SUBMISSION TO THE
STATUTORY REVIEW
OF THE
ADMINISTRATIVE
APPEALS TRIBUNAL

(August 2018)
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INTRODUCTION

1. It has now been three years since the Administrative Appeals Tribunal (AAT) was amalgamated with the former Migration Review Tribunal (MRT), Refugee Review Tribunal (RRT) and Social Security Appeals Tribunal (SSAT). The AAT welcomes this review required by the legislation that gave effect to the amalgamation as an opportunity to:
   • reflect on the achievements made to date
   • identify current challenges, and
   • recommend options that would assist the Tribunal in delivering on our statutory objective of providing a mechanism of review that is accessible, fair, just, economical, informal, quick and proportionate and that promotes public trust and confidence in the decision-making of the Tribunal.¹

2. The amalgamation of the former tribunals represented a significant machinery of government change, effectively increasing the former AAT from an organisation of about 230 members and staff with annual lodgements of around 7,000 applications to one that now has more than 900 members and staff with annual lodgements of almost 59,000.

3. The AAT’s purpose is to provide independent merits review, enabling individuals and organisations to seek review of decisions made under Commonwealth laws that affect their interests and, more broadly, contribute to improving the quality of government decision-making. With this in mind, considerable efforts were made at the point of amalgamation to ensure a seamless experience for those who had applications before the existing tribunals and for new applicants and other parties. This included a consolidated website and arrangements making it possible for all registries to accept applications across all divisions and locations. The Tribunal has continued to focus on improving the services delivered to users of the AAT, including making online lodgement available for all types of applications and enhancing the information made available about the Tribunal’s role and procedures such as new video guides on what happens at the AAT in plain English and community languages and fact sheets providing information about the issues arising in reviews of common types of decisions.

4. Since 1 July 2015, many significant steps towards creating an integrated AAT have been achieved, particularly in consolidating back office functions and systems as well as the AAT’s physical and technology infrastructure. These have included merging the separate corporate services areas previously operated by the former tribunals into a shared Principal Registry, implementing single financial and human resource management systems, completing the physical co-location of the Tribunal’s registries in seven capital cities and integrating IT networks.

5. In relation to the AAT’s workload, the number of applications lodged annually has grown by more than 45 per cent since amalgamation.² This increase has been even

¹ Section 2A of the Administrative Appeals Tribunal Act 1975 (AAT Act).
² The combined lodgements of the former tribunals in 2014–15 was 40,379. There were 58,780 applications lodged in the AAT in 2017–18.
more marked in the Migration and Refugee Division, where applications have more than doubled since amalgamation. The challenges associated with this significant increase in workload have been compounded by the fact that the Tribunal has had fewer members available to undertake reviews. In addition, the existing funding arrangements are effectively predicated on a number of finalisations that, with the large growth in lodgements, is no longer aligned with the lodgements being received by the Tribunal. The combined effect of these factors is a reduction in clearance rates and a larger number of matters on hand at the end of 2017–18.

6. Notwithstanding those workload and resource issues, the AAT has maintained high productivity levels, finalising more than 40,000 applications in the 2017–18 financial year. This has been achieved through adoption of new case management strategies with a particular focus on early case assessment and resolution where possible. These approaches are in the best interests of all parties involved in a review.

7. Looking ahead, the Tribunal remains focused on maintaining the quality and timeliness of reviews while continuing the consolidation of the amalgamated AAT, including the further alignment of registry operations and digital transformation. There are a number of things that should be addressed with a view to achieving the full potential benefits of amalgamation. These include:

- some aspects of practice and procedure embedded in legislation, particularly for the Migration and Refugee Division, that inhibit the Tribunal’s ability to operate in the most effective and efficient manner
- a divisional framework based on legacy arrangements which might be amended to provide a functional structure to manage the AAT’s varied jurisdictions in the merged AAT
- funding arrangements inherited from the former tribunals that might now be amended to best and most efficiently serve an amalgamated AAT with the current caseload, and
- a combination of factors, including legacy differences in terms and conditions, which impede the capacity for the AAT to have members working flexibly across divisions.

8. The review is a legislated opportunity to further advance the Tribunal’s proposals for legislative harmonisation, explore possible structural or operational improvements to enhance the AAT’s effectiveness and identify caseload and resourcing issues that must be addressed to allow the Tribunal to continue to achieve its statutory objective and be an expert, innovative and respected tribunal delivering high-quality reviews.

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3 In 2014–15, the MRT and RRT received 18,534 applications. The Migration and Refugee Division received 37,933 applications in 2017–18.
4 The former tribunals had a combined membership of 348 at 30 June 2015. As at 20 August 2018, the AAT has 300 members.
5 The Migration and Refugee Division receives funding for finalising 18,000 applications per year.
6 At the end of 2014–15 the combined cases on hand was 24,863. At the end of 2017–18, the AAT had 53,282 cases on hand.
7 It is noted that amalgamation will not mean that resources can be used universally across every jurisdiction. For example, it is unlikely that every hearing room will be acceptable for each jurisdiction or that every member will be equipped or suitable to hear every matter.
BACKGROUND

ESTABLISHMENT AND ROLE

9. The AAT was established by the Administrative Appeals Tribunal Act 1975 (AAT Act) and commenced operations on 1 July 1976. The MRT, the RRT, including the Immigration Assessment Authority (IAA), and the SSAT were amalgamated with the AAT on 1 July 2015 in accordance with the Tribunals Amalgamation Act 2015 (Amalgamation Act).

10. The role of the AAT is to conduct independent merits review of administrative decisions that have been made under Commonwealth and some Norfolk Island laws. Merits review involves taking a fresh look at the facts, law and policy relating to a decision. The Tribunal must consider all of the material before it and determine what is the legally correct decision or, if more than one correct decision can be made, the preferable decision in the case at the time of making the decision.

11. As was explained by Bowen CJ and Deane J in Drake v Minister for Immigration and Ethnic Affairs:

   The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.\(^8\)

   In most cases, the AAT takes into account new information that was not available to the original decision-maker.

12. When reviewing a decision, the AAT can exercise all of the power and discretions available to the original decision-maker. Members have the power to:
   
   - affirm a decision
   - vary a decision
   - set aside a decision and substitute a new decision, and
   - remit a decision to the original decision-maker for reconsideration.\(^9\)

13. The AAT provides administrative justice for individuals and organisations seeking to challenge individual decisions that affect their interests. More broadly, the Tribunal is part of the framework of administrative law mechanisms that contribute to enhancing the transparency and quality of government decision-making.

STRUCTURE

14. The AAT consists of the President, Deputy Presidents, Senior Members (Level 1 or Level 2) and Members (Level 1, Level 2 or Level 3) who are appointed by the Governor-General on a full-time or part-time basis for up to seven years.\(^10\) Their primary role is to conduct hearings and decide applications for review of decisions.

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\(^8\) (1979) 2 ALD 60 at 68.

\(^9\) Section 43 of the AAT Act and sections 349 and 415 of the Migration Act 1958 (Migration Act).

\(^10\) Section 6 and subsection 8(3) of the AAT Act.
15. The President must be a judge of the Federal Court. The other members may be judges of the Federal Court or Family Court, lawyers of at least five years' standing, or persons with relevant knowledge or skills. Members come from a diverse range of backgrounds with expertise in areas such as accountancy, disability, law, medicine, migration, military affairs, public administration, science and taxation.

16. As at 20 August 2018, there were 300 AAT members.

<table>
<thead>
<tr>
<th>CATEGORY OF MEMBER</th>
<th>JUDGE</th>
<th>FULL-TIME</th>
<th>PART-TIME</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>President</td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Deputy Presidents</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Federal Court judges</td>
<td>15</td>
<td></td>
<td></td>
<td>15</td>
</tr>
<tr>
<td>Family Court judges</td>
<td>5</td>
<td></td>
<td></td>
<td>5</td>
</tr>
<tr>
<td>Non-judicial</td>
<td>10</td>
<td>6</td>
<td></td>
<td>16</td>
</tr>
<tr>
<td>Senior Members</td>
<td>28</td>
<td>19</td>
<td></td>
<td>47</td>
</tr>
<tr>
<td>Members</td>
<td>67</td>
<td>149</td>
<td></td>
<td>216</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>21</strong></td>
<td><strong>105</strong></td>
<td><strong>174</strong></td>
<td><strong>300</strong></td>
</tr>
</tbody>
</table>

17. The ability for superior court judges to be appointed and sit from time to time as Deputy Presidents of the AAT is a valuable feature of the AAT Act. Judges are well-suited to dealing with particularly complex cases, including applications involving the review of decisions that have been made personally by Ministers. In the area of taxation, it is not uncommon for taxpayers to have applications before both the AAT and the Federal Court. In these circumstances, a Federal Court judge who is also appointed to the AAT is able to deal with applications in both jurisdictions at the same time.

