Questions on Notice from Senate Inquiry Hearing - 2 October 2024

Question from Senator Shoebridge: The beneficial interpretation that the High Court gave to the AAT provisions in the Miller case could have applied to these provisions in the Migration Act but for these amendments.

The High Court decision in *Miller v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 23 considered whether the non-compliance of a lodgement requirement under the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) rendered an application invalid. Section 29(1)(c) of the AAT Act provided that an application "must contain a statement of reasons for the application". The High Court held that the inflexible interpretation of this requirement that would invalidate an application would "be to attribute to the legislature an intention which would be arbitrary to the point of being capricious",[1] especially where non-compliance could be readily remediable by directions made by the Tribunal within jurisdiction.

Relevantly, the High Court observed:

> "To discern such a legislative purpose would also be **to attribute to the legislature an intention wholly at odds with the express legislative imposition on the Tribunal of the obligation in s 2A(a) and (b) of the AAT Act to pursue the objective of providing a mechanism for review that is accessible, fair, just, economical, informal, and quick**. Antithetically to each of those legislative aspirations, invalidity of an application for non-compliance with s 29(1)(c) **would result in a mechanism for review which would shut out persons adversely affected by reviewable decisions who might have substantial reasons for seeking review of those decisions but who, through mistake or misfortune or lack of education or linguistic skills, failed to express those reasons in their written application**. Antithetically also to the legislative aspiration of s 33(1)(b), that a proceeding before the Tribunal be conducted without undue formality and technicality, and with due expedition, invalidity of the application would give rise to the farcical (and, in terms of public administration, highly inconvenient) prospect of a contestable preliminary issue in a proceeding before the Tribunal as to whether markings contained in an application (which might be in a language other than English or in the form of a scribble or an emoji) conveyed sufficient information to comply with s 29(1)(c) [emphasis added]." [2]

While *Miller* is regarding the interpretation of certain AAT Act provisions, the High Court's reasoning is helpful in considering how provisions in the *Migration Act 1958* (Cth) (Migration Act) and the

[1] *Miller v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 23, [37].
[2] Ibid at [38].

Administrative Review Tribunal Act 2024 (Cth) should be understood in relation to Tribunal application lodgement requirements and when an application would be deemed as invalid. Similar to the Administrative Appeals Tribunal (AAT), the Administrative Review Tribunal's (ART) objectives include providing an independent mechanism of review that is fair, just, accessible and responsive to the diverse needs of parties to proceedings.[3] The High Court's consideration of the legislative purpose of the AAT is highly relevant to how provisions regarding access to review before the ART are interpreted.

However, proposed section 348 to the Migration Act circumvents the High Court's logical and beneficial interpretation by preventing the ART from reviewing any applications that do not comply with the requirements in proposed section 347, including the provision of prescribed information and documents and payment of a prescribed fee. Permitting this section would be "wholly at odds" with the objectives of the ART, and should be removed from the Administrative Review Tribunal (Miscellaneous Measures) Bill 2024 (the Bill).

Merits review is a cornerstone of Australian administrative law. Its fundamental objectives include justice for individuals, who are entitled to the correct decisions particularly where consequences are severe, and to enhance accountability and transparency in government decision-making. This is an important opportunity to ensure the ART's objectives are supported by its governing legislation. Changes likely to prevent access to merits review for people subject to government decisions without adequate justification should be vehemently resisted.

Question from Senator Paul Scarr: My first question—and feel free to take on notice any of these questions and provide a more fulsome written response—is: to what extent does this bill lead to a deterioration of people's existing rights to bring applications for administrative review? From the practical perspective of the witnesses here before us, do the concepts in this bill lead to a deterioration of rights under the existing system?

