Submissions

A. Introduction

1. On 27 July 2018, the Attorney General, the Hon Christian Porter MP, announced that the Hon Ian David Francis Callinan AC QC, former Justice of the High Court of Australia, will undertake a statutory review of the Administrative Appeals Tribunal **(AAT)** in accordance with section 4 of the *Tribunals Amalgamation Act 2015* **(TA Act)**.

2. On 1 July 2015, the AAT was amalgamated with the Social Security Appeals Tribunal and the Migration Review Tribunal and Refugee Review Tribunal. The amalgamation occurred following the commencement of the TA Act.

3. Under section 4 of the TA Act, the Attorney General must initiate a review of the operations of the amendments made under the TA Act, commencing as soon as practicable three years after the commencement of the TA Act. The review must also consider any other related matters that the minister specifies.

4. In July 2018, the Terms of Reference in relation to the AAT Statutory Review **(Statutory Review)** were released publicly.[1]

5. The writer received an email on 30 July 2018, the effect of which provided information in relation to the Statutory Review and the potentiality of lodging a written submission in relation to the Statutory Review process. In accordance with that invitation, the writer makes the following submissions.

B. The Statutory Objectives of the AAT

6. One of the Terms of Reference related to the Statutory Review is expressed in

[1] https://www.ag.gov.au/Consultations/Documents/statutory-review-tribunals-act-2015/aat-statutory-review-terms-of-reference.pdf

the following terms:

> Whether the Tribunal is meeting the statutory objectives contained in section 2A of the Administrative Appeals Tribunal Act 1975, with particular regard to:
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> - The objective to promote public trust and confidence in the decision making of the Tribunal, including:
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> - the extent to which decisions of the Tribunal meet community expectations; and
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> - the effectiveness of the interaction and application of legislation, practice directions, ministerial directions, guides, guidelines and policies of the Tribunal.

7. Section 2A of the *Administrative Appeals Tribunal Act 1975* (Cth) provides as follows:

> Tribunal's objective:
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> In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:
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> (a) is accessible;
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> (b) is fair, just, economical, informal and quick;
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> (c) is proportionate to the importance and complexity of the matter; and
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> (d) promotes public trust and confidence in the decision making of the Tribunal.

8. At a broad level of generality, it is the view of the writer that the AAT is meeting the statutory objectives reflected in section 2A of the *Administrative Appeals Tribunal Act 1975* (Cth). Accordingly, broadly speaking, the decisions of the AAT are both largely meeting community expectations and giving effect to applicable legislation, related policy and applicable guidelines.

9. First, in 2016–17, 82 per cent of applications were finalised within 12 months of

lodgement.[2] In 2015–16, 80 per cent of applications were finalised within 12 months of lodgement.[3] Given these statistics, it follows that a substantial number of applications before the AAT have been finalised within an appropriate timeframe. Although 34,495 applications were on hand at 30 June 2017, this must be considered in light of the following matters:[4]

(1) The number of applications lodged with the AAT increased by 24% during 2016–17.

(2) The significant increase in lodgments resulted in a 36 per cent increase in the number of applications on hand at year end.

10. According to the 'AAT Caseload Report for the period 1 July 2017 to 31 May 2018', 77 per cent of applications (on average) before the AAT were finalised within 12 months of lodgement.[5] Given this statistic, the most recent data from the AAT appears to support the following conclusions:

(1) Analogous to the 2016–17 financial year, the AAT has been able to finalise a substantial number of AAT applications within an appropriate timeframe in 2017–18 (i.e. within 12 months of lodgement).

(2) Apart from the Migration and Review Division of the AAT,[6] most divisions of the AAT have been able to finalise a substantial number of applications within 12 months of lodgement.

11. Second, the number of appeals allowed by the courts in 2016–17 amounted to

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[2] Administrative Appeals Tribunal, '2016–17 at a glance', p. 3: http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201617/AAT-At-A-Glance-2016-17.pdf
[3] Administrative Appeals Tribunal, '2016–17 at a glance', p. 4: http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201516/AAT-At-A-Glance.pdf
[4] Administrative Appeals Tribunal, '2016–17 at a glance', p. 1: http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201617/AAT-At-A-Glance-2016-17.pdf
[5] AAT Caseload Report for the Period 1 July 2017 to 31 May 2018: http://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2017-18.pdf
[6] The Migration and Review Division of the AAT has finalised an average of 58 per cent of applications within 12 months of lodgement, the third lowest proportion of applications finalised within 12 months of lodgement in comparison to other divisions within the AAT.

