The Tax Institute

16 May 2023

Administrative Review Taskforce
Justice and Communities Group
Attorney-General's Department
Barton ACT 2600

By email: AATReformEnquiries@ag.gov.au

Dear Attorney-General,

Administrative Review Reform Issues Paper

The Tax Institute welcomes the opportunity to make a submission to the Administrative Review Taskforce in the Attorney-General's Department (**AGD**) and the Expert Advisory Group in response to its Administrative Review Reform: Issues Paper (**Issues Paper**) on the development of a new federal administrative body (**new review body**).

Our submission builds on our earlier submission to the Senate Legal and Constitutional Affairs Committee in relation to its inquiry titled *The performance and integrity of Australia's administrative review system* and letter to the Attorney-General, the Hon Mark Dreyfus KC MP, on 17 March 2023, in which we provided our initial views on the core principles that should be prioritised in the design of the new review body. Our comments primarily relate to the legislation and administration of the Australian taxation and superannuation systems, and the Taxation Divisions of the Administrative Appeals Tribunal (**AAT**) and new review body, though we note that many of the principles and recommendations apply equally across all Divisions.

We would also like to thank the AGD for meeting with The Tax Institute and its members to discuss our feedback and recommendations in relation to the new review body. We appreciate the AGD's openness to discussing important aspects of the reform and the opportunity to partake in its design.

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The AAT plays crucial role in the review and administration of Australia's tax system. The AAT's review of decisions made by government agencies allows applicants the opportunity to have adverse decisions reviewed by a trusted and wholly independent tribunal. However, the AAT has had significant shortcomings that have prevented it from being an effective and efficient body. The shortcomings and need for improvement have been recognised in several reviews including the 2018 Report on the Statutory Review on the *Tribunals Amalgamation Act 2015* (cth) (**Callinan Report**) and the Senate Legal and Constitutional Affairs Committee's Interim Report on the performance and integrity of Australia's administrative review system (**Senate Committee Report**).

The new review body will play an equally crucial role. It is imperative to ensure that the new review body does not encounter the same issues that adversely impacted the ability of the AAT to provide accessible, efficient and low-cost resolutions to taxation and superannuation disputes. There are a number of aspects of the current approach to the AAT that need to be addressed. These include, but are not limited to:

- ensuring the new review body has practices and procedures in place that will assist it in achieving its intended objectives;
- ensuring the new review body is adequately funded to provide services of the required quality and standard;
- ensuring that members are adequately remunerated, with consideration given to how long it takes to write a decision;
- improving the timeliness of decision making by the new review body;
- retaining separate divisions for taxation and small business taxation in the new review body;
- ensuring that alternative dispute resolution (**ADR**) is accessible and used as often as possible to resolve matters in a cost-effective and equitable manner;
- increasing the transparency of all aspects of the new review body, including the case triage process;
- keeping aspects of the *Administrative Appeals Tribunal Act 1975* (cth) (**AAT Act**) that are currently working well;
- ensuring that the new review body has a culture that is conducive to achieving its stated outcomes;
- ensuring that the Australian Taxation Office's (**ATO**) resources and procedures can better assist in the timely and efficient resolution of taxation and superannuation disputes; and
- re-establishing and potentially expanding the scope of the powers of the Administrative Review Council (**ARC**);

Further, we consider that the processes and effectiveness of the new review body should be regularly reviewed and benchmarked to ensure they continue to achieve their intended objectives. It may be possible for reviews and improvements in processes to be undertaken by a re-established ARC, or through formal reviews conducted by independent bodies and Parliament.

Please refer to **Appendix A** for our detailed comments.

We would be pleased to continue to work with the AGD and expert advisory panel to ensure that the design of the new review body can best achieve its stated objective and provide a fair, efficient, and effective resolution mechanism for taxation or superannuation disputes. To arrange a further meeting with The Tax Institute, or to discuss any aspect of our submission, please contact our Senior Tax Counsel, Julie Abdalla, on (02) 8223 0058.

The Tax Institute is the leading forum for the tax community in Australia and is committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. Please refer to **Appendix B** for more information about The Tax Institute.

Yours faithfully,

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APPENDIX A

We have set out below our detailed comments and observations for your consideration. Our comments broadly follow the outline in the Issues Paper and are made from the perspective of Australia's taxation and superannuation legislation and administration.

Part 1 – Structure and Membership

Design

1. What are the most important principles that should guide the approach to a new federal administrative review body?

The Tax Institute agrees with the objectives of the reform of the AAT[1] and essential features of a tribunal[2] as stated in the Issues Paper. Using the proposed objectives and principles of merits, diverse membership, flexibility of process, accessibility and cost effectiveness will set an appropriate foundation for the new review body in the resolution of tax disputes.

However, consideration needs to be given to how the new review body will operate in practice to ensure that these objectives are met. This may require regular reviews of the operation of the new review body, ensuring that it is capable of adapting its practices to the needs of an ever-changing world.

2. Should the new federal administrative review body have different, broader or additional objectives from those of the current AAT? If so, what should they be?

As noted in the Issues Paper, the AAT is currently required to pursue the objective of providing a mechanism for review that:[3]

- 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.

We consider that these objectives were appropriate when determining the guidelines for what the AAT should strive to achieve. We consider that these objectives, or a similar formulation of them, will also be appropriate for the new review body. Impediments to achieving these objectives, may arise from the actual approach taken regarding all aspects of the new review body's activities. As discussed throughout our submission, considerations need to be given to all aspects of the design and activities of the new review body to ensure that it indeed meets its objectives.

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1 Issues Paper, page 5.

2 Ibid, page 18.

3 AAT Act, section 2A.

3. Should the Administrative Review Council (ARC), or a similar body, be established in the new legislation? What should be its functions and membership?

The ARC was established under the AAT Act as an independent policy advisory body which reviewed the Commonwealth administrative law system, monitored any relevant developments and made recommendations to the Minister for any improvements that should be made.[4] As noted in the Issues Paper, the ARC developed a number of best practice guides, reports, and training materials while also undertaking checks on members. These processes ensured that the operations of the AAT were regularly reviewed with the intention of improving the delivery of the AAT's objectives. The ARC was de-funded and dissolved as part of the Federal Budget 2015–16[5] in order to reduce the size of the public sector.[6] The legislative framework supporting the ARC remains in the AAT Act.

Although the ARC's functions have been transferred to the AGD, the important oversight role it has historically played has not been replicated. The Tax Institute has a number of concerns regarding the transfer of the ARC's oversight roles, including:

- the legality of whether the functions previously performed by the ARC are able to be transferred to the AGD given the Executive branch has a duty to execute and maintain the laws of the Commonwealth under section 61 of Constitution and the AAT Act, which assume the existence of the ARC;[7]
- that it is not in the interests of the public's trust and confidence in the operations of the AAT for the oversight role to be carried out by the AGD, as the ARC was better suited given its status as an independent and apolitical body;[8] and
- the unique role and composition of the ARC making it best placed to provide the robust, independent, and expert advice required to uphold the integrity of the Australian administrative review system.[9]

The Tax Institute supports the re-establishment of the ARC, or an equivalent body, in the legislation establishing the new review body. This approach has also been recommended by various reviews including the Senate Committee Report[10] and the Callinan Report.[11] We consider that the ARC plays a vital role in ensuring that Australia's administrative review system operates in an independent, fair, efficient and expedient manner. The ARC provides important oversight over tribunals, judicial review, privative clauses, administrative discretions, and the adequacy of existing review mechanisms. Key considerations for the membership and scope of activities of a re-established ARC are discussed below.

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4 Ibid, section 51(1)(aa).

5 Federal Budget 2015–16, Budget Paper No. 2, page 65.

6 Parliament of Australia, Abolition of the Administrative Review Council. Available at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201516/ARC.

