

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

Administrative Appeals Tribunal

Question B:

Senator Hon Kim Carr asked the following question on 1 December 2021:

With reference to the article in the Daily Telegraph on 30 October 2021 by Piers Akerman entitled “Penalising AAT members weakens out country’s borders” and the Tribunal’s responses to Question on Notice LCC-AE21-78 (Member benchmarks and performance):

1. In 2018/19, what was the average amount of time it took a member of the Migration and Refugee Division to finalise an application by decision in circumstances where the Tribunal member set aside a decision to cancel an applicant’s visa?
2. In 2018/19, what was the average amount of time it took a member of the Migration and Refugee Division to finalise an application by decision in circumstances where the Tribunal member affirmed a decision to cancel an applicant’s visa (i.e. rejected the application for review)?
3. In 2019/20, what was the average amount of time it took a member of the Migration and Refugee Division to finalise an application by decision in circumstances where the Tribunal member set aside a decision to cancel an applicant’s visa?
4. In 2019/20, what was the average amount of time it took a member of the Migration and Refugee Division to finalise an application by decision in circumstances where the Tribunal member affirmed a decision to cancel an applicant’s visa (i.e. rejected the application for review)?
5. In 2020/21, what was the average amount of time it took a member of the Migration and Refugee Division to finalise an application by decision in circumstances where the Tribunal member set aside a decision to cancel an applicant’s visa?
6. In 2020/21, what was the average amount of time it took a member of the Migration and Refugee Division to finalise an application by decision in circumstances where the Tribunal member affirmed a decision to cancel an applicant’s visa (i.e. rejected the application for review)?

In the event the Tribunal is unable to provide this information, please indicate to the Secretariat what information it would be possible for the Tribunal to give to the Committee in order to provide an indication of how long it typically takes a Tribunal member to decide to cancel an applicant’s visa (by affirming the decision) versus how long it typically takes a member to decide to set aside a decision to cancel an applicant’s visa.

The response to the Honourable Senator’s question is as follows:

Questions 1–6

Table 1 provides data relating to the average time in calendar days elapsed between constitution of a visa cancellation review to a member and finalisation of the review for the years 2018–19, 2019–20 and 2020–21.

Table 1. MRD - average calendar days from allocation of a case to a member to finalisation in reviews of cancellation decisions

Case category	Set Aside			Affirm		
	2018-19	2019-20	2020-21	2018-19	2019-20	2020-21
Bridging	59	67	116	73	76	54
Family	136	215	590	93	177	319
Sponsor cancellation/bar	125	96	142	63	118	162
Partner	130	98	105	131	168	158
Permanent business	140	187	135	100	227	146
Protection	151	232	212	159	251	258
Skilled	117	327	100	70	177	53
Student	79	88	154	81	82	142
Temporary work	103	157	103	91	115	127
Visitor	79	377	60	71	69	110
Other	104	119	134	152	101	110
<i>Migration (all)</i>	96	106	129	85	90	131
<i>Refugee</i>	151	232	212	159	251	258
Total	105	120	140	87	94	136

This data has a number of limitations as an indicator of the average amount of time taken by a member to finalise a review of a visa cancellation decisions. These limitations are outlined in Attachment A. Attachment A also contains additional information regarding the caseload allocation process in the MRD.

Member time required to finalise cases and outcomes in the Migration & Refugee Division

A decision by a Tribunal member to affirm a decision under review does not necessarily require more work effort than a decision to set aside the decision under review. For instance, there may be more work required to set aside certain decisions in the protection and partner caseloads than to affirm the decision.

Relevantly, the statutory requirement to provide proper reasons, setting out findings on any material questions of fact, evidence or any other material on which the findings of fact are based and reasons for the conclusions made by the member apply regardless of whether the decision is an affirm or set aside (refer sections 368(1) and 430 of the *Migration Act 1958*).

The Tribunal does not collect data or analyse information that would enable measurement of the amount of member time allocated to the finalisation of set aside and affirm decisions in individual cases.

For the purpose of caseload allocation, the Migration and Refugee Division (MRD) makes assessments about the time taken, or expected to be taken, in finalising cases by establishing weightings in each caseload. These weightings are established by reference to the overall characteristics of the caseload, trends ascertained as a result of monitoring member output against the benchmarks, and consultation with senior members and members. All cases are different although they may have common characteristics that enable analysis across the caseload.

Time elapsed between allocation of a case to a member and decision

The data provided in **Table 1** of the AAT's response shows for each case category, the average elapsed time in calendar days between constitution of a case to a member and finalisation of the case.

The case management system used in the MRD contains data relating to the constitution, or formal allocation, of cases to members. Data relating to the average time elapsed between constitution of a case to a member and finalisation of the case has been extracted and provided as indicated in Table 1. However, the AAT does not consider this data to be a useful indicator of the amount of member time required to finalise a case. There are several reasons for this, including the varying approaches taken by members in managing their work. Some members choose to be allocated larger numbers of cases on a less frequent basis, while other members prefer more frequent but smaller allocations of cases. Members employing these different approaches may spend a similar amount of time to finalise each individual case, but the constitution to decision timeframes may appear significantly different.