Proposed section 348 to the Migration Act precludes the ART from hearing a review application which is not accompanied by prescribed information and prescribed documents and the prescribed fee at the time of lodgement. As explained in our response above regarding the High Court decision of *Miller*,[4] section 48 requires strict adherence to lodgement requirements and prevents favourable judicial interpretation regarding these lodgement provisions, which is antithetical to the objectives of the Tribunal, in particular to be fair, just, accessible and responsive to the diverse needs of parties to proceedings.[5]

[3] *Administrative Review Tribunal Act 2024* (Cth), s 9.
[4] *Miller v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 23.
[5] *Administrative Review Tribunal Act 2024* (Cth), s 9.

It should also be recalled that the previous system was the subject of extensive criticism for defects in integrity and accessibility, leading to the present reform. When announcing the abolition of the AAT, the Attorney-General stated that:

> "the AAT's public standing has been irreversibly damaged as a result of the actions of the former government over the last nine years...The Albanese Government is committed to restoring trust and confidence in Australia's system of administrative review – beginning with the establishment of a new administrative review body that is user-focused, efficient, accessible, independent and fair."[6]

This reform is a critical opportunity not only to avoid deterioration of people's rights, but also to correct defects under the previous administrative review system.

Shorter timeframes for people in detention

The Bill shortens the time available for people in detention to seek review of protection decisions and certain migration decisions from seven working days to seven calendar days.[7]

In our experience, this is a wholly insufficient timeframe for a person to obtain legal advice and engage with the review process, and must be extended to 28 days, with provision for extension of time. Denying people seeking asylum, refugees and migrants a meaningful opportunity to seek legal advice, consider their options and take action will continue to have a devastating impact on their ability to seek review due to barriers including literacy and language skills, poor mental health, and isolation from community support, especially for people in immigration detention. Legal advice is vital for applicants to navigate legally complex matters and effectively engage with the merits review process, particularly given the serious consequences of review such as deportation to severe harm, permanent family separation and indefinite detention. **Short deadlines for people in detention result in people missing out on their opportunity to seek merits review, and consequently being detained indefinitely for years while they attempt to access judicial review or Ministerial intervention, or are forcibly removed from Australia with irreversible consequences.**

Payment of fees within strict timeframes

The Bill amends proposed sections 347 and 348 of the Migration Act to provide that an application to the ART must include the payment of a prescribed fee within a specified timeframe.[8] This is the

[6] Mark Dreyfus MP, Albanese Government to abolish Administrative Appeals Tribunal, 16 December 2022, https://www.markdreyfus.com/media/media-releases/albanese-government-to-abolish-administrative-appeals-tribunal-mark-dreyfus-kc-mp/.
[7] *Migration Act 1958* (Cth), s 412, 338(4); *Migration Regulations 1994* (Cth), r 4.10(2)(b), 4.31(1).
[8] Proposed subsections 347(3) and 348(3)(c).

first time that the requirement for the payment of a fee within a specific timeframe has been included in the Migration Act regarding Tribunal review applications.

The fee for a review application of a migration decision (currently $3,496) must be paid within seven days for those in immigration detention, and 28 days otherwise, for the application to be reviewed by the Tribunal.[9] The Bill's proposed amendments undermine the objectives of the ART, particularly regarding accessibility and responsiveness to the diverse needs of parties to proceedings.

Currently, applicants have the option to pay a reduced fee of 50% of the prescribed fee due to financial hardship with their application. However, the Bill does not provide flexibility regarding the payment of a reduced fee upon lodgement. The updated *Migration Regulations 1994* (Cth) (Migration Regulations) now state that:

> *"If the ART Principal Registrar, having regard to the review applicant's income, expenses, liabilities and assets, considers that the payment of the fee mentioned in subregulation (1) [$3,496] would cause, or has caused, financial hardship to the review applicant, the prescribed fee is 50% of the amount mentioned in subregulation (1)."*[10]

However, this assessment by the ART Principal Registrar will take some time and will not be concluded within the seven-day deadline for people in detention, and it is very unlikely to have been concluded within the 28-day deadline for people in the community. Therefore, people will be required to pay the full fee upon lodgement to ensure their application is valid even if they are eligible for a fee reduction (which they would only be informed of at a later date).

