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CHANGING ATTITUDES TO INDEPENDENCE OF AUSTRALIAN TRIBUNALS

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This paper examines the history of administrative tribunals in Australia from pre-Federation until the establishment of the Administrative Review Tribunal on 14 October 2024, with a focus on changes in their functions and in legislative and judicial attitudes concerning their independence. When colonial governments and legislatures began to establish administrative tribunals, they were generally considered to be part of the machinery of government. Since those early beginnings, there has been a gradual attitudinal change regarding the role and independence of administrative tribunals. Today, many tribunals are tasked with reviewing government decisions and the need for them to be, and be seen to be, independent of the agencies whose decisions they review is generally accepted by Australian legislatures and courts. Indeed, some merits review tribunals, such as the Administrative Review Tribunal, are expected not only to provide redress for a specific individual by overturning a particular inappropriate decision, but also to improve administrative decision-making more generally and foster good government.

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CONTENTS

I	Introduction.....	232
II	Meaning of Independence in the Context of Administrative Tribunals.....	233
III	The Pre-Federation Period.....	234
IV	The Period between 1901–50.....	236
	A Appeal Bodies Dealing with Censorship of Imported Films and Literature	237
	B The Repatriation Commission and War Pensions Appeals Tribunals.....	237
	C The Taxation Boards.....	239
V	The Period between 1951–70.....	243
VI	The Kerr Report and the AAT, 1971–2024	245
	A The Kerr and Bland Committees’ Reports	245
	B Relevant Attributes of the AAT	249
	C Amalgamation of Separate Administrative Tribunals in 2015	251
	D The AAT and the Concepts of ‘Administrative Continuum’ and ‘Stepping into the Shoes’	254
VII	The ART.....	257
VIII	Conclusion	262

I INTRODUCTION

Under Australia’s separation of powers doctrine, administrative tribunals are part of the executive branch in ch II of the *Australian Constitution*. They are not courts exercising judicial power under ch III. As such, independence is not one of their ‘defining characteristics’¹ within the meaning of the *Kable* principle.² Rather, they are statutory bodies whose independence can vary according to the Acts establishing them.

Today, the importance of independence for administrative tribunals is generally accepted by Australian legislatures. However, that was not always the case. When colonial governments and legislatures began to establish administrative tribunals in Australia, the tribunals were generally considered to be part of the machinery of government, rather than independent bodies tasked with conducting robust arm’s-length reviews of government decisions. Since those

¹ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ).

² See generally *Kable v DPP (NSW)* (1996) 189 CLR 51, 118–19, 121 (McHugh J), 127–8 (Gummow J). See also *ibid* 76 [63]–[64] (Gummow, Hayne and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1, 157 [428] (Crennan and Bell JJ).

early beginnings, there has been a gradual attitudinal change regarding the need for administrative tribunals to be, and be seen to be, independent.

The establishment of the Administrative Review Tribunal ('ART') on 14 October 2024 to replace the Administrative Appeals Tribunal ('AAT') provides an ideal opportunity to consider the evolution of administrative tribunals in Australia and how legislative and judicial attitudes concerning their independence have evolved with them.³

II MEANING OF INDEPENDENCE IN THE CONTEXT OF ADMINISTRATIVE TRIBUNALS

This paper deals with tribunals established by a government not to make primary governmental decisions, but to perform an appeal or review function in relation to such decisions. In the present context, such tribunals are independent if their members are 'free of any loyalties, duties or interests that might inappropriately influence or interfere with the performance of their functions'.⁴ Tribunal members must be able to make decisions in accordance with the law irrespective of their personal preferences and without having regard to whether a decision will be unpopular with the government or generate adverse publicity. They must not be subject to direction from any minister or other public official, and there must be no capacity for any form of adverse consequences for them if they make decisions which are unfavourable to the government of the day.

Independence requires that all decision-making processes by an administrative tribunal are transparent and in accordance with the rule of law.⁵ If a party is unhappy with a tribunal's decision, the avenues available to them to overturn the decision should be confined to those set out in validly enacted legislation, which will usually be an appeal to a court or a judicial review proceeding. A tribunal is not independent if appeals against its decisions may be made to a minister.

³ See Revised Explanatory Memorandum, Administrative Review Tribunal Bill 2024 (Cth) 1 ('Revised Explanatory Memorandum'); *Administrative Review Tribunal Act 2024* (Cth) ss 2, 8 ('ART Act').

⁴ Justice Kyrou, 'The Art of Merits Review: Significant Changes to Membership Provisions' (Conference Paper, COAT Annual Conference, 6 June 2024) 9 <https://www.fedcourt.gov.au/_data/assets/rtf_file/0003/119082/06062024.rtf>, archived at <<https://perma.cc/3K45-VA48>>.

⁵ See Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 14 September 1995) 70–1 [4.4]–[4.5] <<https://nla.gov.au/nla.obj-2510757419/view?partId=nla.obj-2514856036#page/n3/mode/1up>>, archived at <<https://perma.cc/WKF3-KP4E>> ('*Better Decisions*'); Matthew Groves, 'Equality of Arms in Administrative Review' (2023) 46(3) *Melbourne University Law Review* 726, 740–1.

Independence is essential to an administrative tribunal's capacity to perform its functions effectively and for its decisions to have integrity, particularly when dealing with powerful and well-resourced government departments and public authorities. These bodies make decisions which have profound effects on the personal and business affairs of members of the community. When a tribunal is established to review such decisions, the tribunal can only properly perform the critical role of ensuring that decisions are lawful, transparent and appropriate in the circumstances of a particular case if it is independent of the decision-makers and is seen to be so.⁶

III THE PRE-FEDERATION PERIOD

In the pre-Federation period, the predominant conception of administrative tribunals was as bodies that performed public functions as part of the overall delivery of government services.⁷ In other words, these early bodies were part of the machinery of government. However, there were early examples of executive bodies performing an appeal or review function in respect of governmental decisions.

Oddly enough, the colonial Governor or Executive Council performed a review function in some circumstances. For example, in the colony of New South Wales, under the *Police Regulation Act 1852* (NSW), a police chief or other constable dismissed for 'neglect or violation of duty in his office' could appeal to the Governor.⁸ The Governor could affirm the decision or order a further inquiry and rely on the report of the inquiry to decide whether the police officer should 'be dismissed or restored to his office.'⁹

By way of further example, in the colony of Victoria, the *Customs Act 1883* (Vic) ('1883 Act') provided that a person 'aggrieved by the determination of the Commissioner' may have their grievance considered by way of an inquiry conducted by two people deputed by the Governor in Council.¹⁰ Interestingly, that section provided that the conduct of the panel's inquiry 'shall be in as close conformity as the nature of such inquiry will admit with the practice adopted before justices on inquiries had before them.'¹¹ The panel that conducted the inquiry was required to produce a report for the Governor in Council.¹² It then

⁶ See below n 125 and accompanying text.

⁷ Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987) 36–7.

⁸ *Police Regulation Act 1852* (NSW) 16 Vict, No 33, s 9.

⁹ *Ibid.*

¹⁰ *Customs Act 1883* (Vic) 47 Vict, No 768, s 41.

¹¹ *Ibid.*

¹² *Ibid.*

fell to the Governor in Council to ‘decide the case upon such evidence and make an order ... upon consideration of the ... circumstances and evidence so reported’.¹³

The *1883 Act* did not make clear from where the persons appointed by the Governor in Council were to be drawn and whether they were independent of the Customs Office. It is significant that this early iteration of a hearing of an appeal from a determination of an executive officer should draw on the example set by the courts, albeit that the findings of the panel were then reduced to a report and the case ultimately determined by the Governor in Council.¹⁴ This suggests that, even in the pre-Federation era, some consideration had been given to how accountability and transparency of decisions of colonial executive officers could be improved.

Outside of the appellate function performed by Governors and Executive Councils, some pre-Federation bodies also performed an appellate or review function in relation to government decisions. An example is the New South Wales Minister for Lands, who had the power under the *Crown Lands Act 1884* (NSW) (*‘1884 Act’*) to hear appeals from decisions of local land boards on matters relating to compensation claims and other matters pertaining to the Crown lands for which they were responsible.¹⁵ It is notable that the *1884 Act* required both the Boards at first instance and the Minister on appeal to sit ‘as in open Court’.¹⁶ It is also notable that the Minister had the power under to remit a case to a Board for the purpose of the Board taking further evidence, in which event the Board could ‘after hearing such evidence[,] reverse[,] alter or amend its previous decision in any way it may consider necessary’.¹⁷ This is an early example of the power to remit, which is a common feature of modern appeal and review bodies.¹⁸

¹³ *Ibid* s 42.

¹⁴ See *ibid* ss 41–2.

¹⁵ See *Crown Lands Act 1884* (NSW) 48 Vict, No 18, ss 13(1), 18.

¹⁶ *Ibid* ss 14(1), 18.

¹⁷ *Ibid* s 19.

¹⁸ See, eg, *ART Act* (n 3) ss 85(1), 105(c)(ii); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 51(2)(d) (*‘VCAT Act’*).

IV THE PERIOD BETWEEN 1901–50

In the period between 1901–50, the Commonwealth Parliament established various bodies to review a diverse range of government decisions.¹⁹ Because of the large number of appeal and review avenues that existed during this period, I will focus on three administrative review mechanisms, two of which were the subject of consideration by the High Court and the Privy Council. Those mechanisms are as follows:

- 1 the appeal boards dealing with censorship of imported films and literature;
- 2 the Repatriation Commission and its associated bodies, the War Pensions Entitlement Appeal Tribunal and the Assessment Appeal Tribunal; and
- 3 the ill-fated Taxation Board of Appeal and its more durable successor, the Taxation Board of Review.

