

# THE ADMINISTRATIVE CONTINUUM AND LIMITS ON MERITS REVIEW IN AUSTRALIA

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*This article examines the pivotal role of the newly established Administrative Review Tribunal (ART) within Australia's administrative continuum—a concept emphasising the interconnected processes of government decision-making and review. Replacing the Administrative Appeals Tribunal (AAT) under the Administrative Review Tribunal Act 2024 (Cth), the ART conducts de novo reviews to ensure fairness and accountability. By analysing key cases such as Re Edmund Kenneth Jebb v Repatriation Commission, Buntin v Minister for Immigration, Citizenship and Multicultural Affairs, and Minister for Immigration and Border Protection v Makasa, the article demonstrates how the ART's holistic approach emphasises procedural fairness and clear communication, safeguarding the integrity of the administrative process.*

*Operating independently yet adhering to the same legal constraints as primary decision-makers, the ART ensures consistency and legality in its decisions, reinforcing their finality and preventing arbitrary executive actions. The article argues that the ART is essential for maintaining a balanced and just administrative governance system in Australia. By upholding principles of fairness, transparency, and accountability, the ART not only corrects administrative errors but also strengthens public trust in the administrative law framework. Its integral position within the administrative continuum ensures that justice is served throughout the decision-making process, reflecting the evolving nature of administrative law and its commitment to procedural integrity.*

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## I INTRODUCTION

The administrative continuum in Australian public law is a foundational concept that illuminates the interconnected and layered processes through which government decisions are made, reviewed, and refined. At the heart of this continuum lies the Administrative Review Tribunal (ART), established through the *Administrative Review Tribunal Act 2024* (Cth), replacing the now-defunct Administrative Appeals Tribunal (AAT). The ART's role, much like its predecessor, extends beyond mere review; it forms a vital link within a continuous administrative framework that ensures fairness, procedural integrity, and accountability in governmental decision-making.

This article explores the ART's position within the administrative continuum, focusing on its holistic and *de novo* approach to reviewing decisions. Unlike isolated or piecemeal reconsiderations, the ART's function is entrenched within a larger system of governance, where it serves as a critical checkpoint.

Drawing on the precedent set by cases like *Re Edmund Kenneth Jebb v Repatriation Commission*,<sup>1</sup> this article argues that the ART's approach reflects an ongoing and dynamic engagement with the facts, laws, and changing circumstances relevant to an applicant's case, ensuring that justice is served throughout the entire decision-making period.

The administrative continuum is not constrained to cases of continuing issues; rather, it permeates all levels of government decision-making. Justice Logan's remarks from the AAT era capture this idea: that the ART and executive decision-makers are not separate entities but function within a shared continuum. This interrelatedness allows the ART to rectify procedural defects from earlier stages, ensuring that the administrative process operates within the bounds of procedural fairness, legality, and justice.

Through an examination of the ART's statutory objectives—ensuring fairness, enhancing transparency, and promoting public trust—this article illustrates how the ART functions as both a review body and an essential part of the broader machinery of government. It not only corrects administrative errors but also provides oversight and serves as a mechanism to check the exercise of executive power. By examining key

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<sup>1</sup> [1988] FCA 105.

cases, including *Buntin v Minister for Immigration, Citizenship and Multicultural Affairs*<sup>2</sup> and *Minister for Immigration and Border Protection v Makasa*,<sup>3</sup> the article emphasises the ART's role in maintaining consistency, accountability, and fairness in Australian administrative law.

Ultimately, this article seeks to underscore the ART's integral role within the administrative continuum by showing how its decisions contribute to maintaining a balanced and just system of administrative governance in Australia.

### *A Part A - Setting the Landscape*

In *Re Edmund Kenneth Jebb v Repatriation Commission*,<sup>4</sup> Justice Davies stated that the general approach of the AAT is to view the administrative decision-making process as a continuum.<sup>5</sup> The Tribunal considers its function to be an integral part of this continuum, rather than an isolated review.<sup>6</sup> This means that, when reconsidering a decision under review, the AAT (now ART) evaluates the applicant's entitlement from the date of the application or another appropriate starting date up to the date of the Tribunal's decision.<sup>7</sup> This approach ensures a comprehensive assessment of the applicant's circumstances<sup>8</sup> throughout the entire decision-making period.<sup>9</sup> This approach underscores the Tribunal's commitment to ensuring fairness<sup>10</sup> and comprehensiveness in its reconsideration of administrative decisions,<sup>11</sup> considering the entirety of the applicant's circumstances within the relevant timeframe.<sup>12</sup>

That is, the ART adopts a holistic approach towards administrative decision-making, viewing its function as an integral part of a continuous

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<sup>2</sup> [2023] FCA 1055.

<sup>3</sup> (2021) 270 CLR 430.

<sup>4</sup> [1988] FCA 105.

<sup>5</sup> *Ibid* [10].

<sup>6</sup> *Ibid*.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Kelekci v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1000 [24].

<sup>9</sup> *Ibid*.

