REVIEW ON THE MERITS OF MIGRATION AND REFUGEE DECISIONS – REFLECTIONS ON THE OPERATION OF THE MIGRATION REVIEW TRIBUNAL AND THE REFUGEE REVIEW TRIBUNAL IN AN INTERCONNECTED WORLD

Denis O'Brien*

The Migration Review Tribunal (MRT) has jurisdiction under the *Migration Act 1958* (Cth) to provide final, independent merits review of decisions made by the Minister for Immigration and Citizenship or his or her delegates in the Department of Immigration and Citizenship to refuse to grant a wide range of migration visas or to cancel migration visas. The MRT's jurisdiction extends to certain visa-related decisions of the Minister or his or her delegates, including (in the skilled and business visa areas) decisions to refuse to approve sponsors, nominated positions or business activities.

The Refugee Review Tribunal (RRT) has jurisdiction under the *Migration Act* to provide final, independent merits review of decisions of the Minister or his or her delegates to refuse to grant, or to cancel, protection visas.

The tribunals are separately created under the *Migration Act* but members are cross-appointed to both tribunals. As appointments are made by the Governor-General, the members are independent statutory office-holders. Most members are appointed for 5 years but may be re-appointed.

The staff are also appointed to both tribunals and the Principal Member has agency head responsibility for them under the *Public Service Act*. The tribunals operate as a single agency for the purposes of the *Financial Management and Accountability Act 1997*.

The tribunals at present have 146 members, of whom 62 are full-time[1] and 84 are part-time. The members are drawn from a wide spectrum of society. Most are senior lawyers; many are not but have instead had careers as senior public servants, diplomats, academics or senior employees of international organisations.

The tribunals have about 340 staff.

With a budget of around $53.3 million in 2011-2012 and with 10,815 cases decided by the tribunals in that year,[2] the cost per case was about $4,900.

As administrative bodies, the tribunals are part of the Executive branch of government. They are independent of the Department of Immigration and Citizenship and are accountable through the Minister to the Parliament and the Australian public.

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* *Denis O'Brien was Principal Member of the Migration Review Tribunal and Refugee Review Tribunal, 2007-2012, and, before that, was a partner of Minter Ellison. This paper was presented at the 2013 AIAL National Administrative Law Conference, 19 July 2013, Canberra, ACT. The views expressed are personal to the author and are not the views of the tribunals. The author is grateful to Amanda MacDonald, Deputy Principal Member, and Colin Plowman, Registrar, of the tribunals for their assistance in reviewing some of the factual material in the paper.*

This paper discusses the work of the MRT and RRT and the growth in that work that has occurred in recent years. The paper then makes some comparisons with the workloads of the United Kingdom, Canada and United States tribunals and goes on to draw attention to particular features of the operation of the Australian tribunals. Finally, the paper raises for consideration aspects of the operation of the MRT and RRT that the author considers are in need of reform.

Review on the merits by the tribunals

In reviewing decisions of delegates of the Minister, the tribunals are required to provide a mechanism of review that is fair, just, economical, informal and quick.[3] These requirements are not mutually exclusive. The Parliament expects decisions to be made quickly but also fairly. In the case of the RRT, the legislature has defined what it means by 'quick'. Cases are to be determined within a maximum of 90 days.[4] This statutory time period reflects the intention of the Parliament that decisions on protection visa applications be made in a timely and efficient manner so as to provide transparency and certainty for protection visa applicants. The Principal Member must report regularly to the Parliament on the extent to which the time limitation is being met. Of course, in particular cases, fairness to the applicant may require that the applicant be given more time to prepare his or her case before the tribunal, with the result that the case is not completed within 90 days. At other times, the 90-day requirement is not met because the existing caseload of members is such that new cases must wait in a queue until member capacity allows them to be allocated.