The functions that the above bodies performed continue to this day, with reviews concerning veterans' entitlements and taxation now being undertaken by the ART.²⁰

¹⁹ See Senate Standing Committee on Finance and Government Operations, Parliament of Australia, *Statutory Authorities of the Commonwealth* (Report No 1, December 1978) 13 [1.15] <<https://nla.gov.au/nla.obj-1464608449/view?partId=nla.obj-1469526527#page/n0/mode/1up>>, archived at <<https://perma.cc/6HMJ-4H57>>; cited in Justice Lisa Hesse, 'Background and History of Administrative Review to Put the Future in the Context of the Past' (2024) 31(1) *Australian Journal of Administrative Law* 10, 14. See generally Commonwealth Administrative Review Committee, Parliament of Australia, *Report* (Parliamentary Paper No 144, August 1971) 6–7 [18] <<https://nla.gov.au/nla.obj-1928610510/view?partId=nla.obj-1933534037>>, archived at <<https://perma.cc/YEW4-2YXN>> ('*Kerr Committee Report*'); Committee on Administrative Discretions, Parliament of Australia, *Final Report* (Parliamentary Paper No 316, October 1973) app E <<https://nla.gov.au/nla.obj-1362164077/view?partId=nla.obj-1364720157#page/n2/mode/1up>>, archived at <<https://perma.cc/V9MD-F6TK>> ('*Bland Committee Report*').

²⁰ Appeals from decisions of the Repatriation Commission have been available through a succession of tribunals, the most recent of which is the Veterans' Review Board ('VRB') which came into operation on 1 January 1985: see *Repatriation Legislation Amendment Act 1984* (Cth) ss 2, 19 ('*Repatriation Amendment Act*'), repealing and substituting *Australian Soldiers' Repatriation Act 1920* (Cth) s 107VB ('*1920 Act*'). Decisions of the VRB were subject to a further review by the AAT from 1985: *Repatriation Amendment Act* (n 20) ss 2, 19, repealing and substituting *1920 Act* (n 20) s 107VZW(1). The Taxation Board of Review was abolished in 1986 and its caseload was transferred to the AAT: *Taxation Boards of Review (Transfer of Jurisdiction) Act 1986* (Cth) ss 2(1), 214. See also at ss 82, 84, 91, repealing *Income Tax Assessment Act 1936* (Cth) ss 191–2, 202.

A *Appeal Bodies Dealing with Censorship of Imported Films and Literature*

Two early examples of bodies exercising merits review functions independently of the original decision-maker originate from the customs field: the film Censorship Board (and Appeal Board) and the Literature Censorship Board (and Appeal Censor) were required to make or review decisions pertaining to the censorship of imported films and books, respectively.²¹

The *Customs (Cinematograph Films) Regulations 1928* (Cth) established an Appeal Board to review decisions of the film Censorship Board.²² The Appeal Board could ‘allow the appeal, with or without conditions, or disallow the appeal.’²³ However, the Minister retained the power to intervene at any stage of the proceeding to determine the matter personally.²⁴

Similarly, an importer aggrieved by a decision of the Literature Censorship Board that literature was blasphemous, indecent or obscene could apply for review by the Appeal Censor.²⁵ The Appeal Censor was required to review the relevant literature and ‘determine whether, in his opinion, the literature is blasphemous, indecent or obscene.’²⁶

The two-tiered structure of decision-making and independent review continues to this day, with the Australian Classification Board as the primary body and the Classification Review Board as the review body.²⁷

B *The Repatriation Commission and War Pensions Appeals Tribunals*

Merits review of administrative decision-making to protect the rights of ex-servicemen to war pensions and associated benefits dates back to the *War Pensions Act 1914* (Cth).

The *Australian Soldiers’ Repatriation Act 1920* (Cth) (*‘1920 Act’*) established a Repatriation Board for each state to assess pensions for returned soldiers and their dependants.²⁸ The *1920 Act* also established the Repatriation Commission

²¹ Hespe (n 19) 14. See also *Customs (Cinematograph Films) Regulations 1928* (Cth) regs 5, 11–14 (*‘Cinematograph Regulations’*); *Customs (Literature Censorship) Regulations 1937* (Cth) regs 3–5, 12 (*‘Literature Regulations’*).

²² *Cinematograph Regulations* (n 21) regs 5(1), (3)–(4).

²³ *Ibid* reg 9(7).

²⁴ *Ibid* reg 10.

²⁵ *Literature Regulations* (n 21) reg 12(1).

²⁶ *Ibid* reg 12(4).

²⁷ *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 41A, 45, 72.

²⁸ *1920 Act* (n 20) ss 13(1), 26(d).

as a statutory corporation that was akin to a government department.²⁹ The *1920 Act* conferred a right of appeal from decisions of a State Board to the Repatriation Commission.³⁰

The *1920 Act* was amended by the *Australian Soldiers' Repatriation Act 1929* (Cth) ('*1929 Act*') to confer a right to appeal from the Repatriation Commission to newly established War Pensions Entitlement Appeal Tribunals for decisions concerning eligibility for a war pension, and to newly established Assessment Appeal Tribunals for decisions concerning a returned soldier's incapacity and therefore the amount of pension payable.³¹ The War Pensions Entitlement Appeal Tribunal consisted of a chairman, who had to be either an admitted barrister or solicitor, and two other members who had to be returned soldiers.³² The Assessment Appeal Tribunal consisted of a chairman — who had to be a returned soldier as well as an admitted barrister or solicitor — and two other members who had to be medical practitioners.³³

Section 6 of the *1929 Act* inserted s 45W into the *1920 Act*. Section 45W(2) provided that neither of the two aforementioned types of tribunals were 'bound by any rules of evidence but shall act according to substantial justice and the merits of the case'.³⁴ Modern versions of this provision were later included in many statutes establishing administrative tribunals.³⁵

R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott ('*Bott*') concerned whether the War Pensions Entitlement Appeal Tribunal had complied with the rules of natural justice.³⁶ The High Court by majority held that the Tribunal had done so.³⁷ Interestingly, the plurality (Rich, Dixon and McTiernan JJ) stated that the Tribunal was not bound to only consider the evidence that was before the Commission, but could 'take into consideration

²⁹ See *ibid* ss 7(1)–(2); *Repatriation Commission v Kirkland* (1923) 32 CLR 1, 8 (Knox CJ and Starke J), 12–13 (Higgins J), 20–1 (Rich J).

³⁰ *1920 Act* (n 20) s 27.

³¹ *Australian Soldiers' Repatriation Act 1929* (Cth) s 6 ('*1929 Act*'), inserting *1920 Act* (n 20) ss 45A(1), 45K(1), 45L(1)–(2), 45N.

³² *1929 Act* (n 31) s 6, inserting *1920 Act* (n 20) ss 45A(3)–(4).

³³ *1929 Act* (n 31) s 6, inserting *1920 Act* (n 20) ss 45L(3)–(4).

³⁴ *1929 Act* (n 31) s 45W(2).

³⁵ See especially *VCAT Act* (n 18) ss 97, 98(1)(b). See also, eg, *Copyright Act 1968* (Cth) s 164 ('*Copyright Act*'); *Administrative Appeals Tribunal Act 1975* (Cth) ss 33(1)(c) ('*AAT Act*'); *ART Act* (n 3) s 50.

³⁶ (1933) 50 CLR 228, 248 (Starke J) ('*Bott*').

³⁷ See *ibid* 243–4 (Rich, Dixon and McTiernan JJ), 248–9 (Starke J).

whatever evidentiary matters it thought proper'.³⁸ This is also a feature of many modern tribunals.³⁹

In *Bott*, Evatt J stated in dissent that the 'general design' of the *1929 Act* was to give returned soldiers 'the right to secure a review of any adverse departmental decision by entirely independent appeal tribunals'.⁴⁰ As will be seen, Evatt J's focus on the independence of the appeal tribunals was unusual for this period. His observation represents one of the earliest judicial acknowledgments of the importance of independence for an administrative tribunal.

C *The Taxation Boards*

The Taxation Board of Appeal was established by the *Income Tax Assessment Act 1922* (Cth) ('*1922 Act*').⁴¹ Its function was to review decisions made by the Commissioner of Taxation as an alternative to challenging such decisions in a court.⁴² The Board consisted of a chairman and two other members, all of whom were appointed for terms of seven years by the Governor-General.⁴³ The chairman was usually a senior executive-ranking official from the Taxation Department, one of the two other members was usually a lawyer and the other member was usually a practising accountant.⁴⁴

The establishment of the Taxation Board of Appeal represents one of the most important early examples of Parliament recognising that a review tribunal consisting of members with specialist expertise is capable of 'provid[ing] a simple[r], cheap[er] and [more] efficient remedy' than a court.⁴⁵ The Board was empowered by ss 44 and 51 of the *1922 Act* to hear cases that were referred to it at the request of a taxpayer who was dissatisfied with a decision of the Commissioner, and to make such orders as it thought fit.⁴⁶

³⁸ *Ibid* 240.

³⁹ See, eg, *Copyright Act* (n 35) s 164; *VCAT Act* (n 18) ss 98(1)(b)–(d); *ART Act* (n 3) ss 50, 52.

⁴⁰ *Ibid* 251.

⁴¹ *Income Tax Assessment Act 1922* (Cth) s 41(1) ('*1922 Act*'). This same Act provided that '[a] Board of Appeal holding office at the commencement of this Act shall continue to hold office as if appointed under this Act': at s 41(3).