The time required to finalise a case is impacted by the quality of representation and any delay by applicants in providing timely relevant evidence and submissions in support of their review, although this does not necessarily add to the work required by the member to undertake the review. The duration of the period of time between constitution of a case to a member and finalisation of a case is also affected by factors such as the number of applicants, whether or not the grounds for cancellation and discretionary matters are complex or contested, statutory timeframes relating to requests for further information, applicant requests for further time to provide information, and members' skills and experience. Recently, the pandemic has limited the number of face-to-face hearings the AAT has been able to hold, which has created delays in cases where face-to-face hearings are required. This has extended the period between the allocation of certain cases to members and finalisation of those cases.

Case weightings in the Migration & Refugee Division

The MRD has developed case weightings expressed in ‘case days’ to indicate the usual amount of member time expected to finalise different categories of case. Decision targets in some form have a long history in the management of the large and complex migration and refugee merits review caseload. Member ‘productivity targets’ were in place in predecessor tribunals from about 1997–98.

Case weightings in the MRD are based on an assessment of what is considered a reasonable amount of time a particular case type should take to finalise, calculated by reference to the time that a productive member would be expected to take in completing all work associated with that type of case, including preparation, hearing and delivery of a decision together with reasons for that decision. This calculation is based on:

- the characteristics of a caseload and the cases within the caseload (which evolve over time)
- the type of tasks that generally would need to be undertaken
- trends ascertained as a result of monitoring member output against the benchmarks, and
- assessments made by Practice Leaders and consultation with members more generally through the Executive Members.

Case weightings have been developed for 6 categories of case based on the usual characteristics of those cases, ranging from 4 case days (Category A) for certain complex protection visa cases to 0.5 case days (Category F) for the majority of student visa refusal cases. Details of the weightings allocated to the range of case categories in the MRD are set out in **Table A** below. The outcome of a substantive decision, i.e. whether the decision under review is affirmed or set aside, has no bearing on the case weighting, or case days allocated to members, for individual cases.

In general, the time required to set aside or affirm decisions under review tends to vary across different case categories, reflecting the particular features of the caseload, including the applicable legislation. It is also relevant to note that time taken can vary according to the particular circumstances of the case. Factors such as the age of the case, the quality of representation and the information provided, and the relevance and availability of information from third parties may impact on the time taken to finalise a review. Cases remitted for reconsideration will generally take more time but this is recognised in the case weightings. Where the circumstances of a particular case are out of the ordinary, the member can seek a re-weighting of the case.

The decision-making process required for the review of cancellation decisions provides a useful illustration of why set aside decisions do not necessarily take less effort by members and may in fact require more effort. In cases of this kind, where the primary decision-maker was not satisfied about the identity of the applicant, the applicant may not have been able to get access to identity documents in support of his or her claim. As such the ground for the cancellation relates to one ground, namely failure to be satisfied about identity. If the applicant is given sufficient time to obtain any relevant identity documents from overseas, or if the member is able to obtain those documents as a result of the Tribunal’s independent enquiries with the Department, there may be significant elapsed time between the date of constitution and the finalisation of the case but the work effort involved in considering the evidence and finalising the written reasons may be relatively straightforward. In contrast, in cancellation cases that involve multiple applicants and complex findings of fact about the grounds of the cancellation and the discretionary considerations, the conduct of the review leading to the setting aside of a decision (including finalising written reasons explaining to the Department and the community why a different decision has been made) will be time-consuming. These cases generally take more time to finalise than more straightforward affirm decisions where the ground on which the discretion to cancel is based is not in contest and there are few discretionary matters to consider.

Review outcomes in the Migration & Refugee Division

The rates at which members affirm or set aside decisions under review, both overall and in different categories of case, have remained relatively stable over time. **Table B** below shows affirm and set aside rates for reviews of cancellation decisions managed in the MRD each year since amalgamation in 2015–16.

The data shows there is more variation in smaller case categories, including family and visitor visa cancellations, which is likely due to the smaller data set which results in the rate being influenced by small variations in decision-making. It is important to note that broad trends in outcomes can be affected by variations in the caseload composition and MRD caseload strategies targeting particular case cohorts. For example, during the pandemic, many reviews in the partner visa caseload were delayed due to the inability to conduct face-to-face hearings, which are generally required in these cases. To maintain services to users, the AAT identified and prioritised cases where the provision of additional information was likely to be able to show that visa requirements were met, and enable a decision under review to be set aside without the need for a hearing.

Table A. Case Weightings in the Migration & Refugee Division

(This document has been developed for internal use and contains terminology and abbreviations used internally in the AAT)

