

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter briefly outlines the rationale for the Migration Amendment (Review Provisions) Bill 2006 (the Bill) and the main provisions of the Bill.¹

Rationale for the Bill

2.2 The Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT, and together the Tribunals²) provide final independent merits review of visa-related decisions made by the Minister for Immigration and Citizenship (the Minister), or by officers of the Department of Immigration and Citizenship (the Department) acting as delegates of the Minister. The Tribunals are required to deliver a mechanism of review that is fair, just, economical, informal and quick.³

2.3 Merits review by the Tribunals is an administrative reconsideration of the subject matter of the case. The principal objective of a merits review is:

...to ensure that the administrative decision reached in a case is the correct and preferable decision. Correct in the sense that the decision made is consistent with law and policy, and preferable in the sense that, if there is an area of discretion in making a correct decision, the decision made is the most appropriate in the circumstances.⁴

2.4 The review process provides review applicants with an opportunity to give further information supporting his or her case, and to be informed of any information which could form the basis for an adverse decision before his or her case is decided. The Tribunals can also conduct further investigations to support their decision-making process. The issues and evidence are considered afresh and the Tribunals have the power to affirm the Department's decision, vary the decision, set the decision aside and substitute a new decision, or remit the matter to the Department for reconsideration.⁵

1 Most of the text in this chapter is taken directly from the EM to the Bill, and the Second Reading Speech.

2 The Bill enacts separate but identical provisions in relation to each of the Tribunals. For this reason, on occasions, there will be a reference in the report to 'the Tribunal'. A reference to 'the Tribunal' is a reference to either the MRT or the RRT.

3 Migration Review Tribunal and Refugee Review Tribunal Annual Report, <http://www.mrt.gov.au/publications/ar0506/MRTRRTAR0506.pdf> [Accessed 19/12/06].

4 Migration Review Tribunal, www.mrt.gov.au/about.htm [Accessed 8/12/06].

5 Migration Review Tribunal, www.mrt.gov.au/about.htm [Accessed 8/12/06].

2.5 Currently, the MRT and RRT have an obligation under the *Migration Act 1958* (the Act) to provide review applicants with procedural fairness. The Tribunals must:

- give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review;
- ensure, as far as reasonably practicable, that the applicant understands why the information is relevant to the review; and
- invite the applicant to comment on the information.⁶

2.6 The Explanatory Memorandum (EM) states that the cumulative effect of Federal Court and High Court decisions has been to require the Tribunals to adopt a very literal approach to providing applicants with procedural fairness. The main issue relates to the requirement to provide information in writing and also for the Tribunals to provide the applicant with a written copy of information (even if the applicant originally provided the information) and allow the applicant the opportunity to comment. The EM suggests that these issues are having considerable practical ramifications on the operations of the Tribunals.⁷

2.7 The EM provided these examples:

- delays are being caused by matters that have already been covered exhaustively at the Tribunal hearings, having to be put to the applicants again in writing following the hearing; and
- information such as passport details, family composition and statutory declarations provided by the applicant during the process leading to the decision under review, if the Tribunals are to rely on the information, must be put to the applicant in writing for comment.⁸

2.8 The amendments proposed in the Bill seek to resolve these difficulties. In his Second Reading Speech, the Minister for Justice and Customs, Senator the Honourable Chris Ellison stated that:

These amendments will uphold the fundamental right of all review applicants to receive procedural fairness during review proceedings, while at the same time giving the tribunals flexibility in how they meet their procedural fairness obligations.

These amendments will allow the tribunals to conduct reviews more efficiently, with less unnecessary process and paperwork. This will help the Refugee Review Tribunal to comply with its statutory 90-day time limit for

6 EM, p. 2.

7 pp 2-3.

