



## Migration Amendment (Statutory Agency) Bill 2007

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Law and Bills Digest Section

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## Migration Amendment (Statutory Agency) Bill 2007

**Date introduced:** 24 May 2007

**House:** House of Representatives

**Portfolio:** Immigration and Citizenship

**Commencement:** The day after Royal Assent.

### Purpose

The [Migration Amendment \(Statutory Agency\) Bill 2007](#) ('the Bill') inserts a new section into the *Migration Act 1958* ('the Migration Act') that will establish a single statutory agency for the purposes of the *Public Service Act 1999* ('the Public Service Act').

The proposed agency will consist of the Principal Member of the [Refugee Review Tribunal](#) ('RRT') and the registrars, deputy registrars and other officers of both the RRT and [Migration Review Tribunal](#) ('MRT') engaged under the Public Service Act.

The major change effected by the Bill is that under the current statutory arrangements, the Australian Public Service (APS) employees working at the tribunals are legally employed by the Secretary of the Department of Immigration and Citizenship (DIAC). If the Bill is passed, the APS staff will instead be employed by the Principal Member of the RRT. The Minister states that in reality 'for all practical purposes, tribunal staff are directed by the principal member, who is the executive officer of both of the tribunals, under powers delegated by the secretary'.<sup>1</sup>

The Principal Member of the RRT will be the agency head of the proposed statutory agency. The Minister stated:

This is an important provision because it ensures that, if in future two individuals are separately appointed as the Principal Member of the Refugee Review Tribunal and the Principal Member of the Migration Review Tribunal, there will still be certainty about who is the head of the single statutory agency established for the purposes of the Public Service Act.

As a statutory appointee, the Principal Member of the Migration Review Tribunal will not form part of the statutory agency.<sup>2</sup>

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## Background

Basis of policy commitment

### Uhrig Review

When introducing this Bill into Parliament, Immigration Minister Kevin Andrews [stated](#) it will implement ‘the last of a range of minor changes to the legislative framework of the Migration Review Tribunal and the Refugee Review Tribunal recommended in the Uhrig report, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, in 2003’ (the ‘[Uhrig Review](#)’).<sup>3</sup> He further states:

The purpose of the recommended changes is to strengthen the governance of the two tribunals and give legal effect to the practical reality that they have progressively been administered as one agency since 2001.<sup>4</sup>

The Uhrig review generally recommends two templates designed to ensure good governance exists: one where governance can best be provided by ‘executive management’, and the other where it can best be provided by a ‘board’.<sup>5</sup>

The Minister for Finance and Administration (Finance Minister) [announced](#) the Government’s response to the Uhrig Review on 12 August 2004. The latest update dated May 2007 is available [here](#). For a summary of the responses and debate that followed the release of the review, please refer to Dr. Richard Grant, ‘[The Uhrig Review and the future of statutory authorities](#)’, *Research Note*, no. 50, Parliamentary Library, 2004–05. More information about the Uhrig Review and the Commonwealth financial framework can be found in the ‘Background’ section of the ‘[Australian Centre for International Agricultural Research Amendment Bill 2007](#)’, *Bills Digest No. 160*, 2006-07, 23 May 2007 by Juli Tomaras.

The Minister for Immigration and Citizenship has provided the Migration Review Tribunal and the Refugee Review Tribunal with a [Statement of Expectations](#), which is stated to be in response to the Uhrig Review. The Principal Member of the Tribunals has responded with a [Statement of Intent](#), which includes key performance indicators for the Tribunals.

The operational relationship between the Tribunals and DIAC is contained in a [Memorandum of Understanding](#) signed on 25 November 2005 by the Principal Member Steve Karas and Andrew Metcalfe, the Secretary of DIAC. The Tribunals have also developed a new [Corporate Plan](#) (still in draft with comments invited); a [Service Charter](#); and a Member Code of Conduct.

The Uhrig Review does not generally deal with merits review tribunals:

The terms of reference called for the identification of governance principles and the development of templates the Government might apply to all statutory authorities and

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office holders and more broadly to a wide range of public sector bodies. As the templates developed by the review are based on established principles of governance, they lend themselves to wide applicability. However, notwithstanding the fact that the principles on which the templates are based are broadly applicable, some authorities involve considerations which take them outside the scope of matters examined by the review.

For example, although Commonwealth courts and tribunals are established by legislation and included in the AAO in a Minister's portfolio responsibilities, they are covered by the principle of judicial or quasi-judicial separation of powers and consequently require different governance arrangements to those applying to government generally. Similarly, the Auditor-General has statutory independence, reporting directly to the Parliament and consequently is not subject to direction by a Minister. Nevertheless, principles of governance are by their nature broadly applicable and will be relevant to the wider public sector.<sup>6</sup>

It is not clear therefore on what precise basis the Uhrig Review applies to the MRT/RRT, except in broad principle of improving accountability and governance. Unlike the AAT, the RRT Principal Member is neither a judicial appointment or drawn from judicial ranks, but the expectation is that the tribunals provide an independent merits review process as is reinforced by the language used in the current Annual Report. In that sense, Uhrig review discussions about the independence of statutory authorities such as the Reserve Bank of Australia or the Australian Electoral Commission may be relevant. The statutory requirement laid down by the Migration Act in existing subsection 353(1) is that the tribunals shall, in carrying out their functions under this Act, pursue the objective of providing a mechanism of review that is 'fair, just, economical, informal and quick'.