<sup>10</sup> Justice Greg Garde AO RFD, 'Ensuring Procedural Fairness – Tribunals to Courts', COAT Victoria Chapter Conference, 22 April 2016, 9–10.

<sup>11</sup> Robert Orr and Robyn Briese, 'Don't Think Twice? Can Administrative Decision Makers Change Their Mind?' (2002) 35 *AIAL Forum* 11, 12.

<sup>12</sup> Matthew Groves, 'The Duty to Inquire in Tribunal Proceedings' (2011) 33 *Sydney Law Review* 177, 199.

process.<sup>13</sup> Rather than treating its role as isolated from the broader administrative context, the ART considers itself situated within the continuum of decision-making.<sup>14</sup>

Like the role of the ART itself, the continuum has remained an ethereal concept, with no clear bounds beyond those first developed in *Jebb*.<sup>15</sup> Even if one only views the ‘administrative decision-making continuum’ through the lens of *Jebb* that the continuum is relevant only where the issue before it is of a continuing nature, that understates its significance as a way of understanding the role of the ART.<sup>16</sup>

The ‘administrative decision-making continuum’ is not constrained to circumstances where the issue before the ART ‘is of a continuing nature’.<sup>17</sup> As a part of the administrative decision-making continuum, the ART lies within ‘an integrated, coherent system of administrative law’.<sup>18</sup> Any argument that the original decision-maker denied the applicant procedural fairness is misguided, as any such defect is rectified by the ART providing a fair hearing.<sup>19</sup>

Justice Logan, sitting as President of the now redundant AAT, noted that, ‘if each element of our system of government understands and respects the role of the other,’<sup>20</sup> the tension between them will be much lessened. The ART and the executive officer of the Commonwealth, who made the primary decision reviewed by the ART, are placed within an administrative

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<sup>13</sup> The Australian Law Reform Commission, ‘Managing Justice: A Review of the Federal Civil Justice System’ [1999] *ALRC* 89, 10.

<sup>14</sup> Bernard McCabe, ‘Automated decision-making in (good) government’ (2020) 100 *AIAL Forum* 106, 127.

<sup>15</sup> Matthew Paterson, ‘Adventures on the administrative decision-making continuum: Reframing the role of the Administrative Appeals Tribunal’ (2019) 96 *AIAL Forum* 65.

<sup>16</sup> (1988) 80 *ALR* 329; Dennis Pearce, *Administrative Appeals Tribunal*, (LexisNexis, 4th ed, 2015) 294.

<sup>17</sup> *Ibid*.

<sup>18</sup> Robin Creyke, ‘Administrative Justice — Towards Integrity in Government’ (2007) 31 *Melbourne University Law Review* 705, 730.

<sup>19</sup> Margaret Allars, ‘The Nature of Merits Review: A Bold Vision Realised in the Administrative Appeals Tribunal’ (2013) 41 *Federal Law Review* 197, 221.

<sup>20</sup> *Singh (Migration)* [2017] AATA 850 [17].

continuum as defined by the ART Act.<sup>21</sup> This continuum concludes with the ART, and the Federal Court is not a part of it.<sup>22</sup>

On 3 June 2024, the *Administrative Review Tribunal Act 2024* (Cth) became law in Australia. This legislation establishes the Administrative Review Tribunal, which is set to commence operations on 14 October 2024, replacing the AAT. Like the AAT, the executive administrative continuum will also end with the publication of decisions by the ART.<sup>23</sup>

In relation to the reviewable decision, the ART has several options for making a determination.<sup>24</sup> It may choose to affirm the reviewable decision, meaning it agrees with the original decision.<sup>25</sup> Alternatively, the Tribunal can vary the decision, making adjustments while keeping the original decision largely intact.<sup>26</sup> The Tribunal also has the authority to set aside the reviewable decision entirely.<sup>27</sup> In doing so, it can either make a new decision in substitution for the original or remit the matter back to the original decision-maker for reconsideration, along with any specific orders or recommendations from the Tribunal.<sup>28</sup>

These powers of the ART are analogous to those outlined in s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth).<sup>29</sup> Like the AAT,<sup>30</sup> the ART must also observe the rules of procedural fairness.<sup>31</sup> As discussed earlier, the scope of procedural fairness in a particular case is largely influenced by the broader context of administrative decision-making. This concept, known as the administrative continuum, plays a crucial role in shaping how procedural fairness is applied, ensuring that decisions are

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<sup>21</sup> *SDCV v Director-General of Security* [2022] HCA 32 [120].

<sup>22</sup> *Ibid.*

<sup>23</sup> For an excellent discussion on new Administrative Review Tribunal, see further The Hon Justice Emilios Kyrrou AO, 'The Art of Merits Review: Structural and Operational Flexibility' (2024) 31 *Australian Journal of Administrative Law* 5.

<sup>24</sup> *Administrative Review Tribunal Act 2024* (Cth), s 105.

<sup>25</sup> *Ibid* s 105(a).

<sup>26</sup> *Ibid* s 105(b).

