25 January 2024

Submission to the Inquiry into the Administrative Review Tribunal Bill 2023 (ART Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill)

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1 Introduction

We thank the House of Representatives Standing Committee on Social Policy and Legal Affairs for the opportunity to provide a submission to assist in its scrutiny of the ART Bill and Consequential and Transitional Bill.

The Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney is the world's first and only research centre dedicated to the study of international refugee law. The Centre was established in October 2013 to undertake rigorous research to support the development of legal, sustainable and humane solutions for displaced people, and to contribute to public policy involving the most pressing displacement issues in Australia, the Asia-Pacific region and the world.

The Kaldor Centre Data Lab was established in 2022. The Lab publishes regularly updated data and statistical analysis of the administrative and judicial review of Protection Visa applications in Australia. The data currently covers review by the Administrative Appeals Tribunal (AAT) and Immigration Assessment Authority (IAA), as well as judicial review by the Federal Circuit and Family Court.

We welcome many of the components of the ART Bill and Consequential and Transitional Bill, particularly the implementation of a merits-based appointment process, the re-establishment of the Administrative Review Council and the abolishment of the Immigration Assessment Authority (IAA) and Fast Track process. These changes will make substantial improvements to the fairness and efficient operation of Australia's administrative review system. However, the decision to retain a separate procedural code for decision-making in the Migration and Refugee Division is a missed opportunity for creating a unified

in the ART Bill, and associated efficiency gains, will not apply to the Migration and Refugee Division where they are most needed.

Our submission draws on statistical analysis undertaken by the Kaldor Centre Data Lab concerning the decision-making of the Administrative Appeals Tribunal (AAT) and the Immigration Assessment Authority (IAA) with respect to Protection Visa applications.

The data drawn on for the purposes of this submission covers:

- 26,036 Protection Visa decisions made by the AAT from 1 January 2015 to 18 May 2022; and
- 10,000 Protection Visa decisions made by the IAA from 1 May 2015 to 17 May 2022.

This data covers the entire caseload of the AAT and IAA with respect to Protection Visa decisions during the respective periods and was obtained through freedom of information requests to the AAT.

We have also separately collated data on the judicial review of migration and refugee decisions made by the AAT (and its predecessor tribunals), as well as the IAA, from 1982 to 2022. This data was drawn from the published annual reports of the respective bodies.

Our aim is to provide quantitative empirical foundation for evaluating key elements of the ART Bill and Consequential and Transitional Bill. However, it is important to note the limited data points which we were able to access through the freedom of information process and annual reports. Access to more detailed data would open opportunities for more robust analysis in relation to whether the bills will achieve the Government's policy objectives and not have unintended consequences. Moving forward, it is essential that the new ART adopts a robust approach to data collection and transparency to enable ongoing evaluation of its operation and to identify areas in need of further reform.