18. Applications to the AAT are managed in one of eight divisions:

- General, Freedom of Information (FOI), National Disability Insurance Scheme (NDIS), Security, Taxation and Commercial, and Veterans' Appeals Divisions (collectively referred to as the General and other Divisions)
- Migration and Refugee Division, and
- Social Services and Child Support Division.

The AAT Act and the Migration Act specify that certain matters must be dealt with in particular divisions. In general, the President can direct the allocation of applications to divisions.

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11 Subsection 7(1) of the AAT Act.
12 Subsections 7(2) and (3) of the AAT Act.
13 Section 17A of the AAT Act and section 8 of the Administrative Appeals Tribunal Regulation 2015.
14 For example, the review of security assessments made by the Australian Security Intelligence Organisation (ASIO) and the review of decisions under the Archives Act 1983 about ASIO records must be dealt with in the Security Division: subsection 17B(2) of the AAT Act.
19. The President and Deputy Presidents can exercise powers in any division. Senior Members and Members may only exercise powers in the division(s) to which they have been assigned by the Attorney-General following any ministerial consultation required under the AAT Act.\textsuperscript{16}

20. A Deputy President may be assigned to be the Head of one or more divisions and a Deputy President or Senior Member may be assigned as the Deputy Head of one or more divisions.\textsuperscript{17} Since amalgamation, Division Heads have been assigned for three of the divisions: Migration and Refugee, Social Services and Child Support, and Taxation and Commercial. Three Senior Members have been assigned as Deputy Division Heads, one in the Migration and Refugee Division and two in the Social Services and Child Support Division. Only the Deputy Division Head for the Migration and Refugee Division continues to be a member of the AAT.

21. In relation to the AAT’s governance, the President is responsible for ensuring the expeditious and efficient discharge of the business of the Tribunal and for managing the Tribunal’s administrative affairs.\textsuperscript{18} The Division Heads assist the President by directing business in their divisions and they are assisted by the Deputy Division Heads.\textsuperscript{19} The Registrar, a statutory office holder appointed by the Governor-General on the nomination of the President, assists the President in managing the AAT’s administrative affairs and, in particular, is responsible for the AAT’s finances and staffing.\textsuperscript{20}

**JURISDICTION AND CASELOAD**

22. The AAT does not have a general power to review decisions and can only review a decision if an Act or other legislative instrument states it can be reviewed by the AAT. Currently, the Tribunal can review decisions made under more than 400 enactments.

23. When the AAT, MRT, RRT and SSAT were amalgamated, no changes were made to the decisions that had been subject to merits review by each of those tribunals.

24. The MRT and RRT had jurisdiction to review a range of decisions relating to visas under Parts 5 and 7 of the Migration Act: Part 7 relates to decisions about protection (refugee) visas while Part 5 relates to decisions about other types of visas. This jurisdiction was transferred to the AAT’s Migration and Refugee Division. The Migration Act specifies that the AAT’s powers to review decisions under Part 5 and Part 7 of the Migration Act can only be exercised in the Migration and Refugee Division.\textsuperscript{21}

\textsuperscript{16} See sections 17C to 17H of the AAT Act. Consultation with the responsible Minister is required in relation to the Migration and Refugee, NDIS, Social Services and Child Support, and Taxation and Commercial Divisions.

\textsuperscript{17} Sections 17K and 17L of the AAT Act.

\textsuperscript{18} Section 18A and subsection 24A(1) of the AAT Act.

\textsuperscript{19} Subsections 17K(6) and 17L(6) of the AAT Act.

\textsuperscript{20} Sections 24B, 24BA and 24C of the AAT Act.

\textsuperscript{21} Subsections 336N(2) and 409(2) of the Migration Act.
25. Prior to the amalgamation, the AAT also had a jurisdiction to review certain types of decisions about visas under the Migration Act that could not be reviewed by the MRT or RRT.\(^\text{22}\) Primarily, these were decisions relating to the character of a non-citizen.\(^\text{23}\) Since 1 July 2015, these decisions are reviewed in the General Division.

26. The SSAT had jurisdiction to review a range of decisions made by officers of the Department of Human Services, primarily relating to child support, family assistance, farm household support, paid parental leave, social security and student assistance. On amalgamation, the President directed that this jurisdiction be dealt with in the Social Services and Child Support Division.

27. Prior to the amalgamation, a person could apply to the AAT for merits review of an SSAT decision to affirm, vary or set aside the following types of decisions:
   - any decision relating to family assistance, farm household support, social security or student assistance
   - a limited subset of child support decisions,\(^\text{24}\) and
   - any paid parental leave decision relating to a claimant but not an employer.

28. The two identical rights of merits review for these decisions were maintained following amalgamation. ‘AAT first reviews’ are conducted in the Social Services and Child Support Division and ‘AAT second reviews’ in the General Division.

29. Both before and after amalgamation, the AAT has had jurisdiction to review a wide range of other types of decisions. The types of decisions most commonly reviewed, by the division within the General and other Divisions to which they are allocated, include decisions relating to:
   - General Division: Australian citizenship, child care services, civil aviation, customs, education regulation, passports, therapeutic goods regulation and workers’ compensation under federal laws\(^\text{25}\)
   - FOI Division: FOI, national archives and privacy
   - NDIS Division: the NDIS
   - Security Division: ASIO security assessments
   - Taxation and Commercial: bankruptcy, business names, corporations and financial services regulation, and taxation, and
   - Veterans’ Appeals Division: military compensation and veterans’ entitlements.

\(^{22}\) Subsection 500(1) of the Migration Act.
\(^{23}\) They include the following types of decisions: decisions to refuse to grant a visa or to cancel a visa under section 501 of the Migration Act; decisions under section 501CA not to revoke a mandatory cancellation of a visa under section 501; and decisions to refuse to grant a protection visa under section 65 relying on section 5H(2), 36(1C) or 36(2C)(a) or (b) which, in broad terms, may apply where it is considered the non-citizen has committed certain types of international or other crimes or acts, or is a danger to Australia’s security or the Australian community.
\(^{24}\) Primarily, these are decisions to refuse to extend the time for lodging an application for a first review of a child support decision and decisions about the percentage of time a parent or other carer has the care of a child for calculating child support.
\(^{25}\) Some types of decisions formally allocated to the General Division are managed in accordance with the procedures that apply in the Taxation and Commercial Division, including decisions about aged care accreditation and civil aviation regulation: see the Review of Taxation and Commercial Decisions Practice Direction.
30. The following table sets out the number of applications lodged in the AAT by division each year since 1 July 2015 and the size of each division’s workload as a proportion of all applications lodged. It shows the differences in volume between divisions.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No</td>
<td>%</td>
<td>No</td>
</tr>
<tr>
<td>Freedom of Information</td>
<td>37</td>
<td>&lt;0.1%</td>
<td>44</td>
</tr>
<tr>
<td>General</td>
<td>5,460</td>
<td>13.2%</td>
<td>5,798</td>
</tr>
<tr>
<td>NDIS</td>
<td>48</td>
<td>0.1%</td>
<td>215</td>
</tr>
<tr>
<td>Security</td>
<td>16</td>
<td>&lt;0.1%</td>
<td>10</td>
</tr>
<tr>
<td>Taxation &amp; Commercial</td>
<td>1,057</td>
<td>2.6%</td>
<td>975</td>
</tr>
<tr>
<td>Veterans’ Appeals</td>
<td>342</td>
<td>0.8%</td>
<td>330</td>
</tr>
<tr>
<td>Subtotal for General and other</td>
<td>6,960</td>
<td>16.8%</td>
<td>7,372</td>
</tr>
<tr>
<td>Migration &amp; Refugee</td>
<td>18,929</td>
<td>45.7%</td>
<td>26,604</td>
</tr>
<tr>
<td>Social Services &amp; Child Support</td>
<td>15,543</td>
<td>37.5%</td>
<td>17,450</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>41,432</strong></td>
<td><strong>51,426</strong></td>
<td><strong>58,780</strong></td>
</tr>
</tbody>
</table>

31. The chart at Appendix A with accompanying table shows the number of applications lodged, finalised and on hand for each of the amalgamating tribunals in 2014–15 and for the General and other Divisions, Migration and Refugee Division and Social Services and Child Support Division for the first three years of the amalgamated AAT. It shows the growth in the size of the Migration and Refugee Division caseload from 2016–17 and the size of the AAT’s current backlog.