⁴² See *ibid* ss 44(1), 50(4)–(5); *Hespe* (n 19) 11.

⁴³ *Ibid* ss 41(2), (4).

⁴⁴ See Commonwealth, *Parliamentary Debates*, House of Representatives, 10 October 1922, 3508 (Stanley Bruce, Treasurer).

⁴⁵ See Commonwealth, *Parliamentary Debates*, Senate, 20 May 1936, 1876 (EB Johnston).

⁴⁶ See especially *1922 Act* (n 41) ss 44(1), 50(4)–(5), 51(1).

Under the 1922 Act, the Taxation Board of Appeal could decide both questions of law and fact,⁴⁷ and its decisions on questions of fact were deemed ‘final and conclusive on all parties.’⁴⁸ The ‘object of finality’⁴⁹ in its decisions was one of the features of the Board that led the High Court to find in the 1925 case of *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (‘*British Imperial*’) that the Board was unconstitutional because it was an executive body rather than a court, and that the legislation purported to confer upon it part of the judicial power of the Commonwealth.⁵⁰

In Isaacs J’s view, had the Board been entrusted with only ‘the duty of reviewing the decision of the Commissioner and, in case of difference, of substituting its opinion for his’, there would have been no constitutional difficulty.⁵¹ That was because, in such a case

[t]he Board of Appeal would ... be a mere revisory body of the same nature as the Commissioner and in no way exercising judicial power, because its decision would not be one determining existing rights and duties as they already stand, but would be one merely ascertaining a fact which the Legislature adopted as the standard upon which its will operated to create rights and duties.⁵²

As a result of *British Imperial*, the Commonwealth Parliament enacted the *Income Tax Assessment Act 1925* (Cth) (‘1925 Act’).⁵³ The 1925 Act replaced the Taxation Board of Appeal with the Taxation Board of Review,⁵⁴ which was intended to be an administrative body exercising the same powers and functions as the Commissioner, rather than a body exercising judicial power.⁵⁵ The 1925 Act ‘assimilated’ the Board to the Commissioner.⁵⁶ It replaced ss 44 and 51 of

⁴⁷ See *ibid* ss 50(4), 51(1)–(3), (8).

⁴⁸ *Ibid* s 51(2).

⁴⁹ Hespe (n 19) 11, discussing *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422 (‘*British Imperial*’).

⁵⁰ *British Imperial* (n 49) 432–3 (Knox CJ), 437–8 (Isaacs J), 444 (Rich J), 445 (Starke J).

⁵¹ *Ibid* 435 (Isaacs J).

⁵² *Ibid*.

⁵³ *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 163 (Knox CJ), 182 (Isaacs J) (‘*Munro*’), discussing *British Imperial* (n 49); Hespe (n 19) 12.

⁵⁴ *Income Tax Assessment Act 1925* (Cth) s 10 (‘1925 Act’), repealing and inserting 1922 Act (n 41) s 44.

⁵⁵ See 1925 Act (n 54) s 10, repealing and inserting 1922 Act (n 41) s 44(1); *Munro* (n 53) 183 (Isaacs J).

⁵⁶ *Munro* (n 53) 183 (Isaacs J).

the 1922 Act with new provisions.⁵⁷ The new s 44 provided that the Board's decisions were deemed to be those of the Commissioner,⁵⁸ while the new s 51 no longer stated that the Board's decisions on questions of fact were final and conclusive.

The Taxation Board of Review 'consisted of a chairman (usually an Executive from the Taxation Department) and two additional members, one drawn from the legal profession and the other from the accounting profession.'⁵⁹ In addition, '[e]ach term of office was limited to seven years[,] but members were eligible for reappointment'.⁶⁰

In *Federal Commissioner of Taxation v Munro* ('*Munro*'), the High Court by majority held that the powers conferred on the Taxation Board of Review were not part of the judicial power of the Commonwealth and therefore the Board was not unconstitutional.⁶¹ The Board was described by Isaacs J as 'having a true administrative character and affording ... a practical means of reconsidering business matters without the intricacies, delay and expense of legal proceedings'.⁶² Meanwhile, Higgins J described the Board as 'auxiliary to the Commissioner in his administrative functions' and concluded that the Board 'ought to be treated as a mere piece of administrative machinery'.⁶³ In Starke J's view, the Board's functions were 'in aid of the administrative functions of government'.⁶⁴

In *Munro*, the High Court also dealt with a separate proceeding by the British Imperial Oil Co Ltd.⁶⁵ Under its new name of Shell Co of Australia Ltd, it appealed against the High Court's decision in *Munro* to the Privy Council.⁶⁶ In 1930, in *Shell Co of Australia Ltd v Federal Commissioner of Taxation* ('*Shell*'), the Privy Council affirmed the decision of the High Court that the Taxation Board of Review was not unconstitutional.⁶⁷ Their Lordships stated that the

⁵⁷ 1925 Act (n 54) ss 10, 12.

⁵⁸ Ibid s 10, repealing and inserting 1922 Act (n 41) s 44(1).

⁵⁹ Hespe (n 19) 12, citing *Kerr Committee Report* (n 19) 6 [18(a)].

⁶⁰ Hespe (n 19) 12, citing Commissioner of Taxation (Cth), *Fortieth Report of the Commissioner of Taxation* (Report, 1 June 1961) 22 <<https://nla.gov.au/nla.obj-2771832915/view?partId=nla.obj-2781514623#page/n0/mode/1up>>, archived at <<https://perma.cc/VV45-WVXP>>.

⁶¹ *Munro* (n 53) 182 (Isaacs J), 201 (Higgins J), 210 (Rich J), 212 (Starke J).

⁶² Ibid 182.

⁶³ Ibid 201.

⁶⁴ Ibid 212.

⁶⁵ Ibid 210–11, 218 (Starke J).

⁶⁶ (1930) 44 CLR 530, 536 (Lord Sankey LC for the Court) ('*Shell*').

⁶⁷ Ibid 546 (Lord Sankey LC for the Court).

Board ‘appears to be in the nature of administrative machinery to which the taxpayer can resort at his option in order to have his contentions reconsidered.’⁶⁸ They added that the Board ‘is merely in the same position as the Commissioner himself; namely, it is another administrative tribunal which is reviewing the determination of the Commissioner, who admittedly is not judicial, but executive.’⁶⁹

Five years later, in the 1935 case of *Jolly v Federal Commissioner of Taxation* (*Jolly*), Rich and Dixon JJ referred to the Privy Council’s statements in *Shell*,⁷⁰ before noting that the Board ‘is only another executive body in an administrative hierarchy.’⁷¹ Interestingly, a few pages earlier, they stated that ‘[o]ne of the purposes [the Board] was intended to serve was the *independent* review of cases falling within the Commissioner’s discretionary powers.’⁷²

The phrase ‘another executive body in the administrative hierarchy’ that Rich and Dixon JJ used in *Jolly* is similar to the phrase ‘administrative machinery’ that Higgins J used in *Munro* and the Privy Council used in *Shell*.⁷³ These descriptions of the Taxation Board of Review indicate that, in the 1920s and 1930s, the High Court and the Privy Council considered that an administrative review tribunal need not be independent of the administrative body whose decisions it reviews. Rather, the tribunal could be ‘assimilated’⁷⁴ within that body or be ‘auxiliary’⁷⁵ to or in ‘aid’⁷⁶ of that body. In other words, the tribunal and the decision-maker whose decisions the tribunal was empowered to review were part of the same administrative apparatus.

The reference by Rich and Dixon JJ to ‘independent review’ in *Jolly* is not inconsistent with the then-prevailing view about the independence of administrative tribunals.⁷⁷ That is because the reference to ‘independent review’ is to the nature of the review being conducted by the Taxation Board of Review rather than the nature of the Board itself. In other words, the Board was seen by Rich and Dixon JJ as being part of the same administrative machinery or hierarchy as the Commissioner of Taxation, which was tasked with conducting an

⁶⁸ Ibid 544 (Lord Sankey LC for the Court).

⁶⁹ Ibid 545.

⁷⁰ (1935) 53 CLR 206, 212 (*Jolly*).

⁷¹ Ibid 214.

⁷² Ibid 212 (Rich and Dixon JJ) (emphasis added).

⁷³ *Munro* (n 53) 201 (Higgins J); *Shell* (n 66) 544 (Lord Sankey LC for the Court).

⁷⁴ *Munro* (n 53) 183 (Isaacs J).

⁷⁵ Ibid 201 (Higgins J).

⁷⁶ Ibid 212 (Starke J).

⁷⁷ See above n 72 and accompanying text.

independent review of the Commissioner's decisions.⁷⁸ By contrast, in his dissenting remarks in *Bott*, Evatt J focused on the independence of the war pensions appeal tribunals themselves rather than the independence of their review functions.⁷⁹

As will be seen, the relaxed attitude to the independence of administrative review tribunals that prevailed in the 1920s and 1930s persisted well into the 1970s, when the AAT was established.⁸⁰

V THE PERIOD BETWEEN 1951–70

In the period between 1951–70, a large number of administrative review tribunals were established at the federal level to deal with matters such as regulation of the arts,⁸¹ the provision of medical services,⁸² copyright⁸³ and trade practices.⁸⁴

The Valuation Board is worth mentioning. It was established by the *Taxation Administration Act 1953* (Cth) ('1953 Act') to review determinations of the Commissioner of Taxation with respect to the valuation of property under s 15

⁷⁸ See *Jolly* (n 70) 212.

⁷⁹ *Bott* (n 36) 251, 255–7 (Evatt J).

⁸⁰ See below n 127 and accompanying text.