December 2021 updated

BM=Annual Benchmark

BM / Weighting	Case category
	Bridging
115 2 days	Cat C - Cancellation 116(1e/g)/109/137Q
230 1 day	Cat E - Refusals other cancellations PIC 4005 / PIC 4017
	Family
77 3 days	Cat B - FPO - all remits [other than sch. 3] Cancellation Permanent visa under s.116(1)(e)/s.116(1)(g)/s.109/s.137Q - FPO/Business/Skilled Cancellation Temporary 116(1e/g)/109/137Q - FPO
115 2 days	Cat C - FPO - Orphan relative refusal/Carer/Adoption Pic 4020 - FPO/Business/Skilled/Visitor
153 1.5 days	Cat D - Health - 4007 or 4006A - Adverse/No MOC opinion - FPO/Business/Skilled
230 1 day	Cat E - FPO - Remaining relative/resident return/parent/aged dependant/Child all other cancellations PIC 4005 / PIC 4017
460 0.5 day	Cat F - withdrawals post-constitution pre-hearing
	Nomination/Sponsor approval
58 4 days	Cat A - sponsorship bar/cancellations
153 1.5 days	Cat D - Business nominations [temporary and permanent]
230 1 day	Cat E - Business sponsorship / visa [temporary and permanent] PIC 4005 / PIC 4017
460 0.5 day	Cat F - withdrawals post-constitution pre-hearing
	Partner
77 3 days	Cat B - FPO - all remits [other than sch. 3] Cancellations - NZ Subclass 444 Cancellation Permanent visa under s.116(1)(e)/s.116(1)(g)/s.109/s.137Q - FPO/Business/Skilled Cancellation Temporary 116(1e/g)/109/137Q - FPO
115 2 days	Cat C - Partner [other than sponsorship withdrawn] FPO - all sch 3 remits Pic 4020 - FPO/Business/Skilled/Visitor
230 1 day	Cat E - FPO - Remaining relative/resident return/parent/aged dependant/Child PIC 4005 / PIC 4017
460 0.5 day	Cat F - FPO - Partner [sponsorship withdrawn] withdrawals post-constitution pre-hearing
	Permanent business
77 3 days	Cat B - Business refusals - permanent (talent/owner/established business/innovation & investment [890, 892, 845, 132 and 888]) and provisional (innovation & investment [188]) Cancellation Permanent visa under s.116(1)(e)/s.116(1)(g)/s.109/s.137Q - FPO/Business/Skilled
115 2 days	Cat C - PIC 4020 - FPO/Business/Skilled/Visitor
153 1.5 days	Cat D - Health - 4007 or 4006A - Adverse/No MOC opinion - FPO/Business/Skilled
230 1 day	Cat E - Business sponsorship / visa [temporary and permanent] all other cancellations PIC 4005 / PIC 4017
460 0.5 day	Cat F - withdrawals post-constitution pre-hearing
	Protection
58 4 days	Cat A - Protection - Bangladesh, Pakistan, Sri Lanka; cancellations inc. 155 resident return/SZGIZ and SZRNJ/reconstituted post-hearing/remittals (except DFQ17/BMY18 affected remittals) ¹
77 3 days	Cat B - Protection - complex countries
115 2 days	Cat C - Protection - standard countries
460 0.5 day	Cat F - withdrawals post-constitution pre-hearing
	Skill linked
77 3 days	Cat B - Cancellation Permanent visa under s.116(1)(e)/s.116(1)(g)/s.109/s.137Q - FPO/Business/Skilled
115 2 days	Cat C - Pic 4020 - FPO/Business/Skilled/Visitor Cancellation Temporary 116(1e/g)/109/137Q
153 1.5 days	Cat D - Health - 4007 or 4006A - Adverse/No MOC opinion - FPO/Business/Skilled Points test
230 1 day	Cat E - Skilled* - Study requirements/qualifications closely related all other cancellations PIC 4005 / PIC 4017
460 0.5 day	Cat F - MAHL / back-to-back (unless points/study/qualifications closely related) withdrawals post-constitution pre-hearing
	Student cancellation
115 2 days	Cat C - Cancellation Temporary under 116(1e/g)/109/137Q
230 1 day	Cat E - all other cancellations PIC 4005 / PIC 4017
460 0.5 day	Cat F - withdrawals post-constitution pre-hearing

	Student refusal
230 1 day	Cat E - PIC 4020 PIC 4005 / PIC 4017
BM / Weighting	Case category
460 0.5 day	Cat F - All other cases withdrawals post-constitution pre-hearing**
	Temporary work
115 2 days	Cat C - PIC 4020 - FPO/Business/Skilled/Visitor Cancellation 116(1e/g)/109/137Q
153 1.5 days	Cat D - Business - cancellations temporary under s.116(1)(b) - condition 8107/8607
230 1 day	Cat E - Business sponsorship / visa [temporary and permanent] all other cancellations PIC 4005 / PIC 4017
460 0.5 day	Cat F - withdrawals post-constitution pre-hearing
	Visitor
115 2 days	Cat C - PIC 4020 Cancellation 116(1e/g)/109/137Q
230 1 day	Cat E - Visitor refusals [other than sch. 3] PIC 4005 / PIC 4017 all other cancellations
460 0.5 day	Cat F - MAHL / back-to-back withdrawals post-constitution pre-hearing all sch. 3 matters
	Other
77 3 days	Cat B - FPO Cancellations - NZ Subclass 444 Cancellation Permanent visa under s.116(1)(e)/s.116(1)(g)/s.109/s.137Q - FPO/Business/Skilled Cancellation Temporary 116(1e/g)/109/137Q - FPO
115 2 days	Cat C - Pic 4020 - FPO/Business/Skilled/Visitor
230 1 day	Cat E - FPO - Remaining relative/resident return/parent/aged dependant/Child all other cancellations PIC 4005 / PIC 4017
460 0.5 day	Cat F - withdrawals post-constitution pre-hearing

NB:

All Court Remittal cases will move up one complexity category from the first instance review unless otherwise specified (except for Category A cases which already receive the highest weighting)