7 Callinan Report, page 19.

8 Senate Committee Report, paragraph 7.27.

9 Ibid, paragraph 7.29.

10 Ibid, paragraph 7.31.

11 Callinan Report, page 20.

Broad scope for the re-established Administrative Review Council

We consider that the role of the re-established ARC should not be limited to the review of specific operations of the new review body. The oversight role played by the ARC is increasingly important in an environment where the Government's discretionary powers are extending and new mechanisms for making administrative discretion are created. The ARC should be able to review any new administrative decision-making powers handed to government bodies to better ensure that it is able to achieve its goals with a holistic view of the landscape in which the powers operates.

Operating as an Ombudsman for the new review body

The Inspector General of Taxation and Taxation Ombudsman (**IGTO**) plays an important role in assisting the public and providing confidence in the demonstration of Australia's taxation system by overseeing the administrative actions of the ATO and the Tax Practitioners Board (**TPB**). The IGTO is an independent body, that is appointed by the Governor-General of the Commonwealth of Australia.

The stated objectives of the IGTO are to:[12]

- improve the administration of taxation laws for the benefit of all taxpayers, tax practitioners and other entities;
- provide independent advice to the government on the administration of taxation laws;
- investigate complaints by taxpayers, tax practitioners or other entities about the administration of taxation laws; and
- investigate administrative action taken under taxation laws, including systemic issues, that affect taxpayers, tax practitioners or other entities.

The *Inspector-General of Taxation Act 2003* (cth) and *Ombudsman Act 1976* (cth) provide the relevant legislative framework that enables the IGTO to achieve its goals. From an operational perspective, the IGTO achieves its objectives through a range of activities including:

- investigating taxpayer complaints about the processes or decision-making process undertaken by the ATO and TPB in relation to specific matters;
- proactively reviewing a range of the ATO's and TPB's administrative actions such as its recent review in the use of the Commissioner of Taxation's (**Commissioner**) General Powers of Administration, or the ATO's management of the objections process; and
- investigating potential systemic issues that have been identified by taxpayers, tax practitioners or professional bodies like The Tax Institute.

The broader system would benefit from the re-established ARC being able to operate in a role similar to an Ombudsman with regards to the decision-making processes implemented by the new review body, and to investigate instances where its objectives are not met. If implemented, this function could allow the re-established ARC to also review the decision-making protocols of various government agencies to ensure that steps are taken to resolve disputes at an earlier stage to reduce pressures on the new review body.

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[12] *Inspector-General of Taxation Act 2003* (cth), section 3.

Enforceability of recommendations

Over the course of the ARC's existence, it made several key recommendations that were not adopted and applied by the AAT. These recommendations were largely in relation to:[13]

- ensuring that applicants perceive that tribunals are properly exercising their review functions;
- developing additional training for members to uphold such perceptions;
- making selection criteria for members publicly available;
- creating a competitive reappointment process;
- staggering member appointments;
- developing appraisal schemes for members; and
- instilling a statutory entitlement to an adequately briefed interpreter in review tribunal proceedings.

There is a reasonable argument that had the ARC's recommendations been implemented, many of the current perceived shortcomings of the AAT could have been addressed in a timely manner. We consider that the re-established ARC should be empowered to ensure that its recommendations are adopted and applied by the new review body in a reasonable time and manner, provided the appropriate funding and resources are available. This may be achieved through legislative provisions, delegated authority of the re-established ARC to make regulations in this regard, or a binding Code of Conduct which requires the new review body to adopt recommendations that help it to improve. Although it is possible for the recommendations to be non-binding yet still be adopted by the new review body, it requires a corporate culture that is willing to embrace and respond constructively to feedback which can take time to develop and foster.

Selecting members for the Administrative Review Council

Careful consideration needs to be given regarding the membership of the re-established ARC to ensure that it remains an apolitical and independent organisation. This will require:

- transparency over the member's selection process;
- identification and active management of potential, perceived, and actual conflicts of interest; and
- public consultation involving the relevant professional bodies, industry experts and other stakeholders in any reviews of the new review body and the development of recommendations to improve its operations.

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[13] Senate Committee Report, paragraph 1.31.

Improving decision making by government agencies

Before it was de-funded, the ARC published numerous papers and best practice guides on administrative law issues including matters of lawfulness, natural justice, evidence, reasons and accountability. For example, the ARC's Legal Training for Primary Decision Makers guide[14] sets out core elements of law for use in training primary decision makers in government agencies.

We consider that the re-established ARC should be empowered to play a material role in supporting and encouraging government agencies to improve their policies and practices, and the way in which they are applied. This could take the form of further training or guides similar to those mentioned above. Allowing the ARC to be active in this type of role may help to prevent some disputes from arising in the first place, and may also assist in resolving disputes at an earlier stage before they are escalated for external review.

Consideration should also be given to whether other government bodies should be required to implement recommendations or training provided by the re-established ARC in relation to their decision-making process. We consider that government agencies should promote the culture of positively responding to constructive feedback as noted above. This may be achieved by requiring other government agencies who do not adopt any recommendations or training to be required to provide detailed reasons for their decisions, ensuring that there is sufficient scrutiny over the decision-making in this regard.

4. How should the legislation creating the new body encourage or require government agencies to improve administrative decision-making in response to issues identified in decisions of the new federal administrative review body?

Decisions by a tribunal can have a normative function as a check on executive decisions. The normative effect relates to the broader, long-term impact of review tribunal decisions on government agency decision making. In practice, this manifests by ensuring that tribunal decisions are reflected by government agencies in similar cases and, on a more macro level, are also considered in the design of policy and legislation in that area.

The fact that most decisions relating to a taxpayer's affairs that are made by ATO staff are reviewable at tribunal should of itself encourage correct decisions making in the first instance. However, not all tribunal decisions will necessarily have the normative effect, especially since many depend on the facts of their own case.

Please also refer to our response to Question 4 above detailing the potential expanded role of the re-established ARC in this regard.

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[14] Administrative Review Council, 'Legal training for primary decision makers: A curriculum guideline' (June 2004).

Structure

5. What structure would best support an efficient and effective administrative review body?

Separate taxation and superannuation division

The new review body will be responsible for reviewing decisions across a wide range of disciplines. Many of these disciplines have their own legislation, processes and administrative practices that would benefit from being managed separately to other disciplines.

Taxation and superannuation are niche and highly complex areas of Australia's legal system, comprising thousands of pages of legislation, unique review processes and administration approaches, with requirements and 'quirks' that are not be present in other areas of the law. This breadth of our tax system impacts all types of taxpayers from individuals to multinational enterprises (**MNEs**), with each category of taxpayers often having their own distinct set of needs and challenges when ensuring that there is an efficient and fair resolution of their tax disputes.

The new review body will also play an important role in the administration and review of Australia's tax system. Without a tribunal, the costs and procedural challenges of bringing matters before a court would likely deter many taxpayers from seeking external resolution of their disputes. Providing taxpayers with access to a timely and cost-effective mechanism of independent review of ATO decisions plays an integral part in maintaining the community's overall confidence in the tax system.

For these reasons, we consider that taxation and superannuation matters should be dealt with in a separate Division in the new review body. This will ensure that any processes, assigned members and legislative requirements are best adapted and applied specifically to efficiently resolve tax disputes. Currently, tax disputes take an unreasonably long time to resolve, with only 59% of cases in the Taxation and Commercial Division being finalised within 12 months in 2021–22.[15] Taking steps to ensure there is timely resolution of these matters should be a high priority.

Separate Small Business Taxation Division

Although the Small Business Taxation Division (**SBT Division**) has existed for less than 5 years, it is an important part of the AAT as it allows small businesses to have their tax disputes resolved in an effective way that is tailored to their particular requirements. This is reflected by the general increase in the number of cases lodged. The SBT Division has seen an increase in cases from 123 in 2018–19[16] to 552 in 2020–21,[17] with a one-off decrease to 317 in 2021–22.[18]

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[15] Administrative Appeals Tribunal, Annual Report 2021–22, page 28.

[16] Administrative Appeals Tribunal, Caseload Report For the period 1 July 2018 to 30 June 2019. Available at https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2018-19.pdf.

[17] Administrative Appeals Tribunal, Caseload Report For the period 1 July 2020 to 30 June 2021. Available at https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2020-21.pdf.