### The amalgamation of the Refugee Review Tribunal and Migration Review Tribunals

As explained in the [Migration Review Tribunal and Refugee Review Tribunal Annual Report 2005-06](#), the MRT and RRT are merits review bodies established under Parts 6 and 7 of the Migration Act and the jurisdiction, powers and statutory procedures of the tribunals are set out in the Act and the Migration Regulations 1994.

The main function of the RRT is to review decisions made by DIAC to refuse or cancel protections visas to non-citizens in Australia. The Tribunal also has the power, in respect of certain 'transitory persons', to conduct an assessment of whether a person is covered by the definition of a 'refugee' in Article 1A of the [1951 Refugee Convention](#) (as amended by the 1967 Protocol). The RRT was established in 1993 by the [Migration Reform Act 1992](#) (no Bills Digest available).

The MRT provides a final, independent, merits review of visa and visa-related decisions made by the Minister for Immigration and Citizenship or, more typically, by officers of DIAC, acting as delegates of the Minister. The MRT began operating on 1 June 1999.

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Decisions to deport a person, decisions refusing or cancelling visas on character grounds under section 501, and decisions cancelling business visas under section 134 are reviewable by the [Administrative Appeals Tribunal](#).

Mr Steve Karas AO is the Principal Member of the Tribunals. He was first appointed on 1 July 2001 and his current appointment is to 30 June 2007.

Sections 397 and 460 of the Migration Act provide that the Principal Member is ‘the executive officer’ of the Tribunals and is responsible for their overall operation and administration, including ‘monitoring the operations’ of the Tribunals ‘to ensure that those operations are as fair, just, economical, informal and quick as practicable’. Sections 353A and 420A provide that the Principal Member may give written directions as to the operation of the Tribunals and the conduct of reviews by the Tribunals.

The Members are appointed by the Governor-General for fixed terms on a full-time or part-time basis. The remuneration of Members is determined by the Remuneration Tribunal, and their terms and conditions of employment are determined by the Minister for Immigration and Citizenship.<sup>7</sup> A number of tribunal Members are employed on maximum term contracts, but are eligible for re-appointment by the Minister.

Staff are employed under the Public Service Act and are appointed as Tribunal officers under the Migration Act. Since May 2005, all staff have been cross-appointed to both the MRT and the RRT.<sup>8</sup>

The two tribunals have progressively amalgamated their administrative operations. Both tribunals are now co-located in Sydney and Melbourne and have common registries and legal, research, library, corporate and administrative facilities. The Principal Member, and other members are cross-appointed to both tribunals to allow them to hear cases in either tribunal. The APS staff who work at the tribunals are covered under the same certified agreement and provide their services to either tribunal, as required. These ‘efficiency and saving measures’<sup>9</sup> came about partly as a response to a lively debate in Australian administrative law about the proper role and reform of merits review tribunals, and are not linked to the Uhrig review process.<sup>10</sup>

Regulation 5 ‘Prescribed Agencies’, Schedule 1, Part 1, Item 128AB of the [Financial Management and Accountability Regulations 1997](#) (‘the FMA regulations’) establish the tribunals as a single prescribed agency for the purposes of section 5 of the *Financial Management and Accountability Act 1997* and made the Principal Member of the RRT the head of that agency. Note B of the regulations describes the RRT as a statutory agency for the purposes of the Public Service Act. This reform was achieved by the [Financial Management and Accountability Amendment Regulations 2006 \(No. 7\) \(SLI No 154 Of 2006\)](#) (‘FMA Regulations’) which took effect from 1 July 2006.

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The Minister therefore stated when introducing the Bill:

It is important to stress that this bill will not change the functions of the two tribunals under the Migration Act and will not diminish the role and responsibility of the position of Principal Member of the Migration Review Tribunal under that act.<sup>11</sup>

The Explanatory Memorandum and second reading speech are silent on why the current amendments to the Migration Act were not introduced prior to the 2006 change in the FMA regulations. The 2001 cumulative merger of the two tribunals began prior to the Uhrig process.

### Position of significant interest groups/press commentary

Some of the broader issues raised in this Bill relating to the accountability and governance of the tribunals were dealt with in some detail in the Senate References Committee on Legal and Constitutional Affairs report [Administration and operation of the Migration Act 1958](#) tabled on 2 March 2006, especially [Chapter 3 - Secondary assessment of visa applications](#). This report followed on issues about the RRT raised in [Chapter 5](#) of a previous report titled [A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes](#) tabled in June 2000.