32. Since 1 July 2015, lodgements in the Migration and Refugee Division have more than doubled and the Division has not kept pace with the workload. Following a 41 per cent increase between 2015–16 and 2016–17, lodgements increased a further 43 per cent in 2017–18 to 37,933. The gap between lodgements and finalisations has resulted in clearance rates reducing from 74 per cent in the migration caseload and 64 per cent in the protection caseload in 2016–17 to 47 per cent for both migration and protection in 2017–18. The number of cases on hand at 30 June 2018 is 44,436, up 82 per cent from 30 June 2017. This backlog will continue to grow if current trends continue.

33. Overall, the AAT (and the Migration and Refugee Division in particular) has experienced a reduction in the membership available to undertake reviews since amalgamation, particularly since 1 July 2017. The terms of over 50 per cent of the then membership working primarily in the Migration and Refugee Division expired on 30 June 2017. The combined numbers of reappointments and new appointments resulted in a reduced member capacity overall to deal with the workload. The appointment of new members has also meant there has been reduced immediate capacity on a per head basis as the new appointees develop their knowledge and experience.
34. The relationship between member availability and completion of reviews by the MRT-RRT and the Migration and Refugee Division over the period from 1 July 2012 to 30 June 2018 is shown in the following table.26

<table>
<thead>
<tr>
<th>Financial year</th>
<th>Lodgements</th>
<th>Finalisations</th>
<th>Number of available FTE members27</th>
<th>On hand at 30 June</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012–13</td>
<td>20,397</td>
<td>19,347</td>
<td>99</td>
<td>19,417</td>
</tr>
<tr>
<td>2013–14</td>
<td>22,272</td>
<td>24,729</td>
<td>103</td>
<td>16,970</td>
</tr>
<tr>
<td>2014–15</td>
<td>18,539</td>
<td>21,567</td>
<td>95</td>
<td>13,935</td>
</tr>
<tr>
<td>2015–16</td>
<td>18,929</td>
<td>16,111</td>
<td>80</td>
<td>16,764</td>
</tr>
<tr>
<td>2016–17</td>
<td>26,604</td>
<td>18,908</td>
<td>91</td>
<td>24,462</td>
</tr>
<tr>
<td>2017–18</td>
<td>37,933</td>
<td>17,960</td>
<td>77</td>
<td>44,436</td>
</tr>
</tbody>
</table>

35. The AAT has been seeking additional appointments, particularly on a part-time sessional basis, to assist the Migration and Refugee Division deal with the backlog and increasing workload. The appointment of additional sessional members would give the Tribunal the ability to make solid inroads into the backlog, without incurring an ongoing financial liability or having too many members engaged should lodgement numbers drop in future years. The Department of Finance has advised that this requires the funding agreement for work in the Migration and Refugee Division to be revised to account for the higher workload. This issue is discussed in more detail in the ‘Funding arrangements’ section below.

PROCEDURES

36. The AAT’s review procedures vary depending on the division dealing with the application and the type of decision under review. There are key variations between the General and other Divisions, Migration and Refugee Division and Social Services and Child Support Division reflecting procedures that were in place in the former tribunals. A high-level outline of the procedures the AAT uses is set out in Appendix B to this submission.

37. One difference between the divisions is that the decision-making agency does not usually participate in a review in the Migration and Refugee Division or the Social Services and Child Support Division, other than to provide the documents that are relevant to the review. In the General and other Divisions, the decision-maker is an active party. This has implications for various aspects of how the review process proceeds, particularly how hearings are conducted, including requirements for the hearing rooms.

26 The AAT notes that various factors affect the precise number of finalisations in a year, including the type and complexity of the cases dealt with in a particular year as well as improvements to review practices which contribute to increased productivity. However, the number of available members is the key factor.
27 As some members are part-time or have management responsibilities, a simple headcount does not accurately reflect the availability of members to undertake work on a full-time basis. Therefore a full-time equivalent (FTE) count has been provided.
38. A further difference is that the procedures to be followed in the Migration and Refugee Division, primarily set out in Parts 5 and 7 of the Migration Act, vary from the procedures in the other divisions, particularly the codes of procedure which regulate closely, among other things, how the AAT may request information relevant to a review, what and how adverse information must be provided to an applicant for comment and when a hearing may be held.28

39. In the Migration and Refugee Division, the decision-maker is not required to provide a copy of the documents given to the Tribunal to the applicant in the review.

40. In the Migration and Refugee Division, the Tribunal has no power to hold directions hearings or issue enforceable directions. This is a major issue, as it constrains the way in which the Tribunal can efficiently manage the way proceedings are conducted.

41. Broadly, the General and other Divisions and Social Services and Child Support Division operate in accordance with procedures set out in the AAT Act. However, some particular requirements are specified in the legislation that confers jurisdiction on the AAT. In particular, the AAT Act and various pieces of social services legislation modify aspects of the procedures for the conduct of first reviews in the Social Services and Child Support Division.

42. As noted in the ‘Further improving the AAT’s operations’ section below, the AAT has identified that some of these areas of difference would benefit from further harmonisation, including elements of the codes of procedure, but not all areas. It would be impractical, for example, for the decision-making agency to be involved routinely in reviews in the highest-volume caseloads.

43. The AAT publishes various policy and procedure documents, designed to help parties and their representatives understand the Tribunal’s processes and what is expected of them during a review. These include practice directions and jurisdictional guides explaining the procedures that apply for particular types of applications. Other directions, guidelines and process models deal with particular aspects of the Tribunal’s operations such as the use of ADR, how the Tribunal is constituted for a review and the use of expert evidence.

IMMIGRATION ASSESSMENT AUTHORITY

44. The IAA is established under Part 7AA of the Migration Act as a separate office within the AAT’s Migration and Refugee Division and commenced operations in October 2015. The IAA’s role is to conduct a limited form of merits review, generally on the papers, of decisions to refuse a protection visa to fast track applicants.29

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28 See Division 5 of Part 5 and Division 4 of Part 7 of the Migration Act.
29 Fast track applicants include unauthorised maritime arrivals who entered Australia between 13 August 2012 and 31 December 2013 who have not been taken to an offshore processing country and have been permitted by the Minister to make a protection visa application as well as any other persons specified by the Minister.
45. The IAA consists of:
   - the President of the AAT
   - the Division Head of the Migration and Refugee Division
   - the Senior Reviewer, and
   - the reviewers.\(^{30}\)

   The President and the Division Head are responsible for the overall operation and administration of the IAA.\(^{31}\) The Senior Reviewer is responsible for managing the IAA, subject to the directions of, and in accordance with policies determined by, the President and the Division Head.\(^{32}\) The Senior Reviewer must be a Senior Executive Service employee and the reviewers must also be engaged under the Public Service Act.\(^{33}\) At 20 August 2018, there were 43 reviewers in addition to the Senior Reviewer.

46. For the purposes of the *Public Governance, Performance and Accountability Act 2013* and the *Public Service Act 1999*, the IAA is considered to be part of the AAT.

**IMPLEMENTATION OF THE AMALGAMATION**

47. The first two matters the review is asked to consider are:
   - whether the objectives of the Amalgamation Act have been achieved, and
   - the extent to which the Tribunal operates as a truly amalgamated body, and whether any existing levels of separation are necessary and appropriate.

48. The Amalgamation Act does not include any stated objectives. From the Explanatory Memorandum and Second Reading Speech to the Tribunals Amalgamation Bill 2014, the key objectives of the amalgamation appear to include the following matters:

   (i) produce a coherent merits review framework providing a single point of contact for persons seeking review of most administrative decisions
   (ii) establish a sound institutional framework for the amalgamated AAT which would preserve its independence and the expertise of its members
   (iii) reduce unnecessary duplication and generate efficiencies and savings by adopting consolidated governance, corporate and property arrangements
   (iv) preserve existing rights of access to merits review
   (v) harmonise and simplify merits review procedures where appropriate while preserving processes and features of the existing tribunals that are appropriate to their particular cohorts of parties and caseloads, and
   (vi) enable members and staff to utilise their experience across a broader range of work, share their knowledge and expertise, and learn from each other.

\(^{30}\) Subsection 473JA(2) of the Migration Act.
\(^{31}\) Subsection 473JB(1) of the Migration Act.
\(^{32}\) Subsection 473JB(2) of the Migration Act.
\(^{33}\) Subsections 473JC(1) and 473JE(1) of the Migration Act.
COMMONWEALTH MERITS REVIEW FRAMEWORK AND INSTITUTIONAL FRAMEWORK FOR AAT

49. The amalgamation of the AAT, MRT, RRT and SSAT has established a single tribunal responsible for conducting independent reviews of most administrative decisions made under Commonwealth laws that are subject to merits review. It provides the envisaged single entry point to access merits review for individuals and organisations affected by the broad variety of decisions the Tribunal can review.