¹Protection Court Remittal cases remitted on the basis of DFQ17/BMY18 will retain the original country weighting for a standard case (i.e. a Malaysian DFQ17/BMY18 remittal will be weighted at Category C)

*Skilled study requirements or qualifications closely related cases included in MAHLs or back-to-back hearings will continue to attract a 1 day rating

**No Jurisdiction cases in the Student Refusal caseload allocated through the National Duty Member Roster attract no weighting

***Withdrawals post hearing will maintain their original weighting

Acronyms:

FPO: family, partner and other

MOC: Medical Officer of the Commonwealth

MAHL: multi-applicant hearing list

PIC: public interest criterion

SZGIZ, SZRNJ, DFQ, BMY: references to court decisions which affect MRD cases

Table B. MRD – set aside and affirm rates in reviews of cancellation decisions

Case category	Cancellations					
	Set Aside					
	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
Bridging	41%	36%	18%	20%	22%	30%
Family	67%	60%	88%	70%	71%	29%
Sponsorship cancellation/bars*	31%	26%	23%	19%	28%	28%
Partner	56%	51%	48%	44%	54%	66%
Permanent business	38%	50%	63%	57%	57%	64%
Protection	21%	45%	42%	66%	63%	67%
Skilled	15%	63%	60%	18%	29%	28%
Student	24%	17%	12%	16%	23%	22%
Temporary work	34%	40%	35%	11%	29%	45%
Visitor	13%	33%	29%	11%	5%	23%
Other	14%	36%	22%	38%	45%	77%

	Cancellations					
	Affirm					
	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
Bridging	40%	41%	53%	55%	44%	34%
Family	3%	40%	13%	30%	29%	57%
Sponsorship cancellation/bars*	39%	33%	38%	6%	25%	28%
Partner	38%	46%	38%	45%	39%	30%
Permanent business	50%	35%	13%	35%	37%	21%
Protection	55%	45%	40%	27%	27%	17%
Skilled	67%	38%	20%	74%	41%	44%
Student	61%	65%	60%	66%	66%	64%
Temporary work	50%	46%	38%	61%	59%	35%
Visitor	25%	29%	21%	61%	51%	50%
Other	35%	36%	29%	27%	34%	16%

Note:

*These types of decisions are not reviews of *visa* cancellations but reviews of decisions by the Department to cancel a business as an approved sponsor, or bar a business from holding sponsorship approval for a specified period of time.

- Data for 18-19, 19-20 and 20-21 FYs taken from Annual Report runs of 'MRD caseload summary by subclass - for website (Snapshot)' - report published on the AAT website. Figures for 15-16, 16-17 and 17-18 are taken from new runs of the same report and may differ slightly from contemporaneous runs of the data.

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

Administrative Appeals Tribunal

Question C:

Senator Hon Kim Carr asked the following question on 1 December 2021:

With reference to the article in the Daily Telegraph on 30 October 2021 by Piers Akerman entitled “Penalising AAT members weakens out country’s borders” and the Tribunal’s responses to Question on Notice LCC-AE21-78 (Member benchmarks and performance):

1. In 2018/19, what was the average amount of time it took a member of the Migration and Refugee Division to finalise an application by decision in circumstances where the Tribunal member set aside a decision to refuse an applicant a visa?
2. In 2018/19, what was the average amount of time it took a member of the Migration and Refugee Division to finalise an application by decision in circumstances where the Tribunal member affirmed a decision to refuse an applicant a visa (i.e. rejected the application for review)?
3. In 2019/20, what was the average amount of time it took a member of the Migration and Refugee Division to finalise an application by decision in circumstances where the Tribunal member set aside a decision to refuse an applicant a visa?
4. In 2019/20, what was the average amount of time it took a member of the Migration and Refugee Division to finalise an application by decision in circumstances where the Tribunal member affirmed a decision to refuse an applicant a visa (i.e. rejected the application for review)?
5. In 2020/21, what was the average amount of time it took a member of the Migration and Refugee Division to finalise an application by decision in circumstances where the Tribunal member set aside a decision to refuse an applicant a visa?
6. In 2020/21, what was the average amount of time it took a member of the Migration and Refugee Division to finalise an application by decision in circumstances where the Tribunal member affirmed a decision to refuse an applicant a visa (i.e. rejected the application for review)?

In the event the Tribunal is unable to provide this information, please indicate to the Secretariat what information it would be possible for the Tribunal to give to the Committee in order to provide an indication of how long it typically takes a Tribunal member to decide to refuse an applicant a visa (by affirming the decision) versus how long it typically takes a member to decide to set aside a decision to refuse an applicant a visa.

The response to the Honourable Senator’s question is as follows:

Questions 1–6

Table 1 provides data relating to the average time in calendar days elapsed between constitution of a visa refusal review to a member and finalisation of the review for the years 2018–19, 2019–20 and 2020–21.