Unlike a court's judicial review role, the role of the tribunals is not confined to reviewing the legal correctness of decisions of delegates of the Minister. The task of each tribunal is the same as that of other merits review tribunals. It stands in the shoes of the primary decision maker and makes the correct or preferable decision on the basis of the material before it:[5] correct in the sense that the decision is correct on the facts before the tribunal and according to the law it must apply, and preferable in the sense that, to the extent that a discretion exists in the making of the decision, the decision made is the most appropriate in the circumstances. The material before the tribunal quite often includes material that was not before the primary decision maker. In making its decision, the tribunal is not bound by technicalities, legal forms or the rules of evidence and is required to act according to substantial justice and the merits of the case.

Proceedings in each tribunal are not adversarial but are inquisitorial in character.[6] Neither the Minister nor the Department is represented before the tribunal and neither usually presents any further material after the primary decision is made and the Department's file is produced to the tribunal.

For the purposes of a particular review the MRT is to be constituted by 1, 2 or 3 members.[7] In practice, it is almost invariably constituted by 1 member. Hearings of the MRT are open to the public, subject to any direction the tribunal may give for particular evidence to be taken in private.[8]

The RRT, on the other hand, is required to conduct its hearings in private[9] and hearings and reviews are conducted before a single member.[10] The obligation to conduct hearings in private serves to protect applicants and family members from possible retribution in their country of origin. The combination of the privacy of the hearing and its conduct before a single member helps to establish an environment in which applicants should feel more comfortable in giving evidence about their personal situation.

More than 80% of RRT hearings require evidence to be taken through an interpreter. About 60% of MRT hearings require the use of an interpreter.

Through the decisions they make, the tribunals perform a significant educative role in providing guidance to primary decision makers in the Department – in relation to the Refugees Convention in the case of the RRT and in relation to the visa criteria set out in the Migration Regulations in relation to the MRT.

The rate at which the tribunals set aside decisions of primary decision makers can vary depending upon the particular cohorts of cases involved in the decisions. In the MRT the average set aside rate tends to be around 30-35%. In the RRT the average set aside rate is normally around 25%. As of writing, in 2013, the RRT set aside rate is a little higher at 38%. The likely reason for that increase is the taking on by the RRT of the review role in relation to irregular maritime arrivals that was formerly performed by the Department's Independent Protection Assessment Office. Indeed, in the recent appearance of the tribunals before the Senate Estimates Committee, Kay Ransome, Principal Member, noted that, since 1 July 2012, the RRT had received applications from 1,510 irregular maritime arrivals and said, in answer to a question from a Senator, that the set aside rate in relation to irregular maritime arrivals was 72%.[11] In the RRT, there can often be marked variations in set aside rates depending on country of origin of the applicant and depending on how conditions may have changed in particular countries.[12]

The tribunals have tried to publish about 40% of their decisions, although the significant increase in decisions in recent times (see below) has made achievement of this target impossible.[13] Publication of significant numbers of decisions across a range of visa categories and a range of countries serves to enhance openness and accountability in tribunal decision making.[14]

Growth in workload of MRT and RRT

The following table shows the number of MRT and RRT applications made in the year ended 30 June 2007, the number of cases decided in that year, the number of cases on hand as at 30 June that year and the like numbers for the following 5 years.[15]

MRT and RRT annual caseload

	2007	2008	2009	2010	2011	2012
MRT applications	5810	6325	7422	8332	10315	14088
RRT applications	2835	2284	2538	2271	2966	3205
MRT decisions	6203	5219	5767	7580	6577	8011
RRT decisions	3102	2318	2462	2157	2604	2804
MRT cases on hand 30 June	3534	4640	6295	7048	10786	16863
RRT cases on hand 30 June	582	548	624	738	1100	1501

In the current financial year to 31 March 2013 the statistics show a continuation of the trends shown above.