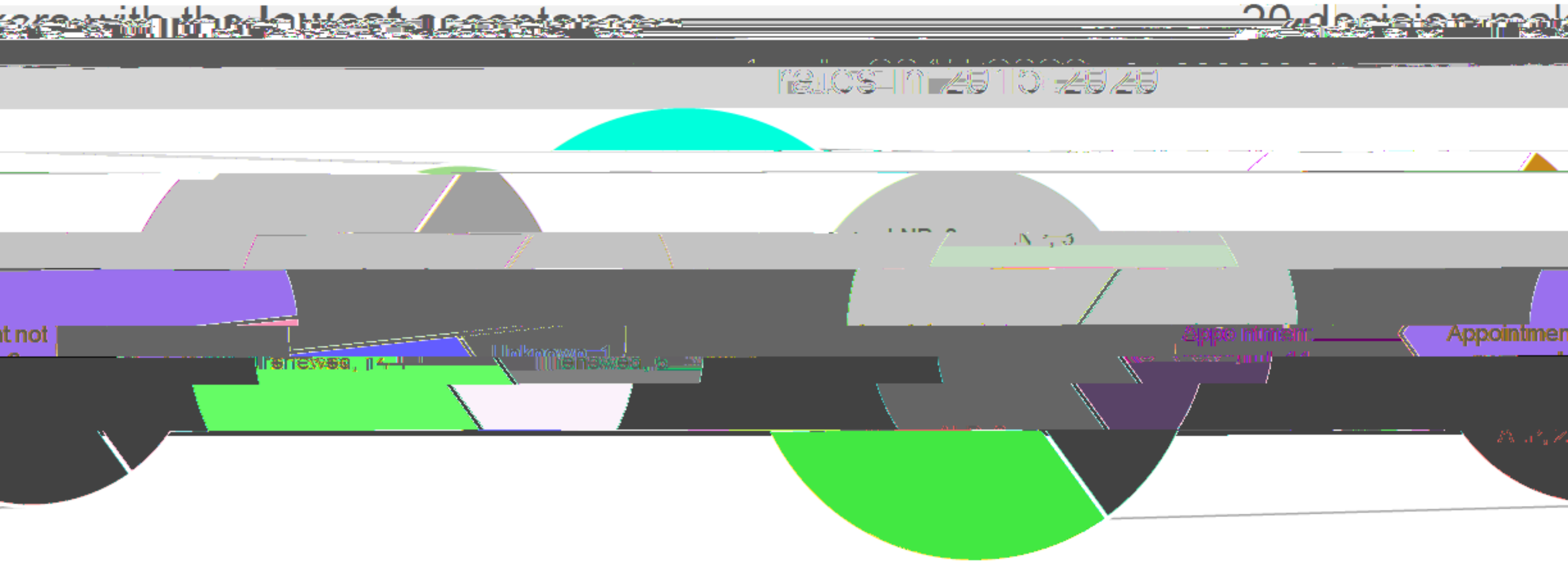
2 Administrative Review Tribunal Bill

2.1 Appointment and Reappointment Processes

2.1.1 Merits-based appointment process

We welcome the implementation of merits-based independent appointment and re-appointment processes. Analyses carried out by the K20 12-6.3 (o2 (l)3.1 (y)-8 (s)-8 y3.002 Tc 0.122 Tw -)]TJ 0.002 Tw [(3 (me)-12ed c)-8 (o)-12.

Figure 2. Reappointment of Decision Makers with the Lowest Acceptance Rates



2.2 The re-establishment of the Administrative Review Council (ARC)

... administrative review system' and 'inquir[ing] into systemic issues related to the making of ... Commonwealth ... administrative decisions and the exercise of administrative discretions' (cl 249). However, as a core part of ...

... functions ...

... strengthen public confidence in the body ... body is operating, which in turn, can ...

2.3 Using data to improve agency decision-making

should encompass analysis of the types of decisions being overturned. This analysis and data should be shared with agency departments and decision-makers. Particular types of cases from a specific agency or individual decision-maker that have high overturn rates should be identified and flagged to enable strategies to be implemented to address any identified issues.

Data collection and use internally by the new body will enable it to anticipate and address increases in workload and identify areas in need of additional resources. Data and statistics are also an important tool that can assist the body in evaluating the quality and efficiency of their own decision-making and identifying potential areas in need of improvement or reform.

In the judicial context, the Australian Law Reform Commission (ALRC) recently recognised and endorsed the utility of using statistical data to improve the function of the courts. TheoA

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When the system is considered holistically, the 'fast track' process has not led to any efficiency gains, but rather

[redacted]

[redacted] Table 1. Remittal and set aside rates for judicial revie[redacted]

Year	Appeals finalised	Remitted or set aside	Dismissed or discontinued	Success of appeals
2015-16	1	1	0	100%
2016-17	53	19	34	36%
2017-18	309	100	209	32%
[redacted]				

3.2 Separate procedural code for migration decisions

The example of the IAA discussed above illustrates the ineffectiveness of attempts to create efficiencies by reducing procedural and substantive rights of applicants. As such, maintaining the carve out of separate more restrictive procedural code for the Migration and Refugee Division in the *Migration Act 1958* (Cth) will undermine both the fairness and efficiency of decision-making.