⁸¹ The National Literature Board of Review replaced the Literature Censorship Board on 1 January 1968 following the signing of an intergovernmental agreement on 15 November 1967: see Parliament of Australia, *Agreement between the Governments of the Commonwealth and of the States of Australia in Relation to the Administration of Laws Relating to Blasphemous, Indecent or Obscene Literature* (Parliamentary Paper No 157, 1968) 1, 8–9 <<https://nla.gov.au/nla.obj-2772889496/view?partId=nla.obj-2778352199#page/n2/mode/1up>>, archived at <<https://perma.cc/U87V-TBJD>>; *Customs (National Literature Board of Review) Regulations 1967* (Cth) regs 2, 4(1); David Hume and George Williams, 'Australian Censorship Policy and the Advocacy of Terrorism' (2009) 31(3) *Sydney Law Review* 382, 387.

⁸² The *National Health Act 1953* (Cth) provided for the establishment of a Medical Services Federal Committee of Inquiry and a Pharmaceutical Services Federal Committee of Inquiry: at ss 108(1), 113(1). See also *Kerr Committee Report* (n 19) 7 [18(f)].

⁸³ The Copyright Tribunal was established on 1 May 1969: see *Copyright Act* (n 35) s 138; Commonwealth, *Commonwealth of Australia Gazette*, No 35, Monday 28 April 1969, 2543.

⁸⁴ The Trade Practices Tribunal was established on 1 September 1967: see *Trade Practices Act 1965* (Cth) s 9(1); Commissioner of Trade Practices (Cth), Parliament of Australia, *First Annual Report for Year 1967–68* (Parliamentary Paper No 133, 1968) 1 [1.1], archived at <<https://perma.cc/M9TF-AXG2>>. In 1995 this body was renamed the Australian Competition Tribunal: see *Competition Policy Reform Act 1995* (Cth) s 36(c).

of the *Estate Duty Assessment Act 1914* (Cth) and s 21 of the *Gift Duty Assessment Act 1941* (Cth).⁸⁵ The Board comprised a chairman (typically a senior officer from the Taxation Department), a qualified accountant and a qualified valuer.⁸⁶ The Valuation Board did not survive beyond 1979, when Commonwealth estate duty and gift duty were abolished.⁸⁷

The Taxation Board of Review was the subject of further consideration by the High Court in the period between 1951–70.

In *Sutton v Commissioner of Taxation*, the High Court held that the Board could not compel the Commissioner of Taxation to supply particulars, give discovery or provide more detailed reasons for the decision being reviewed by the Board.⁸⁸ However, the Board could ask the Commissioner to assist with facilitating the conduct of a proceeding.⁸⁹ This decision demonstrated the limited powers of the Board as an administrative body rather than a court and highlighted how the lack of cooperation by the Commissioner could diminish the effectiveness of the Board's merits review function.

In 1963, in *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* ('*Mobil Oil*'), Dixon CJ described the Taxation Board of Review as 'another administrative authority' and stated that the purpose of enabling a taxpayer to refer a matter to it 'seems to have been to provide a less formal method of investigating facts at a hearing, an opportunity of exercising discretion and the like by a more detached administrative process'.⁹⁰ In Kitto J's view, the function of the Board was 'merely to do over again ... what the Commissioner did in making the assessment — not to give a decision affecting the taxpayer's legal situation, but to work out, as a step in administration, what it considers that situation to be'.⁹¹ He then quoted the observation of the Privy Council in *Shell* that the Board is 'in the same position as the Commissioner himself',⁹² and the observation of Rich and Dixon JJ in *Jolly* that the Board is 'only another executive body in an administrative hierarchy'.⁹³

⁸⁵ See *Taxation Administration Act 1953* (Cth) s 9(1); *Kerr Committee Report* (n 19) 6 [18(b)]. Valuation Boards in different forms existed prior to 1953: see Finn (n 7) 50, cited in Hespe (n 19) 11.

⁸⁶ *Kerr Committee Report* (n 19) 6 [18(b)]; Hespe (n 19) 13.

⁸⁷ William H Pedrick, 'Oh, To Die Down Under!: Abolition of Death and Gift Duties in Australia' (1981) 35(1) *The Tax Lawyer* 113, 117.

⁸⁸ (1959) 100 CLR 518, 523–4 (Dixon CJ, Fullagar, Kitto, Taylor and Windeyer JJ).

⁸⁹ *Ibid.*

⁹⁰ (1963) 113 CLR 475, 488 ('*Mobil Oil*').

⁹¹ *Ibid.* 502.

⁹² *Ibid.*, quoting *Shell* (n 66) 545 (Lord Sankey LC for the Court).

⁹³ *Mobil Oil* (n 90) 502, quoting *Jolly* (n 70) 214.

The ad hoc and uncoordinated manner in which a plethora of different review tribunals and boards were established after the Second World War made it difficult to assess their efficiency and 'efficacy in securing public confidence in executive decision-making'.⁹⁴ Speaking in 1967, the Hon Gough Whitlam MP (then Leader of the Opposition) observed that in the year 1965, there were

forty-six Acts; eighty-two sections or groups of sections of those Acts under which appeals could be made; and forty-six different categories of boards, tribunals, committees and courts hearing such appeals. ... These bodies seldom sit in public or publish reasons. There is too great a diversity in the existing bodies and too great a mystery in the existing methods.⁹⁵

Mr Whitlam described the then-existing procedures for review of social security payments in particular as 'appeals from Caesar to Caesar'.⁹⁶

VI THE KERR REPORT AND THE AAT, 1971–2024

A The Kerr and Bland Committees' Reports

It was against the backdrop of a multiplicity of ad hoc tribunals and the absence of a generalist Federal Court that the Commonwealth Attorney-General established the Administrative Review Committee on 29 October 1968.⁹⁷ The Committee was named in honour of its chairman, former Australian Capital Territory and Northern Territory Supreme Court Judge John Kerr.⁹⁸ The other members were Anthony Mason (who was the Commonwealth Solicitor-General until 1 May 1969 and then a judge of the New South Wales Court of Appeal), Robert Ellicott KC (who succeeded Anthony Mason as Solicitor-General) and Australian National University professor Harry Whitmore.⁹⁹ The Kerr Committee's report was presented by command on 14 October 1971.¹⁰⁰

⁹⁴ Hesper (n 19) 14.

⁹⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1967, 2339 (Gough Whitlam, Leader of the Opposition).

⁹⁶ *Ibid.*

⁹⁷ *Kerr Committee Report* (n 19) 1 [1].

⁹⁸ *Ibid.* See also Carmel Meiklejohn, *Making a Difference: 40 Years of the Commonwealth Ombudsman* (Office of the Commonwealth Ombudsman, 2017) 5 <https://www.ombudsman.gov.au/__data/assets/pdf_file/0026/287342/40th-Anniversary-Book.pdf>, archived at <<https://perma.cc/QNX4-C3JA>> ('*Making a Difference*').

⁹⁹ *Kerr Committee Report* (n 19). See also *Making a Difference* (n 98) 5.

¹⁰⁰ *Kerr Committee Report* (n 19).

One of the terms of reference of the Kerr Committee was '[t]o consider the desirability of introducing legislation along the lines of the *United Kingdom Tribunal and Inquiries Act 1958*'.¹⁰¹ This particular Act was the product of recommendations by the United Kingdom Committee on Administrative Tribunals and Inquiries 1955–57 ('Franks Committee').¹⁰²

At the time of the Kerr Committee handed down its report, where a person or body was aggrieved by a government decision, unless a specialist tribunal existed that could review that decision, the main avenues of redress were an application to a court for a prerogative remedy or a complaint to a Member of Parliament.¹⁰³ The Kerr Committee's report stressed that citizens aggrieved by government decisions usually wanted a form of review that resulted in the decision being changed, rather than a form of review that simply set aside the decision and ordered that the decision-maker reconsider the matter.¹⁰⁴

The key recommendation of the Kerr Committee was the establishment of a generalist tribunal, which it described as the 'Administrative Review Tribunal' to review decisions 'on the merits'.¹⁰⁵ The Kerr Committee concluded that the approach taken to the provision of appeal on the merits of administrative decisions in the past had been too narrow.¹⁰⁶ The Kerr Committee considered that a 'general system of appeals' on the merits should be established on a 'much broader basis' than the few cases provided for at the time, which was to be preferred to the proliferation of specialised tribunals.¹⁰⁷ Underpinning the Kerr Committee's key recommendation was its analysis of the limitations and problems associated with judicial review of government decisions by the courts.¹⁰⁸

One of the striking features of the Kerr Committee's report by today's standards is that the Kerr Committee did not appear to be very concerned with the institutional independence of the proposed tribunal. Indeed, the only time that 'independence' is mentioned is in the following statement:

We see no objection to departmental officers being appointed to membership of tribunals ... when the process of adjudication is seen as arising naturally out of the course of administration. We do not think 'complete independence' is necessary as did the [Franks] Committee. ... Because private rights are affected we are

¹⁰¹ Ibid 1 [1].

¹⁰² Ibid 36 [116].

¹⁰³ Ibid 5–6 [17], 7 [19].

¹⁰⁴ Ibid 9 [20]. See also at 20 [58].

¹⁰⁵ Ibid 86 [291].

¹⁰⁶ Ibid 67 [225].

¹⁰⁷ Ibid 67 [225], 82–3 [280].

