

MIGRATION REVIEW TRIBUNAL AND
REFUGEE REVIEW TRIBUNAL

SUBMISSION TO PRODUCTIVITY
COMMISSION'S ACCESS TO JUSTICE
ARRANGEMENTS DRAFT REPORT

INFORMATION REQUEST 10.1

Given the contextual differences of the specific matters that tribunals seek to resolve, the Commission seeks feedback on how and where alternative dispute resolution processes might be better employed in tribunal settings, including in what types of disputes, to assist in timely and appropriate resolution.

The MRT and RRT do not have a traditional dispute resolution process in the commonly understood adversarial sense as applies in the courts or tribunals such as the AAT. There is no representation or involvement from the Minister or the department in the review process other than the provision of relevant documents. There is no power for the Minister or the department to settle a matter before the tribunal.

A review in the MRT and RRT is a similar process to that of the primary decision maker. The member conducting the review first considers the documentary and other information provided by the applicant and the department, may seek additional information or instigate investigations, invites (unless a favourable decision can be made on the papers) the applicant to appear before the member to present arguments and to enable the member to take oral evidence from the applicant and witnesses, and then makes a decision.

This form of review enables the MRT-RRT to deal with a very large volume of cases at a much lower cost per case than for example the AAT. Further, the costs to the department are also much lower – there are no costs associated with providing representation before the MRT or RRT, and there is no requirement to provide relevant documents in a particular form or to provide a copy for the applicant – the department typically meets its obligation by providing an existing paper file to the MRT or RRT.

The nature of the dispute, the absence of a respondent in proceedings, and the extent that procedures are specified in legislation means there is very limited scope for the MRT or RRT to modify its procedures. It is likely modifications to the MRT, RRT or the role of the department may result in increased overall cost to Government.

The MRT and RRT primarily review decisions relating to the granting of visas requiring a determination as to whether criteria are or are not met. Unlike decisions on other matters, such as compensation or social security benefits, there is very limited capacity for a negotiated agreement, or a sliding scale of outcomes. Even matters such as the length of temporary visas and the conditions which apply to a visa are often mandatory, not discretionary.

Adding a conference or interview step to the process would add additional time and costs to the review process noting that there are statutory requirements that compel the MRT and the RRT to conduct a hearing with the applicant in all but a very limited number of cases. MRT hearings take less than an hour on average, with some categories of cases dealt with in hearing lists with up to 25 matters being dealt with in two hours. RRT hearings average

around two hours. Some more complex MRT and RRT cases may require more than one hearing, but few cases have hearings lasting more than four hours in total.

For those cases involving visas for a non-citizen already in Australia, the matter before the MRT or RRT is essentially about a non-citizen seeking a further temporary stay or to be granted permanent residence. It is a consideration that non-citizens will seek to use visa application, review and ministerial intervention processes to delay their departure or removal from Australia, and have no interest in settling a matter early. In these cases, pre-hearing conferencing aimed at resolving matters more quickly is unlikely to achieve such an outcome, and will likely add additional time and cost.

DRAFT RECOMMENDATION 10.1

Restrictions on the use of legal representation in tribunals should be more rigorously applied. Guidelines should be developed to ensure that their application is consistent. Tribunals should be required to report on the frequency with which parties are granted leave to have legal representation.

There is a right to representation in the MRT or RRT however it is limited. A representative (including a lawyer) must generally be a registered migration agent, and a representative can only address the MRT or RRT during a proceeding at the discretion of the member, and cannot examine or cross examine witnesses.

There are statutory restrictions on right of representation at an MRT or RRT hearing (ss.363 and 427 of the *Migration Act 1958*):

In the RRT, a person is not entitled to be represented when appearing before the Tribunal *to give evidence*. This has been interpreted as leaving a discretion for the member to permit representation, and a consideration being whether in the circumstances of a case procedural fairness requires it.

In the MRT, a person is not entitled to be represented at the hearing but is entitled to have another person present to assist him or her. In practice, it is not uncommon for an adviser to make submissions at MRT hearings, although proceedings are tightly controlled by the member.

The above restrictions do not apply to representation outside of the hearing. However, there are statutory restrictions on who can be a representative (See Part 3 of the *Migration Act 1958*). With very limited exceptions, a person giving ‘immigration assistance’ (i.e., assisting a person before the MRT or RRT) must be a registered migration agent. This person may or may not be a lawyer, but being a lawyer alone is not sufficient basis to provide ‘immigration assistance’. Migration agents must be registered and are subject to a code of conduct.

Given the threshold registration requirement, the tribunals do not make enquiries into whether a representative is legally qualified or not. Records are kept as to whether a representative is a registered migration agent.

Competent representation can assist in the timely and effective disposition of applications by narrowing issues and compiling submissions and evidence on relevant matters.