[18] Administrative Appeals Tribunal, Annual Report 2021–22, page 21.

The SBT Division's approach to case management,[19] lower application fees, 'early case assessment processing', provision of various ADR methods,[20] and commitment to deciding matters within 28 days[21] has made it a more viable and accessible avenue for small businesses. Further, the SBT Division has historically exceeded the AAT's benchmarks and resolved matters in an expedient manner, with 100% of cases resolved within 12 months in 2018–19[22] and 82% of matters resolved within 12 months in 2021–22.[23] The rise in matters before the SBT Division in conjunction with the prompt resolution of matters demonstrates that this has historically been an overlooked part of the system. Small business taxpayers have benefitted from the creation of the SBT Division.

We consider that the new review body should maintain the SBT Division to ensure that taxpayers in this sector can continue to access timely and cost-effective resolution of their tax disputes. Initiatives and strategies that improve public awareness of the SBT Division are likely to further increase its use and better support the small business sector.

6. How flexible should the new body be in assigning members across the full spectrum of matters in the new body, and who should have the ability to assign or reassign members?

Taxation and superannuation matters are generally complex. We consider that members with little or no experience in these areas should not be assigned to decide on these types of matters. The efficient and correct resolution of tax disputes can only be achieved if the matter is heard before a member with specialist experience in taxation or superannuation. In the event of a shortage of skilled specialists at a given point in time, The Tax Institute supports additional funds to ensure the most qualified members are assigned to the Taxation and SBT Divisions, or the use of ad-hoc or temporary specialist members to ensure timely resolution.

We note that reliance on ad hoc or temporary members carries a higher risk that political factors may influence member selection and composition. We therefore reiterate the importance of ensuring that these members are engaged according to the requirements of the new review body and subject to appropriate selection processes. Please refer to our responses to Questions 18 and 20 below for more information.

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[19] See it, 'Guide to the Small Business Taxation Division'. Available at https://www.aat.gov.au/landing-pages/practice-directions-guides-and-guidelines/guide-to-the-small-business-taxation-division.

[20] Practice Direction, *'Review of Small Business Taxation Decisions Practice Direction'*, clause 6.2. Available at https://www.aat.gov.au/landing-pages/practice-directions-guides-and-guidelines/review-of-small-business-taxation-decisions-practi.

[21] Ibid, clause 8.1

[22] Administrative Appeals Tribunal, Caseload Report For the period 1 July 2018 to 30 June 2019. Available at https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2018-19.pdf.

[23] Administrative Appeals Tribunal, Annual Report 2021–22, page 28.

9. Should the new body have other judicial members and what should their role be?

The new review body may benefit from having members that are part of the judiciary. Judicial members could be employed in any of the following capacities:

- a decision maker, either in the primary hearing or during a potential review by the second tier (as noted in Question 58 of the Issues Paper);
- a specialist to whom a question of law is referred; or
- a specialist providing oversight or review of the performance or accuracy of decisions made by the new review body.

From a practical perspective, the use of additional judicial members may be limited by the availability of individuals who also have the relevant experience in the field.

Members

15. What should be the levels of membership in the new body, and what should be the roles, responsibilities and qualifications required at each level?

The Issues Paper contains a proposal to simplify the existing structure consisting of six levels of members down to three, as shown in the table below:[24]

Role	Purpose
Division head/Practice Group lead [depending on structure of new body]	Provides leadership for members in their division (including jurisdictional, development and pastoral issues), and assists the Senior Leadership in running the new body
Senior Member	Hears more complex cases, and assists Division head/Practice Group lead if required.
General Member	Hears the majority of cases

This would be consistent with the approach taken in many State and Territory tribunals[25] and potentially simplify the allocation of cases. The Tax Institute broadly supports a simplified approach to the level of membership and the respective roles. It is important for the simplified structure to provide the appropriate levels of remuneration and incentives to ensure that appropriately qualified members are incentivised to join.

Taxation and superannuation are specialist areas of the law. It is not uncommon for individuals who work in the professions to only work in this field for the duration of their careers. The level of expertise required often results in people spending their careers practicing in only certain parts of the taxation or superannuation system.

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[24] Issues Paper, Table 3 – Possible structure for the membership of the new body, page 35.

[25] Ibid.

The level of speciality involved may require a larger proportion of Senior Members in the Taxation and SBT Divisions. Although General Members may be able to efficiently resolve issues that are simpler in nature or relate primarily to evidentiary concerns, the efficient resolution of many taxation and superannuation matters will often require deep knowledge of the relevant legislative provisions and practical experience.

16. Should all members be required to be legally qualified to be eligible for appointment?

Currently, the AAT Act requires that the President of the AAT is a Judge of the Federal Court while deputy presidents, senior members and members may be judges, lawyers or have relevant 'special knowledge or skill' in the opinion of the Governor-General.[26] The Callinan Report suggested that requiring members to be legally qualified is desirable or necessary for the operation of the AAT given its highly complex and legal nature.[27] However, the Senate Committee Report recognised that some submissions during the consultation process advocated for a more diverse range of views in this regard.[28]

The Tax Institute considers that although a detailed understanding of legal processes would be beneficial, on its own, it may not adequately achieve an efficient and expedient process for resolving tax disputes. Requiring that all members have legal qualifications may also have the inadvertent impact of entrenching a legalistic culture that promotes a court-like and adversarial process to dispute resolution. This requirement may also limit the pool of potential candidates, excluding otherwise qualified members. Ultimately, this approach will likely result in problems for the new review body like those currently seen in the AAT, where the costs and complexity of progressing a matter is akin to bringing the matter before a court. We do not consider this to be an appropriate outcome for the new review body as it will deter taxpayers from seeking the effective resolution of their tax disputes.

As detailed in our response to Question 17 below, members with taxation and superannuation specific qualifications are more likely to achieve the objectives of the new review body. If an otherwise qualified member does not have the requisite level of knowledge regarding the legal system, it may be prudent to require them to undergo comprehensive training in this regard.

17. What is the value of members holding specific expertise relevant to the matters they determine? Should the new body set particular criteria for subject-matter expertise (alongside more general qualifications)?

The ATO has improved and expanded its ADR offerings and approach to managing tax disputes. In 2021–22, the ATO resolved 18,684 cases in their internal review process (**objections process**), with 440 cases being lodged with courts or tribunals pursuant to Part IVC of the *Taxation Administration Act 1953* (cth) (**TAA 1953**).[29] This has resulted in many issues being resolved before they are escalated to tribunal, particularly the less complex matters.

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[26] AAT Act, section 7.

[27] Callinan Report, page 9.

[28] Senate Committee Report, paragraphs 4.72 to 4.90.

[29] Commissioner of Taxation, Annual Report 2021–22, page 203.

As a result, the cases arising before the AAT are more often those that are more complex or those where the parties' positions are more entrenched. Cases of this nature require greater expertise and experience to resolve and manage. A lack of experience in taxation or superannuation (as the case may be) is likely to result in delays and an inefficient process.

We consider that Members who are deciding taxation and superannuation cases should have relevant qualifications in tax and experience in the industry to better ensure the efficient resolution of cases. General Members who are hearing cases that are lower in complexity may not necessarily require the same degree of experience. However, we reiterate that these are not likely to be the majority of tax disputes being escalated to the new review body.

The relevant qualifications could include recognised programs by professional bodies, such as the Chartered Tax Advisor program, that provide participants with a detailed level of understanding in the taxation and superannuation field. As noted above, there are numerous areas of specialty within the taxation and superannuation sphere. The new review body would benefit from ensuring its membership can collectively cover the various sub-specialist areas. Members hearing tax cases may also benefit from other competencies, such as accounting and financial investigation.

18. Is there value in having members who are available to hear matters on an ad hoc basis (sessional members)? What role should they play?

The Tax Institute supports having members available in an ad hoc manner to hear cases as and when they are needed. This approach can ensure that the new review body is better able to respond to fluctuations in cases, or call on members when needed to decide on otherwise uncommon areas of the taxation and superannuation legislation.