50. The continuation of the amalgamated AAT as a tribunal with the following institutional features which are embedded in the AAT Act contributes to the independence of the Tribunal and perceptions of independence:
   - the President is a judge of the Federal Court
   - the AAT is a self-administering agency with its own budget, and
   - members enjoy security of tenure for the term of their appointment with their remuneration set independently by the Remuneration Tribunal.\textsuperscript{34}

51. The AAT Act provides a high-level governance framework for the amalgamated AAT based on a divisional structure, setting out the respective roles of the President, Division Heads, Deputy Division Heads and Registrar in relation to managing cases and the Tribunal’s administrative affairs.

52. The divisional structure plays an important role as the central organising principle in the Act. It allows for the appropriate organisation and management of the caseload, including aligning tailored review procedures for different types of cases and the assignment of members to areas of work they are best equipped to undertake. The current divisional framework was based on the structure of the former tribunals. Consideration should now be given to providing a functional structure to manage the amalgamated AAT’s varied jurisdictions.

53. As has been noted above, the size of the workload varies between the divisions and there is some inflexibility in the ability to allocate types of work to divisions.\textsuperscript{35} Consideration should now be given to reconfiguring the number and scope of divisions to ensure that they will best support tailored processes appropriate to particular caseloads and cater for manageable spans of control within the divisions.

54. Currently, only Deputy Presidents may be assigned as the head of one or more divisions while either a Deputy President or Senior Member may be assigned to be a Deputy Division Head. Some of the current divisions are of a size that the appointment of a Deputy President as a standalone Division Head would not be financially justified. The preferable approach may be to allow flexibility with respect to the leadership of the divisions.


\textsuperscript{35} For example, most applications relating to decisions under the Migration Act about visas are required to be dealt with in the Migration and Refugee Division while some need to be dealt with in the General Division. Applications for review of Centrelink and child support decisions are dealt with in the same division as this was the case in the SSAT and they are made within the same department. Some child support decisions are reviewed in the General Division.
55. Consideration could be given to:
- creation and removal of divisions in a more flexible way not requiring legislative change: for example, by making greater use of the ability to prescribe divisions in regulations
- allowing Senior Members to be assigned as Division Heads
- permitting the President to assign both Division Heads and Deputy Division Heads, either directly under the AAT Act or under a delegation from the Attorney-General, and
- changing the requirement in the AAT Act that a person’s assignment as a Division Head or Deputy Division Head continues for the duration of their appointment to assignment for a specified period of time.

Each of these proposals would give the Tribunal greater flexibility to put in place appropriate arrangements to support the management of the AAT’s caseload over time. For example, assignment of a person as a Division Head or Deputy Division Head for a specified period would allow the President to respond to fluctuations in volume or particular needs arising in relation to specific caseloads for a limited period.

56. There are various consultation requirements that must be observed under the AAT Act prior to the assignment of a Division Head or Deputy Division Head. Should the President be given the power to assign Division Heads and Deputy Division Heads, either directly or via delegation, the President could undertake the requisite consultation prior to finalising the assignment.

57. The AAT Act sets out various matters relating to members and their expertise, including:
- four main membership categories with five separate levels for the Senior Member and Member categories
- broad qualification requirements for membership, and
- the requirement for Senior Members and Members to be assigned to divisions by the Attorney-General with varying qualification and/or consultation requirements for the different divisions.

58. The broad qualification requirements set out in the AAT Act remain appropriate. As a practical tool to assist with appointment and assignment processes, administrative documents with more detailed descriptions of the knowledge and skills required for the different membership categories and roles in line with the AAT’s Framework of Competencies for Members of the Tribunal could usefully be developed.

59. In relation to ensuring members with appropriate expertise deal with cases, the AAT suggests that consideration be given to:

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36 Subsection 10A(1) of the AAT Act permits the Minister to delegate to the President any or all of the Minister’s powers or functions under the Act.
37 Subsections 17K(5) and 17L(5) of the AAT Act.
38 Subsections 17K(2) and s17L(2) of the AAT Act.
changing the AAT Act to permit the President to assign members to divisions as is the case in other tribunals,\textsuperscript{39} and

- removing the consultation requirements currently set out in the Act given that member appointments are considered by Cabinet as part of the appointment process and the relevant Minister would have input at the time of the cabinet decision (when, it is suggested, the areas of proposed assignment would be included).

60. These suggestions aim to avoid unnecessary duplication and promote efficiency. The President, with the assistance of Division Heads, is well-placed to understand the knowledge and skills needed to deal with the cases arising in each of the divisions and the knowledge and skills of the Tribunal’s available members. This approach would address delays that arise from time to time in completing the current assignment processes, particularly for newly appointed members, and facilitate the cross-assignment of existing members to other divisions to deal flexibly with the AAT’s caseload.

CONSOLIDATION OF THE TRIBUNALS

61. The amalgamated AAT has achieved significant consolidation of arrangements that were previously duplicated across the former AAT, MRT, RRT and SSAT, including in relation to governance, corporate services and property. Key developments since 1 July 2015 include the following:

- establishment of a new senior management team comprising the President, the Division Heads, the Registrar and the Senior Executive Service officers and the implementation of revised governance arrangements in 2015–16, including key committees and groups to support the President and Registrar
- development of the Strategic Plan 2015–20 setting out the vision for the amalgamated AAT as well as its strategic objectives and priorities
- creation of consolidated corporate services areas in a revised Principal Registry from 1 July 2015 to deliver functions including communications, corporate legal and policy support, financial and human resource management, governance support and library, information, procurement, property and technology services
- launch of a single website from 1 July 2015 and the introduction of online lodgement for all divisions from April 2016
- integration and upgrading of the AAT’s information technology infrastructure over the three years since amalgamation
- implementation of single finance and human resource management systems to support operations across all locations and divisions, and
- rationalisation of the AAT’s property portfolio over time from 16 to nine separate offices, including single, co-located registries operating in seven capital cities with the final co-location exercise occurring in Melbourne in December 2017.

\textsuperscript{39} See, for example, the NSW Civil and Administrative Tribunal and the Victorian Civil and Administrative Tribunal. The AAT also notes that the power to assign members to divisions has previously been delegated by the Attorney-General to the President. The President undertook the required consultation with Ministers prior to finalising the assignment of members.
62. As noted in the Explanatory Memorandum, reductions in expenses associated with the consolidation of corporate functions and property were expected to produce savings of $7.2 million over the forward estimates period. The AAT’s budget appropriations were adjusted to reflect the savings and have been accommodated.

63. Work remains to be done in relation to some elements of the Tribunal’s technology landscape. In particular, the amalgamated AAT inherited four electronic case management systems and various related systems which are used to manage the review workload. The AAT’s digital strategy includes the development of an integrated case management solution as a key part of the Tribunal future technology landscape.

REVIEW RIGHTS AND PROCEDURES

64. The amalgamation of the AAT, MRT, RRT and SSAT resulted in no changes to the decisions that were subject to review. This included retaining the opportunity for a second review of certain Centrelink and child support decisions.

65. In relation to review procedures, the Amalgamation Act preserved in the legislative framework the vast majority of procedures previously in place in the amalgamating tribunals. The procedures of the MRT and RRT, including the detailed codes of procedure, were maintained, essentially unchanged, in Parts 5 and 7 of the Migration Act. Areas in which there was already commonality between the AAT and SSAT were reflected in the amended AAT Act but differences were retained in the AAT Act and the social services legislation conferring jurisdiction on the AAT.

66. The only area of substantive harmonisation implemented at the time of amalgamation related to the provision of the documents relevant to the review in the Social Services and Child Support Division. As had been the case in the former AAT, the Department of Human Services has been required since 1 July 2015 not only to provide a copy of the documents to the Tribunal but also to the applicant and any other party to the review.\(^\text{40}\)

67. While the amalgamation led to some simplification in the legislative framework and has provided scope for harmonisation of some areas of procedure not governed by legislation, this has been very limited. The diversity in the types of decisions that the AAT reviews means there will necessarily be differences in the procedures that are best suited to managing different types of cases. However, the differences in procedure between the divisions which were maintained in legislation at the time of the amalgamation have constrained the AAT’s ability to implement consistent procedures where appropriate to enhance the effectiveness and efficiency of the review processes and otherwise realise the benefits of amalgamation.

68. The AAT’s proposals for changes are discussed in the ‘Further improvements to the AAT’s operations’ section below.

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\(^\text{40}\) Section 37(1AE) of the AAT Act.
GREATER UTILISATION AND SHARING OF MEMBER AND STAFF EXPERTISE

69. The amalgamation has afforded members and staff some opportunities to undertake different work and benefit from the knowledge and experience of their colleagues. Building a cohesive and collaborative culture is one of the priorities specified in the Strategic Plan 2015–20.