It will be impossible for people in detention to pay this fee within seven days given their vulnerabilities, including lack of work rights, unlawful status and isolation from support networks. This provision will effectively prevent all migration review applications from people in immigration detention.

Also, many migrants in the community will struggle to pay the high fee within 28 days, particularly those experiencing family violence, insecure housing and serious mental health issues. **It is unfair that people who would be eligible for a fee reduction will be required to pay the full fee upfront with their review application due to the Bill's strict provisions. This will consequently exclude meritorious applications from being heard by the ART.**

For protection review applications, the Migration Regulations specify when the fee must be paid.[11] Currently, the Migration Regulations prescribe that any fee for review of reviewable protection decisions only becomes payable seven days after notification from the Tribunal of its decision, and that no fee is payable where the Tribunal remits a matter (i.e. when the applicant is successful in

[9] Proposed subsections 347(3)(a) and 348(3)(c).
[10] *Migration Regulations 1994* (Cth), r 4.13(4).
[11] Proposed subsection 347(3)(b).

their review application).[12] However, the Migration Regulations could be amended at any time to require protection applicants to pay the review fee at the time of lodgement as there is no safeguard in the Bill, Migration Act or other ART legislation to preserve the current position regarding when protection applicants are required to pay their fees. This creates uncertainty and offers inadequate protections.

Provision of additional information with review application

The *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* (Cth) and the Bill amend proposed sections 347 and 348 to provide that an application to the ART must include the provision of prescribed information and prescribed documents.[13] This is the first time that this language has been included in the Migration Act regarding Tribunal review applications.

The Bill and its Explanatory Memorandum are silent on what 'prescribed information' and 'prescribed documents' will be required by applicants to lodge a valid review application under proposed sections 347 and 348. However, the *Migration Amendment (Administrative Review Tribunal Consequential Amendments) Regulations 2024* (Cth), which were made on 15 August 2024 and came into effect on 14 October 2024, include the following definitions of 'prescribed documents' and 'prescribed information' under current subsection 347(2) of the Migration Act:

> *"(2) If the person (the review applicant) making an application for review of a reviewable migration decision has a copy of the notification of the decision, the prescribed document is a copy of that notification.*
>
> *(3) If the review applicant does not have a copy of that notification and the review applicant is an individual, the prescribed information is:*
>
> *(a) the review applicant's full name; and*
>
> *(b) the review applicant's address and contact details; and*
>
> *(c) the date of the decision (if known to the review applicant) and a description of the decision; and*
>
> *(d) at least one of the following:*
>
> *(i) the review applicant's date of birth;*
>
> *(ii) the review applicant's country of birth;*
>
> *(iii) the review applicant's citizenship or nationality;*

[12] *Migration Regulations 1994* (Cth), r 4.31B(2), (3).
[13] Proposed subsections 347(3) and 348(3)(c).

(iv) the country of issue and number of the review applicant's passport; and

(e) if the decision relates to an application for a visa made by a person (the visa applicant) who is not the review applicant—the information specified in subregulation (5).

(5) For the purposes of paragraphs (3)(e) and (4)(g), the following information is specified:

(a) the visa applicant's full name;

(b) the visa applicant's address and contact details;

(c) at least one of the following:

(i) the visa applicant's date of birth;

(ii) the visa applicant's country of birth;

(iii) the visa applicant's citizenship or nationality;

(iv) the country of issue and number of the visa applicant's passport."[14]

This is a significantly longer list of information than what was previously required in relation to the AAT where applicants only had to complete an approved form, however specific information in the form was not mandated by legislation.[15] Whilst this list of information may not appear to be complex, refugees and people seeking asylum often face additional barriers to seeking review including language skills, insecure housing and employment, and serious mental or physical illness, which will make it onerous for them to provide this information within the strict timeframes of seven days for people in detention, and 28 days otherwise. Many ASRC clients struggle to provide information and documents in connection with seeking legal help despite it being an informal and supportive setting.