<sup>27</sup> *Ibid* s 105(c).

<sup>28</sup> *Ibid.*

<sup>29</sup> The Hon Justice Lisa Hespe, 'Background and History of Administrative Review to Put the Future in the Context of the Past' (2024) 31 *Australian Journal of Administrative Law* 10.

<sup>30</sup> *Administrative Appeals Tribunal Act 1975* (Cth), s 39.

<sup>31</sup> See Part 3 of the *Administrative Review Tribunal Act 2024* (Cth).

made consistently and justly throughout the administrative process.<sup>32</sup>

The statutory objectives of the *Administrative Review Tribunal Act 2024* (Cth)<sup>33</sup> demonstrate that the Tribunal is part of the administrative continuum in Australia by embedding it within the broader framework of government decision-making. The Tribunal's focus on fairness, justice, accessibility, and responsiveness underscores its role in reviewing administrative decisions in a way that complements the functioning of the executive branch.

By resolving disputes efficiently, minimising formality and costs, and enhancing transparency, the Tribunal not only serves as a mechanism for correcting errors in administrative decision-making but also acts as a check on the exercise of governmental power. Its mandate to promote public trust and confidence reinforces its integral role in ensuring that administrative decisions are made and reviewed in line with principles of accountability and procedural fairness. This situates the Tribunal within the continuum of administrative law as a body designed to provide oversight, correct administrative errors, and ensure that government decision-making remains transparent, accountable, and just.

### *B Part B - Change of Position*

When an applicant lodges an appeal with the ART, they typically gain access to the original decision and the reasons provided by the initial decision-maker. This transparency forms a critical link in the administrative continuum, as it allows the applicant to understand the material findings of fact and legal rules that shaped the decision-making process.<sup>34</sup>

The original decision serves as a foundational document that ensures clarity and informs the applicant's engagement with the appeals process.<sup>35</sup> This transparency enhances procedural fairness—a cornerstone of

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<sup>32</sup> See further Jason Donnelly, 'Towards a Progressive Future: The Advent of the Administrative Review Tribunal and Its Transformative Impact on Administrative Law' (2024) 30 *Australian Journal of Administrative Law* 234.

<sup>33</sup> See s 9 of the *Administrative Review Tribunal Act 2024* (Cth).

<sup>34</sup> See s 25D of the *Acts Interpretation Act 1901* (Cth).

<sup>35</sup> = Justice Garry Downes AM, 'The State of Administrative Justice in Australia', Canadian Council of Administrative Tribunals Fourth International Conference, World Report #1, Vancouver, Canada, 7 May 2007, 3.

administrative law—by giving the applicant the tools to navigate the appeal and better respond to the decision.<sup>36</sup>

Within the administrative continuum, the ART has the authority to make new findings of fact. However, it remains essential to the fairness and integrity of the process that any changes in position be clearly communicated to the applicant before the final decision is made.<sup>37</sup> This approach ensures that applicants have an opportunity to respond, a key procedural safeguard that reflects the broader administrative system's commitment to just decision-making. Failure to adhere to this principle undermines the integrity of the administrative process<sup>38</sup> and may expose the decision to judicial review.<sup>39</sup>

The administrative continuum in Australia relies heavily on procedural fairness to maintain legitimacy and public trust in government decision-making. By actively involving applicants in the decision-making process and clearly communicating any changes in position, the ART upholds the values of transparency and due process.<sup>40</sup> This commitment to fairness prevents procedural errors and ensures that decisions are legitimate, thus reinforcing the Tribunal's role within the broader administrative system.

The case of *Buntin v Minister for Immigration, Citizenship and Multicultural Affairs*<sup>41</sup> highlights the importance of this principle within the administrative continuum. In this case, the applicant, a 33-year-old citizen of the United Kingdom, had his visa mandatorily cancelled due to a criminal record. The AAT affirmed the decision to cancel the visa. However, an issue of procedural fairness arose when the Minister's position

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<sup>36</sup> Danielle Moon and Carolyn Adams, 'Too Much of a Good Thing? Balancing Transparency and Government Effectiveness in FOI Public Interest Decision Making' (2015) 82 *AIAL Forum* 28.

<sup>37</sup> *Manebona v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCAFC 116.

<sup>38</sup> Bruce Dyer, 'Determining the Content of Procedural Fairness' (1993) 19(1) *Monash University Law Review* 165.

<sup>39</sup> *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398.

<sup>40</sup> *HKRC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1487 [92].

<sup>41</sup> [2023] FCA 1055. *Buntin* has been subsequently cited and considered in *Taylor and Minister for Immigration, Citizenship and Multicultural Affairs* [2024] AATA 205, *Muller and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] AATA 150, *Bainbridge and Minister for Immigration, Citizenship and Multicultural Affairs* [2023] AATA 4184.

shifted regarding the best interests of the applicant's children, without prior notice. This change was introduced unexpectedly during closing submissions, leaving the unrepresented applicant without an opportunity to respond.