MRT and RRT caseload year to date in 2013[16]

MRT applications	12280
RRT applications	3899
MRT decisions	10089
RRT decisions	2652
MRT cases on hand 31 March	19060
RRT cases on hand 31 March	2748

The statistics show the following:

- there has been enormous growth in the MRT caseload, year by year, and the number of applications this year will again well exceed the number in the previous year;
- no doubt in response to the growth in those applications, there has been an impressive lift this year in the number of MRT decisions, with the number of decisions likely to come close to matching the number of applications; and
- there has this year been a similar increase in the number of RRT decisions but RRT applications have also significantly increased and at 31 March had already exceeded the 2011-2012 total by about 700.[17]

The tribunals were on track as at the end of May to decide more than 18,000 cases across both tribunals in 2012-2013.

The significant increase in the membership of the tribunals which occurred from 1 July 2012 and the return of members who had been undertaking independent protection assessment work have assisted in achieving the increased decision output, as have the strategies the tribunals have adopted of greater specialisation by members and the use of task forces to deal with particular cohorts of cases.

Appeals[18] workloads – some international comparisons

The existence, in the refugee determination area, of a facility for review accords with procedures recommended for signatories to the Refugees Convention by the United Nations High Commissioner for Refugees (UNHCR). The provision of a right of appeal is seen by the UNHCR as an essential guarantee for applicants.[19]

United Kingdom

The migration and refugee appeal body in the United Kingdom is the Asylum and Immigration Tribunal (AIT). The AIT hears appeals against decisions made by the Home Secretary and his officials in asylum, immigration and nationality matters. The AIT has two tiers. The first is the Immigration and Asylum Chamber and the second is the Upper Tribunal. In the Immigration and Asylum Chamber, appeals are heard and determined by one or more immigration judges. They provide a final determination of most appeals. In certain circumstances, either the appellant or the respondent (the UK Border Agency) can appeal a determination to the Upper Tribunal. Appeals to the Upper Tribunal can be made only on the basis of error of law made by the first tier tribunal and only if the first tier tribunal grants leave to appeal.

The UK Ministry of Justice is responsible for the AIT and publishes statistics for all tribunals in the UK. The published statistics for the year ended 31 March 2012[20] show that:

- the caseload for the AIT fell by 32% compared with the previous year;
- total appeals, in asylum, immigration and nationality matters, received by the Immigration and Asylum Chamber numbered 112,500; and
- the Immigration and Asylum Chamber determined 125,300 cases.

The number of asylum appeals made to the Immigration and Asylum Chamber over the past three years has been declining but there were still 12,300 asylum appeals lodged in the year to 31 March 2012.

United States

The Department of Justice's Executive Office for Immigration Review (EOIR) administers the US immigration court system. EOIR's main role is to decide whether foreign-born individuals who are charged by the Department of Homeland Security (DHS) with violating immigration law should be ordered to be removed from the US or should be granted protection from removal and be permitted to remain in the US. To make these determinations the Office of the Chief Immigration Judge within EOIR has more than 235 immigration judges who conduct administrative court proceedings in 59 immigration courts across the US.[21]

In most removal proceedings individuals admit that they are removable but then apply for relief. One of the grounds of relief commonly relied on is that the person is entitled to asylum.

Appeals lie from a decision of an Immigration Judge to the Board of Immigration Appeals (BIA) and are normally determined by the BIA on the papers. An individual (but not the DHS) dissatisfied with a ruling of the BIA may appeal to the appropriate federal circuit court.

Statistics published by the EOIR show that 44,170 appeals were made to the immigration courts in 2012.[22] Appeals granted numbered 11,978; appeals denied numbered 9,574.The bigger cohorts of cases involved nationals of China (10,985), Mexico (9,206), El Salvador (2,991) and Guatemala (2,895).[23]

Canada

The Immigration and Refugee Board of Canada (IRB) has both a primary decision making role and an appeal role. The statistics published on the IRB website[24] show that, as at 31 December 2012:

- claims pending before the Refugee Protection Division numbered 32,600; and
- claims finalised in that Division numbered 29,400.