However, ad hoc members should not be relied upon as the primary source of members for the Taxation and SBT Divisions. We consider that the new review body should ensure it is sufficiently staffed by full time members. This will ensure consistency in decisions and writing of cases.

When deciding on a process for selecting and assigning members acting on an ad hoc basis, consideration should be given to:

- appropriate steps to ensure there is no actual or perceived conflict of interest for the ad hoc members;
- providing adequate training to ensure ad hoc members understand and operate the procedures and guidelines of the new review body if they do not have the current competency in this regard;
- ensuring that ad hoc members with a non-legal background are able to receive any necessary and regular training about changes in processes and requirements of the new review body; and
- if ad hoc members are utilised on a regular basis or for a regular topic in the Taxation and SBT Divisions, whether there is a need to fill that role on a permanent basis.

We consider ad hoc members should be selected pursuant to the same processes as permanent members. Please refer to our response to Question 20 below regarding the selection process.

Appointments and reappointments

20. Should the requirement for a transparent and merit-based selection process for members, including the Senior Leadership of the body, be incorporated in legislation? What elements should be included?

Historically, the member appointment process has been relatively opaque. The AAT Act itself does not prescribe an appointment process, with only requirements for member's experience being contained in section 7 of the AAT Act. Members of the AAT were appointed under the *Protocol for Appointments to the Administrative Appeals Tribunal* (2019) **(Appointment Protocol)** from 2019 until 15 December 2022 when the Government released new appointment guidelines.[30]

The Appointment Protocol broadly stipulated that the President of the AAT would seek expressions of interest from the public every 6-months and present recommendations to the Attorney-General. The Attorney-General, however, did not need to follow the President's recommendations and could even appoint members from outside of the Expressions of Interest Register.[31] Because of this wide ministerial discretion, the Senate Committee Report highlighted that 29% of members had a 'direct political affiliation' with either of the two major political parties, and also noted that such members were less likely to have had legal training.[32]

The Tax Institute supports a transparent and independent process to select members which is not influenced by the Government or politics. It is important for the principles of this approach to be legislated, ensuring that future procedural changes cannot be made that could reduce the transparency and independence. The features in the legislation to achieve this could include:

- reporting requirements to ensure complete transparency of the process from expressions of interest to the reasons for a member's election;
- ensuring applications are reviewed by an independent party (such as an independently appointed review panel);
- if individuals are recommended, ensure that their suitability is also subject to review by an independent panel; or
- a power to review any decisions regarding member selection, or the process utilised, to be reviewed by an independent party.

The ARC may be the independent body that is tasked with undertaking the reviews suggested above.

However, the legislative process should still allow sufficient flexibility to allow other factors to be considered, where appropriate. These include factors such as age, gender and cultural background. We consider that a more diverse membership will ensure improved decision-making and public confidence in the new review body.

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30 Issues Paper, page 40.

31 Senate Committee Report, paragraph 4.17.

32 Ibid, paragraph 4.43.

21. Should the legislation require the Minister to consult the President before appointing or reappointing members?

We consider that Ministerial discretion should not be allowed to overrule or overturn recommendations regarding a member's suitability made by the independent selection process. Allowing this type of discretion would undermine the public confidence in the new review body, raising similar issues to what has been noted in the Senate Committee Report regarding the AAT. If the Minster is to be involved in the appointment or reappointment process, they should be compelled to exercise their power only based on the findings of the transparent and independent process.

23. What is the appropriate term of appointment for members, the President and the Registrar (or equivalent)? Should terms be fixed, and should there be a maximum number of reappointments?

The Tax Institute supports a fixed term for members of the new review body. We consider that member tenure should be extended beyond the current standard. Extending member tenure will promote stability by ensuring that cases are overseen and resolved by those who are best suited. It will also better facilitate an increase in consistency and organisational memory for decisions made by the new review body.

We do not consider that there should be a limit on the maximum number of reappointments. However, consideration may need to be given to the number of times the President and Registrar can be reappointed, especially if there is the potential for political involvement or pressure in the selection of those members.

24. What should be the process and criteria for reappointment of members? How should past performance be assessed to inform reappointment or appointment at a higher level?

Currently, the AAT Act does not provide for a mechanism concerning the reappointment of members.[33] Reappointments are made in the form of a:[34]

- short-term extension or short-term reappointment based on organisational needs; or
- substantive reappointment with a new term.

We consider that members seeking reappointment should be required apply under the same process as those who are seeking appointment in the first instance to ensure that the principles of transparency and independence in member selection are preserved. Please refer to our response to Question 20 above for our views on a transparent and independent appointment process.

The member's experience and past performance should be considered by the decision-maker as relevant factors in the overall assessment of the applicant's suitability for the role.

We also consider that the legislation should allow for short extensions in a member's term. Occasionally, a member may be required to extend their term for a short period of time, for a number of reasons, including:

- organisational needs;

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[33] Issues Paper, page 43.

[34] Ibid.

- completing unfinished workload; or
- addressing unforeseeable instances (such delays in the selection process for new members).

The flexibility for a member's term to be slightly altered to better manage these circumstances would be beneficial. However, any extensions should be required to be reported, along with the reasons for the extension to ensure there is transparency over the process.

25. How can the current legislative requirements and processes for managing conflicts of interest, actual or perceived, be enhanced for the new body?

The Tax Institute is of the view that the current framework for identifying and managing potential or actual conflicts of interest as identified on page 44 of the Issues Paper is largely effective in achieving its intended outcomes. However, we consider that the Code of Conduct which outlines the details concerning the reporting and managing of a member's potential conflicts should be enforceable. An enforceable code will increase public confidence in the ability and decisions made by members of the new review body, an important aspect in preserving the integrity of our tax system.

Consideration may also need to be given to other mechanisms that ensure members are correctly reporting their potential and actual conflicts. Examples include an infrequent and random audit of the disclosed conflicts register.

26. What interests or outside employment of a member could give rise to an actual or perceived conflict of interest in a matter. What consequences for the member should follow from such a conflict?

Currently, a full-time member is not permitted to engage in outside employment without the President's approval.[35] Part-time members are not permitted to engage in paid employment that, in the opinion of the President, conflicts or may conflict with the performance of the member's duties.[36] An exception to these prohibitions is if the member holds an office or appointment by the Defence Force.[37]

From a taxation and superannuation perspective, we consider this to be an appropriate approach to outside employment for the new review body. If a member is approved for outside employment, we consider that the employment should be immediately disclosed on the member's conflicts register. It may also be desirable for information that the member has outside employment to be made publicly available.

If the new review body employs ad hoc members, a further exclusion to the current rules may be needed. It is unreasonable to expect members employed on a short-term or ad hoc basis to not engage in other employment to support themselves. However, this may make ad hoc members more susceptible to being impacted by potential conflicts and thereby precluded from hearing cases. The risk of conflicts should be mitigated through appropriate mechanisms, such as public disclosure of the ad hoc member's outside employment and consideration of the outside employment during the case allocation process.

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35 AAT Act, subsection 11(1).

36 Ibid, subsection 11(2).

37 Ibid, subsection 11(3).

Performance management and removal of members

28. How should the legislation empower the new body to manage and respond to issues relating to member performance and conduct?

The AAT Act provides that the appointment of a member (not judges) may be terminated by the Governor-General following an address to each House of Parliament in the same session under certain circumstances including:[38]

- proven misconduct;
- incapacitation;
- bankruptcy;
- failure to reasonably disclose interests; or
- contravention of the outside employment rule.

However, performance management is not legislated in a similar manner. The AAT relies on internal policies and guidelines, such as the code of conduct, to manage performance and conduct that does not meet the threshold for termination.[39] This limits the ability for poor performance and inappropriate conduct to be dealt with in an effective manner.