Justice Meagher ruled that this failure to provide prior notice constituted a breach of procedural fairness, emphasising the necessity for clear communication of any changes in position within the Tribunal's decision-making process.<sup>42</sup> The Tribunal's role, while meant to remake decisions, must still adhere to procedural norms, ensuring that parties are not blindsided by new arguments that could impact the outcome of the case.

This case underscores the critical role of procedural fairness within the administrative continuum. It demonstrates that decision-makers must clearly communicate any significant changes in position to all parties, ensuring they have the opportunity to respond appropriately. The *Buntin* decision affirms that procedural fairness is not merely a formality but an essential aspect of the Tribunal's function, preserving the transparency, consistency, and fairness that the administrative system demands.<sup>43</sup>

In sum, the adherence to procedural fairness within the administrative continuum is vital to the legitimacy of administrative decisions. Failing to communicate changes in position jeopardises the integrity of the process and undermines public trust in the fairness of decision-making. Maintaining these principles ensures that the administrative continuum remains transparent, consistent, and just, reflecting the values of the broader administrative law framework in Australia.<sup>44</sup>

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<sup>42</sup> *Buntin v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1055 [83].

<sup>43</sup> These are qualities that underpin the rule of law doctrine in Australia: see Jason Donnelly, 'Utilisation of National Interest Criteria in the Migration Act 1958 (Cth) – A Threat to Rule of Law Values?' (2017) 7(1) *Victoria University Law and Justice Journal* 94.

<sup>44</sup> See s 9(e) of the *Administrative Review Tribunal Act 2024* (Cth).



*C Part C - Alterations in Statutory Objectives*

The case of *Minister for Immigration and Border Protection v Makasa*<sup>45</sup> serves as a critical illustration of the role of the ART within the administrative continuum in Australia. The case involved a Zambian citizen whose visa was cancelled twice under the character test provisions of the *Migration Act 1958* (Cth). After the AAT initially overturned the 2011 visa cancellation, the Minister later sought to re-exercise the cancellation power in 2018 based on the same facts.

The High Court's ruling clarified that, in the absence of new factual circumstances, the Minister could not revisit the cancellation decision once the AAT had already made a merits review on the same grounds.<sup>46</sup>

This case reinforces the notion that the AAT (and indeed the ART) operates as a vital checkpoint within the administrative continuum, tasked with standing 'in the shoes of the decision-maker' and conducting a fresh merits review.<sup>47</sup> The High Court emphasised that the AAT's role is not simply to replicate the decision-making process but to conduct a *de novo* hearing, where it reassesses the case independently and without deference to the initial decision. This ensures that the administrative process remains dynamic, capable of addressing errors or omissions in the original decision and allows for the reconsideration of facts and legal principles.

By ruling that the Minister could not re-exercise the same statutory power on identical facts, the High Court safeguarded the integrity of the AAT's function within the administrative continuum. Allowing the Minister to cancel the visa again based on the same facts would undermine the AAT's role as an independent arbiter and reduce the merits review process to a mere formality.<sup>48</sup> This would erode the Tribunal's authority and

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<sup>45</sup> [2021] HCA 1; (2021) 270 CLR 430.

<sup>46</sup> *Makasa* has been cited and considered in various decisions: see *MBJY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 11, *Crime and Corruption Commission v Carne* [2023] HCA 28, *Independent Liquor & Gaming Authority v 4 Boys (NSW) Pty Ltd* [2023] NSWCA 210, *Vunilagi v R* [2023] HCA 24, *ENT19 v Minister for Home Affairs* [2023] HCA 18.

<sup>47</sup> Joel Townsend, 'No Narrow or Pedantic Approach: The NDIS and AAT Jurisdiction' (2024) 34 *Public Law Review* 327.

<sup>48</sup> *Minister for Immigration and Border Protection v Makasa* [2021] HCA 1; (2021) 270 CLR 430 [50].

compromise the legitimacy of the administrative review process as a meaningful part of the continuum.<sup>49</sup>

The *Makasa* case exemplifies how the administrative continuum in Australia relies on a balance between decision-makers and review bodies, each with distinct yet interrelated roles. The Tribunal's function as an independent tribunal capable of providing thorough and equitable reviews reflects the evolving nature of administrative law,<sup>50</sup> where tribunals serve as essential safeguards against arbitrary or unfair decisions. By maintaining the finality and authority of the Tribunal's decisions, the High Court preserved the Tribunal's autonomy, ensuring that its decisions are respected within the broader administrative framework.

The Tribunal's role in providing a *de novo* hearing<sup>51</sup> also highlights its unique contribution to the administrative continuum, allowing for a flexible reassessment of cases that may introduce new evidence or legal perspectives. This flexibility ensures that the ART can dynamically respond to evolving legal standards and factual circumstances, maintaining fairness and transparency in administrative decision-making.<sup>52</sup>

The *Makasa* ruling underscores the critical importance of respecting the ART's role within Australia's administrative continuum. By reaffirming the Tribunal's independence and ensuring that its decisions are not easily undermined, the case highlights the need for a robust system of review and oversight that maintains public confidence in the integrity and fairness of administrative processes. This continuity and balance between decision-making and review bodies are essential to the health of Australia's administrative law system, ensuring that all parties receive thorough and just consideration.