Table 1. MRD – average calendar days from allocation of a case to a member to finalisation in reviews of refusal decisions

Case category	Set Aside			Affirm		
	2018-19	2019-20	2020-21	2018-19	2019-20	2020-21
Bridging	10	19	18	12	12	19
Family	128	98	97	112	117	112
Nomination refusals	107	105	104	93	77	78
Partner	124	117	124	156	146	160
Permanent business	103	102	102	91	81	99
Protection	232	193	219	92	71	75
Skilled	35	31	49	68	51	62
Student	48	55	65	60	48	66
Temporary work	60	63	85	97	87	82
Visitor	73	76	85	93	91	78
Other	N/A	489	49	147	95	54
<i>Migration (all)</i>	80	80	89	82	67	81
<i>Refugee</i>	232	193	219	92	71	75
Total	89	85	94	85	68	79

This data has a number of limitations as an indicator of the average amount of time taken by a member to finalise a review of a visa refusal decision. These limitations are outlined in **Attachment A**. Attachment A also contains additional information regarding these limitations and the caseload allocation process in the MRD.

Member time required to finalise cases and outcomes in the Migration & Refugee Division

A decision by a Tribunal member to affirm a decision under review does not necessarily require more work effort than a decision to set aside the decision under review. For instance, there may be more work required to set aside certain decisions in the protection and partner caseloads than to affirm the decision.

Relevantly, the statutory requirement to provide proper reasons, setting out findings on any material questions of fact, evidence or any other material on which the findings of fact are based and reasons for the conclusions made by the member apply regardless of whether the decision is an affirm or set aside (refer sections 368(1) and 430 of the *Migration Act 1958*).

The Tribunal does not collect data or analyse information that would enable measurement of the amount of member time allocated to the finalisation of set aside and affirm decisions in individual cases.

For the purposes of caseload allocation, the Migration and Refugee Division (MRD) makes assessments about the time taken, or expected to be taken, in finalising cases by establishing weightings in each caseload. These weightings are established by reference to the overall characteristics of the caseload, trends ascertained as a result of monitoring member output against the benchmarks, and consultation with senior members and members. All cases are different although they may have common characteristics that enable analysis across the caseload.

Time elapsed between allocation of a case to a member and decision

The data provided in **Table 1** of the AAT's response shows for each case category, the average elapsed time in calendar days between constitution of a case to a member and finalisation of the case.

The case management system used in the MRD contains data relating to the constitution, or formal allocation, of cases to members. Data relating to the average time elapsed between constitution of a case to a member and finalisation of the case has been extracted and provided as indicated in Table 1. However, the AAT does not consider this data to be a useful indicator of the amount of member time required to finalise a case. There are several reasons for this, including the varying approaches taken by members in managing their work. Some members choose to be allocated larger numbers of cases on a less frequent basis, while other members prefer more frequent but smaller allocations of cases. Members employing these different approaches may spend a similar amount of time to finalise each individual case, but the constitution to decision timeframes may appear significantly different.

The time taken to finalise a case is impacted by the quality of representation and any delays by applicants in providing timely relevant evidence and submissions in support of their review, although this does not necessarily add to the work required by the member to undertake the review. The duration of the period of time between constitution of a case to a member and finalisation of a case is also affected by factors such as the number of applicants, statutory timeframes relating to requests for further information, applicant requests for further time to provide information, and members' skills and experience. Recently, the pandemic has limited the number of face-to-face hearings the AAT has been able to hold, which has created delays in cases where face-to-face hearings are required. This has extended the period between the allocation of certain cases to members and finalisation of those cases.

Case weightings in the Migration & Refugee Division

The MRD has developed case weightings expressed in 'case days' to indicate the usual amount of member time expected to finalise different categories of case. Decision targets in some form have a

long history in the management of the large and complex migration and refugee merits review caseload. Member ‘productivity targets’ were in place in predecessor tribunals from about 1997–98.

Case weightings in the MRD are based on an assessment of what is considered a reasonable amount of time a particular case type should take to finalise, calculated by reference to the time that a productive member would be expected to take in completing all work associated with that type of case, including preparation, hearing and delivery of a decision together with reasons for that decision. This calculation is based on:

- the characteristics of a caseload and the cases within the caseload (which evolve over time)
- the type of tasks that generally would need to be undertaken
- trends ascertained as a result of monitoring member output against the benchmarks, and
- assessments made by Practice Leaders and consultation with members more generally through the Executive Members.

Case weightings have been developed for 6 categories of case based on the usual characteristics of those cases, ranging from 4 case days (Category A) for certain complex protection visa cases to 0.5 case days (Category F) for the majority of student visa refusal cases. Details of the weightings allocated to the range of case categories in the MRD are set out in **Table A** below. The outcome of a substantive decision, i.e. whether the decision under review is affirmed or set aside, has no bearing on the case weighting, or case days allocated to members, for individual cases.

In general, the time required to set aside or affirm decisions under review tends to vary across different case categories, reflecting the particular features of the caseload, including the applicable legislation. It is also relevant to note that time taken can vary according to the particular circumstances of the case. Factors such as the age of the case, the quality of representation and the information provided, and the relevance and availability of information from third parties may impact on the time taken to finalise a review. Cases remitted for reconsideration will generally take more time but this is recognised in the case weightings. Where the circumstances of a particular case are out of the ordinary, the member can seek a re-weighting of the case.