Both reports summarise concerns raised about the RRT, particularly its independence. Under Recommendation 5.5 of the 2000 report, the Senate Committee recommends the Principal Member of the RRT should be a person with judicial experience. Notably the President of the AAT must be a judge of the Federal Court of Australia.

In the 2006 report, the Committee cites a concern raised by the International Commission of Jurists:

It is not satisfactory in terms of the independence of the review tribunals that the Minister who determines appointment and re-appointment of tribunal Members, is also the Minister responsible for administering DIMIA, whose decisions are under review by the tribunal. It is a classic example of a structure whereby the purportedly independent tribunals could be subjected to powerful political pressure from the Minister whose departmental delegates are being called into question in the review cases. It is reasonable to fear that review tribunal Members may feel indirect, if not direct, pressure to provide decisions that please the Minister, and which could not be seen to be contrary to government policy. ... Further, concerns about the independence of the review tribunals are reinforced when one notes that many tribunal Members are ex-DIMIA officers, promoted by the Minister through the ranks of the public service. Further, if a visa applicant takes the tribunal and the Minister to court over a tribunal decision, the tribunals engage the same lawyer as the Minister to represent both parties in the proceedings.<sup>12</sup>

In contrast, DIAC informed the Committee that RRT Members 'are statutory office holders independent of the Minister and the Department of Immigration and Multicultural

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Affairs. Whilst the Act permits the Minister and Principal Member of the Tribunals to provide general Directions to Members concerning their method of performance or exercise of general powers or functions under the Act, that power does not allow a member to be directed as to how to exercise his or her powers in specific cases'.<sup>13</sup>

Paragraphs 3.45 to 3.47 the 2006 report outlines concerns raised that the measures used to assess the performance of the Tribunals such as performance indicators compromised their independence and decision-making. At paragraph 3.102 the Committee states:

The fact remains that DIMIA's tribunals are considered to be partisan, to not adequately apply natural justice procedures, and therefore not able to consistently deliver just outcomes.<sup>14</sup>

The government response to the Senate References Committee on Legal and Constitutional Affairs 2006 report [Administration and operation of the Migration Act 1958](#) is not yet available.

The Auditor-General approved the conduct of a performance audit of the Tribunals as part of the 2004-05 [Australian National Audit Office](#) (ANAO) audit work program issued in July 2004. The ANAO audit, which commenced in April 2005, is focussed on productivity issues, quality of service and trends in review outcomes and the relationship between the Tribunals and DIAC. The ANAO's report is expected to be available in June 2007.

## Financial implications

The Explanatory Memorandum states that the Bill has no significant financial impact.

## Main provisions

Schedule 1—Amendments to the *Migration Act 1958*

**Item 1** inserts **new Part 7A** entitled 'Statutory agency for purposes of Public Service Act'.

**New section 473A** provides that for the purposes of the *Public Service Act 1999*:

- (a) the Principal Member of the Refugee Review Tribunal and the persons mentioned in subsections 407(4) and 472(4) together constitute a Statutory Agency; and
- (b) the Principal Member of the Refugee Review Tribunal is the Head of that Statutory Agency.

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## Concluding comments

This Bill amends the Migration Act to clarify the current operational arrangements of the MRT and RRT.

The link between the amendments proposed by this Bill and the Uhrig Review (see discussion under 'Background' in this Digest) is imprecise. The [Explanatory Memorandum](#) does not reference the Uhrig process at all.

Parliament may wish to consider any operational implications of this Bill with the benefit of the [ANAO audit](#) of the tribunals, expected to be available in June 2007.

## Endnotes

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1. *ibid*
2. *ibid*.
3. Kevin Andrews MP (Minister for Immigration and Citizenship), '[Migration Amendment \(Statutory Agency\) Bill 2007: Second Reading](#)', *Debates*, House of Representatives, 24 May 2007, p. 5.
4. Kevin Andrews, *op cit*.
5. Senator Nick Minchin, 'Australian Government Response to Uhrig Report', [media release](#), 12 August 2004.
6. J. A. Uhrig, AC, Review of the Corporate Governance of Statutory Authorities and Office Holders, Canberra, June 2003, p. 19.
7. MRT and RRT Annual Report 2005-6, p. 43.
8. MRT and RRT Annual Report 2005-6, p. 45.
9. Kevin Andrews, *op cit*.
10. See further Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995); and the Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, ALRC 89 (2000).
11. Kevin Andrews, *op cit*.
12. ICJ, Submission 115, p. 2. However, note the [Dissenting Report](#) by Government Senators.
13. DIMA, answers to questions on notice, 7 February 2006.
14. Senate References Committee on Legal and Constitutional Affairs report [Administration and operation of the Migration Act 1958](#) tabled 2 March 2006, at p. 114.

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