Not addressing performance or conduct issues in a timely manner will impact the public's perception of, and confidence in, the new review body. It may also cultivate undesirable cultural traits and create an unsafe work culture if incidents are not promptly reported and rectified. It is important that the appropriate checks and balances exist within the new review body with sufficient powers to rectify any shortcomings in this regard. Examples of checks and balances includes:

- enabling the re-established ARC to also have the powers of an Ombudsman, as outlined in our response to Question 3 above;
- ensuring that breaches of the new review body's Code of Conduct have legislated consequences (for example, a sanction);
- publishing information related to poor performance and conduct transparently in the new review body's annual reports to ensure there is public scrutiny and assurance of remediation of undesirable behaviour; and
- not reappointing members who have been found to have breached the Code of Conduct in an unreasonable manner.

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[38] Ibid, section 13.

[39] Issues Paper, page 47.

Part 2 – Powers and Procedures

Making an application

30. How can the new body ensure that application methods and processes are accessible to all those seeking review?

Application process

Broadly, the TAA 1953 requires decisions made by the Commissioner to be reviewed through the objections process before the taxpayer is eligible to appeal to a court or tribunal. If the matter is escalated to a tribunal or court, the taxpayer bears the burden of proof to demonstrate that the Commissioner's findings were excessive, otherwise incorrect, or should have been made differently.[40]

The Tax Institute generally supports the ATO's objections process as it plays an important role in reducing the number of tax disputes that are escalated to a tribunal. As noted in our response to Question 17 above, the vast majority of internal reviews are resolved by the ATO through the objections process. Although we have identified some concerns about the ATO's objections process,[41] these concerns are capable of being addressed through a refinement of existing administration practices or legislative changes.

One key exception to this is the need for expedited review in certain circumstances. For example, cases with precedential value should not be held up in the objections process. This is discussed in further detail in our response to Question 39 below.

As a result of the objections process, most cases that are escalated to a tribunal for further review have often undergone various forms of internal reviews and are usually supported by one or more of the following:[42]

- position papers, containing the Commissioner's reasons for decision at the audit stage;
- responses by the taxpayer to the Commissioner's views;
- position papers and reasons for decisions at the objection stage;
- information and evidence provided by the taxpayer (subject to confidentiality);
- information and evidence gathered by the ATO (subject to confidentiality); and
- if the matter has gone before a panel examining the potential application of the anti-avoidance provisions or fraud and evasion rules, reasons why those rules are applicable.

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[40] TAA 1953, sections 14ZZK and 14ZZO.

[41] For more information see The Tax Institute's submission to the IGTO's investigation into the Australian Taxation Office's Administration and Management of Objections, available at https://www.taxinstitute.com.au/resources/submissions/2022/australian-taxation-office-s-administration-and-management-of-ob.

[42] We note that shortcomings in the audit and objections processes may result in only a few, or potentially none, of these documents being available. Anecdotal evidence suggests that this is more likely to happen for smaller or medium sized taxpayers who may not have effectively engaged during the earlier stages.

Further, there are procedural requirements for taxpayers who appeal a matter to the AAT. Taxpayers are required to:[43]

- make the application in writing;
- provide a statement of reasons for the application; and
- lodge the application with the AAT within 60 days of the being served with the notice of decision by the Commissioner.

This approach has largely been in place since 1991.[44] With the exceptions in our responses to the Questions below, we do not consider that these requirements should be fundamentally changed for the Taxation and SBT Divisions. The requirements are well-understood constants for most in the tax profession and any amendments to the long-standing practice should be done in the context of reviewing the entire appeal process from the audit stage.

Fee structure

The current fee structure for an application lodged to the AAT is:[45]

- $100 for tax matters where the amount in dispute is less than $5,000, the decision relates to a request to be released from paying a tax debt, or a request to extend the time for lodging a taxation objection has been refused;
- $543 for any other small business taxation matter; and
- $1,011 for most other taxation matters.

The Tax Institute supports the current fee structure. We recommend that the current concessions for smaller disputes continue to be offered to ensure that taxpayers are not discouraged from seeking a resolution of their matter due to the cost involved. However, we recommend indexing the current threshold for matters that incur a fee of $100.

31. What should be the consequences of failing to comply with application requirements, including non-payment of fees, and what powers does the new body need to manage non-compliant applications effectively?

Taxpayers who do not correctly complete the application requirements are often unrepresented or dealing with complex matters. We consider that, to the extent reasonable, applicants should be provided with the opportunity to correct their application and ensure the relevant form or statement for reasons are provided.

Further, taxpayers can be late in lodging their applications for a number of reasons, including personal issues, time needed to gather further evidence, or a lack of awareness of the timing requirements. We consider that matters which are lodged late should be considered on a case by case basis, taking into account reasons for and the length of delay. This will ensure that taxpayers are not denied access to justice for a minor procedural breach. Requiring absolute enforcement with procedural steps is likely to diminish the capability and perception of the new review body to be an approachable, simple and cost-effective manner to resolve tax disputes.

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[43] TAA 1953, sections 14ZZC.

[44] Part IVC of the TAA 1953 was introduced by the *Taxation Laws Amendment Act (No. 3) 1991* (cth).

[45] Issues Paper, page 55.

33. Which applicants or categories of applicant should be able to lodge an application orally (noting the workload/resources involved and the need for clear criteria)?

Given the complexity of tax matters, the time and cost associated with gathering and preparing evidence can be disproportionate to the new review body's objectives of providing economical, informal and quick reviews. It would be beneficial to review existing processes and procedures to identify opportunities to reduce barriers. For example, permitting taxpayers to provide oral evidence in some circumstances can achieve the goal of reducing barriers. Taxpayers should be allowed to provide oral evidence:

- where written evidence is not required in the taxation or superannuation legislation, especially for matters where the tax in dispute is low;
- if the applicant has poor English or written skills;
- if a translator is required to allow the taxpayer to effectively communicate their case; and
- if the taxpayer is vulnerable or in need of extraordinary assistance.

Case management, directions and conferencing

34. What powers should the new body have to use case conferencing (or other forms of managing a matter) for the effective and efficient management and resolution of cases? Are there matters for which case conferencing is not appropriate?

The Tax Institute supports the use of case conferencing and other ADR tools to help with an efficient resolution of cases or streamlining of the matter. As noted in the Issues Paper, case conferencing can be used to:[46]

- discuss the matter with an applicant;
- set a timetable for next steps and the provision of information and documents;
- if appropriate, invite the applicant to consider whether to proceed or withdraw their application;
- discuss issues and identify evidence required in preparation for a hearing;
- attempt to obtain an agreed resolution between parties; and
- explore the potential referral of the matter to ADR.

This approach can be highly effective in the resolution of complex taxation disputes, or instances where the parties have become entrenched in their views due to the prior dealings leading up to the tribunal hearing. However, case conferencing may have more limited value in circumstances where the matter is less complex, if the relevant information is available for the member to proceed with the case, and in instances where parties cannot participate in ADR in good faith.

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[46] Issues Paper, page 59.

The scope of case conferencing could also be expanded in the Taxation and SBT Divisions to undertake an initial analysis of the case, allowing for more targeted discussions of any evidentiary concerns or shortcomings. If a non-binding and indicative analysis of the evidence supporting the parties' position is provided, taxpayers and the ATO may also be more willing to engage in ADR processes to resolve their disputes.

In any case, we consider that the approach to case conferencing should be adopted more broadly in the Taxation and SBT Divisions and should not be overly prescriptive in its approach. Flexible and facilitative case conferencing will be more effective in achieving the goals of the new review body.

35. What should be the role and functions of conference registrars (or equivalent) in the new body? Should conference registrars have particular skills or training, for example legal qualifications or skills in dispute resolution?

If the scope of case conferencing is expanded as described in our response to Question 34 above, we consider that the conference registrar will require some competencies in taxation, administration processes, and ADR. In particular, conference registrars would benefit from a detailed understanding of what evidence is required under the taxation and superannuation legislation, enabling a more accurate identification of the material facts of the case. This can assist with streamlining the hearing and decision making.

Without these competencies, the case conferencing process may be less effective. The new review body may benefit from a slower release of case conferencing more broadly if the people with the relevant skill sets are not initially available and need to be appropriately trained.

36. What directions making powers should be available for the new body? Should these powers be available to the new body for all matters? Who should be able to exercise them?