¹⁰⁸ See generally ibid 2 [6]–[7], 9–10 [20]–[21], 11–20 [29]–[58].

of the opinion that, where possible, part of the membership of the tribunal should be drawn from outside the Public Service.¹⁰⁹

The Kerr Committee also concluded that there was no need for the proposed tribunal to operate from premises that were physically separate from the premises of ministers, departments and agencies whose decisions were being reviewed.¹¹⁰ The report stated: ‘we disagree with the [Franks] Committee ... as to the importance of complete physical separation from the premises of the administration.’¹¹¹

Further, the Kerr Committee responded to the Franks Committee’s concerns that a generalist tribunal would not have the necessary experience or expertise,¹¹² stating that ‘an officer of the Commonwealth Department or authority responsible for administering the decision under review’ could sit on the relevant tribunal.¹¹³

The Kerr Committee recommended that the proposed tribunal be headed by a Federal Court judge.¹¹⁴ However, the justification relied upon was not that this would bolster the independence of the tribunal. Rather, the Kerr Committee considered that this would have the ‘distinct advantage’ that ‘[t]he status of the Administrative Review Tribunal would be raised, the judge could rule on all questions of law and the acceptability of the decisions made would be greater.’¹¹⁵

The Kerr Committee recommended that members of the proposed tribunal be able to be removed for incompetence or misbehaviour with the approval of the Governor-General in Council:

Present provisions which apply to some tribunals ... providing for suspension from office by the Governor-General and for resolutions by both Houses of the

¹⁰⁹ Ibid 96 [321].

¹¹⁰ See *ibid* 97 [323].

¹¹¹ *Ibid*.

¹¹² *Ibid* 69 [229]–[230], discussing United Kingdom, *Report of the Committee on Administrative Tribunals and Enquiries* (Cmd 218, 1957) 28 [120]–[121].

¹¹³ *Kerr Committee Report* (n 19) 86 [292]. See also at 96 [321], 115 [390].

¹¹⁴ *Ibid* 87 [293].

¹¹⁵ *Ibid* 87–8 [293]. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 6 March 1975, 1187 (Kep Enderby, Attorney-General) (‘AAT Bill Second Reading Speech’) capturing the second reading speech for the Administrative Appeals Tribunal Bill 1975 (Cth):

The President and the presidential members of the Tribunal will have the status of judges. The Bill accords them this status because it is considered by the Government to be essential to the successful operation of the Tribunal that it should enjoy a high standing in the Australian community.

Parliament for removal from office or restoration to office appear to us to be too cumbersome as provisions to operate generally.¹¹⁶

Following the publication of the Kerr Committee's report, the Commonwealth government established the Committee on Administrative Discretions to examine administrative discretions under Commonwealth statutes and regulations and to advise as to the appropriateness of providing merits review or alternative external review of those decisions.¹¹⁷ The committee comprised Sir Henry Bland (Chairman), Harry Whitmore (who had also been a part of the Kerr Committee)¹¹⁸ and Peter Bailey (who was the Deputy Secretary of the Department of Prime Minister and Cabinet).¹¹⁹ The committee became known as the Bland Committee.¹²⁰

In its 1973 final report, the Bland Committee found that

legislators have, over a wide field, been far from unmindful of the importance of providing opportunities to the citizen to challenge decisions in exercise of administrative discretions. Particular tenderness has been displayed where decisions affect the practice of professions, the pursuit of avocations or the conduct of entrepreneurial activities. This is in dramatic contrast with the scant provision for external review of decisions taken under the social security and welfare, and customs and excise legislation, and the inadequate provisions made in the immigration legislation.¹²¹

Although the Bland Committee described review tribunals as 'an extension of administration' and 'an extension of the administrative decision making process',¹²² it explicitly rejected the Kerr Committee's view about Commonwealth officers from the department or authority responsible for the decision under review hearing those proceedings in a tribunal.¹²³ The Bland Committee stated:

[We] would be concerned about the public reaction to a member of the Tribunal adjudicating upon a decision of his own department. ... In some cases, departments might be the only suitable source for one member of the Tribunal. There

¹¹⁶ *Kerr Committee Report* (n 19) 97 [322].

¹¹⁷ *Bland Committee Report* (n 19) 1.

¹¹⁸ See above n 99 and accompanying text.

¹¹⁹ See *Bland Committee Report* (n 19); *Making a Difference* (n 98) 5.

¹²⁰ *Better Decisions* (n 5) 186 [22].

¹²¹ *Bland Committee Report* (n 19) 8 [44].

¹²² *Ibid* 24–5 [124], 26 [136]. See also at 30–1 [171], 32–3 [172(e), (j), (k)], 34 [173].

¹²³ See *Kerr Committee Report* (n 19) 86 [292].

might be less offence, in principle, if a departmental officer from a department, other than that involved, were a member on an ad hoc basis.¹²⁴

Considered by reference to a basic principle of modern merits review that a review body must not only be independent but also be seen to be independent,¹²⁵ the attitude of both the Kerr Committee and the Bland Committee to departmental officers participating in review of decisions made by their department (or other departments) is extraordinary.

The Bland Committee recommended the establishment of three tribunals: a Valuation and Compensation Tribunal, a Medical Appeals Tribunal, and a General Administrative Tribunal.¹²⁶

The generalist body that the Kerr and Bland Committees recommended became the AAT, which was established by s 5 of the *Administrative Appeals Tribunal Act 1975* (Cth) ('*AAT Act*') and commenced operation on 1 July 1976.¹²⁷ Given that the Kerr Committee's report stated that there was no need for the proposed tribunal to enjoy 'complete independence',¹²⁸ and the Bland Committee considered the tribunal 'an extension' of government,¹²⁹ it not surprising that the independence of the AAT was not legislatively enshrined in the *AAT Act*.

B *Relevant Attributes of the AAT*

As enacted, the *AAT Act* did not refer to independence or provide that the members of the AAT must take an oath of office. As will be seen, the *AAT Act* did not include a statutory objective until 2005.¹³⁰ An oath of office was first mandated in 1982, which focused on allegiance to the monarch and required members to 'faithfully and impartially perform the duties of [their] office'.¹³¹

¹²⁴ *Bland Committee Report* (n 19) 28 [149]–[150].

¹²⁵ See *Better Decisions* (n 5) 18 [2.51]; Leighton McDonald, Kristen Rundle and Emily Hammond, *Principles of Administrative Law* (Oxford University Press, 4th ed, 2023) 289.

¹²⁶ *Bland Committee Report* (n 19) 25 [130].

¹²⁷ See Commonwealth, *Commonwealth of Australia Gazette*, No S94, Friday 4 June 1976, 1.

¹²⁸ *Kerr Committee Report* (n 19) 96 [321].

¹²⁹ *Bland Committee Report* (n 19) 30–1 [171], 32–3 [172(e), (j), (k)], 34 [173].

¹³⁰ *Administrative Appeals Tribunal Amendment Act 2005* (Cth) sch 1 item 1 ('*AAT Amendment Act*'), inserting *AAT Act* (n 35) s 2A.

¹³¹ *Statute Law (Miscellaneous Amendments) Act (No 1) 1982* (Cth) s 38 ('*Statute Law Act*'), inserting *AAT Act* (n 35) sch 2.

I hasten to add that the absence of any statements in the *AAT Act* regarding independence does not mean that it was intended that the AAT would lack independence or that the case law supported any proposition that the AAT did not operate independently of the bodies whose decisions it reviewed.

In his second reading speech for the Administrative Appeals Tribunal Bill 1975 (Cth), the then-Attorney-General stated that the AAT was set up to be an 'independent Tribunal' which would not be an 'appendage of [g]overnment departments' or 'part of the machinery of departmental administration'.¹³² This statement is to be contrasted with the description of the Taxation Board of Review as 'a mere piece of administrative machinery' by Higgins J in *Munro*.¹³³ Interestingly, the part of the Bill to which the Attorney-General referred in relation to the AAT's independence was a provision stipulating that members could only be removed from office upon an address by each House of Parliament.¹³⁴

In *Re Becker and Minister for Immigration and Ethnic Affairs* ('*Becker*'),¹³⁵ the inaugural President of the AAT, Brennan P,¹³⁶ held that the *AAT Act*, by inference, required the AAT to be independent.¹³⁷ He said:

The legislature clearly intends that the Tribunal, though exercising administrative power, should be constituted upon the judicial model, separate from, and independent of, the executive (see Pt II of the Act). ... The decision of the tribunal in the particular circumstances of each case is therefore to be resolved according to its opinion as to the merits of that case. It forms that opinion after considering the views of the decision-maker, but it is not bound by those views.¹³⁸

In *Drake v Minister for Immigration and Ethnic Affairs*, the Full Court of the Federal Court emphasised that the AAT must independently assess all the circumstances of a case and make an independent determination of what is the

¹³² AAT Bill Second Reading Speech (n 115) 1187.

¹³³ *Munro* (n 53) 201 (Higgins J).

¹³⁴ AAT Bill Second Reading Speech (n 115) 1187 (Kep Enderby, Attorney-General), discussing Administrative Appeals Tribunal Bill 1975 (Cth) cl 14 ('AAT Bill'). See also at cls 15(1)–(4), which required AAT members to disclose conflicts of interest in respect of a proceeding and not to exercise any powers in relation to such a proceeding without consent.

¹³⁵ (1977) 15 ALR 696 ('*Becker*').

¹³⁶ Belinda Baker and Stephen Gageler, 'Brennan, (Francis) Gerard' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 66, 66.

¹³⁷ *Becker* (n 135) 699.