3 per cent of all decisions made by the AAT in 2015–16 that could have been appealed to the courts.[7] According to the AAT, this is an improvement on the 3.3 per cent result in 2015–16.[8] Prima facie, this statistical data appears to support the following propositions:

(1) Almost all AAT decisions have been made lawfully in accordance with relevant law and applicable policy documents.

(2) The institutional integrity and competency of the AAT cannot seriously be open to question, given that only a very small number of decisions have been overturned by the courts.

12. Given the statistical data with respect to judicial review outcomes, it is submitted that the decisions of the AAT can be characterised broadly as promoting public trust and confidence in the decision-making mandate of the AAT. Had there been a substantial number of AAT decisions set aside on appeal before the courts, logically, this would call into question public trust and confidence in the decision-making process of the AAT. However, as noted previously, this does not appear to be the case at all.

13. Third, in terms of the Migration and Refugee Division of the AAT, the statistical data indicates that the migration clearance rate for the year to date (financial year to 31 May 2018) is 47 per cent,[9] and the refugee clearance rate for the year to date is 45 per cent.[10] The available data further indicates the following:

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[7] Administrative Appeals Tribunal, '2016–17 at a glance', p. 3: http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201617/AAT-At-A-Glance-2016-17.pdf
[8] Administrative Appeals Tribunal, '2016–17 at a glance', p. 3: http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201617/AAT-At-A-Glance-2016-17.pdf
[9] Administrative Appeals Tribunal Migration and Refugee Division Caseload Report Financial Year to 31 May 2018, p. 1: http://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-Detailed-Caseload-Statistics-2017-18.pdf
[10] Administrative Appeals Tribunal Migration and Refugee Division Caseload Report Financial Year to 31 May 2018, p. 1: http://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-Detailed-Caseload-Statistics-2017-18.pdf

- There are 28,792 active applications involving migration matters before the AAT.
- There are 14,367 active applications involving refugee matters before the AAT.
- There is a combined total of 43,159 active applications involving migration and refugee matters before the AAT.

14. Although it appears that there is a significant number of active applications that have not yet been considered by the Migration and Refugee Division of the AAT, this must be considered in the context of the following matters:

- Migration lodgements were up 43 per cent in the financial year to May 2018 compared with the same period in the previous year.
- Refugee lodgements were up 47 per cent in the financial year to May 2018 compared with the same period in the previous year.[11]

15.. The AAT has noted that:

> The active migration caseload is up 87% compared to the 15,391 cases that were on hand at the same time last year [i.e. financial year to 31 May 2017]. The active Refugee caseload is up 72% compared to the 8,334 cases that were on hand as at the same time last year [i.e. financial year to 31 May 2017].[12]

16. While there appears to be a substantial number of applications that remain active before the Migration and Refugee Division of AAT, this fact does not necessarily reflect adversely on the statutory performance of the AAT. Given the significant increase in lodgement of applications to the Migration and Refugee Division of the AAT in the financial year to 31 May 2018, this is likely to reflect a broader proposition; namely, that further government funding is

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[11] Administrative Appeals Tribunal Migration and Refugee Division Caseload Report Financial Year to 31 May 2018, p. 2: http://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-Detailed-Caseload-Statistics-2017-18.pdf

[12] Administrative Appeals Tribunal Migration and Refugee Division Caseload Report Financial Year to 31 May 2018, p. 9: http://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-Detailed-Caseload-Statistics-2017-18.pdf

required to address the substantial increase in workload of the Migration and Refugee Division of AAT in recent times.

17. Fourth, for the period 1 July 2017 to 31 May 2018, in totality, the proportion of applications in relation to which the AAT has changed the decision under review is 24 per cent.[13] For the period 1 July 2016 to 30 June 2017, in totality, the proportion of applications in relation to which the AAT has changed the decision under review is 26 per cent.[14] From this statistical data, the following assertions can be made:

    (1) A substantial number of decisions made by various Commonwealth government departments have not been disturbed on review by the AAT.

    (2) To the extent that the AAT has set aside decisions of delegates in various Commonwealth government departments, this must be considered in the context of various matters: the addition of new evidence before the AAT, the ability of the AAT to assess the credibility of evidence adduced orally and the potential change in circumstances of applicants that come before the AAT.

