

This legislative brief sets out the key changes that the Tribunals Amalgamation Bill 2014 (Cth) will make in relation to the Migration Review Tribunal and Refugee Review Tribunal.

Overview

The Tribunals Amalgamation Bill 2014 (Cth) provides for the merger of the Administrative Appeals Tribunal (AAT) with the Migration Review Tribunal-Refugee Review Tribunal (MRT-RRT) and the Social Security Appeals Tribunal.¹ This merger was [announced in the 2014-2015 Budget](#) and is due to come into effect by 1 July 2015.

The Australian Government states in the [accompanying Explanatory Memorandum](#) that the purpose of the merger is to:

- further enhance the efficiency and effectiveness of Commonwealth merits review and support high quality and consistent Government decision making;
- generate savings (estimated at \$7.2 million) through shared financial, human resources, information technology and governance arrangements;
- provide for greater utilisation of members' specialist expertise across subject matters and facilitate the sharing of expertise between members and staff;
- incorporate the successful features of the tribunals as currently constituted; and
- incorporate merits review of freedom of information decisions.²

The Bill is 'primarily directed at the establishment, organization and procedures of the amalgamated Tribunal', and is not intended to affect the substantive rights (such as rights of appeal) subject to merits review.³

On 3 December 2014, the Tribunals Amalgamation Bill 2014 (Cth) [was introduced](#) into the Senate. The Bill is expected to be debated in the first half of 2014.

Structure

What the Bill will change

The Bill will result in the MRT-RRT becoming a new division of the AAT, to be known as the Migration and Refugee Division.⁴ The AAT will continue to have a President who is a Federal Court judge, as well as a Deputy President, both of whom will have the power to sit in all Divisions of the AAT. The Bill will create new positions of Division heads and deputy heads.

¹ The Budget announcement indicated that the Classification Review Board would also be included in the merger, but this is no longer intended: [Explanatory Memorandum](#), [8].

² [Explanatory Memorandum](#), [3].

³ [Explanatory Memorandum](#), [9].

⁴ Sch 1, item 27, inserting new section 17A.

The Bill also allows for all Divisions of the AAT to be constituted by one to three members (decision-makers).⁵ This amendment changes the existing position for the Refugee Review Tribunal, which currently can only be constituted by a single member. However, it is expected that single-member panels will continue to be generally used for both migration and refugee matters, with multi-member panels ‘reserved for particularly complex or novel matters’.⁶

The President of the AAT and the head of the Migration and Refugee Division will both have powers to issue practice directions and direct that certain decisions be designated as ‘country guidance decisions’.⁷

Comment

The merger of the MRT-RRT with the AAT may enhance the independence and quality of merits review. The MRT-RRT is currently the responsibility of the Department of Immigration and Border Protection, but under the new structure it will become the responsibility of the Attorney-General’s Department. Another possible benefit is the increased institutional independence as a result of the AAT being headed by a Federal Court judge. There may be other benefits as well, such as broadening the pool of expertise and encouraging the sharing of expertise and knowledge.

The power to constitute multi-member tribunals is a welcome provision. Multi-member panels may be particularly beneficial in the case of ‘country guidance decisions’, which are likely to be introduced in 2015. Confidence in the quality of such decisions will also be promoted by the supervision of the President of the AAT.

Membership

What the Bill will change

The Bill creates four main classes of members: the President of the new merged AAT, Deputy Presidents, senior members and other members (at differing pay levels). The head of each Division will be a Deputy President.⁸ Members will be assigned to one or more Divisions by the Attorney-General, in consultation with the President of the AAT.⁹ However, the Attorney-General will be required to consult with the Immigration Minister prior to assigning a member to the Migration and Refugee Division, or as head or deputy head of the Division.¹⁰ This requirement is said to be ‘appropriate given the need for members exercising powers in [that Division] to have specific subject-matter expertise’.¹¹

⁵ New section 19B.

⁶ [Explanatory Memorandum](#), [268].

⁷ Sch 2, item 138. The Migration Amendment (Protection and Other Measures) Bill 2014 empowers the Principal Member of the MRT-RRT to direct that certain decisions are to be followed by other members, unless clearly distinguishable. This Bill is currently before Parliament and is expected to be passed in early 2014: see our [legislative brief on this Bill](#).

⁸ Sch 1, item 17, inserting new section 17K.

⁹ Sch 1, item 17, inserting new section 17C.

¹⁰ Sch 1, item 17, inserting new sections 17D, 17K(2), 17L(2). Similar provisions are introduced in respect of the National Disability Insurance Scheme Division, the Security Division, and the Social Services and Child Support Division, and the Taxation and Commercial Division (see Sch 1, item 17, new sections 17E-17G). There are similar existing requirements in relation to the National Disability Insurance Scheme and Taxation and Commercial Division.