We consider that the new review body should continue to have broad powers to issue directions and hold directions hearings in the Taxation and SBT Divisions. Existing provisions in the AAT Act are likely to operate well in this regard. In particular, we consider that subsection 33(1AB) of the AAT Act should be retained in the legislation governing the new review body. This will ensure that parties to a hearing maintain a duty to assist the new review body in reaching its overarching objectives.

37. What powers should the new body have to address non-compliance with directions?

The Tax Institute supports providing the new review body with sufficient powers to enforce compliance with issued directions. However, it is important for any powers regarding non-compliance to be exercised in a fair and proportionate manner. Tax disputes, especially disputes in the SBT Division, often involve under-resourced and under-prepared applicants, particularly when compared to the ATO. The exercise of any powers relating to non-compliance should factor in this disparity and ensure that taxpayers, especially those who are self-represented, are not penalised for honest mistakes. Generally, taxpayers will not take intentional steps that have the effect of self-sabotaging their case and it is important that non-compliance with directions does not unfairly penalise taxpayers or obstruct the correct decision from being reached.

Instances where non-compliance powers may be useful include where parties seek to delay proceedings where they may benefit from the delay. We understand that the ATO will generally not seek to recover debts while a taxpayer is disputing the assessment giving rise to that debt through the tribunal. This can create an incentive for some taxpayers to purposely be slow in responding to the tribunal's timetables and seek to delay the progress of the matter in an attempt to defer recovery of the debt. If this is identified as a potential roadblock to the efficient finalisation of a case, an effective tool may be to allow non-compliance powers relating to evidence presented in the tribunal.

39. What powers or procedures should be available to the new body to expedite the resolution of matters? Are there specific types of matter which could benefit from expedited review processes?

As noted in our response to Question 30 above, the TAA 1953 requires taxpayers who wish to contest a decision of the Commissioner to participate in the objections process. While this can lead to the resolution of matters at an earlier stage, it is not a quick or expedient process. The current drafting of the TAA 1953 does not provide sufficient opportunities to expedite and resolve important cases or cases with precedential value.

The Australian Small Business and Family Enterprises Ombudsman (**ASBFEO**) has identified that the cost, time and stress associated with the ATO's internal review processes often means it is not viable for small businesses to seek a further review of their decision.[47] In our opinion, this statement also applies to taxpayers who are not small businesses as they are largely subject to the same internal review processes. Further, as identified by the IGTO, objections may add an unnecessary delay for disputes with precedential value or concerning the ATO's view on the application of the law.[48] Objections in these instances are unlikely to result in a different outcome to the initial decision as ATO processes will likely result in the ATO decision maker applying the Commissioner's existing views as applied in determining the original decision.[49]

In our opinion, the framework for resolving cases with precedential value should be re-visited. These cases can take lengthy periods of time to resolve and can potentially adversely impact the lives of large sectors of society. This is exacerbated when time is of the essence. Accordingly, we are of the view that consideration should be given to allowing for the expedient resolution of matters with important precedential value. The IGTO has noted the public benefits and cost savings, to both taxpayers and the ATO, of an expedited resolution process in this regard.[50]

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47 ASBEFEO, '*ATO practices regarding small businesses*'.

48 IGTO, '*A report on aspects of the ATO's administration of JobKeeper boosting cash flow payments for new businesses*', (2020), page 48; IGTO, '*Review into the management of tax disputes*', (2015), pages 47-48 and 50-52.

49 IGTO, '*A report on aspects of the ATO's administration of JobKeeper boosting cash flow payments for new businesses*', (2020), pages 46-47; ASBFEO, '*ATO practices regarding small businesses*'.

50 Inspector-General of Taxation and Taxation Ombudsman, '*A report on aspects of the ATO's administration of JobKeeper boosting cash flow payments for new businesses*', (2020), page 48.

We consider that the legislative framework for the new review body should provide a right for taxpayers to elect a court or tribunal appeal prior to the current objections process for matters of precedential value or in instances where the ATO position is not going to change due to its interpretation of the law as it stands. This would allow for important matters to be resolved quickly and at a lower cost. To ensure that the appropriate cases are identified for expedited resolution, a separate application process would be required.

It may be beneficial to have a separate panel consisting of representatives from the ATO, new review body, professional associations and experts in the field to determine whether a case demonstrates the appropriate level of precedential value for progression in this way. This would not replace the current dispute resolution process. Rather, applications reviewed under this process will provide assurance over the level of importance or urgency to justify why the matter should not go through the usual pathways, and why it is of public interest to expedite it.

The ATO should also be proactively engaged by the new review body to identify new law and cases with important precedential value at an earlier stage in the dispute resolution process. Among other benefits, this engagement will provide the new review body time to prepare and consider the relevant law before such a matter is heard, potentially shortening the time at hearing.

Information provisions and protection

40. What documents should respondents be required to provide the new body in relation to the original decision, and in what timeframes? Should these provisions be standardised across all matters?

As noted in our response to Question 30 above, disputes with the ATO can often involve a significant amount of supporting materials. We consider that the ATO should be required to provide these materials to the new review body as a matter of course. We consider that this information should be able to be provided within a reasonable timeframe as it should be readily accessible on the ATO's internal systems.

This approach will allow the new review body to efficiently assess the applicant's claim and the merits of the ATO's decision in a preliminary hearing. Requiring the ATO to provide this information up front may expedite the hearing process as taxpayers would not be required to spend time and resources gathering and providing information they have previously furnished. It will also allow members and case conferencing registrars to identify the source of the disagreement, better assessing the options available for ADR.

This approach may be unique to the Taxation and SBT Divisions, depending on the administrative approach and legislative requirements of other government agencies. Different approaches may be required for other divisions, based on the relevant administrative requirements and practices in those areas.

41. What powers should the new body have to compel departments, agencies, applicants, or third parties to provide documents, information or evidence? Should these powers be available across all matters?

We consider that the new review body should have the necessary powers to compel the ATO to provide the documents noted in our response to Question 40 above. However, consideration should be given to circumstances where it may not be appropriate to compel the production of the information. These include information:

- received by the ATO subject to a confidentiality agreement;
- disclosing the affairs of another taxpayer who is not party to the matter;
- that is subject to legal professional privilege; and
- that is not relevant to the matter being raised (for example, information relating to prior, unrelated audit activity).

If the new review body requires the ATO to produce this evidence, safeguards need to built-in to ensure that the fundamental principles of taxpayer confidentiality and general confidentiality are preserved. Further, members need the appropriate experience to be able to identify and analyse the relevant information. Compelling the production of immaterial information is likely to result in delays and, potentially, the consideration of inappropriate evidence in the decision-making process.

42. What documents and information should the Tribunal share or not share with applicants?

Generally, we consider that information gathered by the ATO should be shared with the taxpayer. Taxpayers should be able to access their own information in an efficient manner and without resorting to a complex or time consuming process, such as a freedom of information (**FOI**) request.

43. By what criteria should the new body allow private hearings or make non-disclosure/non-publication orders?

Certain tax cases are able to be heard in private, or not be required to be disclosed.[51] We consider that the legislative provisions enabling this should be carried over to the legislation for the new review body for the Taxation and SBT Divisions.[52] Although the public hearing of cases is important for the public's confidence in the decision of a tribunal, the specifics of some cases should not be released, especially if such disclosure would negatively and disproportionately impact taxpayers.

Further, we consider that the current criteria contained in subsection 35(5) of the AAT Act, which sets out the factors a member must consider when allowing a private hearing or making a determination of non-disclosure, should be carried over into the new legislation. In our opinion, these factors are appropriate in achieving the right balance between the need for privacy and the importance of public hearings.

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[51] Issues Paper, page 69.

[52] AAT Act, subsections 35(2) and (3).