18. Given the preceding statistical data, members of the Australian community can take comfort in the fact that there is a possibility (although not large) that the AAT may set aside an original decision made by the relevant government department. In this context, at a broad level of abstraction, it appears that the AAT is a statutory institution that provides both a relatively 'fair' and 'just' opportunity to achieve individualised justice in the circumstances of a case.

C. Improving the AAT's Operations and Efficiency

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[13] AAT Caseload Report for the Period 1 July 2017 to 31 May 2018: http://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2017-18.pdf

[14] http://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2016-17.pdf

19. Another important consideration reflected in the Terms of Reference regarding the Statutory Review is as follows:

> [...] whether the Tribunal's operations and efficiency can be improved through legislative amendments or through non-legislative changes.

20. In the view of the writer, one particular area of the AAT's jurisdiction that could be improved is with respect to the statutory review of decisions made under section 501 of the *Migration Act 1958* (Cth). Presently, in making decisions that relate to section 501, the AAT is bound by *Ministerial Direction 65* **(Direction 65)**.

21. Importantly, Direction 65 came into effect on 22 December 2014. Given that almost four years have passed since the introduction of Direction 65, it is appropriate to consider potential amendments to this Ministerial Direction (especially in circumstances in which the application of Direction 65 has significant consequences for relevant non-citizens and their families, friends and employment links in Australia).

22. For the following reasons, it is clear that there are significant problems with the application of Direction 65 before the AAT at present.

23. First, one of the primary considerations reflected in Direction 65 deals with 'Expectations of the Australian Community'. For example, clause 9.3(1) of Direction 65 is reflected in the following terms:

> 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.

24. A similar formation of clause 9.3 is reflected in clauses 11.3(1) and 13.3(1) of Direction 65. At the time of writing, there appears to be significant conflict and tension in the application of this primary consideration in Direction 65. There appear to be at least 'two interpretations' of applying this primary consideration.

25. The genesis of the **first interpretation** comes from the judgment of Justice Mortimer in *YNQY and Minister for Immigration and Border Protection*,[15] where her Honour said:

> In substance this consideration is adverse to any applicant. As the Minister submits it is inextricably linked to the other primary consideration of protection of the Australian community. In particular, the last two sentences of para 13.3 of the Direction suggest the 'expectations' about which it speaks are expectations adverse to the position of any applicant who has failed the character test and been convicted of serious crimes. In this primary consideration as expressed (and despite the references earlier in the Direction to 'tolerance') the Australian community's 'expectations' are defined only in one particular way: namely, that the Australian community 'expects' non-revocation where a person has been convicted of serious crimes of a certain nature. That is, 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. That is the structure of this part of the Direction.
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> I do not consider that even if the applicant is correct to submit that the Tribunal did not undertake the task required of it by the Direction in relation to this consideration, he was deprived of a different outcome because of that failure. It was inevitable that this consideration would weigh against revocation: that is what it is intended to do (see *Uelese* [2016] FCA 348; 248 FCR 296 at [64]-[66]).

26. In effect, this aspect of Justice Mortimer's judgment in *YNQY* appears to make plain that, where a non-citizen has engaged in serious criminal conduct, the primary consideration of 'Expectations of the Australian Community' will always

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[15] [2017] FCA 1466 [76]–[77].

act to the detriment of a non-citizen either remaining in or coming to Australia. This aspect of Justice Mortimer's judgment has been applied and followed in a number of AAT decisions.[16]

27. Conversely, there are a number of decisions before the AAT that appear to have not strictly followed the impugned aspect of Justice Mortimer's judgment in *YNQY*.[17] The genesis with respect to the **second interpretation** of the primary consideration relating to 'Expectations of the Australian Community' comes from the decision in *Ayache and Minister for Immigration and Border Protection (Migration)*,[18] where Deputy President S A Forgie stated the following:

> [65] The word 'may' is a word that is consistent with the discretionary nature of the power conferred by s 501(1) to refuse to grant a visa, by s 501(2) to cancel a visa and s 501CA(4) to revoke a cancellation decision made under s 501(3). To assume that the expectations of the Australian community will always be a consideration that will weigh against a visa applicant who has failed to pass the good character test does not, I respectfully suggest, sit comfortably with the discretionary nature of the power given to the Minister. The Minister himself recognises in the Principles set out in paragraph 6.3 of Direction No. 65 that a discretion is involved. He talks in terms of what should generally be expected as in paragraph 6.3(3), of there being some circumstances in which the harm that would follow is so great as to be unacceptable even if there are other