The Tribunal's independence from the Executive Government is a critical component of the administrative continuum in Australia,<sup>53</sup> ensuring that the review process remains unbiased and impartial. This independence allows the Tribunal to exercise discretion free from governmental

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<sup>49</sup> Ibid.

<sup>50</sup> Simon Daley and Nick Gouliaditis, 'The Hardiman Principle' (2010) 59 *Admin Review* 60.

<sup>51</sup> Gerald Brennan, 'The Anatomy of an Administrative Decision' (1980) 9(1) *Sydney Law Review* 1, 4.

<sup>52</sup> For example, see Part 4 of the *Administrative Review Tribunal 2024* (Cth).

<sup>53</sup> Brennan, n 51 above, 9.

influence, safeguarding the fair consideration of applicants' interests without interference from bureaucratic agendas or political objectives.<sup>54</sup>

By positioning the Tribunal as a distinct entity, separate from the executive decision-making process, it reinforces the integrity of administrative law and provides a necessary check on executive power.<sup>55</sup>

While original decision-makers may be influenced by the practical or policy considerations tied to their functions, the ART's adherence to its statutory objectives within the administrative continuum ensures a principled approach to dispute resolution. This highlights the Tribunal's critical function as an impartial arbiter, providing a thorough and equitable review process that upholds the rule of law. By consistently applying the broader principles of fairness and justice,<sup>56</sup> the ART helps maintain public trust and confidence in administrative processes, contributing to the credibility and accountability of the broader legal system.

Moreover, the ART's adherence to its statutory objectives underscores its role as a key player in the administrative continuum. While original decision-makers may not be bound by the same objectives as the ART,<sup>57</sup> the Tribunal's strict commitment to these principles ensures that its reviews remain consistent, transparent, and impartial. This distinction further solidifies the ART's position as a quasi-judicial body, tasked with promoting administrative justice and holding decision-makers accountable. Its role extends beyond simply resolving disputes; it is a mechanism to ensure that executive decisions are subject to scrutiny and that justice and fairness are upheld throughout the administrative system.

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<sup>54</sup> Ibid.

<sup>55</sup> The conferral of the various duties, functions and powers on the Tribunal are subject to a duty implied from common law principles of interpretation to act reasonably: *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 [53]; *King Educational Service Pty Ltd v Chief Executive Officer of the Australian Skills Quality Authority (No 3)* [2021] FCA 692 [104].

<sup>56</sup> *Singh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 1349 [33].

<sup>57</sup> *Seymour v Federal Commissioner of Taxation* (2016) 69 AAR 441; [2016] AATA 397 [55]; *May v Military, Rehabilitation and Compensation Commission* [2011] AATA 697 [15].

In this way, the ART acts as an essential safeguard within the continuum, providing oversight of executive decision-making while protecting individuals' rights. Its unique position reinforces the fundamental principles of administrative law, ensuring that decisions are not only reviewed thoroughly but also rendered in a manner that reflects the broader objectives of fairness and justice across Australia's administrative landscape.

The case of *Lucas v Minister for Immigration, Citizenship and Multicultural Affairs*<sup>58</sup> serves as an illustrative example of the evolving and interconnected nature of the administrative continuum in Australia. In this case, the applicant, a New Zealand citizen, faced automatic visa cancellation under s 501(3A) of the *Migration Act 1958* (Cth) following his conviction for a serious robbery offence.

After his request for revocation was denied, the matter escalated to the AAT, which affirmed the cancellation, raising important questions about procedural fairness and the obligations of decision-makers within the continuum.

The administrative continuum, which encompasses multiple layers of decision-making, reveals how cases may traverse different forums—each with its own procedural standards. In *Lucas*, the conflicting evidence presented by the applicant between the criminal court and the Tribunal underscores the fluid nature of evidence evaluation within the continuum. In the criminal court, the applicant painted a favourable picture of his background, while before the Tribunal, he revealed a family history of gang affiliations. The AAT found that the applicant had attempted to mislead the sentencing court,<sup>59</sup> leading to critical findings regarding his credibility.<sup>60</sup>

Justice Meagher's decision in the Federal Court highlights how procedural fairness within the administrative continuum can be impacted by the interaction between different decision-making bodies. When the AAT's questioning prompted the applicant to affirm evidence previously given in court, conflicting with his statements to the Tribunal, the need for a specific warning about the privilege against self-incrimination arose.<sup>61</sup> This illustrates the interconnected nature of the continuum, where obligations

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<sup>58</sup> [2023] FCA 1653.

<sup>59</sup> *Ibid* [51].

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid*.

that may not arise in the initial stages of government decision-making must be adhered to in subsequent proceedings.