70. From 1 July 2015, the consolidated corporate service areas in Principal Registry have comprised staff from each of the former tribunals. They have worked together to develop the support systems for the amalgamated AAT. In contrast, members and staff dealing with reviews largely continued to work within a divisional framework, reflecting arrangements in each of the previous tribunals. As single offices have been established, however, members and staff across divisions have been able to engage with each other more.

71. Integrated models have been introduced for delivering various elements of the AAT’s registry services, including front-line contact with parties and representatives and support for members. Now the office co-locations have been completed, the Tribunal is focusing on designing and implementing more integrated registry structures that best support the work being undertaken across the AAT’s divisions.

72. Consolidated professional development frameworks have been developed both for members and staff which include opportunities to undertake shared training and development with colleagues undertaking similar work. In particular, the AAT has held two national conferences, bringing together members and senior staff from across Australia to undertake skills-based training as well as develop a cohesive and collaborative environment.

73. The transition to a larger organisation has enabled staff to seek work in a wider range of areas. The extent to which members have been able to undertake work across divisions has been somewhat more limited.

74. The following table shows the number of non-judicial members of the AAT at each of the identified dates by the division(s) in which they primarily worked as well as the number formally assigned to more than one divisional grouping. The table does not reflect the extent to which the members may have undertaken work across divisions.

<table>
<thead>
<tr>
<th>Primary division</th>
<th>At 1 July 2016</th>
<th>At 1 July 2017</th>
<th>At 20 August 2018</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No. of members</td>
<td>No. cross-assigned</td>
<td>No. of members</td>
</tr>
<tr>
<td>General and other Divisions</td>
<td>64</td>
<td>18</td>
<td>69</td>
</tr>
<tr>
<td>Migration and Refugee</td>
<td>128</td>
<td>17</td>
<td>111</td>
</tr>
<tr>
<td>Social Services and Child Support</td>
<td>99</td>
<td>29</td>
<td>101</td>
</tr>
<tr>
<td>TOTAL</td>
<td>291</td>
<td>64</td>
<td>281</td>
</tr>
</tbody>
</table>
75. The figures demonstrate that the number of members who are formally cross-assigned has been increasing over time as has the number of members undertaking work across divisions. There are, however, a number of practical and structural issues that have inhibited the extent to which the AAT has been able to facilitate members undertaking work across divisions. The key factors are the following:

- the volume of work in the different divisions has generally required the AAT to devote the resources of the available members to their primary division(s)
- the significant differences in the procedures between divisions, particularly the Migration and Refugee Division, mean procedural as well as subject matter training and support is required before a member can operate in a different area of work, and
- differences in the ways in which part-time members are engaged and remunerated in the different divisions raises complexities in members working across divisions.

Proposals to ameliorate some of these factors are noted in the ‘Further improvements to the AAT’s operations’ section below.

THE AAT’S STATUTORY OBJECTIVE

76. The third matter the review is asked to consider is whether the AAT is meeting the statutory objective contained in section 2A of the AAT Act. As amended by the Amalgamation Act, that section provides that, in carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:

- is accessible
- is fair, just, economical, informal and quick
- is proportionate to the importance and complexity of the matter, and
- promotes public trust and confidence in the decision-making of the Tribunal.

77. In considering the extent to which the statutory objective is being met, it is relevant to note that the AAT engages with a wide and diverse array of users, including:

- individuals, businesses and other organisations who seek review of decisions or are otherwise parties to a review
- agencies, organisations and other persons who make the decisions that the Tribunal reviews, and
- persons and organisations who represent parties involved in reviews.

78. The AAT strives to be accessible, particularly for people from different cultural and linguistic backgrounds and people with disability. Various measures are employed to assist people to make an application and participate in the review process, particularly where a person is representing themselves. These include:

- information about the AAT’s role and procedures and how the Tribunal applies the law when reviewing certain kinds of decisions is on the website in a variety of formats, including fact sheets and videos
• multiple channels for making an application to the AAT, including easy-to-use online lodgement forms
• information about people and organisations who may be able to provide self-represented parties with advice or assistance in relation to a review as well as legal advice schemes established with legal aid commissions and community legal centres in particular areas of jurisdiction
• staff responding to enquiries about the review process and proactively contacting self-represented parties in some types of cases to explain the AAT’s processes and identify whether a person may require additional assistance during the review
• seeking to ensure alternative dispute resolution processes and hearings are conducted in a way that minimises unnecessary formality and promotes active participation
• free access to interpreters who are engaged by the AAT for people who need assistance in a language other than English for case events as well as interactions with staff, and
• various measures to ensure people with disability can communicate with the AAT, access Tribunal premises and participate in case events.

79. Performance measures have been developed which provide indicators of the extent to which the AAT is meeting aspects of the statutory objective. They are set out in the corporate plans for the AAT prepared since amalgamation as required by the Public Governance, Performance and Accountability Act 2013.\(^{41}\)

80. One performance measure relates to the proportion of AAT decisions overturned by the courts in statutory appeals or judicial review applications, which is an indicator of the extent to which the Tribunal is providing a fair and just review mechanism. The specified target is that the number of appeals allowed should be less than 5 per cent of all AAT decisions that could have been appealed to the courts. This target has been achieved in each of the last three financial years with the following results: 3.3 per cent in 2015–16, 3.0 per cent in 2016–17 and 3.1 per cent in 2017–18.

81. A second performance measure relates to the timeliness of the review process and specifies that the AAT will finalise 75 per cent of applications within 12 months of lodgement. Some types of reviews are generally completed within a shorter time, such as reviews in the National Disability Insurance Scheme and Social Services and Child Support Divisions, while others generally take a longer time. The time to finalisation varies for different types of cases based on diverse factors, including the nature and complexity of the cases, differences in the procedures that apply, the priority given to certain types of cases and the overall level of resources available to deal with applications. The overall target takes into account these variations and has been met in each of the last three financial years: 80 per cent in 2015–16, 82 per cent in 2016–17 and 77 per cent in 2017–18. With the current backlog of cases, particularly in the Migration and Refugee Division, and the currently available number of members, the AAT is unlikely to continue to be able to meet the target.

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\(^{41}\) See the AAT’s corporate plans for the 2015–16, 2016–17 and 2017–18 financial years which are available on our website: <http://www.aat.gov.au/about-the-aat/corporate-information/corporate-and-strategic-plans>
A third performance measure introduced in 2017–18 concerns the publication of AAT decisions and is an indicator that relates to the AAT providing a mechanism of review that is accessible and promotes public trust and confidence in the AAT’s decision-making by informing parties, representatives and the general public about the work of the Tribunal. The AAT is publishing decisions in accordance with a revised Publication of Decisions Policy developed during 2017–18 to increase the number and range of AAT decisions published and to enhance the transparency of the Tribunal’s processes for publishing decisions. The policy specifies that the AAT will publish a randomly selected proportion of written decisions in high-volume categories of cases in the Migration and Refugee Division and in child support cases in the Social Services and Child Support Division, and all written decisions in other types of cases, subject to confidentiality requirements. The target for 2017–18 was to publish at least 4,000 decisions. By 31 July 2018, more than 4,500 decisions made in 2017–18 had been published, making the AAT one of the highest volume publishers of decisions among Australian courts and tribunals. The target for 2018–19 will increase to 5,000 decisions.

The AAT reviews the performance measurement framework each year and continues to explore other ways of measuring the extent to which the statutory objective is being met, including by seeking feedback from users. In May 2018, a survey was conducted for the AAT which invited parties and representatives who had been involved in a finalised case between November 2017 and February 2018 to rate the quality of their experience of various aspects of the review process. Overall, the AAT’s services were rated positively both by parties and representatives with representatives generally providing more strongly positive ratings. When the average positive ratings (i.e. the average of ‘strongly agree’ and ‘agree’ ratings) provided in responses to questions relating to the accessibility, fairness, informality and timeliness of the review process were calculated, the result was an overall user experience rating of 70 per cent. The AAT will include an additional performance measure relating to user feedback in its 2018–19 corporate plan.

Complaints made to the AAT are another source of feedback in relation to how the Tribunal is performing. The AAT’s complaint-handling guidelines specify that complaints may be made orally or in writing and set out how complaints will be managed. Investigations are conducted by an appropriate person in an impartial manner as quickly as possible having regard to the principles of procedural fairness. The number of complaints recorded by the AAT has been increasing each year since amalgamation but the volume remains low as a proportion of the caseload overall, with fewer than six complaints made per 1,000 applications finalised in each year. This is similar to the complaint rate in other tribunals.42 In each year, a small proportion of finalised complaints have involved a finding that the Tribunal could have handled matters more appropriately. They related to issues such as administrative error, how members and staff communicated with users, privacy, procedural issues and timeliness. Complaints data are reviewed periodically, including to identify any systemic issues.