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[16] *Jayba and Minister for Immigration and Border Protection (Migration)* [2018] AATA 385 [37]; *JL and Minister for Immigration and Border Protection (Migration)* [2018] AATA 754 [32]; *Burton and Minister for Home Affairs (Migration)* [2018] AATA 1313 [119]–[120]; *Curran and Minister for Home Affairs (Migration)* [2018] AATA 1314 [106]–[107]; *Dao and Minister for Home Affairs (Migration)* [2018] AATA 1333 [70]–[71]; *Bhangu and Minister for Immigration and Border Protection (Migration)* [2018] AATA 2143 [76]; *Aciek and Minister for Home Affairs (Migration)* [2018] AATA 2755 [51]; *Chibwana and Minister for Home Affairs (Migration)* [2018] AATA 2571 [41]–[43]; *Ferreira and Minister for Home Affairs (Migration)* [2018] AATA 2599 [54]; *Corrigan and Minister for Home Affairs (Migration)* [2018] AATA 2873 [47]–[49].

[17] *Anyoun and Minister for Immigration and Border Protection (Migration)* [2018] AATA 174 [55]; *Murphy and Minister for Immigration and Border Protection (Migration)* [2018] AATA 750 [56]–[58]; *LPGJ and Minister for Home Affairs (Migration)* [2018] AATA 1075 [64]; *Cao and Minister for Home Affairs (Migration)* [2018] AATA 1261 [168]; *QKVH and Minister for Home Affairs (Migration)* [2018] AATA 1855 [49]–[54]; *Dang and Minister for Home Affairs (Migration)* [2018] AATA 2095 [91]–[93]; *Ali and Minister for Home Affairs (Migration)* [2018] AATA 2512 [95]; *ZCNR and Minister for Home Affairs (Migration)* [2018] AATA 2511 [85]–[99]; *Dharma and Minister for Home Affairs (Migration)* [2018] AATA 2757 [29]–[30]; *NBCM and Minister for Home Affairs (Migration)* [2018] AATA 2387 [87]–[98]; *Maut and Minister for Home Affairs (Migration)* [2018] AATA 2754 [42]–[44]; *Rowe and Minister for Home Affairs (Migration)* [2018] AATA 2708 [75]–[77]; *Fiu Uolilo and Minister for Home Affairs (Migration)* [2018] AATA 2876 [91]–[101].

[18] [2018] AATA 310.

> countervailing considerations paragraph 6.3(4). These are but two of the seven principles in paragraph 6.3 but each of the seven shows that what may be, and what may not be, acceptable to the Australian community is a matter of balance to be considered in each case.
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> [66] Accordingly, it follows that I respectfully suggest that the statement made by Mortimer J in YNQY that 'It was inevitable that this consideration [being that in [13.3]] would weigh against revocation; that is what it is intended to do ...' is too broadly stated. It may be that it has that effect in some cases but I respectfully suggest that the way in which it is framed overlooks that paragraph 13.3, and so paragraphs 11.3 and 13.3 are drafted in terms that recognise that a decision-maker has discretion to come to a conclusion about the expectations of the Australian community in a particular case. It requires the decision-maker to have regard to the Government's views but they are views that, as I said, allow regard to be had to the whole of the circumstances.

28. Accordingly, in the **second interpretation**, the primary consideration of 'Expectations of the Australian Community' should not be treated as a deeming provision that will always act to the detriment of a non-citizen who was engaged in serious criminal conduct. From this perspective, closer consideration should be given to all individual circumstances relating to the non-citizen.

29. Given the apparent tension in the authorities, Direction 65 should be amended to resolve the ambiguity currently facing the AAT with respect to applying the primary consideration of 'Expectations of the Australian Community'. In the view of the writer, with respect, the position adopted by Justice Mortimer in *YNQY* is wrong as a matter of law. For the writer, the **second interpretation** is the correct approach to construing 'Expectations of the Australian Community' in Direction 65. Accordingly, Direction 65 should be amended to more clearly reflect the **second interpretation**.