The *Lucas* case highlights the dynamic nature of decision-making within the Tribunal as part of the continuum, where oral advocacy and the presentation of evidence play a pivotal role. Unlike initial government decisions, which are often based solely on written submissions, the Tribunal's review process includes oral hearings where applicants can present new evidence and engage in advocacy. This procedural flexibility, combined with the Tribunal's statutory objectives of fairness and justice, distinguishes the Tribunal's role within the broader administrative framework.

Justice Meagher's ruling further underscores the need for precise and timely communication within the administrative continuum. The obligation to provide a specific warning about the privilege against self-incrimination, as discussed in *Promsopa*,<sup>62</sup> is a key procedural safeguard designed to protect the rights of individuals navigating the complexities of administrative decision-making. By ensuring that applicants are fully aware of their rights and the legal consequences of their actions, the administrative continuum upholds the principles of fairness, transparency, and accountability.

The *Lucas* case exemplifies how the administrative continuum in Australia operates as a multi-layered system, where decisions are shaped by the dynamic interplay of legal principles, procedural obligations, and the evolving presentation of evidence. The Tribunal's role within this continuum, characterised by its capacity for oral advocacy<sup>63</sup> and independent fact-finding, highlights the importance of maintaining procedural fairness and protecting individual rights as cases move through different stages of review. This interconnected process ensures that administrative decisions are subject to rigorous oversight and that justice is consistently applied across all levels of the administrative landscape.

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<sup>62</sup> *Promsopa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1480.

<sup>63</sup> Ruth Higgins SC, 'The Role of the Advocate in Administrative Decision-Making' (2024) 31 *Australian Journal of Administrative Law* 32.

The case of *HDYP v Minister for Immigration, Citizenship and Multicultural Affairs*<sup>64</sup> highlights the nuanced role of the Tribunal within the administrative continuum in Australia, particularly in the way procedural fairness is engaged in its decision-making process. The live presentation of evidence and the opportunity for parties to orally advocate their positions at the Tribunal create a more interactive and dynamic forum. This approach allows for a thorough exploration of facts, arguments, and legal principles, such as fairness and the privilege against self-incrimination, which are more actively scrutinised during oral hearings.

In contrast, administrative decisions made solely on written submissions lack this level of interaction, potentially diminishing the prominence of certain common law safeguards, like the right against self-incrimination. Without direct dialogue between the Tribunal and the parties, the application of these principles may be less robust, highlighting a key difference in how various administrative decision-making processes function within the continuum.

The *HDYP* case exemplifies the critical importance of procedural fairness within this administrative continuum. The applicant, subjected to extensive questioning about illicit drug use during cross-examination before the Tribunal, argued that he was not informed of his right to remain silent to avoid self-incrimination—a fundamental right. Justice Anderson ruled that the Tribunal's failure to advise the applicant of this right constituted a denial of procedural fairness and a jurisdictional error, resulting in practical injustice.

This decision underscores the essential role of procedural safeguards within the administrative continuum, reinforcing the importance of transparency and fairness. The Tribunal's questioning of the applicant and the subsequent failure to provide specific warnings about self-incrimination reflect how oral hearings, though interactive, demand careful adherence to procedural norms to protect parties' rights. The case serves as a reminder that administrative decision-making processes, particularly those involving unrepresented parties, must be vigilant in ensuring individuals are fully aware of their rights and potential legal implications.

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<sup>64</sup> *HDYP v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 103.

Moreover, the *HDYP* decision elaborates on the concept of materiality in procedural fairness errors within the continuum. The ruling emphasises that errors can constitute a denial of procedural fairness if they realistically preclude the possibility of a different outcome—a standard known as ‘reasonable conjecture’.<sup>65</sup> This flexible threshold ensures that the impact of errors is assessed based on their potential influence on the final decision, reinforcing the fairness of administrative processes across all levels of review.

The *HDYP* case also illustrates the dynamic nature of procedural fairness within the administrative continuum. Procedural fairness is not static; it adapts to the specific circumstances of each case. In cases like *HDYP*, where an unrepresented applicant may lack the legal knowledge to navigate complex proceedings, the Tribunal's responsibility to provide clear guidance becomes even more critical. This flexibility ensures that all parties receive a fair opportunity to present their case and that the principles of fairness are upheld throughout the continuum.

Ultimately, *HDYP* reinforces the judiciary's role in safeguarding procedural fairness within the broader framework of Australian administrative law. It demonstrates the interconnectedness of decision-making bodies, from the Tribunal to the courts, all working together to maintain a just and equitable administrative system. The judiciary's oversight ensures that the administrative continuum remains transparent, consistent, and free from prejudice, fostering public trust in the integrity of administrative institutions and the rule of law.

#### *D Part D - Constraints in the Administrative Continuum*

The case of *Frugtniet v Australian Securities and Investments Commission*<sup>66</sup> offers a compelling example of how the administrative continuum in Australia functions, particularly in the relationship between the Tribunal and primary decision-makers like the Australian Securities and Investments Commission (ASIC).<sup>67</sup>

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<sup>65</sup> *Deripaska v Minister for Foreign Affairs* [2024] FCA 62 [164]–[165].