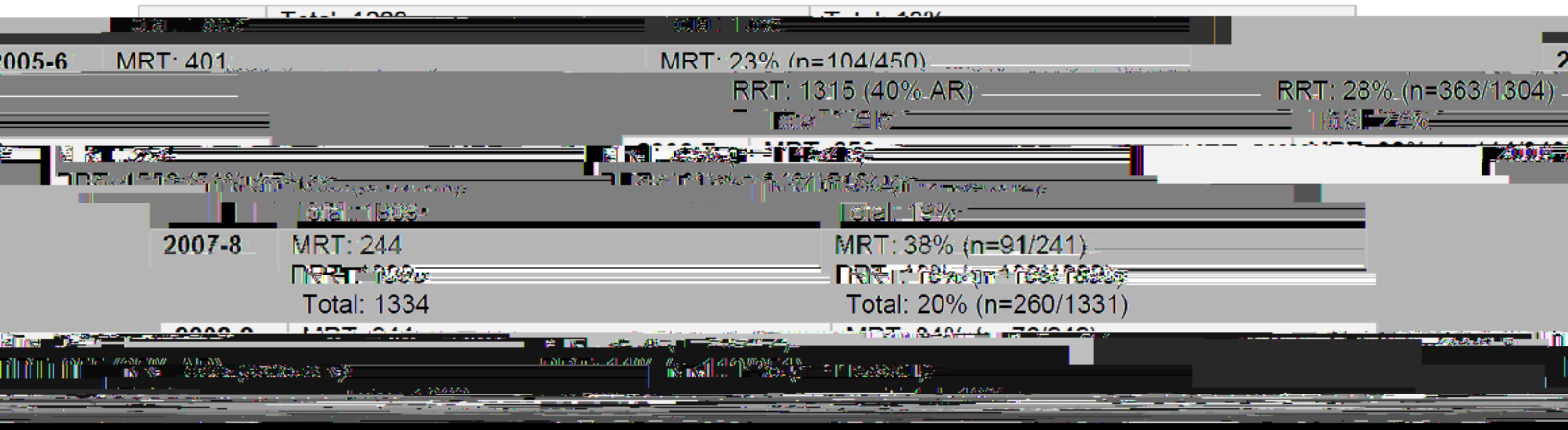
Several provisions of the Consequential and Transitional Bill exclude the application of provisions set out in the

While we understand that the government has attempted to justify the different treatment of applicants in the Migration and Refugee Division on the basis that it enables faster processing, it is our view that it will only create inefficiencies and unjust outcomes.

Over the years, Parliament has passed numerous pieces of legislation that have attempted to codify decision-making procedures for decisions (and exclude the common law natural justice hearing rule) under the *Migration Act 1958* (Cth), as well as other measures aimed at limiting access to judicial review of migration decisions. This process began with the *Migration Reform Act 1992* (Cth) (which became operative from 1 September 1994), and included numerous subsequent reforms, including the *Migration Legislation Amendment Act (No 1)*

Table 2. Judicial Review of Migration and Refugee Decisions in the Federal Courts[8]

Year	Number of applications made to Federal [redacted]	Percentage of applications decided that [redacted]


MRT: 401
MRT: 23% (n=104/450)
RRT: 1315 (40% AR)
RRT: 28% (n=363/1304)
2007-8
MRT: 244
MRT: 38% (n=91/241)
Total: 1334
Total: 20% (n=260/1331)

Courts

Not only is there no evidence that the code of procedure has reduced legal uncertainties or reduced the number of judicial review applications, but the rigidity of the procedures may be actively contributing to inefficiencies. These limitations resulting from the rigidity of the procedures are set out in detail in Professor Crock's *Submission to Attorney-General's Department responding to the Administrative Review Reform: Issues Paper*, and we endorse Professor Crock's conclusion that the code of procedure reduces

> the tribunal's ability to respond with efficiency and humanity to different situations…. these shortcomings encourage the conclusion that as far as possible the new review tribunal should be established with processes that apply uniformly but flexibly across cases according to the nature and complexity of each matter. In other words, fairness and efficiency would be enhanced by abandoning the blanket 'carve out' for migration appeals.[9]

Therefore, the Consequential and Transitional Bill should be amended to harmonise the procedures for review in the Migration and Refugee Division with the other divisions of the ART. The data above indicates that the increased codification of migration and refugee procedures has not increased efficiency or fairness, and accordingly it is unlikely to serve the new Tribunal's objectives. Instead, the failure to abolish the separate and rigid migration procedures, including stricter, shorter deadlines and the exclusion of common law natural justice, will perpetuate many of the issues the Migration and Refugee Division is currently facing. It means that many of the benefits of the new more flexible and adaptable procedures at the ART, and associated efficiency gains, will not apply to the Migration and Refugee Division, where they are most needed.

3.3 Supporting parties with their matter

Clause 294 of the ART Bill

Our data shows that the odds of an applicant succeeding at the AAT were more than five times higher (5.27, 95% CI [4.66, 5.97]) if the applicant had legal representation, controlling for all other variables (including the individual decision-maker, the country of origin of the applicant and the political party that appointed the decision-maker). Similarly, at the IAA, an applicant's chance of success was 2.5 times higher (2.63, 95% CI [2.21, 3.13]) if the applicant had legal representation, controlling for the individual decision-maker and the country of origin of the applicant.

Therefore, the lack of support for Protection Visa applicants, where the barriers to representation are often higher, and the risks of incorrect decisions greater, is especially problematic for the ART's goals of efficiency and fairness. The availability of legal assistance for applicants in the Migration and Refugee Division needs to be brought in line with other divisions of the ART, and there needs to be adequate funding so that applicants who cannot afford legal assistance and representation are able access it.