¹³⁸ *Ibid.*

correct or preferable decision.¹³⁹ In *Re Drake and Minister for Immigration and Ethnic Affairs [No 2]*, Brennan P stated that the AAT ‘is rightly required to reach its decisions with the same robust independence as that exhibited by the courts.’¹⁴⁰

It is noteworthy that in 1992, over 10 years after the *Becker* and *Drake* cases were decided, Hill J compared the AAT to the Taxation Board of Review in *Secretary, Department of Social Security v Hodgson*.¹⁴¹ He said that ‘[t]he Tribunal is, like the Taxation [Board] of Review discussed in *Jolly* ... “another executive body in an administrative hierarchy”’.¹⁴² He also stated that the AAT ‘exists to do again ... that which the decision-maker was entrusted to do’ and referred to the statement of Kitto J in *Mobil Oil* that the AAT has the function of ‘working out as a step in administration what it considers the situation to be.’¹⁴³

It is also noteworthy that in a report published in 1995, the Administrative Review Council (‘ARC’)¹⁴⁴ stated that

tribunals ... are part of the executive arm of government and an extension of the administrative decision-making process. ... Nonetheless, tribunal members must bring the same quality of independent thought and decision making to their task as do judges.¹⁴⁵

C Amalgamation of Separate Administrative Tribunals in 2015

On 1 July 2015, the then-separate Social Security Appeals Tribunal (‘SSAT’), Migration Review Tribunal (‘MRT’) and Refugee Review Tribunal (‘RRT’) were amalgamated with the AAT.¹⁴⁶

¹³⁹ (1979) 24 ALR 579, 591 (Bowen CJ and Deane J), 599, 601 (Smithers J).

¹⁴⁰ (1979) 2 ALD 634, 643.

¹⁴¹ (1992) 37 FCR 32, 40.

¹⁴² *Ibid* (citations omitted).

¹⁴³ *Ibid*, citing *Mobil Oil* (n 90) 502. See also *Liedig v Commissioner of Taxation* (1994) 50 FCR 461, 464 (Hill J), quoting *Mobil Oil* (n 90) 502 (Kitto J).

¹⁴⁴ The establishment of the ARC was recommended in the *Kerr Committee Report* (n 19): at 83–5 [283]–[288]; 114 [390]. The ARC was established by s 48 of the *AAT Act* (n 35), as enacted, and first met on 15 December 1976: Hespe (n 19) 15.

¹⁴⁵ *Better Decisions* (n 5) 70 [4.2].

¹⁴⁶ See Explanatory Memorandum, *Tribunals Amalgamation Bill 2014* (Cth) 1 [1] (‘Amalgamation Bill Explanatory Memorandum’); *Tribunals Amalgamation Act 2015* (Cth) sch 9 item 1 (definition of ‘commencement day’) (‘*Tribunals Amalgamation Act*’).

The SSAT had its origins in a ministerial instruction dated December 1974.¹⁴⁷ Eight separate tribunals were established and tasked with external merits review of pensions and allowances decisions of the Department of Social Security ('DSS').¹⁴⁸ The tribunals operated in accordance with a series of principles and procedures that was published by the Policy Branch of the DSS in December 1974.¹⁴⁹

From 10 February 1975, there was one tribunal in each capital city comprising a full-time officer seconded from the DSS and two part-time members, one of whom was a lawyer and the other of whom had qualifications or experience in welfare.¹⁵⁰ These tribunals could not set aside a decision made by the DSS and substitute a new decision.¹⁵¹ If the tribunals upheld an appeal, they were limited to making a recommendation to the Director-General of Social Security about how the matter should be resolved.¹⁵² Although most of the recommendations of the tribunals were accepted by the DSS,¹⁵³ one could not describe the initial emanation of the SSAT as a truly independent administrative tribunal. Rather, these tribunals were in the nature of internal advisory bodies.

From 1980,¹⁵⁴ decisions of the Social Security Appeals Tribunals could be reviewed by the AAT by way of a second-tier review.¹⁵⁵ In a report published in 1984, the ARC recommended the abolition of these 'quasi external appeals' bodies, emphasising the need to establish an independent external review body on a legislative basis.¹⁵⁶ The *Social Security (Review of Decisions) Act 1988*

¹⁴⁷ See generally *Better Decisions* (n 5) 193 [47]; Department of Social Security (Cth), Policy Branch, *Social Security Appeals System: Principles and Procedures* (Policy, December 1974) [1]–[4] ('*Principles and Procedures*').

¹⁴⁸ *Principles and Procedures* (n 147) [1].

¹⁴⁹ See generally *Principles and Procedures* (n 147).

¹⁵⁰ See Administrative Review Council, *Social Security Appeals* (Report, 1981) 11 [1.001] <<https://www8.austlii.edu.au/au/other/lawreform/AdminRC/1980/8.pdf>>, archived at <<https://perma.cc/B66F-U698>>; *Better Decisions* (n 5) 193 [47]; *Principles and Procedures* (n 147) [2].

¹⁵¹ *Principles and Procedures* (n 147) [3].

¹⁵² *Social Security Appeals* (n 150) 11 [1.001]. See also *ibid* [1], 31.

¹⁵³ Administrative Review Council, *The Structure and Form of Social Security Appeals* (Report No 21, 12 April 1984) 8–9 [21] <<https://nla.gov.au/nla.obj-1473919383/view?partId=nla.obj-1474486599 - page/n0/mode/1up>>, archived at <<https://perma.cc/3Z3Z-LCFW>> ('*Structure and Form*').

¹⁵⁴ *Administrative Appeals Tribunal (Social Services Act) Regulations 1980* (Cth) reg 3(2).

¹⁵⁵ *Ibid* reg 3(3), inserting *AAT Act* (n 35) s 24A(1).

¹⁵⁶ *Structure and Form* (n 153) 19 [68], 19–20 [70], 31 [117]–[118] <<https://nla.gov.au/nla.obj-1473919383/view?partId=nla.obj-1474486599#page/n0/mode/1up>>, archived at <<https://perma.cc/3Z3Z-LCFW>>.

(Cth) (*SSRD Act*) established a statutory SSAT with power to make binding decisions.¹⁵⁷

The Immigration Review Tribunal was established in 1989¹⁵⁸ and became the MRT in 1998.¹⁵⁹ The RRT was established in 1992.¹⁶⁰ In broad terms, the RRT reviewed decisions by the Minister for Immigration and Multicultural Affairs or their delegates in relation to protection visas and the MRT reviewed decisions concerning a range of other visas.¹⁶¹

As with the *AAT Act*, the word ‘independent’ was not used in the legislation establishing the MRT and the RRT. However, under that legislation, the MRT and the RRT had many of the features of the AAT and they were able to act independently of the then-Department of Immigration and the then-Minister for Immigration whose decisions they reviewed.¹⁶² In particular, like the AAT, the two tribunals could control their own procedures and had the power to set aside the original decision and substitute their own decision.¹⁶³

Section 6 of the *SSRD Act* inserted s 176 into the *Social Security Act 1947* (Cth), which provided that the SSAT ‘shall, in carrying out its functions under this Act, pursue the objective of providing a mechanism of review that is fair,

¹⁵⁷ *Social Security (Review of Decisions) Act 1988* (Cth) s 6, inserting *Social Security Act 1947* (Cth) pt xix div 2; *Better Decisions* (n 5) 193 [47].

¹⁵⁸ *Migration Legislation Amendment Act 1989* (Cth) s 27 (*Migration Amendment Act 1989*), inserting *Migration Act 1958* (Cth) s 64ZJ (*Migration Act*).

¹⁵⁹ *Migration Legislation Amendment Act (No 1) 1998* (Cth) sch 2 item 9 (*Migration Amendment Act 1998*), inserting *Migration Act* (n 158) s 394.

¹⁶⁰ *Migration Reform Act 1992* (Cth) s 31 (*Migration Reform Act*), inserting *Migration Act* (n 158) ss 166J.

¹⁶¹ See *Migration Reform Act* (n 160) s 32, inserting *Migration Act* (n 158) 166B(1)(c)–(d); *Migration Amendment Act 1998* (n 159) s 10, inserting *Migration Act* (n 158) s 338.

¹⁶² Prior to their amalgamation with the AAT, the MRT and RRT reviewed decisions made by the Department of and Minister for Immigration and Border Protection and their delegates: Amalgamation Bill Explanatory Memorandum (n 146) 2 [11].

¹⁶³ See *Migration Act* (n 158) ss 349(2)(d), 353–353A, 415(2)(d), 420–420A, as at 1 March 2000; *AAT Act* (n 35) ss 33, 43(1)(c)(ii).

just, economical, informal and quick'. This language was adopted in the establishment of the Immigration Review Tribunal,¹⁶⁴ the MRT¹⁶⁵ and the RRT.¹⁶⁶ It was also adopted as the AAT's objective in 2005, when s 2A was inserted in the *AAT Act*.¹⁶⁷ This section provided that '[i]n carrying out its functions, the [AAT] must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick'. It is to be noted that the mechanism of review was not described as 'independent'. Section 2A was repealed and substituted in 2015 when these tribunals were amalgamated and the objective to provide a mechanism of review that was 'fair, just, economical, informal and quick' was included in the new s 2A(b).¹⁶⁸

D *The AAT and the Concepts of 'Administrative Continuum' and 'Stepping into the Shoes'*

As already discussed, the *AAT Act* did not contain any provisions which expressly referred to independence.¹⁶⁹ Additionally, there are two concepts associated with the AAT which, in my view, detracted from the appearance of its independence from the government. These concepts are the AAT being part of the 'administrative continuum' of government decision-making and the concept of the AAT 'stepping into the shoes' of the decision-maker. These expressions were first used in the 1980s by the Federal Court to describe the role of the AAT.¹⁷⁰

The concept of the 'administrative continuum' was probably inspired by the High Court's decisions in *Munro* and *Jolly* and the decision of the Privy Council

¹⁶⁴ *Migration Act* (n 158) s 64ZL(2), as inserted by *Migration Amendment Act 1989* (n 158) s 27: 'The Principal Member shall ... monitor the operations of the Tribunal to ensure that those operations are as fair, just, economical, informal and quick as practicable.' See also *Migration Act* (n 158) s 64E(1), as inserted by *Migration Amendment Act 1989* (n 158) s 26: 'The Tribunal shall, in carrying out its functions under this Act, pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.'