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42 The NSW Civil and Administrative Tribunal has a complaint rate of 0.42% (2016–17 Annual Report, p 30). The Queensland Civil and Administrative Tribunal has a complaint rate of 0.7% (2016–17 Annual Report, p 14).
85. With regard to the aspects of the statutory objective relating to providing a mechanism of review that is economical and proportionate to the importance and complexity of the matter, the AAT has not as yet developed any performance measures. These matters have been earmarked for further work in the future.

86. In addition to increasing the number and range of AAT decisions that are published, the Tribunal has implemented other measures to seek to promote public trust and confidence in the Tribunal’s decision-making. In particular, steps are being taken to enhance the availability to stakeholders and the public of accurate and timely information about the AAT’s role and decisions.

87. In February 2018, the AAT launched *The Review*, a monthly newsletter that includes plain English summaries of a selection of recent decisions as well as short articles about aspects of the Tribunal’s work and recent developments. This publication is in addition to the weekly AAT Bulletin, aimed primarily at regular users, which contains a list of recently published decisions and information relating to appeals against AAT decisions. The Tribunal has also developed its capabilities and systems for engaging with the media and continues to review its broader stakeholder engagement arrangements.

88. The terms of reference for the review require that consideration also be given to the extent to which decisions of the Tribunal are meeting community expectations, as well as to the interaction and application of laws and policy and procedural documents produced by the AAT.

89. When reviewing a decision, the Tribunal may need to have regard to a range of laws and policy depending on the particular decision-making context but in the following hierarchy:
   - any relevant primary legislation
   - any relevant subordinate legislation
   - any relevant direction or policy required by legislation to be taken into account such as directions given by the Minister under section 499 of the Migration Act
   - any relevant policy made by the decision-maker to guide decision-making.

90. The legislative context for the decision under review determines the nature of the member’s decision-making task. In general, it will involve one or both of the following elements:
   - determining whether one or more criteria are met or particular states of affairs exist
   - the exercise of any residual discretion in relation to whether a power should or should not be exercised.

Legislation may provide explicit guidance on the matters to be taken into account in deciding these matters or the legislation may need to be interpreted to determine the factors to be taken into account. Policy may also provide guidance in relation to the decision-making task.
91. The general approach a member should adopt in relation to considering policy was described by Brennan J sitting as President of the AAT in *Drake and Minister for Immigration and Ethnic Affairs (No 2)*:

When the Tribunal is reviewing the exercise of a discretionary power reposed in a Minister, and the Minister has adopted a general policy to guide him in the exercise of the power, the Tribunal will ordinarily apply that policy in reviewing the decision, unless the policy is unlawful or unless its application tends to produce an unjust result in the circumstances of the particular case.\(^{43}\)

92. It would be expected that community expectations are reflected in the terms of the legislation, subordinate legislation and policy put in place by the elected representatives of the community which the AAT must apply.

93. There are very few decisions in relation to which the Tribunal is required explicitly by the terms of legislation or policy to consider community expectations as a discrete and particular factor when reviewing the decision. These include decisions relating to visas made on character grounds by delegates of the Minister under sections 501 and 501CA of the Migration Act. Direction no. 65 (Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA) made by the Minister under section 499 of the Migration Act contains general guidance and a set of principles against which decisions should be made which articulate community expectations. The expectations of the Australian community are also identified as one of three primary considerations that must be taken into account when considering whether to exercise the discretion to cancel a visa under section 501, to refuse a visa application under section 501 or to revoke under section 501CA the mandatory cancellation of a visa. The direction also sets out various other considerations that must be considered where relevant to the individual case.

94. The way in which decision-makers, including the AAT, must approach the primary consideration relating to the expectations of the Australian community was considered by the Federal Court in *YNQY v Minister for Immigration and Border Protection*.\(^{44}\) Justice Mortimer stated at [76]:

In substance this consideration is adverse to any applicant. … 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. … 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. …

95. A member is bound to follow this approach in taking this consideration into account. It must then be weighed with the other primary considerations and relevant other considerations specified in Direction no. 65 before reaching a decision. These other factors include:

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\(^{43}\) (1979) 2 ALD 634 at 645.

\(^{44}\) [2017] FCA 1466.
• the protection of the Australian community from criminal or other serious conduct, including the nature and seriousness of the non-citizen’s conduct to date and the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct
• the best interests of minor children in Australia
• international non-refoulement obligations
• the strength, nature and duration of the non-citizen’s ties to Australia
• the impact on the non-citizen’s family members
• the impact on Australian business interests
• the impact on victims of the non-citizen’s criminal behaviour, and
• the extent of impediments the non-citizen may face if removed from Australia.

96. Members must apply the law when reviewing decisions. While the Tribunal commits errors of law from time to time in performing the decision-making task, the number of successful appeals as a proportion of all decisions made by the AAT remains relatively low as has been noted above.

97. As has been noted above, the AAT publishes various policy and procedure documents designed to help parties and their representatives understand the Tribunal’s processes and what is expected of them during a review. Practice directions, guides and guidelines are consistent with the AAT Act, Migration Act and relevant pieces of social services or other legislation that confers jurisdiction on the AAT. When they are reviewed, feedback is sought from stakeholders to inform their development and enhance their utility.

FURTHER IMPROVING THE AAT’S OPERATIONS

98. The fourth and fifth matters the review is required to consider are:
• the degree to which legislation, processes, grounds, scope and levels of review in, and from, the Tribunal promote timely and final resolution of matters, and
• whether the Tribunal’s operations and efficiency can be improved through further legislative amendments or through non-legislative changes.

99. The AAT has undertaken many initiatives and achieved a significant amount since 1 July 2015 in creating an integrated Tribunal within the framework put in place by the Amalgamation Act. The work has been guided by the strategic objectives and priorities set out in the Strategic Plan 2015–20 which was recently reviewed to ensure it remains appropriate for the Tribunal’s future direction.

100. A single entity has been established and the AAT has consolidated many areas of its operations. As noted above, significant differences remain, however, in relation to the way in which the AAT must deal with applications for review of decisions. This part of the submission identifies some broad policy issues that the Tribunal believes should be considered in relation to the amalgamated AAT as well as legislative and non-legislative changes that can be pursued in the shorter term to improve the effectiveness and efficiency of the AAT’s operations, particularly to deal with the Tribunal’s large backlog of cases.
101. With respect to the AAT’s core statutory functions, the form the amalgamation took was to translate the former tribunals into the AAT with the divisional structure largely reflecting the original structure of the separate tribunals and with their existing jurisdiction and procedures largely kept intact in legislation. The process leading to the creation of the amalgamated AAT did not involve extensive consideration of the issues which (with hindsight) are raised in this submission.

102. Consideration should now be given to the design of an appropriate legislative framework for an amalgamated Tribunal with the AAT’s breadth of jurisdiction, hearing mechanisms and diversity of parties. To achieve the Tribunal’s statutory objective, it is clear that the procedures the Tribunal adopts must differ for different categories of decisions. A facilitative legislative framework should flexibly permit the implementation of tailored procedures that best meet the needs of particular caseloads. At present, the AAT is inhibited in its ability to do this because of the extent to which some procedures are specified in legislation. This is particularly the case in relation to the procedures for the Migration and Refugee Division in Parts 5 and 7 of the Migration Act.

103. The amalgamation retained the two opportunities for merits review as of right previously provided by the SSAT and AAT for certain categories of decisions in the social services area. These are the only decisions in relation to which this is available in the amalgamated Tribunal. The reviews are identical in nature involving de novo merits review. In the context of the amalgamated Tribunal, consideration should now be given to the need (and if there is a need, the appropriate design) for the availability of multiple levels of review and the access arrangements that should apply to any further review.

104. Many state tribunals, which are not subject to the jurisdictional limitations to which the AAT is subject, have internal appeal mechanisms which have the effect of alleviating the pressure on the court system and allowing matters (on review/appeal) to be dealt with by the Tribunal, following processes similar to the initial decision. Consideration might now be given to whether any such mechanism might be available in the amalgamated Tribunal.

105. These are significant policy issues, now ‘ripe’ for consideration either in this review or which might be the subject of a further targeted review involving engagement with the broad range of affected stakeholders.

106. Beyond these broader policy issues, the AAT has identified a number of specific areas of difference in procedure between divisions embedded in legislation that could be harmonised.