30. Second, clause 14.1(4) of Direction 65 is expressed in the following terms:

> Where a non-citizen makes claims which may give rise to international non-refoulement obligations and that non-citizen would be able to make a valid application for another visa if the mandatory cancellation is not revoked, it is unnecessary to determine whether non-refoulement obligations are owed to the non-citizen for the purposes of determining whether the cancellation of their

visa should be revoked.

31. The effect of clause 14.1(4) is also reflected in similar terms in clauses 10.1(4) and 12.1(4) of Direction 65.

32. Accordingly, clauses 10.1(4), 12.1(4) and 14.1(4) of Direction 65 appear to have the effect that, where section 501 of the *Migration Act 1958* (Cth) is being exercised, the decision maker is not required to have regard for any international non-refoulement claims made by the non-citizen in circumstances in which the non-citizen's visa:

    (1) has been cancelled;

    (2) may potentially be cancelled; or

    (3) is refused; and

    (4) the relevant visa is not a protection visa.

33. In the recent decision in *QSBL and Minister for Home Affairs* [2018] AATA 2074 (2 July 2018), Senior Member Dr Evans found that, although paragraph 14.1(4) of Direction 65 provides that it is 'unnecessary' to determine whether non-refoulement obligations are owed to the non-citizen for the purposes of considering whether the cancellation of their visa should be revoked if the applicant can make an application for a protection visa, a contrary view was adopted by a majority of the Full Court of the Federal Court in *BCR16 v Minister for Immigration and Border Protection*[19] **(*BCR16*)** in which the majority Bromberg J and Mortimer J stated:

> That returning an individual to a country where there is a real possibility of significant harm, or a real chance of persecution, may contravene Australia's

[19] [2017] FCAFC 96 [48].

non-refoulement obligations, is also a matter to be weighed in the balance of deciding whether to revoke a mandatory visa cancellation.

34. The effect of the majority's decision in *BCR16* was discussed by Deputy President Kendall (as he then was) in *HSKJ and Minister for Immigration and Border Protection*,[20] who stated:

> [87] Until recently, the Tribunal would have found that, because of his ability to apply for a Protection visa, the Tribunal was not required to assess any non-refoulement obligations owed to HSKJ. It was generally accepted that because Direction No. 65 specifically states that it is not necessary to determine a non-refoulement issue in circumstances where an applicant can apply for a Protection visa, the Tribunal would normally rely on any non-refoulement assessment being made by another body specifically charged with determining the validity of a Protection visa claim.
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> [88] That position is now disputed, however, because of the recent decision of the Federal Court in BCR16 v Minister for Immigration and Border Protection [2017] FCAFC 96 ('BCR16'). Following BCR16 (now on appeal to the High Court but which is binding on this Tribunal) the Tribunal is required to assess (to the extent that it can on the evidence) any type of harm that might arise to him should HSKJ be deported to Iraq. This is so regardless of whether an applicant specifically frames his risk of harm as a non-refoulement issue.

35. It follows that the other considerations of 'international non-refoulement obligations' in Direction 65 should be amended to give effect to the decision of *BCR16*.

36. Third, in *Siueva v Minister for Home Affairs (Migration)*,[21] Member Brigadier A G Warner said, in the context of whether a mandatory cancellation decision made under s 501(3A) of the *Migration Act 1958* (Cth) should be revoked, that 'the existence or otherwise of "another reason" should be established on the balance of probabilities'.

37. It follows that, according to the decision of *Siueva*, a non-citizen seeking to get

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[20] [2017] AATA 1802 [87]–[88].
[21] [2018] AATA 1079 [21].

back his or her visa under section 501CA(4) of the *Migration Act 1958* (Cth) needs to demonstrate 'another reason' on the 'balance of probabilities'. This aspect of the decision of *Siueva* has been followed in various AAT decisions.[22]

38. With respect, the decision of *Siueva* and other AAT decisions that have adopted a 'balance of probabilities' test in the statutory context of section 501CA(4) of the *Migration Act 1958* (Cth) are wrong as a matter of law.