¹⁶⁵ *Migration Act* (n 158) s 397(2)(a), as inserted by *Migration Amendment Act 1998* (n 159) sch 2 item 9: 'The Principal Member is responsible for ... monitoring the operations of the Tribunal to ensure that those operations are as fair, just, economical, informal and quick as practicable.'

¹⁶⁶ *Migration Act* (n 158) s 166JC(2)(a), as inserted by *Migration Reform Act* (n 160) s 31: 'The Principal Member is responsible for ... monitoring the operations of the Tribunal to ensure that those operations are as fair, just, economical, informal and quick as practicable.'

¹⁶⁷ *AAT Act* (n 35) s 2A, as inserted by *AAT Amendment Act 2005* (n 130) sch 1 item 1.

¹⁶⁸ *AAT Act* (n 35) s 2A(b), as inserted by *Tribunals Amalgamation Act* (n 146) sch 1 item 1.

¹⁶⁹ See above Part III(A).

¹⁷⁰ See below nn 174, 179 and accompanying text.

in *Shell* in the 1920s and 1930s and the High Court's decision in *Mobil Oil* in 1963 regarding the Taxation Board of Review. It will be recalled that these authorities stated that the Board was 'merely in the same position' as the Federal Commissioner of Taxation,¹⁷¹ and described the Board as 'administrative machinery'¹⁷² and as 'only another executive body in an administrative hierarchy'.¹⁷³

A variant of the expression 'administrative continuum' was used by Davies J in 1988 in the case of *Jebb v Repatriation Commission ('Jebb')*.¹⁷⁴ He said:

[T]he general approach of the tribunal has been to regard the administrative decision making process as a continuum and to look upon the tribunal's function as a part of that continuum so that, within the limits of a reconsideration of the decision under review, the tribunal considers the applicant's entitlement from the date of application, or other proper commencing date, to the date of the tribunal's decision.¹⁷⁵

The above observation was made by Davies J in the context of rejecting the proposition that the AAT was required to consider an applicant's claim on the basis of the circumstances existing at the time the claim was lodged with the department or agency, rather than as at the time of the AAT hearing.¹⁷⁶

The expression 'administrative continuum' has been repeated in several Federal Court and High Court cases since *Jebb* was decided.¹⁷⁷ The most recent reference to the expression by the High Court was in 2022 by Gageler J in dissent in *SDCV v Director-General of Security*, where he stated:

The AAT, and the executive officer of the Commonwealth who made the primary decision reviewed by the AAT so as to become a party to the proceeding before the AAT, are situated by the AAT Act in an administrative continuum. The administrative continuum ends with the AAT. The Federal Court is not a part of it.¹⁷⁸

¹⁷¹ *Shell* (n 66) 545 (Lord Sankey LC for the Court).

¹⁷² *Munro* (n 53) 201 (Higgins J).

¹⁷³ *Jolly* (n 70) 214 (Rich and Dixon JJ).

¹⁷⁴ (1988) 80 ALR 329 ('*Jebb*').

¹⁷⁵ *Ibid* 333.

¹⁷⁶ *Ibid* 334.

¹⁷⁷ See, eg, *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250, 271 [53] (Bell, Gageler, Gordon and Edelman JJ) ('*Frugtniet*'); *SDCV v Director-General of Security* (2022) 277 CLR 241, 289 [120] (Gageler J) ('*SDCV*').

¹⁷⁸ *SDCV* (n 177) 289 [120] (citations omitted).

The expression ‘being in the shoes’ of the original decision-maker was used by Smithers J in 1980 in dissent in *Minister for Immigration and Ethnic Affairs v Pochi*.¹⁷⁹ He said that ‘in reviewing a decision the Tribunal is to be considered as being in the shoes of the person whose decision is in question’.¹⁸⁰ He made this observation in support of the proposition that, in reaching a decision on review of a decision of the original decision-maker, the AAT should consider itself as though it was performing the relevant function of that decision-maker in accordance with the law as it applied to that person.¹⁸¹

Variants of the expression ‘being in the shoes’ — including ‘stands in the shoes’ and ‘steps into the shoes’ — have been used in numerous cases since *Pochi*.¹⁸² The metaphor ‘steps into the shoes’ sought to convey that, in reviewing a decision, the AAT would have the same powers and discretions as the department or agency which made the decision and would be subject to the same legislative constraints.¹⁸³

In *Frugtniet v Australian Securities and Investments Commission*, the plurality (Bell, Gageler, Gordon and Edelman JJ) emphasised that the role of the AAT is to ‘stand in the shoes of the decision-maker’¹⁸⁴ and that the primary decision-maker and the AAT ‘exist within an administrative continuum’.¹⁸⁵ In that case, the High Court found that the same constraints on decision-making power applied to both the primary decision-maker and the AAT.¹⁸⁶ The plurality stated:

[E]xcept where altered by some other statute ... the jurisdiction conferred on the AAT ... is to stand in the shoes of the decision-maker whose decision is under review so as to determine for itself on the material before it the decision which can, and which it considers should, be made in the exercise of the power or pow-

¹⁷⁹ (1980) 31 ALR 666, 670–1 (*Pochi*). Earlier AAT decisions used a variant of this expression: see, eg, *Re Smooker and Defence Force Retirement and Death Benefits Authority* (1977) 1 ALD 74, 78 (Senior Member Edmunds, Member Skermer and Dr Glick); *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934, 943 (Senior Member Hall, Members Thompson and Marsh); *Re Hanlon and Commissioner for Superannuation* (1979) 2 ALN No 91, 658 (Senior Member Hall, Dr Glick and Mr Borthwick).

¹⁸⁰ *Pochi* (n 179) 671 (Smithers J).

¹⁸¹ *Ibid.*

¹⁸² See, eg, *Repatriation Commission v Maloney* (1993) 45 FCR 563, 568 (Wilcox, Foster and Whitlam JJ); *Shi v Migration Agents Registration Board* (2008) 235 CLR 286, 299 [40] (Kirby J), 324 [134] (Kiefel J) (*Shi*); *Frugtniet* (n 177) 271 [51] (Bell, Gageler, Gordon and Edelman JJ).

¹⁸³ *Frugtniet* (n 177) 271 [51] (Bell, Gageler, Gordon and Edelman JJ).

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid* 271 [53].

¹⁸⁶ *Ibid* 256–7 [14] (Kiefel CJ, Keane and Nettle JJ), 271 [51], 272 [54] (Bell, Gageler, Gordon and Edelman JJ).

ers conferred on the primary decision-maker for the purpose of making the decision under review. The AAT exercises the same power or powers as the primary decision-maker, subject to the same constraints. The primary decision, and the statutory question it answers, marks the boundaries of the AAT's review. The AAT must address the same question the primary decision-maker was required to address, and the question raised by statute for decision by the primary decision-maker determines the considerations that must or must not be taken into account by the AAT in reviewing that decision.

...

The AAT and the primary decision-maker exist within an administrative continuum. The AAT has no jurisdiction to make a decision on the material before it taking into account a consideration which could not have been taken into account by the primary decision-maker in making the decision under review and which could not be taken into account by the primary decision-maker were the AAT to remit the matter to the primary decision-maker for reconsideration.¹⁸⁷

In my view, the concepts of the 'administrative continuum' and 'steps into the shoes' detracted from the appearance of the AAT's independence because they conveyed that the AAT was part of the process of departmental decision-making. The fact that those concepts gained currency is not surprising when one has regard to the fact that, at the time the AAT was established, there was less concern about the need for it to be seen as independent from the rest of the executive branch than there is today.

VII THE ART

I now turn to the ART.

Independence is a core institutional feature of the ART, which is entrenched in the *Administrative Review Tribunal Act 2024* (Cth) ('ART Act').¹⁸⁸

Independence from administrative decision-makers was a primary consideration in the government's establishment of the ART.¹⁸⁹ In the second reading speech on the *Administrative Review Tribunal Bill 2024* (Cth), the then-Attorney-General said the following:

¹⁸⁷ Ibid 271 [51], 272 [53] (citations omitted).

¹⁸⁸ See *ART Act* (n 3) s 9.

¹⁸⁹ See Revised Explanatory Memorandum (n 3) 4 [20]–[21].

A strong, user-focused administrative review body provides an avenue for community members to seek independent review of government decisions that have major and sometimes life-altering impacts on their lives.¹⁹⁰

The Revised Explanatory Memorandum to the Bill included the word ‘independent’ more than 40 times.¹⁹¹ It also explained the reason that the President must be a judge of the Federal Court of Australia in the following terms:

The person appointed to the position of President must be a Judge of the [Federal Court of Australia] ... [and] [t]his [requirement] is equivalent to the requirement contained in section 7 of the *AAT Act*. A judicial President reinforces the independence of the Tribunal from government. Having a judicial President as the head of the body entrenches its impartiality as an appellate body, albeit one within the executive branch.¹⁹²

As can be seen, the advantages of having a Federal Court judge as President of the ART were seen as extending beyond raising the status of the Tribunal envisioned in 1975 for the AAT, to include reinforcing the independence of the ART from the government.