107. During 2016–17, an inter-agency review led by Andrew Metcalfe AO considered harmonisation in the following areas: making applications to the AAT; rules about the AAT receiving and giving documents; access to documents relevant to the review; powers to require the decision-maker to investigate or take action and to require persons to provide information or documents; the availability of pre-hearing case management processes and procedures; power to make directions and the availability of associated sanctions; rules governing procedural fairness; the power to remit a matter to the decision-maker for reconsideration during a review; and the rules relating to giving oral reasons for decisions.
108. This review resulted in a number of recommendations for legislative change. The AAT supports these recommendations. Consideration should now be given to implementing all of the recommendations contained in the report.

109. Key among these proposals are:
- creating greater alignment in relation to the ways applications may be made across divisions
- permitting the AAT to conduct conferences in the Migration and Refugee Division and conferences and other alternative dispute resolution processes in the Social Services and Child Division, particularly in child support cases, and
- permitting the Migration and Refugee Division to conduct directions hearings, give directions and dismiss applications for failure to comply with a direction.

110. A further area of policy and procedure specified in legislation that has not yet been the subject of consideration for harmonisation relates to fees associated with the making of applications to the AAT. The rules currently vary between divisions in relation to the following matters: whether a fee is payable; the amount of any fee that is payable; the time at which a fee is payable; the grounds for seeking a fee reduction and the amount by which a fee may be reduced; and the amount of the fee refunded to a successful applicant.

111. The AAT has also identified various other legislative changes that could be made to improve, streamline or clarify particular aspects of its operations. These include modernising the provisions in the AAT Act dealing with the terms and conditions of members which will support the alignment of working arrangements for members across divisions as well as a clear mechanism for the President to deal with complaints about members.

112. The AAT considers that implementing these various proposals for legislative change offers opportunities to improve the experience for users of the AAT as well as its own performance, including by:
- enhancing flexibility to determine tailored procedures for different types of cases
- enhancing the Tribunal’s ability to manage cases more effectively which will enable applications to be finalised more quickly
- making it easier for members and staff to work across divisions leading to improvements in efficiency and output, and
- reducing the complexity and associated costs of developing integrated business processes and a single set of digital systems to support the review process.

The AAT has been engaging with the Attorney-General’s Department and other relevant agencies in relation to progressing these proposals.

113. The AAT has also identified various non-legislative initiatives to improve its operations and efficiency, many building on work already undertaken in accordance with the Tribunal’s strategic objectives and priorities.
114. In relation to how cases are handled, the Tribunal is continuing to develop and implement new ways of managing different types of reviews, particularly in the high-volume areas of the caseload. These involve the use of early case assessment to determine differentiated review pathways, improved communication with parties in relation to their review and enhanced preparation of cases for hearing which can deliver a more effective and efficient review. More generally, the AAT is identifying and pursuing priorities to improve the accessibility of the Tribunal’s services and the general experience of users of the review process.

115. A Registry Transformation Program has been instituted to explore new and improved business processes and ways of organising registries to better support efficient case management and assist members in their work. Work also continues on identifying and harmonising policies and practices across divisions where practicable.

116. The AAT is continuing to make progress on its digital transformation strategy which will deliver an integrated suite of electronic systems over time to improve how cases are managed for external users as well as members and staff. These include a more intuitive and usable website, improved online lodgement and other online service options, integrated electronic case management tools and better systems for managing information. Aligned with this work, the AAT is engaging with departments and other organisations whose decisions are reviewed in relation to the electronic transfer of documents relating to reviews.

117. The AAT maintains a focus on implementing a more coordinated set of stakeholder engagement arrangements to better understand the users of the Tribunal’s services and other stakeholder needs as well as implementing a strategy to improve understanding of what the Tribunal does and the decisions that are made. The Tribunal continues to develop and implement professional development frameworks to ensure members and staff have the knowledge and skills to deliver services effectively and efficiently. The AAT also continues to review and improve its governance arrangements and program and project management capabilities to manage effectively the change complexity associated with the further harmonisation and integration of the Tribunal’s operations, delivery of the digital transformation program and the significant increase in workload.

**FUNDING ARRANGEMENTS**

118. The last matter the terms of reference require the review to consider is whether the arrangements for funding the operations of the Tribunal are appropriate, including ensuring consistent funding models across divisions.

119. Funding for the AAT currently consists of separate and distinct components inherited from the arrangements that applied to the AAT, MRT-RRT and SSAT prior to the amalgamation. The funding model for cases in the Migration and Refugee Division is the largest component of the AAT’s funding arrangements.

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45 The MRT and RRT were considered as a single entity for the purposes of the finance law.
GENERAL AND OTHER DIVISIONS

120. The funding model for the AAT prior to the amalgamation which now applies to the wide variety of decisions reviewed in these six divisions is effectively a ‘flat’ funding model: it is not demand-driven but based on a pre-determined annual appropriation. There is no ongoing model or formula to adjust the funding of work managed in these divisions to take into account changes in the volume of applications for the review of different types of decisions.

121. Where a New Policy Proposal (NPP) involves the conferral of new jurisdiction on the AAT to be dealt with in one of these divisions, efforts are made to ensure the NPP includes additional funding for the AAT where appropriate which will vary according to a number of factors including the nature and complexity of the caseload, the review pathway to be applied (e.g. the number and type of case events and likely constitution of the Tribunal to hear and decide cases) and the anticipated volume of lodgements. There are no adjustments made to funding if the anticipated volume of lodgements has been over- or underestimated.

MIGRATION AND REFUGEE DIVISION

122. Funding for the Migration and Refugee Division is based on a demand-driven model, inherited from the MRT and RRT, whereby funding varies according to increases or decreases in cases finalised around a baseline number of completed applications. The AAT is currently funded to complete 18,000 finalisations in the Migration and Refugee Division with any adjustments made at the time of Additional Estimates in the following financial year.

123. The adjustments are calculated at a fixed marginal cost per review. The first 2,000 reviews finalised above or below 18,000 are valued at a cost of $2,137 per review. The second-tier marginal cost, which covers reviews after the first 2,000 reviews, is $3,036 per review. These figures are updated each year as funding is subject to Wage Cost Index 646 indexation and efficiency dividends. The base funding is provided by the Department of Home Affairs with any supplementary funding being drawn from Consolidated Revenue Fund. If finalisations fall below 18,000, funding is returned to the Consolidated Revenue Fund.

124. The cost per review is based on a global or median cost, irrespective of the complexity of different categories of cases. There are some types of reviews in the Migration and Refugee Division that cost less because they can be dealt with more quickly than other more complex reviews such as protection visa cases. This has the potential to lead to simpler or shorter matters being prioritised over more complex matters.

125. The base number of finalisations was updated to 18,000 in the 2013–14 Budget and determined on the understanding that the baseline should be at the conservative end of estimates of anticipated applications. Prior to the 2013–14 Budget, the MRT-RRT were funded to finalise a base of 8,300 cases. Revisions to this baseline funding followed large increases in applications to the MRT-RRT.

46 This is an index applied to funding provided to account for any increases in wages.
126. The caseload-driven funding model for the former MRT-RRT was seen as desirable to provide flexibility to plan operations and respond to changes in caseload demand. It is the AAT’s position that this existing funding model is a valid, ongoing agreement which permits the Tribunal to manage an increasing workload across a diverse case mix. It allows the Tribunal to target a combination of case types to allow for both simpler (less expensive) and more complex (more costly) matters to be finalised across the financial year.

127. A critical aspect of the funding model for the Migration and Refugee Division is that the number of cases that can be finalised in a financial year is directly related to the membership available to the Division, as the vast majority of matters are determined by members. This differs from reviews conducted in the FOI, General, NDIS, Security, Taxation and Commercial and Veterans’ Appeals Divisions which are less heavily reliant on member numbers, with approximately 80 per cent of matters being resolved, including through the use of alternative dispute resolution processes, without a member making a decision following a hearing.

128. The Department of Finance has indicated that, notwithstanding the ability to make adjustments to the funding of the Migration and Refugee Division based on the number of finalisations, there is no prospect of allocating additional funding to the AAT for anything significantly above 18,000 finalisations, unless and until there is an agreed resetting of the baseline.

129. This has delayed consideration of the appointment of additional sessional members. Given that lodgements received in the Migration and Refugee Division have doubled since the funding figures were last agreed, there will need to be an upwards adjustment of the baseline finalisations from 18,000 to between 30,000 and 35,000 for the financial years 2019–20 and beyond as a matter of urgency.