<sup>66</sup> [2019] HCA 16; (2019) 266 CLR 250.

<sup>67</sup> *Frugtniet* has been cited in over 240 decisions. See, for example, *Manikantan v Secretary, Department of Employment and Workplace Relations* [2024] FCA 94, *Precious Family Day Care Pty Ltd v Secretary, Department of Education* [2024] FCA 20, *Sage v Commissioner of Taxation* [2023] FCA 1247.

In this case, ASIC imposed a banning order against Rudy Frugtniet, deeming him not a ‘fit and proper person’ to engage in credit activities under s 80 of the *National Consumer Credit Protection Act 2009* (Cth). Although ASIC’s decision took into account Frugtniet’s criminal history, including spent convictions, the High Court ultimately ruled that the Tribunal, which had reviewed and upheld ASIC’s decision, was subject to the same legal constraints as ASIC and could not consider the spent convictions.

This case reinforces the administrative continuum’s principle of consistency in decision-making. The Tribunal’s role within the continuum is not to act independently of the legislative framework that governs the original decision-maker.<sup>68</sup> As the High Court explained, the Tribunal ‘stands in the shoes’ of the primary decision-maker and must apply the same statutory rules and legal constraints that governed the original decision. This ensures that the administrative review process remains consistent, transparent, and legally bound across all levels of decision-making within the continuum.

The *Frugtniet* case also highlights the structured boundaries within which the Tribunal operates in the administrative continuum. The Tribunal’s review process is not a *de novo* reconsideration of all possible aspects of a case,<sup>69</sup> but a focused review constrained by the statutory questions that the primary decision-maker was required to address.<sup>70</sup> This aspect of the continuum underscores the importance of statutory interpretation in administrative law proceedings, as the Tribunal is bound by the same legislative limits as the original decision-maker.<sup>71</sup>

By ensuring that reviews remain within the statutory framework, the Tribunal upholds the rule of law and maintains consistency across administrative decision-making bodies.

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<sup>68</sup> *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 1354 [46].

<sup>69</sup> *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 at 271.

<sup>70</sup> *PDWL and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 485.

<sup>71</sup> *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16* [2019] FCA 2033.



Additionally, the High Court's ruling emphasised that the factors a primary decision-maker must or must not consider apply equally to the Tribunal. In *Frugtniet*, ASIC was prohibited from considering spent convictions under Part VIIC of the *Crimes Act 1914* (Cth), and, accordingly, the Tribunal was also barred from considering these factors. This reinforces the principle that administrative bodies, as part of the continuum, must adhere strictly to the statutory framework, ensuring that procedural and substantive legal norms are consistently applied at each stage of the administrative process.

For Australian administrative law, this case illustrates the critical role of legal consistency and statutory adherence within the administrative continuum. When preparing for Tribunal proceedings, legal practitioners must ensure that their arguments align with the legal boundaries governing the primary decision-maker, as any deviation may result in jurisdictional error.<sup>72</sup> This ensures that the Tribunal remains a key component of the administrative continuum, not as an independent body but as an integral link in ensuring that decisions are reviewed in accordance with the same legal standards that guide the original decision-making process.

*Frugtniet* exemplifies the vital function of the administrative continuum in maintaining consistency, transparency, and legal integrity in decision-making processes across Australia. By requiring that the Tribunal adheres to the same statutory constraints as primary decision-makers, the case underscores how the continuum ensures that administrative decisions are reviewed and remade within a consistent legal framework,<sup>73</sup> reinforcing public confidence in the fairness and predictability of the administrative system.

The theme of the administrative continuum in Australia reflects the complex, layered interaction between statutory decision-makers, tribunals, and courts, which together form the backbone of governance and procedural fairness. A notable exemplification of this theme in action is the case of *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL*.<sup>74</sup>

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<sup>72</sup> *Farcas and Minister for Immigration, Citizenship and Multicultural Affairs* [2024] AATA 111 [19]–[21].

<sup>73</sup> *FYBR v Minister for Home Affairs* [2019] FCAFC 185 [88].

<sup>74</sup> (2021) 284 FCR 1.

PDWL, an Afghan citizen, applied for a Safe Haven Enterprise Visa in 2016, only to have the visa refused by a delegate of the Minister in December 2019 under s 501 of the *Migration Act 1958* (Cth) on character grounds. This decision was subsequently set aside by the AAT, which ruled that s 501 did not apply to the refusal of protection visas.<sup>75</sup>

This case traverses key points in the administrative continuum. The Minister appealed the AAT's decision, which raised important questions about the Tribunal's interpretive power and its ability to bind primary decision-makers. The Full Federal Court, ultimately siding with the Minister, clarified that the AAT had erred in its legal interpretation, particularly concerning its understanding of the application of s 501 and its jurisdictional scope.

Importantly, the Court reiterated that the AAT's function is confined to reviewing decisions within its statutory authority under s 500(1)(b), emphasising that administrative bodies must operate strictly within their conferred powers.