For example, the Regulations require an applicant to provide a copy of the notification of their decision if the person has a copy of it (this is defined as a 'prescribed document'). Many people who are not literate in English may have a copy of the notification, however be unaware of the contents of this document or that they are required to provide it. They might also not be aware it is the 'notification' requested, as opposed to their decision. If they do not provide this document with their ART application, they will be excluded from seeking review before the Tribunal. This is a strict legal requirement devoid of discretion that will thwart applications even if the applicant has a valid reason for their failure to provide the document.

The justification for inclusion of 'the notification of the decision' is unclear and apt to cause substantial injustice. Section 352 of the Migration Act provides that on receiving notice of an

[14] *Migration Regulations 1994* (Cth), r 4.12A.
[15] *Migration Act 1958* (Cth), s 347(1)(a).

application for review, the Secretary must provide to the ART copies of the relevant decision and any other document or part thereof that is relevant to review. The requirement for an applicant to provide the notification serves no purpose other than to frustrate applications. The same is true for the other information prescribed, including country of birth, which can be easily obtained from the person's decision record.

Also, many review applicants do not have a permanent address or contact details (defined as 'prescribed information') because they are experiencing homelessness or insecure housing, including women fleeing gender-based violence. The strict requirement for an applicant to provide an address and contact details without any flexibility for such details to be provided at a later time (even a few days after lodgement) will exclude people experiencing disadvantage with meritorious applications from seeking review before the Tribunal.

Consequently, more people will suffer the unjust repercussions of losing the fundamental right to seek merits review including indefinite detention, refoulement and permanent family separation. Their main recourse will be to seek judicial review before the High Court of Australia, which is costly and not available for the majority of people, has limited chances of success particularly noting the lack of availability of legal representation, and will place a further strain on the Court's resources.

The requirement to provide prescribed information and documents also places strain on legal services, where demand exceeds resourcing and where documents and information are notoriously hard to obtain, as well as on the Tribunal, who will be required to assess whether additional (and changeable) formalities have been met in order to commence review, including ascertaining whether a person had 'a copy of the notification of the decision' at the time of application.

Question from Senator Paul Scarr: To the extent that the regulations provide for additional, say, prescribed documents or prescribed information, which may make it more difficult for a potential applicant to apply, would that be through disallowable regulations?

A legislative instrument that defines 'prescribed documents' or 'prescribed information' under proposed subsection 347(2) of the Migration Act will be disallowable.

Section 42 of the *Legislation Act 2003* (Cth) (Legislation Act) provides for the disallowance of legislative instruments. Section 44 of the Legislation Act states that some legislative instruments are not subject to disallowance where:

- an Act declares, or has the effect, that section 42 does not apply in relation to the instrument or provision; or
- the legislative instrument is prescribed by regulation for the purposes of s 44(2)(b).[16]

[16] *Legislation Act 2003* (Cth), s 44(2).

Section 504 of the Migration Act provides the Governor-General with the power to make regulations under the Migration Act. The Migration Act does not preclude section 42 of the Legislation Act applying to legislative instruments made under the Migration Act.

Regulation 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth) lists instruments that are prescribed for the purposes of s 44(2)(b) of the Legislation Act, including "an instrument made under Part 1, 2 or 5 of, or Schedule 1, 2, 4, 5A or 8 to, the Migration Regulations 1994".[17] However, this Regulation does not apply to an instrument made under the Migration Act.

As mentioned above, the *Migration Amendment (Administrative Review Tribunal Consequential Amendments) Regulations 2024* (Cth), which were made on 15 August 2024 under the Migration Act, include definitions of 'prescribed documents' and 'prescribed information' under current subsection 347(2) of the Migration Act.[18] This Regulation is disallowable under the Legislation Act.

This is an inadequate protection, in particular where there is reduced opportunity for expert scrutiny, and creates unnecessary uncertainty.

[17] See item 20 in the table.
[18] See item 24 in Schedule 1.