The IRB also has an Immigration Division and an Immigration Appeal Division.

A new system for refugee status determination came into force in Canada on 15 December 2012. The new system is the result of two laws passed by the Canadian Parliament – the *Balanced Refugee Reform Act* and the *Protecting Canada's Immigration System Act*.[25] The Canadian Government has said that the new system is designed to weed out 'bogus' asylum claimants. For the first time most applicants will have access to a newly-created Refugee Appeal Division (RAD) of the IRB. Failed asylum claimants from countries that have a history

of producing genuine refugees will be able to appeal to the RAD. The claims of claimants from countries that do not normally produce refugees will be expedited; hearings for them will be held within 30 or 45 days, depending upon whether the asylum claim was made at an inland Immigration Office or at a port of entry. This system will depend upon the government designating certain countries of origin as 'safe' countries.

Countries of origin that have now been designated include the USA, most countries in the European Union, Japan, Australia and New Zealand.

In a press release of 30 November 2012, the Canadian Minister for Citizenship, Immigration and Multiculturalism, Jason Kenney, said:

> Last year alone, nearly a quarter of all asylum claims in Canada were made by people from democratic European Union nations – that's more claims than Canada received from Africa or Asia. We're spending too much time and taxpayers' money on bogus claims, and on generous tax-funded health and social benefits for claimants from liberal democracies.[26]

Some conclusions

The new refugee status decision making system in Canada is particularly worthy of note in that it is now very similar to the system in Australia. Public servants within the Immigration and Refugee Board now make the first decision on refugee claims, with some (but, in contrast with Australia, not all) applicants having access to an appeal on the merits process.

In a general sense, the above statistical information about the numbers of refugee status determination claims in Canada, the USA and the UK tends to make the numbers dealt with at first instance in Australia, and by the RRT on appeal, rather pale into insignificance. One might not get that impression about the Australian numbers if one spent too much time listening to many of our radio shock jocks.

Complementary protection

Prior to 24 March 2012 the only basis on which a person could be granted a protection visa was if the person was a non-citizen in Australia in respect of whom the Minister (or the RRT on appeal) was satisfied Australia had protection obligations under the Refugees Convention, or was a member of the family unit of such a person.[27] With effect from that date, the Commonwealth Parliament introduced into s 36 of the *Migration Act* a 'complementary protection' basis for the grant of a protection visa. 'Complementary protection' describes protection that is complementary to Australia's obligations under the Refugees Convention based on Australia's *non-refoulement* obligations under certain international human rights laws.[28]

The introduction of complementary protection brought the *Migration Act* into line with comparable provisions in the European Union,[29] Canada, the US and New Zealand.

A person meets the complementary protection criterion for a protection visa if the person is a non-citizen in Australia 'in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm'.[30]

Section 36(2A) defines in an exhaustive way the types of harm that will amount to 'serious harm', including 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment', terms that are further defined in s 5 of the Act. Section 36(2B)

provides further amplification of the concept of 'real risk' by providing that there is taken not to be a real risk that a person will suffer significant harm if, amongst other things, the Minister is satisfied that the person could obtain from an authority of the receiving country protection such that there would not be a real risk that the person will suffer significant harm (s 36(2B)(b)).

As is apparent from this brief and incomplete sketch of the complementary protection provisions, the new criterion for a protection visa is loaded with complex elements requiring interpretation by decision makers (including 'substantial grounds for believing', 'necessary and foreseeable consequence' and 'real risk'). Fortunately for the RRT, when complementary protection was introduced into the Act, members had the benefit of training on the new provisions which was delivered by Professor Jane McAdam of the University of NSW, assisted by Matthew Albert of the Victorian Bar. Professor McAdam is recognized as a world authority on complementary protection and is the author of *Complementary Protection in International Refugee Law*.[31]

In the context of this paper it is not appropriate to enter upon a full analysis of the complementary protection criterion for a protection visa[32] but it is worth noting that, following the introduction of the new provisions, the Minister took a different view from the RRT on one element of the criterion. In *Minister for Immigration and Citizenship v MZYYL*[33] the Federal Court did not accept the Minister's construction and instead upheld the construction adopted by the RRT.