This decision underscores the importance of administrative bodies adhering to statutory limits and procedural boundaries—key elements of the administrative continuum. It also highlights the layered checks and balances that ensure decisions are made within proper legal frameworks. The judicial intervention served as a corrective measure to ensure that the Tribunal, as part of this continuum, respects its statutory limits,<sup>76</sup> affirming the hierarchical nature of administrative decision-making in Australia.

Similarly, the High Court's ruling in *Minister for Immigration and Border Protection v Makasa*<sup>77</sup> further illustrates the functioning of the administrative continuum, particularly regarding the finality of executive decisions and the limitations on revisiting them.

The Court ruled that decisions made by delegates or the Tribunal not to

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<sup>75</sup> PDWL has been cited in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Antoon* [2023] FCA 717, *Inspector-General in Bankruptcy v Rutherford (Bankrupt)* [2023] FCAFC 99, *Morgan and Registrar of Aboriginal and Torres Strait Islander Corporations* [2022] AATA 2234 and *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL (costs)* [2021] FCAFC 75.

<sup>76</sup> *CEU22 v Minister for Home Affairs* [2024] FCAFC 11 [27].

<sup>77</sup> [2021] HCA 1; (2021) 270 CLR 430.

cancel a visa under s 501(2) are generally final,<sup>78</sup> unless new information emerges that fundamentally alters the factual basis of the case. This ruling reinforces the importance of procedural finality within the administrative system, preventing arbitrary or repetitive reconsideration of decisions. It underscores that the executive's powers must be exercised in a structured manner, constrained by statutory provisions, reinforcing the principles of consistency and integrity in decision-making.

The role of the Tribunal, as demonstrated in both *PDWL* and *Makasa*, is essential in the administrative decision-making continuum, providing a crucial review function that contributes to good governance in Australia. While the Minister retains oversight powers, the Tribunal serves as a vital intermediary, ensuring accountability and proper application of the law. This system promotes transparency and ensures that administrative decisions across various levels are made within the bounds of statutory authority, reflecting the core values of the administrative continuum in the Australian legal system.

## II CONCLUSION

The concept of the administrative continuum within Australian public law offers a nuanced understanding of the interplay between primary decision-makers, review tribunals, and the courts. This article has highlighted the critical role of the ART in this continuum, showcasing its pivotal function in ensuring that administrative decisions are revisited and scrutinised with fairness, transparency, and procedural integrity.

Through its *de novo* review process, the ART provides a fresh assessment of cases, reflecting its mandate to independently evaluate not only the facts but also the legal frameworks underpinning administrative decisions. This unique function of the ART ensures that procedural fairness is not just a theoretical principle, but an operational reality embedded within the continuum of decision-making.

Key cases, including *Buntin* and *Lucas*, illustrate the practical application of these principles. They reveal how the Tribunal must navigate the procedural and legal complexities of administrative law, ensuring that

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<sup>78</sup> Justice Michael Kirby, 'The AAT 20 Years Forward' (Speech delivered at AAT Back to the Future, Australian National University, 1–2 July 1996). See <[https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj\\_aat.htm](https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_aat.htm)>.

applicants receive just treatment, and that decision-makers adhere to the bounds of their statutory authority. These cases also underscore the dynamic nature of procedural fairness, demonstrating that decision-makers must clearly communicate significant changes in position, especially when these shifts have the potential to alter the outcome of a case. This communication fosters transparency and ensures that parties have a meaningful opportunity to respond, reinforcing the legitimacy of the administrative process. Furthermore, the article explored the statutory objectives of the *Administrative Review Tribunal Act 2024* (Cth), which frames the ART within the broader system of administrative law in Australia. The ART is positioned as an integral part of the administrative continuum, charged with the dual responsibility of correcting administrative errors and acting as a check on executive power. This structure is designed not only to provide oversight but also to uphold principles of accountability, accessibility, and procedural fairness, which are essential to maintaining public trust in the governance system.

Through cases such as *Makasa*, this article has demonstrated that the ART's decisions are crucial in maintaining the finality and consistency of administrative decision-making. The High Court's ruling in *Makasa* reaffirms that the Tribunal's role is not merely to review decisions but to serve as a final arbiter in administrative disputes, barring significant new facts. This principle prevents arbitrary re-exercise of executive power and strengthens the ART's position within the continuum, ensuring that its decisions carry authority and are not subject to unnecessary reconsideration.

In sum, the administrative continuum in Australia reflects a structured and layered process of decision-making, where bodies like the ART serve as essential mechanisms for ensuring fairness, justice, and accountability. The ART's unique position allows it to operate independently of the executive, providing a meaningful review process that ensures that administrative decisions are made within the bounds of the law. This interconnected system, grounded in the principles of procedural fairness, statutory compliance, and accountability, is vital to the health and integrity of Australia's administrative law framework.

As the ART begins its operations in October 2024, it will continue to play a central role in upholding these values and ensuring that the continuum of administrative decision-making remains just, transparent, and effective.