The decision-making process required for business nominations and related visa refusal cases provides a useful illustration of why set aside decisions do not necessarily take less effort by members and may in fact require more effort. In business nomination cases, the delegate will generally refuse the nomination on a single ground. To set aside this decision and approve the nomination, a Tribunal member must consider all requirements for approval, including the ground rejected by the delegate, and this generally involves making findings on at least 8 additional criteria. Accordingly, the work required to set aside a decision to refuse the approval of a business nomination would usually involve at least twice the time required to affirm the decision under review. This also impacts on the related visa application, which has been refused on the grounds that the nomination is not approved. If the nomination refusal is set aside and substituted with a decision that the nomination is approved, then the member will be required to consider the further requirements of the visa application before setting aside the decision under review. In 2020–21, The Tribunal set aside 1,004 business nominations.

Review outcomes in the Migration & Refugee Division

The rates at which members affirm or set aside decisions under review, both overall and in different categories of case, have tended to remain relatively stable over time. **Tables B and C** below show affirm and set aside rates for reviews of decisions to refuse a visa each year since amalgamation in 2015–16.

The data shows there is variation in smaller case categories, including family and visitor, this is likely due to the smaller data set which results in the rate being influenced by small variations in decision-making. It is important to note that broad trends in outcomes can be affected by more variations in the caseload composition and MRD caseload strategies targeting particular case cohorts. For example, during the pandemic, many reviews in the partner visa caseload were delayed due to the inability to

conduct face-to-face hearings, which are generally required in these cases. To maintain services to users, the AAT identified and prioritised cases where the provision of additional information was likely to be able to show that visa requirements were met and enable a decision under review to be set aside without the need for a hearing.

Table A. Case Weightings in the Migration and Refugee Division

(This document has been developed for internal use and contains terminology and abbreviations used internally in the AAT)

December 2021 updated

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	Family
77 3 days	Cat B - FPO - all remits [other than sch. 3] Cancellation Permanent visa under s.116(1)(e)/s.116(1)(g)/s.109/s.137Q - FPO/Business/Skilled Cancellation Temporary 116(1e/g)/109/137Q - FPO
115 2 days	Cat C - FPO - Orphan relative refusal/Carer/Adoption Pic 4020 - FPO/Business/Skilled/Visitor
153 1.5 days	Cat D - Health - 4007 or 4006A - Adverse/No MOC opinion - FPO/Business/Skilled
230 1 day	Cat E - FPO - Remaining relative/resident return/parent/aged dependant/Child all other cancellations PIC 4005 / PIC 4017
460 0.5 day	Cat F - withdrawals post-constitution pre-hearing
	Nomination/Sponsor approval
58 4 days	Cat A - sponsorship bar/cancellations
153 1.5 days	Cat D - Business nominations [temporary and permanent]
230 1 day	Cat E - Business sponsorship / visa [temporary and permanent] PIC 4005 / PIC 4017
460 0.5 day	Cat F - withdrawals post-constitution pre-hearing
	Partner
77 3 days	Cat B - FPO - all remits [other than sch. 3] Cancellations - NZ Subclass 444 Cancellation Permanent visa under s.116(1)(e)/s.116(1)(g)/s.109/s.137Q - FPO/Business/Skilled Cancellation Temporary 116(1e/g)/109/137Q - FPO
115 2 days	Cat C - Partner [other than sponsorship withdrawn] FPO - all sch 3 remits Pic 4020 - FPO/Bus/Ski/Vis
230 1 day	Cat E - FPO - Remaining relative/resident return/parent/aged dependant/Child PIC 4005 / PIC 4017
460 0.5 day	Cat F - FPO - Partner [sponsorship withdrawn] withdrawals post-constitution pre-hearing
	Permanent business
77 3 days	Cat B - Business refusals - permanent (talent/owner/established business/innovation & investment [890, 892, 845, 132 and 888]) and provisional (innovation & investment [188]) Cancellation Permanent visa under s.116(1)(e)/s.116(1)(g)/s.109/s.137Q - FPO/Business/Skilled
115 2 days	Cat C - PIC 4020 - FPO/Business/Skilled/Visitor
153 1.5 days	Cat D - Health - 4007 or 4006A - Adverse/No MOC opinion - FPO/Business/Skilled
230 1 day	Cat E - Business sponsorship / visa [temporary and permanent] all other cancellations PIC 4005 / PIC 4017
460 0.5 day	Cat F - withdrawals post-constitution pre-hearing
	Protection
58 4 days	Cat A - Protection - Bangladesh, Pakistan, Sri Lanka; cancellations inc. 155 resident return/SZGIZ and SZRNJ/reconstituted post-hearing/remittals (except DFQ17/BMY18 affected remittals) ¹
77 3 days	Cat B - Protection - complex countries
115 2 days	Cat C - Protection - standard countries
460 0.5 day	Cat F - withdrawals post-constitution pre-hearing
	Skill linked
77 3 days	Cat B - Cancellation Permanent visa under s.116(1)(e)/s.116(1)(g)/s.109/s.137Q - FPO/Business/Skilled
115 2 days	Cat C - Pic 4020 - FPO/Business/Skilled/Visitor Cancellation Temporary 116(1e/g)/109/137Q
153 1.5 days	Cat D - Health - 4007 or 4006A - Adverse/No MOC opinion - FPO/Business/Skilled Points test
230 1 day	Cat E - Skilled* - Study requirements/qualifications closely related all other cancellations PIC 4005 / PIC 4017
460 0.5 day	Cat F - MAHL / back-to-back (unless points/study/qualifications closely related) withdrawals post-constitution pre-hearing
	Student cancellation
115 2 days	Cat C - Cancellation Temporary under 116(1e/g)/109/137Q
230 1 day	Cat E - all other cancellations PIC 4005 / PIC 4017
460 0.5 day	Cat F - withdrawals post-constitution pre-hearing
	Student refusal