Resolving a matter

45. What types of dispute resolution should be available in the new body?

The AAT currently offers ADR processes such as case conferences, conciliation, mediation, case appraisal and neutral evaluation to help with the 'fair, just, economical informal and quick' resolution of cases.[53] Following an application being lodged with the AAT, Registry staff refer applications to case conferencing where the member or conference registrar can subsequently refer the parties to ADR.[54]

A publicly available guide describes the factors that members should consider when deciding on the appropriate ADR mechanism, including considering the complexity and length of the issue in dispute. There is also further detailed information about each type of ADR that can be accessed by applicants.[55]

The Tax Institute strongly supports the use of ADR to promote the early resolution of tax disputes and is of the view that it is highly effective when utilised appropriately. From 1 July 2021 to 30 June 2022, 47% of small business decisions and 41% of taxation decisions were resolved through ADR, compared to only 10% and 21% of cases, respectively, being resolved by a decision of the AAT.[56] We consider that Division 3 of Part IV of the AAT Act and the current protocols employed by the AAT should be included in the legislation for the new review body.

46. Should dispute resolution be available across all types of matters? Are there matters where it may be less appropriate? Should some methods of dispute resolution only be made available for particular types of matters?

We consider that ADR should be considered across all taxation and superannuation matters. Whether an ADR method is appropriate will depend on a range of factors including the facts of the case, positions of the parties and prior experiences in the taxpayer's dealings with the ATO. Determination of the appropriate ADR method, or if ADR should not be pursued, needs to be made on a case-by-case basis.

49. What powers should the new body have to manage applications that are frivolous or vexatious?

It is important to address frivolous or vexatious cases, or cases with no reasonable prospects of success, in an efficient yet fair manner. We consider that cases which could potentially fall into these categories should be identified during the case triage process and assessed separately. If the preliminary hearing determines that the case falls into one of these categories, the new review body should be given the power to take one of the following actions, as appropriate:

- dismiss the case with a short reason for decision, ensuring that the taxpayer understands why the case has been dismissed without proceeding to a hearing;

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[53] Ibid, section 2A and subsection 3(1).

[54] Administrative Appeals Tribunal, 'Alternative Dispute Resolution (ADR) Guidelines' (June 2006).

[55] Administrative Appeals Tribunal, 'Taxation and Commercial Alternative Dispute Resolution (ADR)' (Webpage, 2023).

[56] Administrative Appeals Tribunal, Annual Report 2021–22, page 67.

- provide the taxpayer with more time to obtain any necessary information and reasons as to why this is required; or
- encourage the taxpayer to withdraw their application to preserve their right to lodge if the circumstances change.

The bar for determining whether a case is frivolous or vexatious, or has no reasonable prospects, should be set quite high. We consider it to be an inequitable outcome if a taxpayer's case is incorrectly dismissed before it is heard.

50. In what circumstances should the new body be able to dispense with a hearing?

We consider that the new review body should be able to dispense with a hearing where both parties agree to the matter being determined 'on the papers'. This will be particularly appropriate in simple tax cases in where:

- there is no (or little) factual dispute;
- there is no (or undisputed) witness evidence; and
- written submissions are sufficient to provide the parties' views.

51. How should hearings be conducted to ensure that they are accessible, informal, economical, proportionate, just and quick?

The actual review process in the Taxation and SBT Divisions of the AAT has been recognised as being 'functionally the same as litigation conducted in the Federal Court'.[57] Matters are highly complex, adversarial, have large volumes of documentary evidence, and often result in multi-day hearings by well-represented parties.[58] This is partly due to the nature of the cases heard, and partly due to the processes of the AAT.

The Tax Institute strongly supports processes that ensure that cases heard before the new review body are accessible, informal, economical, proportionate, just and quick. Some suggestions include:

- not requiring taxpayers or the ATO to produce and submit evidence that is not required by the taxation legislation (for example, procuring expert opinions when there is no legislative requirements to seek a specialist opinion);
- not requiring taxpayers or the ATO to submit evidence in a format different to what is set out in the taxation legislation (for example, requiring taxpayers to provide written statements instead of oral submissions);
- ensuring members have sufficient experience in the relevant area of taxation or superannuation;
- enabling members to take a more inquisitorial approach to cases, especially if unrepresented taxpayers require further guidance or directions to ensure they can focus on the key issues and provide the pertinent facts;

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[57] Ibid, page 65.

[58] Ibid.

- undertaking the information gathering process in a timely and efficient manner (for example, requiring the ATO to produce information related to the case that it already holds on its systems);
- ensuring that the appropriate ADR avenues are considered in all cases;
- ensuring that the member's remuneration structure gives appropriate weighting to all aspects of their role;
- allowing flexibility in the use of technology to ensure hearings are conducted on time;
- investing in the new review body's IT systems to enable the fast transmission of the voluminous number of documents through a secure channel; and
- requiring the re-established ARC to regularly review processes and make binding recommendations to ensure the objectives are met.

Decisions and appeals

52. What should be the requirements and timeframes for issuing oral and written reasons for decision in the new body?

Written decisions

We consider that decisions in the Taxation and SBT Divisions of the new review body should be required to be made in writing. Written decisions play an important role in Australia's taxation and superannuation systems including:

- developing the case law;
- providing a form of normative check on decision making by the ATO by encouraging consistent decision-making;
- recording the facts of a case, which can be relied up on the event of a further appeal; and
- providing detailed case studies to guide administrative decision-making and policy development.

If there are concerns of a taxpayer's access to justice due to the written decisions,[59] we consider that members should also provide oral decision to those taxpayers. It is particularly important for taxpayers, especially those who are unrepresented, to understand the reasons why an appeal was disallowed.

Resourcing for decision writing

The writing of taxation decisions can be time consuming and arduous given the complexity and volumes of information before the members. It is important that the member's remuneration structure acknowledges this burden and appropriately compensates them for the writing portion of the decision. This may be achieved in a number of ways, for example, by making part of the member's remuneration reflective of the average number of hours taken to write a decision. Alternatively, member's salaries may be paid as a rate for the hours taken to write a decision.

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[59] Issues Paper, page 78.

Further, it is important to ensure that members are provided with the appropriate accommodation and resources to allow them to effectively write their decisions. As noted in the Callanan Report:[60]

> 'Permanent Members do need appropriate accommodation because the writing of reasoned determinations requires absence of distraction and reasonable writing conditions.'

Finally, members should be provided adequate support resources, such as research and assistant writing staff, to make the decision writing process more manageable for more complex matters.

Timeframes for decisions

The Tax Institute considers that if service standards are implemented, they should appropriately balance the need for speedy resolution with the complexity of the matters before the new review body. We understand that under the current formula or approach used, members are effectively given eight hours or one working day to write each decision. As noted above, tax cases before the AAT tend to be complex or cases where the parties have entrenched positions. We note that given the complexity, the ATO and well-resourced taxpayers will generally have invested significant time researching and analysing their positions. It is rarely feasible or realistic for the decisions for these cases to be written within a day. Further, not accommodating for complexity may deter highly qualified candidates from applying to be members.

While allowing for complexity and other extenuating factors, timeframes could be set with reference to the end of the hearing:

- simple taxation matters should be decided within 2 months of the end of the hearing;
- matters of medium complexity should be decided within 4 months of the end of the hearing; and
- matters of high complexity should be decided within 6 months of the end of the hearing.

Matters that are not decided within this set timeframe should be subject to review. We consider that the goal should be to identify the reasons why the delay occurred, allowing solutions to be designed and implemented to prevent them from re-occurring.

53. How can the new body achieve quality, consistency, accessibility and simplicity in explaining the reasons for a decision?

We consider that taxation decisions by the new review body should be written in a standard form that sets out the relevant factors the member will need to consider in the making of their decision. For example, the template for decisions could be contain the following categories:

- parties and other formalities;
- issue(s) decided;
- summary of decision;
- facts of the case;

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[60] Callinan Report, page 131.

- relevant legislation considered;
- taxpayer's arguments;
- Commissioner's arguments; and
- reasons for decision.

Setting the format of how the decision should be written may assist in streamlining the writing process and ensure that members focus on only the relevant aspects of the decision. It may also be beneficial to require that members write their decisions in plain English, and not import any perceived standards set by a Court in their decision writing. This could remove an aspect of formality and make the decisions more accessible to taxpayers.