¹¹ [Explanatory Memorandum](#), [235].

Members will be appointed for a maximum term of five years, although the appointment can be renewed.¹² This is the same as the current arrangement for MRT-RRT members, although the [maximum term for AAT members is currently seven years](#).¹³ The Attorney-General can set out other terms and conditions of appointment in writing (as is currently the case for the MRT-RRT) rather than by regulation (as currently required for the AAT).¹⁴

The existing grounds for removal for members of the MRT-RRT continue to apply. These will now also apply to the AAT (except for judges appointed as President or Deputy President),¹⁵ with the effect of broadening the grounds for removal for AAT members to include absence and conflict of interest.¹⁶

Comment

The Bill generally seeks to harmonize the employment conditions of AAT members with MRT-RRT members (by reducing the protections down to the existing level of the MRT-RRT).

One concern is that there does not appear to be adequate justification for the requirement to consult with the Immigration Minister for appointments to the Migration and Refugee Division. It is not clear why the need to ensure appropriate subject-matter expertise could not adequately be considered through ordinary selection processes or, if desired, through a legislative provision requiring particular expertise, such as is provided in relation to the National Disability Insurance Scheme Division.¹⁷ The requirement of consultation with the Immigration Minister does not promote a perception of independence, which is crucial for public confidence in merits review.

Jurisdiction, procedure and other matters

What the Bill will change

In general, the Bill proposes minimal changes to the procedure or jurisdiction of the MRT-RRT. The existing codes of procedure within the *Migration Act* will be retained, as will be the existing migration jurisdiction of the AAT. However, an existing but little-used power of the MRT to refer cases involving matters of general principle to the AAT has been repealed.¹⁸

The maximum penalty for the offences of failing to comply with a summons, failing to be sworn and answer questions, and contempt of the Tribunal has been doubled from six months (for both the MRT-RRT and the existing AAT) to 12 months.¹⁹ This increase is said

¹² Sch 1, item 19.

¹³ [Administrative Appeals Tribunal Act 1975 \(Cth\) s 8](#). See Sch 1, item 19.

¹⁴ Sch 1, item 21, substituting subsection 8(7). Cf *Migration Act 1958 (Cth)* [ss 400, 465](#).

¹⁵ Sch 1, item 26, substituting section 11-14; compare *Migration Act 1958 (Cth)* ss 403, 468.

¹⁶ Compare [Administrative Appeals Tribunal Act 1975 \(Cth\) s 13](#). Specifically, members may now be removed for unauthorized outside employment or failure to disclose conflicts of interest.

¹⁷ Sch 1, item 17, inserting new sections 17E(2).

¹⁸ Sch 2, item 68, repealing Division 9 of Part 5.

¹⁹ Sch 1, item 135-144, substituting ss 61-63. Compare *Administrative Appeals Tribunal Act 1975 (Cth)* [ss 61-62](#), *Migration Act 1958 (Cth)* [ss 370-371, 432-433](#).

to be justified because it aligns the penalties with those in the *Migration Act* and in other legislation establishing courts and tribunals.²⁰

Currently, these offences allow for a defence that a person has a 'reasonable excuse'. This is replaced with a defence of self-incrimination (that is, it is a defence that the person would incriminate him or herself). This is consistent with Commonwealth guidance that the defence of reasonable excuse should be avoided because it is too vague.²¹ However, the existing general defences under the Criminal Code (Cth) continue to apply.

Comments

The limited changes with respect to jurisdiction and procedure are unsurprising, given the measure is primarily concerned with administrative efficiencies. Arguably, this is a missed opportunity to review the procedures of the MRT-RRT with a view to improving consistency across Australian administrative law (for example, in the requirements of procedural fairness).

The doubling of the penalty for offences of not complying with the requirements of the Tribunal also does not appear to be justified. Similar offences of non-compliance in Commonwealth legislation for courts, tribunals and royal commissions typically attract maximum penalties of six months, and this is broadly consistent with state and territory legislation.²² It is difficult to justify a higher penalty than that which exists, for example, for similar offences in the Federal Court of Australia.²³

Dr Joyce Chia
Senior Research Associate

²⁰ [Explanatory Memorandum](#), [640].

²¹ [Explanatory Memorandum](#), [636].

²² See the Attorney-General's Department, *Commonwealth Guide to Framing Offences and Penalties* (2011), 104; [Australian Law Reform Commission, Royal Commissions and Official Inquiries](#) (DP 75, 2009) [20.25]-[20.31].

²³ [Federal Court of Australia Act 1976](#) (Cth) s 58.