In that case the Minister sought judicial review of a decision of the RRT in which the RRT had interpreted s 36(2)(aa) when read with s 36(2B)(b) as requiring an assessment of whether the level of protection offered by the receiving country reduced the risk of significant harm to something less than a real one. The tribunal had made that assessment and had found that the applicant could not obtain from an authority of the receiving country protection such that there would not be a real risk that he would suffer significant harm if returned to that country.

As indicated above, the Minister's argument that s 36(2B)(b) is satisfied if the State authority in question operates an effective legal system for the detection, prosecution and punishment of acts constituting serious harm and the non-citizen has access to such protection was rejected by the Federal Court.[34]

Judicial review of migration decisions[35]

In its recent important report, *Federal Judicial Review In Australia*,[36] the Administrative Review Council (ARC) made a series of recommendations aimed at restoring the *Administrative Decisions (Judicial Review) Act 1977* (*ADJR Act*) to a central place in the federal judicial review system. The report proposed that the *ADJR Act* be expanded to pick up the prerogative writ jurisdiction under s 75(v) of the *Constitution* and s 39B of the *Judiciary Act 1903*.

The report is to be welcomed. However, I consider that, in one significant respect, the ARC has missed an opportunity to further restore the primacy of the *ADJR Act*. I refer here to the matter of judicial review of migration decisions.

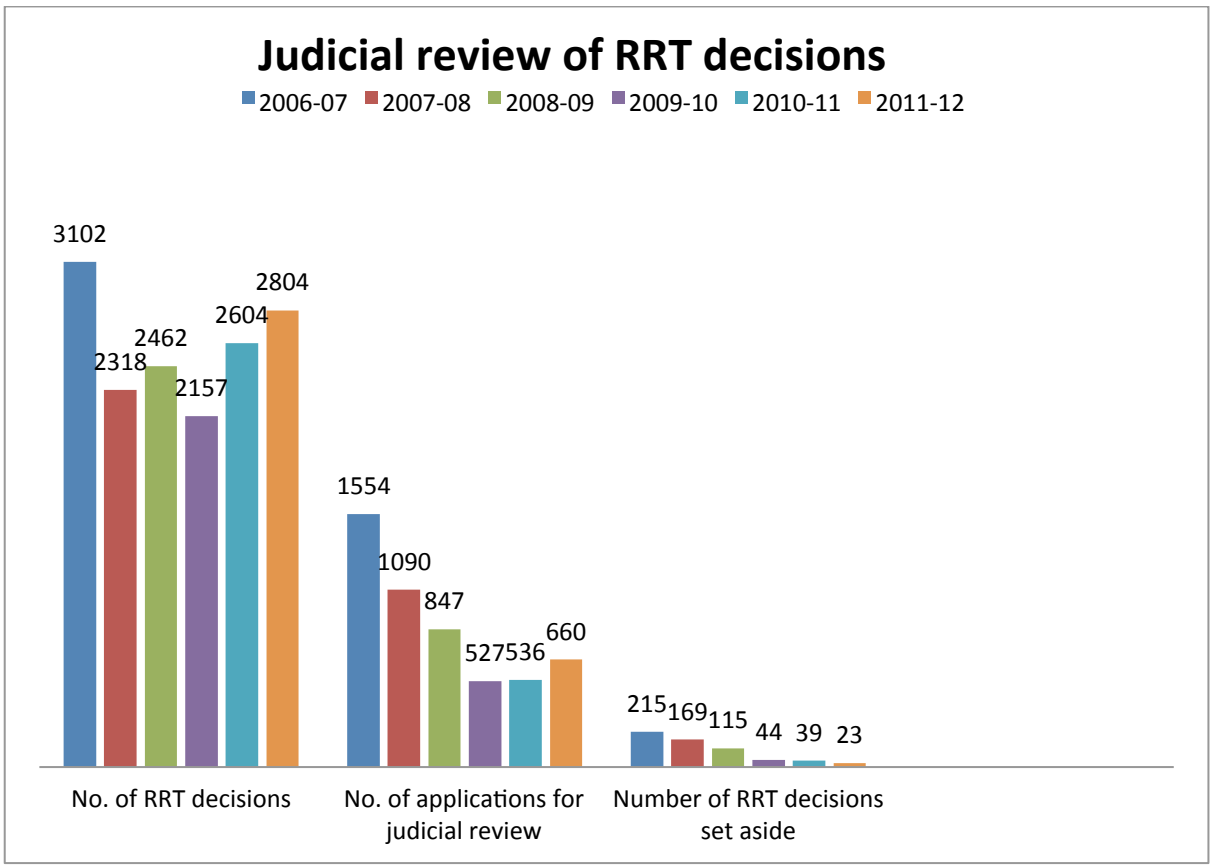
As is well-known, judicial review of migration decisions takes place not under the *ADJR Act* but pursuant to the provisions of Part 8 of the *Migration Act*.[37]

