transitional provisions?

(At the time, I answered: There's a policy question and a political question here of how you guarantee confidence in the decisions that are made. To my mind, transparency has to be a key part of that. We've recommended, for example, that the qualifications of all appointees to the ART be published. Having a guarantee that that was going to happen would go a long way to comforting people that the appointments that have been made are legitimate and can be scrutinised publicly. Beyond that, I'd have to take on notice what we can do about the transition itself.)

Transparency about the process involved to date, who has been appointed to the panels and a commitment to publish the credentials of appointees would be a good start.

Public confidence in the ART and the independence of appointments made to it is essential if the tribunal is to make a clean break from the AAT and the doubt and suspicion understandably associated with that tribunal.