39. In *Sullivan v Civil Aviation Safety Authority*,[23] Justices Flick and Perry stated the following in the Full Court of the Federal Court of Australia:

> The attempt on the part of Mr Sullivan to side-line the fundamental importance of provisions such as ss 2A, 33 and 39 of the Administrative Appeals Tribunal Act – and to shift the focus of attention to the ultimate task of the Tribunal in making the 'correct or preferable' decision as to whether it is 'satisfied' for the purposes of reg 269(1)(d) of the Civil Aviation Regulations – should be soundly rejected. Such a submission, with respect, fails to recognise that:
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> > the rule in *Briginshaw* is a rule of evidence derived from curial proceedings;
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> > the Tribunal is not 'bound by the rules of evidence'; and
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> > a party to proceedings before the Tribunal has no 'onus of proof', let alone an 'onus' to establish facts to any particular or pre-determined standard.

40. In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*,[24] Brennan CJ, Toohey, McHugh and Gummow JJ observed:

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[22] See, for example, *Rowe and Minister for Home Affairs (Migration)* [2018] AATA 2708 [9]; *Ali and Minister for Home Affairs (Migration)* [2018] AATA 2512 [39]; *SVWW and Minister for Immigration and Border Protection (Migration)* [2018] AATA 1870 [18]; *XCBY and Minister for Immigration and Border Protection (Migration)* [2018] AATA 1853 [44]; *Mahu and Minister for Immigration and Border Protection (Migration)* [2018] AATA 161 [22]; *Gordon and Minister for Immigration and Border Protection (Migration)* [2018] AATA 39 [57]; *Winikerei and Minister for Immigration and Border Protection (Migration)* [2017] AATA 2407 [45]; *Moore and Minister for Immigration and Border Protection (Migration)* [2017] AATA 2589 [27]; *Markaj and Minister for Immigration and Border Protection (Migration)* [2017] AATA 1516 [69]; *Deng Mabior and Minister for Immigration and Border Protection (Migration)* [2017] AATA 1155 [12]; *Mulligan and Minister for Immigration and Border Protection (Migration)* [2017] AATA 728 [13]; *Guo and Minister for Immigration and Border Protection (Migration)* [2017] AATA 778.

[23] [2014] FCAFC 93 [115].

[24] (1996) 185 CLR 259, 282.

> [...] Submissions were made at the hearing of the appeal as to the correct decision-making process which it would have been permissible for the delegates to adopt. These submissions were misguided. They draw too closely upon analogies in the conduct and determination of civil litigation.
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> Where facts are in dispute in civil litigation conducted under common law procedures, the court has to decide where, on the balance of probabilities, the truth lies as between the evidence the parties to the litigation have thought it in their respective interests to adduce at the trial. Administrative decision-making is of a different nature. A whole range of possible approaches to decision-making in the particular circumstances of the case may be correct in the sense that their adoption by a delegate would not be an error of law. The term 'balance of probabilities' played a major part in those submissions, presumably as a result of the Full Court's decision. As with the term 'evidence' as used to describe the material before the delegates, it seems to be borrowed from the universe of discourse which has civil litigation as its subject. The present context of administrative decision-making is very different and the use of such terms provides little assistance.[25]

41. In light of decisions such as *Sullivan* and *Wu Shan Liang*, it is difficult to see how the 'balance of probabilities' test is imported into section 501CA(4) of the *Migration Act 1958* (Cth) as a matter of established principle. Accordingly, the writer respectfully submits that Direction 65 should be amended to stipulate clearly whether any jurisdictional facts related to s 501 of the *Migration Act 1958* (Cth) are required to be satisfied to any particular or pre-determined standard.

42. Fourth, in applying *Direction 65*, decision makers may be required to have regard for any claims made by a non-citizen that potentially invoke Australia's international non-refoulement obligations: see clauses 10.1, 12.1 and 14.1. Notably, this matter is treated under the 'other considerations' category, which are generally given less weight than the primary considerations reflected in Direction 65: see the effect of clause 8(4).

43. Australia has international non-refoulement obligations to non-citizens in

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[25] See also *Saunders v Federal Commissioner of Taxation* (1988) 19 ATR 1289 [1295]–[1296] (Northrop J).

Australia under the:

- *1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol*;
- *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; and
- *International Covenant on Civil and Political Rights and its Second Optional Protocol*.

44. To give greater effect to the words 'fair' and 'just' in section 2A of the *Administrative Appeals Tribunal Act 1975* (Cth), Direction 65 should be amended to ensure that the 'international non-refoulement obligations' consideration is moved to the 'primary consideration' section of Direction 65.

45. In the view of the writer, it is inconceivable that decision makers should start from the position that 'international non-refoulement obligations' should generally be given less weight than primary considerations reflected in Direction 65.