The template described above is similar to the template used in the reasons for decisions provided by the ATO. Requiring the new review body to use a similar form may support the normative effect of decisions made. ATO officers determining audits or objections with similar fact patterns will be able to better understand how the new review body approaches similar issues and law, what the material facts are, and how the correct conclusions should be reached.

54. Are there ways to streamline appeal processes and pathways to reduce the overall duration of a matter?

Please refer to our response to Question 51 above.

56. When and how should the new body be able to refer a question of law to the Federal Court of Australia? Are there other ways for the new body to seek clarity on unsettled matters (such as guidance decisions or decisions by an appeal panel within the new body) and how should these be used?

The Tax Institute supports the ability of the new review body to refer questions of law to the Federal Court. This will be most appropriate in complex cases, cases with unique facts, or in circumstances where there is no precedent. Precedential matters discussed in our response to Question 39 above may be appropriate for such escalation.

Alternatively, it may be possible to create a panel within the new review body which comprises of judges of the Federal Court and other specialists to provide preliminary views on the questions of law. While this poses an additional administrative layer in one respect, it may assist to resolve or redirect certain issues without necessarily incurring the costs and time of escalation to the Federal Court. Although this may not be appropriate for urgent or precedential matters, it can provide guidance in instances where the question of law is difficult to determine given the existing jurisprudence. Consideration should also be given to whether referral to former members of the judiciary with experience in the relevant area would be appropriate in these circumstances.

57. What processes should be in place to ensure the new body refers questions of law to the Federal Court of Australia in appropriate circumstances?

We consider that members should be provided with guidelines on the circumstances in which it is appropriate to refer a question of law to the Federal Court. A panel may be required to consider the request for referral to the Federal Court to ensure that only appropriate questions are referred. Alternatively, members may need to seek approval from the relevant head of the Taxation or SBT Division prior to making the referral. Ultimately, we consider that the member hearing the case in first instance should have some discretion in this regard after considering a range of factors, including requests by either party.

58. Should a second, more formal tier of review be available in the new body, either for specific types of matter or across all matters? For example, should there be an appeals mechanism within the new body for complex matters or matters raising systemic issues?

We consider that a second review tier should remain in the new review body for the Taxation and SBT Divisions. Given the complexity of some taxation and superannuation matters, having a second review tier can play an important role in confirming whether the right outcome has been made. The second review tier should also strive to ensure the new review body is providing accessible, quick and informal appeal rights for taxpayers. A second review tier should not be seen as an exclusive or limited form of appeal for taxation decisions.

However, this does not mean the second tier should be required to review all matters. For example, if, after a preliminary hearing, the second tier determines that the appeal is only regarding a question of fact which has been determined correctly in the first instance, it could be given the power to provide a brief summary instead of conducting a full review.

The Tax Institute also supports a mechanism that allows complex matters, or matters discussed in our response to Question 39 above, to be referred to the second tier in the first instance. This should allow for a more detailed consideration of matters that need a faster resolution or could otherwise be held up in the first review.

Supporting parties with their matter

60. Should there be requirements or a code of conduct for representatives to ensure representatives act in the best interests of a party? How should this be enforced?

We support the inclusion of a legislated Code of Conduct in the new review body for all participants. This will set the required expectations on how people are expected to engage (for example, to act respectfully and courteously towards all parties, to act in good faith etc.) during the hearing and in their other interactions relating to their matter. Penalties for breaches of the Code of Conduct should be proportionate and measured.

We note that legal representatives and registered tax professionals are bound by their respective Codes of Conduct that dictate how they are expected to act when representing a client in the course of their professions. Any Code of Conduct imposed by the new review body should be referrable to these Codes. We also note that the ATO is obligated to act as a Model Litigant during court and tribunal proceedings.[61] Concerns of any of these parties not acting in accordance with the obligations should be raised with the respective oversight bodies.

61. What services would assist parties to fully participate in processes under the new body and improve the user experience?

The Issues Paper contains a range of support services that can be provided to taxpayers to assist them to access the new review body.[62] The Tax Institute supports the provision of these services and we consider that they will support the new review body being more accessible.

62. How can the new body (or ancillary services) enhance access for vulnerable applicants?

We consider that vulnerable applicants need to be appropriately identified so targeted support can be provided. Of particular concern are those applicants who are vulnerable due to personal circumstances, such as mental health concerns, substance abuse, and family and domestic violence. Once a vulnerable applicant is identified, we consider that ADR approaches should be prioritised as a means to resolve the manner.

It may be beneficial for the new review body to grant the ATO a direction to re-visit an earlier decision, potentially allowing for a more appropriate administrative solution under the Commissioner's broad general powers of administration to be implemented.

If a matter with an identified vulnerable applicant progresses to a hearing, we recommend that the member overseeing the hearing should ensure that the applicant has the opportunity to be represented. The ATO should also be required to ensure they support the vulnerable applicant. For example, the ATO should be required to ensure they provide all evidence on their file that can assist the taxpayer's case.

64. Should the legislation place an obligation on the new body to promote accessibility for all users?

The Tax Institute supports a legislative obligation for the new review body to promote accessibility for all users as a core obligation.

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61 Legal Services Directions 2017 (cth).

62 Issues Paper, pages 86 to 87.

Other matters

67. Do you have any other suggestions for the design and function of a new administrative review body?

Adequate funding and member remuneration

The Tax Institute strongly supports increased funding of the new review body. The funding should cover all aspects of the new review body, including the remuneration of the members, support staff, the re-established ARC, IT systems and other infrastructure. Without sufficient funding, the new review body will not be able to attract and retain the appropriate talent or provide the services needed to ensure it meets it objectives.

Transparent case triage process

The AAT uses case triaging processes to achieve a number of different outcomes. These include identifying cases for early intervention or ADR resolution,[63] managing caseloads, and identifying cases that do not require a hearing or are otherwise suitable for expedited decisions.[64] A special triaging process was also used to expedite AAT cases relating to COVID-19.[65] However, despite the wide use of case triaging, there is little available information about the triaging process, or the factors taken into consideration by the AAT's triaging team.

We consider that more information regarding the new review body's triaging process, and the factors that are considered, should be made publicly available. This will better allow applicants to ensure that they provide the relevant information to triaging officers, leading to a more efficient and effective process.

Greater transparency over the new review body's performance

The Tax Institute is of the view that steps should be taken to increase the transparency and accountability of matters before the new review body. Greater transparency of the new review body's performance should be made publicly available, including a greater sampling of statistics regarding case length beyond the metrics currently provided. Examples include statistics regarding the average wait until a case is heard, the average length of time between the hearing and the decision, and the average age of cases which have not yet been determined. This would enable the Division heads or practice group leads in the new review body to identify and address unreasonable delays or potential non-performance by members, instilling greater public confidence in the new body.

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63 Administrative Appeals Tribunal Annual Report 2020-21, page 102.

64 Ibid, page 67.

65 Practice Direction, 'COVID-19 Special Measures Practice Direction – Migration and Refugee Division' Clause 5. Available at https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/COVID-19-Special-Measures-Practice-Direction-Migration-and-Refugee-Division.pdf.

APPENDIX B

About The Tax Institute

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members, shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

Our membership of more than 11,000 includes tax professionals from commerce and industry, academia, government, and public practice throughout Australia. Our tax community reach extends to over 40,000 Australian business leaders, tax professionals, government employees and students through the provision of specialist, practical and accurate knowledge, and learning.

We are committed to propelling members onto the global stage, with over 7,000 of our members holding the Chartered Tax Adviser designation which represents the internationally recognised mark of expertise.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and administration. More than seven decades later, our values, friendships, and members' unselfish desire to learn from each other are central to our success.

Australia's tax system has evolved, and The Tax Institute has become increasingly respected, dynamic, and responsive, having contributed to shaping the changes that benefit our members and taxpayers today. We are known for our committed volunteers and the altruistic sharing of knowledge. Members are actively involved, ensuring that the technical products and services on offer meet the varied needs of Australia's tax professionals.