8 p. 2.

finalising decisions. It will also lead, in many cases, to the faster completion of many cases, which will benefit review applicants who no doubt experience stress and uncertainty in waiting to hear of a decision.⁹

Main provisions of the Bill

2.9 The two major provisions of the Bill which alter the review process of the MRT and RRT are:

- proposed sections 359AA and 424AA which allow the Tribunals discretion to provide information to the applicant orally and also allow the invitation to the applicant to respond to be given orally rather than in writing; and
- proposed paragraphs 359A(4)(b) and 424A(3)(b) which state that the Tribunals do not have to provide the applicant with a written copy of information that the applicant supplied during the process that led to the decision under review (other than information provided orally to the Department).

2.10 Proposed subsections 357A(3) and 422B(3) require that, in the conduct of review by both the MRT and the RRT, 'the Tribunal[s] must act in a way that is fair and just'. The Department commented that these subsections:

[E]xplicitly reinforce that the Tribunals must act in a way that is fair and just. This complements subsections 353(1) and 420(1) of the Act, which provide that in carrying out their functions under the Act, the MRT and the RRT must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.¹⁰

Discretion to give adverse information orally

2.11 Proposed sections 359AA and 424AA provide that where an applicant is at a hearing before one of the Tribunals, the tribunal member will have a discretion to either:

- tell the applicant about any adverse information before the tribunal at the hearing, and invite him or her to respond; or
- write to the applicant about the adverse information, and invite him or her to respond.

2.12 The Second Reading Speech explained that the discretion of the tribunal member as to whether they accord procedural fairness to an applicant orally or in writing will depend on what is appropriate in a particular case and with the member

9 *Senate Hansard*, 7 December 2006, pp 22-23.

10 *Submission 13*, p. 2.

bearing in mind the guiding principle, which is stated in the Act, that the Tribunals endeavour to provide a review that is fair, just, economical, informal and quick.¹¹

Applicant must understand the relevance and the consequence

2.13 If the tribunal member opts for the oral method of according procedural fairness, the proposed amendments will require that the Tribunals do their best to ensure that the applicant understands why the adverse information being put to them is relevant to the review, and that the applicant understands the consequences of the Tribunals relying on that information to affirm the decision that is under review.¹²

Opportunity for applicant to ask for more time

2.14 If the Tribunals choose to tell the applicant at the hearing about any adverse information, the member must orally invite the applicant to comment on or respond to the information and then also advise the applicant that they may seek additional time to provide comment or response. If the applicant asks for more time, and the Tribunals consider that this request is reasonable, the Tribunals must adjourn the review.¹³

Access to interpreters

2.15 Interpreters will remain available to applicants who have difficulty with English and require assistance for review proceedings.

Changes to adverse information provided to applicants

2.16 Sections 359A and 424A, as they currently stand, require that the Tribunals must provide to the applicant particulars of information that the Tribunals consider would be the reason, or a part of the reason, for affirming the decision that is under review (that is, adverse information).

2.17 The current requirement, under paragraphs 359A(1)(a) and 424A(1)(a), to give an applicant particulars of adverse information is subject to a number of exceptions. One exception relates to information that has been given by the applicant for the purposes of 'the application'. The courts have strictly interpreted this exception to apply only to information provided to the Tribunals, and not to information provided by the applicant to the Department during the process leading to the decision under review.

2.18 The Bill amends this requirement and new paragraphs 359A(4)(ba) and 424A(3)(ba) provide for a new class of information that is excepted, being

11 Senator the Hon. Chris Ellison, Minister for Justice and Customs, *Senate Hansard*, 7 December 2006, pp 2-3.

12 Proposed subparagraphs 359AA(b)(i) and 424AA(b)(i).

13 Proposed subparagraphs 359AA(b)(ii), (iii) and (iv) and proposed subparagraphs 424AA(b)(ii), (iii) and (iv).

information given by the applicant to the Department during the process leading to the decision that is under review. This exception will not extend to information that the applicant orally gave to the Department, such as information provided during an interview with a departmental officer for a visa application.