Attachment A

230 1 day	Cat E - PIC 4020 PIC 4005 / PIC 4017
BM / Weighting	Case category
460 0.5 day	Cat F - All other cases withdrawals post-constitution pre-hearing**
	Temporary work
115 2 days	Cat C - PIC 4020 - FPO/Business/Skilled/Visitor Cancellation 116(1e/g)/109/137Q
153 1.5 days	Cat D - Business - cancellations temporary under s.116(1)(b) - condition 8107/8607
230 1 day	Cat E - Business sponsorship / visa [temporary and permanent] all other cancellations PIC 4005 / PIC 4017
460 0.5 day	Cat F - withdrawals post-constitution pre-hearing
	Visitor
115 2 days	Cat C - PIC 4020 Cancellation 116(1e/g)/109/137Q
230 1 day	Cat E - Visitor refusals [other than sch. 3] PIC 4005 / PIC 4017 all other cancellations
460 0.5 day	Cat F - MAHL / back-to-back withdrawals post-constitution pre-hearing all sch. 3 matters
	Other
77 3 days	Cat B - FPO Cancellations - NZ Subclass 444 Cancellation Permanent visa under s.116(1)(e)/s.116(1)(g)/s.109/s.137Q - FPO/Business/Skilled Cancellation Temporary 116(1e/g)/109/137Q - FPO
115 2 days	Cat C - Pic 4020 - FPO/Business/Skilled/Visitor
230 1 day	Cat E - FPO - Remaining relative/resident return/parent/aged dependant/Child all other cancellations PIC 4005 / PIC 4017
460 0.5 day	Cat F - withdrawals post-constitution pre-hearing

NB:

All Court Remittal cases will move up one complexity category from the first instance review unless otherwise specified (except for Category A cases which already receive the highest weighting)

¹Protection Court Remittal cases remitted on the basis of DFQ17/BMY18 will retain the original country weighting for a standard case (i.e. a Malaysian DFQ17/BMY18 remittal will be weighted at Category C)

*Skilled study requirements or qualifications closely related cases included in MAHLs or back-to-back hearings will continue to attract a 1 day rating

**No Jurisdiction cases in the Student Refusal caseload allocated through the National Duty Member Roster attract no weighting

***Withdrawals post hearing will maintain their original weighting

Acronyms:

FPO: family, partner and other

MOC: Medical Officer of the Commonwealth

MAHL: multi-applicant hearing list

PIC: public interest criterion

SZGIZ, SZRNJ, DFQ, BMY: references to court decisions which affect MRD cases

Table B. MRD – set aside and affirm rates in reviews of refusal decisions

	Refusals			
	Refugee		Migration*	
Financial year	Set Aside	Affirmed	Set Aside	Affirm
2015-16	16%	72%	37%	43%
2016-17	10%	72%	39%	39%
2017-18	5%	55%	30%	40%
2018-19	7%	63%	31%	38%
2019-20	6%	68%	30%	40%
2020-21	5%	58%	39%	41%
<i>Average</i>	8%	65%	34%	40%

*Includes nomination refusal decisions

Table C. MRD – set aside and affirm rates in reviews of refusal decisions - by case category

Case category	Refusals						Refusals					
	Set Aside						Affirm					
	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
Bridging	18%	17%	12%	7%	12%	7%	70%	66%	55%	64%	51%	46%
Family	35%	35%	32%	35%	44%	45%	56%	54%	50%	48%	38%	40%
Nomination refusals*	24%	15%	16%	23%	23%	35%	40%	29%	36%	28%	27%	30%
Partner	45%	54%	51%	51%	57%	58%	44%	36%	35%	31%	27%	26%
Permanent business	36%	28%	20%	28%	29%	42%	43%	39%	39%	35%	40%	38%
Protection	16%	10%	5%	7%	6%	5%	72%	72%	55%	63%	68%	58%
Skilled	19%	32%	31%	45%	42%	46%	55%	50%	47%	38%	36%	40%
Student	31%	22%	24%	25%	25%	35%	48%	50%	47%	49%	55%	55%
Temporary work	24%	26%	21%	37%	23%	31%	31%	28%	30%	31%	29%	36%
Visitor	52%	49%	35%	37%	33%	40%	29%	36%	30%	31%	28%	40%
Other	28%	12%	6%	0%	2%	16%	28%	44%	39%	17%	13%	38%

Note:

*These types of decisions are not reviews of *visa* refusals but reviews of decisions by the Department to refuse a business nomination.

Data for 18-19, 19-20 and 20-21 FYs taken from Annual Report runs of 'MRD caseload summary by subclass - for website (Snapshot)' - report published on the AAT website. Figures for 15-16, 16-17 and 17-18 are taken from new runs of the same report and may differ very slightly from contemporaneous runs of the data.