46. Finally, in light of the preceding, it is further submitted that the recommendations made with respect the proposed amendments to Direction 65 will better promote the AAT's statutory objectives reflected in section 2A of the *Administrative Appeals Tribunal Act 1975* (Cth). In other words, the current status of Direction 65 is leading to potentially inconsistent and conflicting decisions for the AAT – which could hardly be characterised with notions of accessibility, fairness and justice reflected in section 2A of the *Administrative Appeals Tribunal Act 1975* (Cth).

D. Levels of Review as Relating to the AAT

47. A useful exposition of the scope of review rights in the AAT was outlined in the *Revised Explanatory Memorandum* to the Tribunals Amalgamation Bill 2014:

> The Tribunals Amalgamation Bill 2014 would amend various Acts in order to merge the Social Security Appeals Tribunal **[SSAT]** and the Migration Review Tribunal **[MRT]** and Refugee Review Tribunal **[RRT]** into the Administrative Appeals Tribunal. The amalgamated Tribunal would be established under the AAT Act. It would be called the AAT. The Veterans' Review Board and the Classification Review Board are not included in the amalgamation.[26]

48. The *Revised Explanatory Memorandum* noted the following salient points in relation to the scope of review rights regarding the AAT:

- Incorporate the successful features of the tribunals as currently constituted.[27]
- Incorporate merits review of freedom of information decisions into the work of the amalgamated tribunal.[28]
- Currently, the AAT has jurisdiction to review decisions under more than 450 laws. Social security, taxation and workers' compensation matters made up approximately 76 per cent of the applications finalised. The AAT also has jurisdiction to review decisions under the National Disability Insurance Scheme (NDIS).[29]
- The MRT-RRT conducts merits reviews of visa and visa-related decisions made by the Department of Immigration and Border Protection. The RRT reviews decisions to refuse to grant or to cancel protection visas within Australia.[30]
- The SSAT is the first level of external review of decisions on social

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[26] *Revised Explanatory Memorandum*, The Parliament of the Commonwealth of Australia, House of Representatives, Tribunals Amalgamation Bill 2014, p. 2.
[27] *Revised Explanatory Memorandum*, The Parliament of the Commonwealth of Australia, House of Representatives, Tribunals Amalgamation Bill 2014, p. 1.
[28] *Revised Explanatory Memorandum*, The Parliament of the Commonwealth of Australia, House of Representatives, Tribunals Amalgamation Bill 2014, p. 1.
[29] *Revised Explanatory Memorandum*, The Parliament of the Commonwealth of Australia, House of Representatives, Tribunals Amalgamation Bill 2014, p. 2.
[30] *Revised Explanatory Memorandum*, The Parliament of the Commonwealth of Australia, House of Representatives, Tribunals Amalgamation Bill 2014, p. 2.

security, family assistance, education or training assistance, child support and parental leave payments.[31]

- The AAT would retain the existing divisional structure of the Tribunal, but with new divisions: Freedom of Information Division; General Division; Migration and Refugee Division; National Disability Insurance Scheme Division; Security Division; Social Services and Child Support Division; Taxation and Commercial Division; and, a further division, the Veterans' Appeals Division, will be established by regulation.[32]

- Preserve the right to a two-staged review process, where currently available, for certain decisions currently reviewed by the SSAT (including social security decisions).[33]

- In reviewing administrative decisions, the role of the amalgamated Tribunal is to ensure the correct or preferable decision is made based on the information before it.[34]

- The Bill would preserve the existing position that certain decisions would undergo two rounds of review within the amalgamated Tribunal: namely, decisions under the social security law, family and student assistance decisions, paid parental leave decisions, and child support decisions, where a right currently exists for further review by the AAT of SSAT decisions.[35]

49. In light of the preceding, it is clear that the *Tribunals Amalgamation Act 2015* (Cth) preserved the right to a two-stage review process where it was available for certain decisions reviewed by the SSAT. Accordingly, under Part 4A of the *Social Security (Administration) Act 1999* (Cth), s 139 currently provides:

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[31] *Revised Explanatory Memorandum*, The Parliament of the Commonwealth of Australia, House of Representatives, Tribunals Amalgamation Bill 2014, p. 2.
[32] *Revised Explanatory Memorandum*, The Parliament of the Commonwealth of Australia, House of Representatives, Tribunals Amalgamation Bill 2014, p. 4.
[33] The *Revised Explanatory Memorandum* explained that key procedural rules that would be preserved for social services and child support matters include the right to a two-stage review of certain decisions made by the amalgamated Tribunal in its Social Services and Child Support Division (those decisions in respect of which the AAT review of SSAT decisions is currently available): *Revised Explanatory Memorandum*, The Parliament of the Commonwealth of Australia, House of Representatives, Tribunals Amalgamation Bill 2014, pp. 4–5.
[34] *Revised Explanatory Memorandum*, The Parliament of the Commonwealth of Australia, House of Representatives, Tribunals Amalgamation Bill 2014, p. 6.
[35] *Revised Explanatory Memorandum*, The Parliament of the Commonwealth of Australia, House of Representatives, Tribunals Amalgamation Bill 2014, p. 7.

> If a person is dissatisfied with a decision of an officer under the social security law, the person may apply to the AAT for a review (an 'AAT first review') of the decision.
>
> If a person is dissatisfied with a decision of the AAT on AAT first review, the person may apply to the AAT for further review (an 'AAT second review').
>
> The rules relating to AAT review of decisions are mainly in the AAT Act, but the operation of that Act is modified in some ways by this Part for the purposes of those reviews.
>
> The AAT Act allows a person to appeal to a court from a decision of the AAT on AAT second review.

50. In the view of the writer, the two-stage statutory review process in the AAT (as relating to social security decisions) should be abolished. There are a number of factors that lead to this view.

51. First, arguably, the two-stage statutory review process regarding social security decisions has the potential to undermine section 2A of the *Administrative Appeals Tribunal Act 1975* (Cth). In accordance with section 2A(b), the AAT must pursue the objective of providing a mechanism of review that is fair and just.

52. It is arguable that it is not 'fair' or 'just' for relevant social security decisions to employ two rounds of review but decisions concerning many other areas of the AAT's jurisdiction have one round of merits review. In the view of the writer, there does not appear to be any clear policy justification in giving special treatment to social security law over other subject matters dealt with by the AAT.

53. Second, it is arguable that, if the 'AAT second review' sets aside the decision of the 'AAT first review', this could have the effect of undermining public trust and confidence in the decision-making process of the AAT contrary to s 2A(d)

of the *Administrative Appeals Tribunal Act 1975* (Cth), since a decision of the AAT would be set aside.

54. Third, the statutory regime reflected in Part 4A of the *Social Security (Administration) Act 1999* (Cth) has the potential to undermine the promotion of timely and final resolution of matters, because the statutory process of two rounds of merits review extends the merits review process and the 'AAT first review' does not necessarily reflect the final resolution of the matter.

55. In light of the preceding, two rounds of review regarding certain social security decisions should be abolished. The AAT should only have jurisdiction to entertain one round of merits review with respect to relevant social security decisions. Accordingly, legislative amendments will be required to Part 4A of the *Social Security (Administration) Act 1999* (Cth) and the applicable policy documents of the AAT. This proposal provides one means of improving the AAT's operations and efficiency.

E. Concluding Remarks

56. The *Revised Explanatory Memorandum* to the Tribunals Amalgamation Bill 2014 concluded that the amalgamation of various statutory tribunals would further enhance the efficiency and effectiveness of the Commonwealth merits review jurisdiction and support high-quality and consistent government decision making.[36]

57. In totality, it appears that the amalgamation prescribed by the Tribunals

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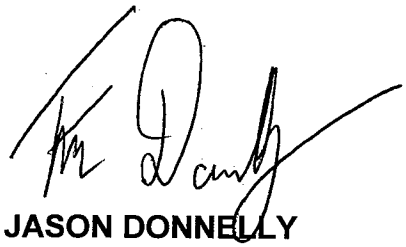
[36] *Revised Explanatory Memorandum*, The Parliament of the Commonwealth of Australia, House of Representatives, Tribunals Amalgamation Bill 2014, p. 1.

Amalgamation Bill 2014 has, in large part, achieved the purposes envisaged by the Commonwealth: the AAT has a significantly low number of decisions being set aside by Australian courts; there is a fairly high level of AAT applications being finalised within 12 months of lodgement; and the AAT has developed a number of cogent practice directions with respect to the regulation of procedural matters concerning AAT cases.



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23 August 2018