The independence of the ART is also reflected in its statutory objective in s 9 of the *ART Act*. That section requires the ART to ‘pursue the objective of providing an *independent* mechanism of review’.¹⁹³ It will be recalled that the objective in the *AAT Act* referred to a ‘*mechanism* of review’ rather than an independent mechanism of review.¹⁹⁴

The *ART Act* also provides that members must take an oath of office to ‘well and truly serve in the office [of the member], and do right to all manner of people according to law without fear or favour, affection or ill-will’.¹⁹⁵ This wording is relevantly identical to the oath taken by Federal Court judges,¹⁹⁶ and

¹⁹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2023, 9198 (Mark Dreyfus, Attorney-General).

¹⁹¹ Revised Explanatory Memorandum (n 3) 1 [1], 2 [9], [11], 4 [20], 9 [56], 10 [61]–[63], [65], 11 [69], 13 [76], 15 [92], 21 [119], 35 [243], 36 [248], [251], [254], 37 [258], [260], 49 [352], 64 [460], 66 [473], 98 [691], 172 [1181], 197 [1288], 200 [1373], [1377], 203 [1401], 205 [1408], 206 [1416], 211 [1447], 215 [1473], 228 [1547], [1554], 233 [1596], 237 [1624], 273 [1831].

¹⁹² *Ibid* 193 [1319].

¹⁹³ *ART Act* (n 3) s 9 (emphasis added).

¹⁹⁴ *AAT Act* (n 35) s 2A (emphasis added), as inserted by *AAT Amendment Act 2005* (n 130) sch 1 item 1.

¹⁹⁵ *ART Act* (n 3) s 213(2).

¹⁹⁶ That oath is set out in the Schedule to the *Federal Court of Australia Act 1976* (Cth) as follows: ‘I will do right to all manner of people according to law without fear or favour, affection or illwill’.

is universally associated with judicial independence. It will be recalled that the oath of office in the *AAT Act* focused on loyalty to the monarch.¹⁹⁷

The independence of members of the ART is fortified by the requirement in the *ART Act* that members can only be appointed if they have been assessed as suitable through a publicly advertised, merit-based appointment process.¹⁹⁸ There was never an equivalent requirement in the *AAT Act*. This requirement assists in fostering public confidence in the ability of ART members to exercise their significant powers to alter government decisions competently, responsibly and independently of government.

There is now a symmetry between merit-based appointees to the ART making merit-based administrative review decisions.

In my opinion, the above unique statutory features of the ART's independence warrant consideration by the courts of whether the concept that the AAT is part of the 'administrative continuum' and the concept that the AAT 'steps into the shoes' of the original decision-maker should apply to the ART.

Another important difference between the *AAT Act* and the *ART Act* which renders the 'administrative continuum' and 'steps into the shoes of' concepts less applicable to the ART is that the *ART Act* expressly requires the ART to perform a normative role in its decision-making. This normative role is reflected in the statutory objective in s 9 of the *ART Act*, which provides that one of the elements of the independent mechanism of review is the improvement of the transparency and quality of government decision-making.¹⁹⁹ It is also reflected in the establishment of the Guidance and Appeals Panel which can make Tribunal guidance decisions in relation to matters that raise issues of significance to administrative decision-making.²⁰⁰

The ART's normative role is further reflected in the obligation of the President to inform ministers, Commonwealth entities and the ARC of any systemic issues related to the making of reviewable decisions that have been identified in the case load of the ART.²⁰¹

It should be noted that, although case law has referred to the AAT's decisions as having a normative effect on administrative decision-making,²⁰² this aspect was never included in the *AAT Act*.

¹⁹⁷ *AAT Act* (n 35) sch 2, as inserted by *Statute Law Act* (n 131) s 38.

¹⁹⁸ See especially *ART Act* (n 3) s 208(2)(b)(i)–(ii).

¹⁹⁹ *Ibid* s 9(d).

²⁰⁰ *Ibid* ss 4 (definition of 'Tribunal guidance decision'), 109, 110, 122(1), 128(2).

²⁰¹ *Ibid* s 193(i).

²⁰² See, eg, *Re Secretary, Department of Education, Employment and Workplace Relations v Morrison* (2008) 49 AAR 295, 298 [12] (Downes J, Deputy President Groom and Senior Member

Apart from these differences between the *AAT Act* and *ART Act*, there are other important factors which warrant consideration by the courts of whether the 'administrative continuum' and 'steps into the shoes of' concepts should be associated with the ART.

Unlike ART members, the majority of federal administrative decision-makers are not statutory office holders and they do not take any form of oath. Most of them do not make decisions as part of an independent statutory mechanism, but as part of the ordinary business of government, and they are subject to government policies and public service rules. An ART member has the same powers and discretions as the original decision-maker but must exercise them as an independent adjudicator.²⁰³

Although administrative decision-makers are required to afford procedural fairness to persons affected by their decisions, the manner in which that obligation is discharged is very different to the manner in which the ART is required to discharge it. Many administrative decisions are made on the papers, without formal hearings.²⁰⁴

The procedures that are utilised by the ART in its decision-making are more closely aligned to those of the courts rather than those of departments or agencies. Of course, there are important differences stemming from the fact that the ART is not a court but an administrative tribunal tasked with meeting its statutory objective. Ordinarily, parties to a review by the ART are not confined to the evidence or submissions that were before the administrative decision-maker.²⁰⁵

At the time an administrative decision is made, there are usually only two participants in the process: the department or agency which makes the decision and the person affected by that decision.²⁰⁶ When an application for review is lodged with the ART, a new process is commenced in which the department or agency and the applicant are parties to a dispute, and the ART is the independent adjudicator of that dispute.²⁰⁷ The ART assigns a proceeding number to the

Cunningham); *Darmanin and National Disability Insurance Agency* [2024] AATA 1202, [30] (Member Toohey).

²⁰³ *ART Act* (n 3) ss 9, 54.

²⁰⁴ Cf *ibid* s 106.

²⁰⁵ *Ibid* s 52.

²⁰⁶ *Ibid* ss 17(1), 22(1)(a)–(b).

²⁰⁷ *Ibid* ss 9, 22(1).

application;²⁰⁸ this number is entirely different from the matter number used by the department or agency.

The statutory objective in s 9 of the *ART Act* provides that one of the elements of the independent mechanism of review is the promotion of public trust and confidence in the ART.²⁰⁹ By definition, people who invoke that mechanism feel aggrieved by the decision made by the relevant department or agency. Many of them are vulnerable individuals without legal representation. From their perspective, any notion that the ART is part of a continuum of decision-making by the relevant department or agency might exacerbate their sense of grievance and thus not promote public trust and confidence in the AAT. In addition, any notion that, by stepping into the shoes of the original decision-maker, the ART will be no different from that decision-maker has the potential to cause confusion and apprehension, and to obscure the fact that the ART is independent of, and vastly different from, the decision-maker.

The phrases ‘being part of the administrative continuum’ and ‘steps into the shoes of’ might appear to be a neat way of reflecting that an administrative tribunal sits within ch II of the *Australian Constitution* and that members of the ART have the same powers and discretions as the original decision-maker. However, applicants to the ART are not concerned with issues such as in which chapter of the *Australian Constitution* matters are heard. Instead, they want to access a mechanism of review which will hear and determine their claims on their merits — fairly and justly — and importantly, independently of the agency or department from where the decision originated. There is a risk that the two phrases may give the incorrect impression that the ART is a part of the bureaucracy and that it conducts internal review.

The ART takes its independence very seriously. We are committed to achieving the statutory objective of providing an independent mechanism of review that has all the elements set out in s 9 of the *ART Act*.²¹⁰ A tangible indication of our commitment to independence is our adoption of a new logo. Unlike the AAT’s logo,²¹¹ the ART logo does not include the Commonwealth

²⁰⁸ See Administrative Review Tribunal (Guidance and Appeals Panel), *Practice Direction 2024*, 14 October 2024, sub-para 3.2(a)(ii) <<https://www.art.gov.au/sites/default/files/2024-10/Administrative%20Review%20Tribunal%20%28Guidance%20and%20Appeals%20Panel%29%20Practice%20Direction.pdf>>, archived at <<https://perma.cc/LP4M-T4LY>>.

²⁰⁹ *ART Act* (n 3) s 9(e).

²¹⁰ See generally *ibid* s 9.

²¹¹ ‘Welcome to the AAT’, *Administrative Appeals Tribunal* (Web Page) <<https://webarchive.nla.gov.au/awa/20241010021833/https://www.aat.gov.au/>>, archived at <<https://perma.cc/8D2A-6L4L>>.

coat of arms.²¹² This should not be seen as tokenistic. Rather, it embodies our desire to convey to applicants who seek review of a government decision that the review will not be conducted by another part of the government by way of internal review, but by an independent statutory body that is robust and at arm's length from the original decision-maker.

VIII CONCLUSION

The brief history of administrative tribunals in Australia outlined in this paper has demonstrated that the functions performed by such tribunals have varied greatly over the years and that independence has not always been associated with them.

Today, the role of merits review is not seen as being confined to providing justice for a specific individual by overturning a particular inappropriate decision, but as extending to improving administrative decision-making more generally and fostering good government. Merits review of government decisions by administrative tribunals such as the ART is now generally accepted as a fundamental component of our democratic system. It is also now generally accepted that, for these important functions to be achieved, administrative tribunals need to be, and be seen to be, independent of the bodies whose decisions they review.

²¹² 'About Us', *Administrative Review Tribunal* (Web Page) <<https://www.art.gov.au/about-us>>, archived at <<https://perma.cc/PEG3-LXVN>>.