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

Administrative Appeals Tribunal

Question D:

Senator Hon Kim Carr asked the following question on 1 December 2021:

With reference to the article in the Daily Telegraph on 30 October 2021 by Piers Akerman entitled “Penalising AAT members weakens out country’s borders”:

1. How many members were there in the Migration and Refugee Division of the Tribunal as at 30 October 2021?
2. Of those:
 - a. how many were first appointed to the Tribunal (or the Migration Review Tribunal–Refugee Review Tribunal, which was amalgamated with the AAT on 1 July 2015) on or after 18 September 2013; and
 - b. how many were first appointed to the Tribunal (or the Migration Review Tribunal–Refugee Review Tribunal, which was amalgamated with the AAT on 1 July 2015) prior to 18 September 2013 and have not been re-appointed to the Tribunal since 18 September 2013?

The response to the Honourable Senator’s question is as follows:

Question 1

As at 30 October 2021 there were 193 members assigned to the Migration and Refugee Division (MRD). At 30 October 2021, 151 members were currently active in the MRD while 2 more had transitioned to another division but continued to hold one active MRD case requiring finalisation as at 30 October 2021.¹

Question 2(a)

Of the 193 members assigned to the MRD at 30 October 2021, 156 were first appointed after 18 September 2013.

Question 2(b)

As all 193 members were current members at 30 October 2021, the response to this question is nil.

¹ Of the 40 members assigned to the MRD but not active in the division, 38 were cross assigned to other divisions and undertook work primarily in another division. The remaining 2 members were appointed to the MRD on a part-time basis and are no longer active in the AAT but have not submitted a resignation.

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

Administrative Appeals Tribunal

Question E:

Senator Hon Kim Carr asked the following question on 1 December 2021:

With reference to the article in the Daily Telegraph on 30 October 2021 by Piers Akerman entitled “Penalising AAT members weakens out country’s borders”, and taking Member Ian Berry, Member Joseph Francis and Senior Member James Lambie as examples:

1. In 2020/21, how many applications did Members Berry, Francis and Lambie finalise by decision (in aggregate)?
2. Of those:
 - a. how many times did Members Berry, Francis or Lambie set aside a decision under appeal; and
 - b. how many times did Members Berry, Francis or Lambie affirm a decision under appeal?
3. On average, how long did it take Members Berry, Francis or Lambie to finalise an application to set aside a decision under appeal in 2020/21?
4. On average, how long did it take Members Berry, Francis or Lambie to finalise an application to affirm a decision under appeal in 2020/21?

The response to the Honourable Senator’s question is as follows:

Questions 1 and 2

The information requested in questions 1 and 2 is provided in **Table 1 of Attachment A**.

The proportion of decisions under review that an individual member in the MRD tends to set aside or affirm is affected by the type of case allocated to them. Further, in general the time required to set aside or affirm decisions under review tends to vary across different case categories, reflecting the particular features of the caseload, including the applicable legislation.

Questions 3 and 4

Table 1 provides the average time elapsed in calendar days between constitution and finalisation of cases for Members Berry, Francis and Lambie in 2020–21.

This data has been provided to assist the Committee. The data has a number of limitations as an indicator of the amount of member time required to finalise a case. The Tribunal does not collect data or analyse information that would enable measurement of the amount of member time allocated to the finalisation of set aside and affirm decisions in individual cases.

Attachments A to Questions B and C provide additional contextual information to assist the Committee regarding the abovementioned limitations and the allocation process in the MRD.

Table 1. Cases finalised by Members Lambie, Francis and Berry in 2020–21

			Substantive Decisions			Other Finalisations				Average calendar days ³	
	Caseload	Total Finalisations in 2020-21 ¹	Decisions set aside	Decisions affirmed	Total Substantive	Dismissed ²	Withdrawn	No Jurisdiction	Total Other	Set aside	Affirm
Member											
Senior Member James Lambie	Bridging	2	0	1	1	1	0	0	1	-	64
	Family	5	2	2	4	0	1	0	1	515	423
	Partner	10	5	3	8	1	1	0	2	482	307
	Protection	18	0	17	17	0	1	0	1	-	93
	Other	1	1	0	1	0	0	0	0	44	-
	Total	36	8	23	31	2	3	0	5		
Member Joseph Francis	Family	9	2	3	5	1	3	0	4	77	138
	Partner	68	44	18	62	1	5	0	6	139	127
	Student refusal	2	2	0	2	0	0	0	0	87	-
	Temporary work	1	0	1	1	0	0	0	0	-	210
	Total	80	48	22	70	2	8	0	10		
Member Ian Berry	Nomination/sponsor	25	10	15	25	0	0	0	0	183	245
	Permanent business	25	10	13	23	0	2	0	2	225	302
	Skilled	29	7	18	25	1	3	0	4	260	142
	Temporary work	15	0	9	9	0	6	0	6	-	176
	Total	94	27	55	82	1	11	0	12		

¹The total finalisations count includes all decision types (i.e. incl. substantive and other) and all review types (i.e. refusals and cancellations).

²Cases dismissed as a result of non-appearance at hearing are counted separately to no jurisdiction and withdrawal decisions in recognition of the amount of review and preparation time involved for members in preparing these cases for hearing, dismissing initially, considering any requests for reinstatement, and confirming the dismissal after 14 days.

³Average calendar days from the date of constitution of the case to the member, to the finalisation date.

Note: as questions 1 - 4 make no distinction between reviews of refusal and cancellation decisions this table includes data for both review types.