The MRT and RRT do not see any point or purpose in reporting on the frequency with which a representative is permitted to address the MRT or RRT in individual cases.

DRAFT RECOMMENDATION 10.2

Legal and other professional representatives should be required to have an understanding about the nature of tribunal processes and assist tribunals in achieving objectives of being fair, just, economical, informal and quick. Legislation should establish powers that enable tribunals to enforce this, including but not limited to tribunals being able to make costs orders against parties and their representatives that do not advance tribunal objectives.

Migration agents are subject to a code of conduct which in part touches on interactions with review authorities but duties to a review authority are limited and are subject to a client's instructions. Provisions in the code of conduct include the following:

2.18 A registered migration agent must act in a timely manner if the client has provided all the necessary information and documentation in time for statutory deadlines. For example, in most circumstances an application under the Migration Act or Migration Regulations must be submitted before a person's visa ceases to be in effect.

2.19 Subject to a client's instructions, a registered migration agent has a duty to provide sufficient relevant information to the Department or a review authority to allow a full assessment of all the facts against the relevant criteria. For example, a registered migration agent must avoid the submission of applications under the Migration Act or Migration Regulations in a form that does not fully reflect the circumstances of the individual and prejudices the prospect of approval.

The code of conduct could be strengthened to impose an obligation on agents to review authorities as well as the client.

In addition, the Principal Member of the MRT-RRT has issued directions under ss.353A and 420A of the *Migration Act* that are designed to assist the tribunals in meeting the objectives of being fair just, economical, informal and quick. However, the Act imposes no sanctions for non-compliance with such directions.

The MRT and RRT operate on the basis that the member has control of the proceedings. The MRT and RRT see limited practical value in costs orders. The tribunals can and do refer matters to the Office of the Migration Agents Registration Authority for investigation and possible sanction where it appears a migration agent has acted in breach of the code of conduct. Strengthening the migration agent code of conduct to include the provision of documents and submissions consistent with Principal Member Directions would assist in such referrals.

INFORMATION REQUEST 10.2

Due to the varying degrees to which tribunals have implemented information and communication technologies, the Commission seeks further information on the extent to which such technologies are used in tribunals, and on the experiences of tribunals that have implemented them.

The MRT and RRT make extensive use of technology which includes:

- holding hearings by video conference
- holding hearings by telephone
- online lodgement of applications for review with document upload and payment facility
- storage of case documents in electronic form within the case management system
- a hearing booking systems which enables members and case officers to identify and book available hearing rooms
- task and workflow management and extensive reporting capability available in the case management system
- digital audio recordings of hearings stored and playable from within the case management system (hearing transcripts are not prepared)
- transmission of documents by electronic means
- exchanging data between the MRT-RRT case management system and departmental systems to assist with the identification of clients and matters, and to ensure that the department has accurate information to inform correct visa status and avoiding incorrect compliance action including unlawful detention
- sophisticated templates which provide references and a summary to the legislation, case law and policy which applies to a particular case

The MRT and RRT have several projects in progress to increase the extent that documents are submitted, stored, used and transmitted electronically, both within the MRT and RRT and by applicants and the department. A limitation on the MRT and RRT at present is the capacity of the department to provide its documents, including relevant information stored across multiple systems, in an electronic format. The department's documents generally comprise the bulk of documents in a review and are typically provided to the MRT and RRT as a paper file.

Having the relevant documents from the department and documents from applicants in a form that is easily accessible to participants in the review process is very important to the efficiency of the review process, and the capacity of applicants and representatives to understand the issues and to participate effectively in the review. Having linkages or access to departmental systems is also important as current information, such as movements of an applicant in and out of Australia, movements of an applicant between detention centres or

change in status of a visa applicant or sponsor, may be relevant to the issues to be determined or the arrangements that the MRT or RRT may make for hearing a case or contacting an applicant. It is also a requirement that the MRT and RRT provide documents relied on in making a decision to the department at the conclusion of the review. Such documents may be relevant to the final grant of a visa, a visa holder's compliance with the conditions of a visa, or a future visa application or compliance action.

INFORMATION REQUEST 10.3

The Commission seeks views on the cost-effectiveness of consolidating all Commonwealth merits review bodies in one Administrative Review Tribunal along the lines recommended by the Administrative Review Council.

The Government announced in the Federal Budget 2014-15 that the MRT and RRT would be amalgamated with the Administrative Appeals Tribunal, the Social Security Appeals Tribunal and the Classification Review Board effective 1 July 2015. The amalgamation is expected to generate efficiencies and savings through shared financial, human resources, information technology and governance arrangements.

INFORMATION REQUEST 10.4

Where consolidation of tribunals is not feasible, the Commission seeks views on options for greater use of co-location, shared administration and shared outreach.