SOCIAL SERVICES AND CHILD SUPPORT DIVISION

130. The funding model for the Social Services and Child Support Division is based on the former SSAT funding model, which was agreed between the Department of Social Services (DSS) and the Department of Finance in 2013. It is effectively an annual appropriation based on historical caseload information. The annual appropriation is adjusted upwards or downwards occasionally depending on the anticipated impact of approved DSS NPPs. In effect, DSS provides increased funding to the AAT for any NPPs that are expected to generate increased caseload for the AAT. The amount of increased funding for an NPP is calculated by estimating the anticipated increase in applications for review to the Social Services and Child Support Division and multiplying this by an agreed marginal cost per review. However, it is not a demand-driven funding model, as there are no adjustments made to funding if the anticipated caseload has been over- or underestimated.

131. As noted above, some decisions made in the Social Services and Child Support Division can be further reviewed in the AAT’s General Division (AAT second review). The 2013 funding model did not include a marginal cost per matter for second review.
132. The 2013 model was revised by the AAT and the Department of Finance in 2016–17 to adjust the marginal costs per review for first reviews in the Social Services and Child Support Division to reflect cost increases over time. The updated model provides a marginal cost per review for Centrelink reviews at $1,204 and child support reviews at $1,119. The revised model also includes a marginal cost per review for AAT second reviews at $849 per review. The lower cost of AAT second reviews reflects the fact that a significant proportion of these cases are finalised during the pre-hearing conferencing process and do not require a member to hear and decide the case.

FUTURE FUNDING MODEL

133. The AAT considers there are benefits in having a mixed funding model reviewed at regular intervals that provides a core base appropriation combined with a variable demand-driven component for the high-volume jurisdictions to support variations in caseloads from year to year.

134. The Tribunal and the Department of Finance should amend the existing funding model for the Migration and Refugee Division to reflect a realistic baseline of finalisations in light of the large increase in lodgements over recent years and as a means to address the increasing backlog of unfinalised cases.

135. The Tribunal and the Department of Finance should amend the existing funding model for the Social Services and Child Support Division to reflect a realistic baseline of finalisations in light of fluctuations in lodgements over recent years.

136. In the Tribunal’s view, there is little utility in having a demand-driven model for the General and other Divisions at this stage due to the relatively stable workload over time and the large number of departments that would be required to be involved in the development of such a model.

137. Should lodgements in the NDIS Division increase significantly in future years as anticipated, the feasibility of applying a demand-driven funding model to that division should be considered once a stable baseline caseload can be identified.
## AAT Caseload Overview

### Lodged

<table>
<thead>
<tr>
<th>Tribunal/ Division*</th>
<th>2014-15</th>
<th>2015-16</th>
<th>2016-17</th>
<th>2017-18</th>
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<tbody>
<tr>
<td>AAT / G&amp;OD</td>
<td>6,581</td>
<td>6,960</td>
<td>7,372</td>
<td>7,412</td>
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<tr>
<td>MRT-RRT/ MRD</td>
<td>18,534</td>
<td>18,929</td>
<td>26,604</td>
<td>37,933</td>
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<tr>
<td>SSAT/ SSCSD</td>
<td>15,264</td>
<td>15,543</td>
<td>17,450</td>
<td>13,435</td>
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<tr>
<td><strong>Total</strong></td>
<td>40,379</td>
<td>41,432</td>
<td>51,426</td>
<td>58,780</td>
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### Finalised

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<th>Tribunal/ Division*</th>
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<th>2015-16</th>
<th>2016-17</th>
<th>2017-18</th>
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<tr>
<td>AAT / G&amp;OD</td>
<td>6,478</td>
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<tr>
<td>MRT-RRT/ MRD</td>
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<td>16,111</td>
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<td>17,960</td>
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<tr>
<td>SSAT/ SSCSD</td>
<td>13,793</td>
<td>15,534</td>
<td>16,407</td>
<td>15,075</td>
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<tr>
<td><strong>Total</strong></td>
<td>42,108</td>
<td>38,146</td>
<td>42,224</td>
<td>40,040</td>
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### On hand at end of financial year

<table>
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<tr>
<th>Tribunal/ Division*</th>
<th>2014-15</th>
<th>2015-16</th>
<th>2016-17</th>
<th>2017-18</th>
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</thead>
<tbody>
<tr>
<td>AAT / G&amp;OD</td>
<td>4,900</td>
<td>5,320</td>
<td>5,713</td>
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<td>MRT-RRT/ MRD</td>
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<td>SSAT/ SSCSD</td>
<td>2,993</td>
<td>3,261</td>
<td>4,320</td>
<td>2,698</td>
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<tr>
<td><strong>Total</strong></td>
<td>24,863</td>
<td>25,345</td>
<td>34,495</td>
<td>53,282</td>
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</table>

* Tribunal refers to the pre-amalgamation AAT, MRT, RRT and SSAT. Division refers to the General and other Divisions (G&OD), Migration and Refugee Division (MRD) and Social Services and Child Support Division (SSCSD) of the amalgamated AAT.
OVERVIEW OF AAT PROCEDURES

When the AAT receives an application that meets the application requirements, the decision-maker is notified and requested to give the Tribunal a copy of the decision and all of the documents they hold that are relevant to the review.\(^{47}\) In divisions other than the Migration and Refugee Division, the decision-maker must also give a copy of these documents to the applicant and any other party.\(^{48}\) In the Migration and Refugee Division, the applicant may request a copy of the documents held by the Tribunal in relation to their review.\(^{49}\)

In the Migration and Refugee Division and the Social Services and Child Support Division, the decision-maker does not generally take part in the review. In the General and other Divisions, the decision-maker is an active party.

A key feature of merits review is the opportunity for the applicant and any other party to give the Tribunal new information to consider in the review. At different stages of the review process, the Tribunal may invite or direct a party to provide information that will be relevant to the case.\(^{50}\) The AAT also has the power to require non-parties to produce documents that are relevant to a review.\(^{51}\)

In the General and other Divisions and child support cases in the Social Services and Child Support Division, conferences or directions hearings are held in most types of cases to talk to the parties about the issues and give directions about what the parties must do and by when to progress the case. When a review involves more than one party, the Tribunal helps them try to reach an agreed outcome without the need for a hearing, while ensuring steps are taken to prepare for a hearing in the event it cannot be resolved by agreement. As well as conferences, other types of alternative dispute resolution processes are used in the FOI, General, NDIS, Taxation and Commercial, and Veterans' Appeals Division to resolve cases by agreement, including conciliation, mediation, case appraisal and neutral evaluation.

In some types of reviews, particularly the review of Centrelink decisions in the Social Services and Child Support Division, the case is listed directly for a hearing.

\(^{47}\) Subsection 37(1) of the AAT Act and subsections 352(2), (3) and (4) and 418(2) and (3) of the Migration Act.

\(^{48}\) Subsection 37(1AE) of the AAT Act.

\(^{49}\) For Part 5 reviews, a request may be made under section 362A of the Migration Act. Otherwise, the request is made under the Freedom of Information Act 1982.

\(^{50}\) The key provisions are subsections 33(2) and 37(2) of the AAT Act, sections 359 and 424 of the Migration Act, section 165 of the Social Security (Administration) Act 1999 and equivalent provisions in the A New Tax System (Family Assistance) (Administration) Act 1999, the Child Support (Registration and Collection) Act 1988 and the Paid Parental Leave Act 2010.

The hearing gives an applicant, and any other party, an opportunity to provide evidence and present arguments about the decision under review. It also allows the AAT to ensure that all issues arising in the review are addressed.

A hearing is conducted by the member or members directed by the President to constitute the Tribunal for the purposes of the review. The Tribunal may be constituted by one, two or three members but most reviews are conducted by a single member.\textsuperscript{52} The Tribunal is not bound by the rules of evidence and aims to conduct hearings with as little formality and technicality as is appropriate in the circumstances.\textsuperscript{53}

Hearings are held in person, by telephone and by video-link. They are conducted in public, unless the Tribunal directs that a hearing be held in private or legislation requires a private hearing.\textsuperscript{54} Hearings must be held in private in refugee cases in the Migration and Refugee Division, in applications for review of Australian Security Intelligence Organisation security assessments, and in all cases in the Social Services and Child Support Division.\textsuperscript{55}

Following the hearing, the Tribunal makes a decision on the review and must give reasons for that decision.\textsuperscript{56} The decision and reasons may be given orally on the day or they may be sent in writing at a later date.

\textsuperscript{52} Subsection 19B(1) of the AAT Act.
\textsuperscript{53} Subsection 33(1) of the AAT Act and sections 353 and 420 of the Migration Act.
\textsuperscript{54} Subsection 35(1) of the AAT Act and subsection 365(1) of the Migration Act.
\textsuperscript{56} Subsection 43(2) of the AAT Act and sections 368, 368D, 430 and 430D of the Migration Act.