The Government announced in the Federal Budget 2014-15 that the MRT and RRT would be amalgamated with the Administrative Appeals Tribunal, the Social Security Appeals Tribunal and the Classification Review Board effective 1 July 2015.

INFORMATION REQUEST 10.5

The Commission seeks views on whether current appeal and review mechanisms within and between tribunals, and between tribunals and courts, are operating fairly, efficiently and effectively, and what opportunities exist for rationalisation or improvement.

Contrary to the information at page 311 of the Productivity Commission draft Report, there is no 'appeal' to the AAT from the MRT or the RRT. There is the capacity for the Principal Member of the MRT-RRT to refer a matter to a presidential bench of the AAT (which is then to include the Principal Member of the MRT or RRT) but this is an alternative method of disposing with the review application, rather than an appeal or further review mechanism. It would permit both the department and the applicant to be represented without the limitations that apply to matters before the MRT and RRT. It is not used in practice.

Decisions of the MRT and RRT are subject to judicial review under Parts 8 and 8A of the *Migration Act 1958*. There is no right of review under the ADJR Act 1977. Review is by way

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of judicial review, rather than appeal. Review may be sought in the Federal Circuit Court, or in the High Court's original jurisdiction, and time limits apply.

For 2012-13, 22.5% of RRT matters were subject to judicial review with 2.6% of all RRT decisions made that year overturned.

For 2012-13, 4.3% of MRT decisions were subject to judicial review with 0.4% of all MRT decisions made that year being overturned.

Judicial review of MRT and RRT decisions in particular have been subject to numerous and significant legislative reforms since 1993 aimed at limiting access to or the scope of judicial review with mixed success.

OBSERVATIONS ON AND CORRECTIONS TO THE DRAFT REPORT

Representation by departments and costs to the Government

The draft report notes at the foot of page 308 that there is no representation by departments before the SSAT and the VRB. The same is true of the MRT and the RRT. In assessing the costs to Government of tribunal review of government decisions, the costs that need to be considered are both the costs of the tribunals and the costs that are incurred (or not) by departments in relation to preparation, case management, inter party communications and appearances in relation to matters before a tribunal.

In relation to the assessment of costs to Government, we also note that one aspect of the MRT and RRT's operations is the extent of use of interpreters. Given the nature of the matters before the tribunals, the majority of applicants require an interpreter at hearing and also often interpreter assistance with counter and telephone enquiries. There are direct costs for the MRT and RRT in engaging interpreters, and any hearings or conversations where an interpreter is involved almost invariably take more member and staff time to cover the same ground.

Appeal from the MRT or RRT

The table at page 311 and commentary on page 312 set out the percentage of MRT and RRT decisions which are appealed to the AAT. There is no right of appeal to the AAT from the MRT or RRT. The percentages quoted refer to the rate of judicial review applications to the Federal Circuit Court or the High Court for the year 2011-12. Updated figures from 2012-13 are provided above.

The draft report discusses at page 324 internal appeals within a tribunal. There is no internal appeal within the MRT and RRT. A single level of external merits review delivered in a way and at a cost proportionate to the nature of a case seems to be adequate. There is a low overturn rate of MRT and RRT decisions by the courts, noting that the volume of cases that go to the courts from the RRT in particular may be driven by factors other than an assessment that the RRT had made an error.

ADR

The draft report notes at the foot of page 314 that there would appear to be scope for tribunals in other jurisdictions to follow the AAT in adopting ADR. As is noted elsewhere in the draft report and in our comments, the MRT and RRT (as with the SSAT and VRB) have informal or non-court like procedures. The relevant departments do not take part in proceedings and would need additional resources as well as legal authority to engage in dispute resolution activities.

Specialisation of tribunal members

The draft report discusses at page 510 the specialisation of members. The MRT and RRT has found that this is critical to the efficiency and quality of reviews in a high volume jurisdiction where there are high levels of unrepresented applicants, applicants with few English skills, and where the department is not represented. The member needs to be expert and proficient in the relevant law and policy in relation to particular visas, country information, financial statements or other evidentiary matters. It is the member who needs to identify and explain the issues. The MRT-RRT has therefore adopted a model of member specialisation where teams of members and staff deal with particular visa classes.

Cost per Case

The draft report notes on page 305 that the average cost/cost per case for the MRT-RRT was \$4900 in 2011-12. This appears to have been derived from total operating expenditure divided by the reviews completed. This is not unreasonable to use for general comparative purposes noting that it would generally not reflect the actual cost to Government of a tribunal's operations, including the cost of departmental representation in proceedings. It is noted that the MRT-RRT achieved considerable efficiencies in operations in 2012-13 and the comparable figure for that year was \$3,600 (for 19,347 MRT and RRT reviews and 702 independent protection assessments). The comparable figure for 2013-14 is on track to be lower again.