In a paper which I delivered at the AIAL's National Administrative Law Conference in 2009,[38] I mentioned that judicial review rates in relation to the RRT had been falling and that, while

judicial review rates in relation to the MRT remained steady, they were low in comparison with the number of decisions made by the MRT. I also referred to statistics showing that, by comparison with the UK and Canada, judicial review numbers in Australia were small. I said in that paper that it was time to repeal Part 8 of the *Migration Act* and to again bring migration decisions under the umbrella of the *ADJR Act*. I remain of that view.

Set out on the next page is a table showing, in relation to the RRT[39] for the past 6 financial years, the number of decided cases, number of applications for judicial review of those decisions and number of those decisions set aside on judicial review.

Judicial review of RRT decisions 2006-2012[40]



These figures highlight why I believe the ARC has missed an opportunity. It said in its report:

> Ultimately, the Council would prefer migration decisions to be reviewed under the general statutory scheme, if the Council's recommendation is accepted to extend the ambit of the ADJR Act to embrace constitutional judicial review. However, acknowledging that return to this structure would have resourcing implications for the courts and the Government, because of the likelihood that any change in the law in this area would lead to a temporary increase in litigation, the Council has not made a specific recommendation with regard to judicial review of migration decisions.[41]

It is difficult to see what resourcing implications the ARC was referring to here: judicial review of migration decisions is presently taking place in the federal courts system (albeit under a different jurisdictional source) and, as the above statistics indicate, the quantum of court resources needed to deal with the cases has reduced over the years. While it is true that, despite the drop in the number of judicial review applications in recent years, migration review still constitutes by far the major portion of federal judicial review,[42] the figures are not as stark as sometimes represented. For example, in the article referred to above,[43] John McMillan says:

> …in the period 2003-11, 1744 migration applications were filed in the Federal Magistrates Court, compared to 56 administrative law applications under the ADJR Act and s.39B.[44]

With all due respect to John, might I suggest that the comparison is more accurately represented when it takes into account the number of non-migration judicial review filings that are made in **both** the Federal Magistrates Court (recently renamed as the Federal Circuit Court of Australia) **and** the Federal Court. My experience as a judicial review practitioner would suggest that, outside the migration area, judicial review applicants file in greater numbers in the Federal Court than in the Federal Circuit Court.

If, as the ARC says in its report, its recommendations focus on restoring the *ADJR Act* to a central place in the federal judicial review system, it does seem a little odd that it should also say that for the time being the largest area of federal judicial review should remain outside the Act.

If the ARC's concern about the return of migration decisions to judicial review under the *ADJR Act* relates to its effect on workload in the original jurisdiction of the Federal Court, consideration could be given to maintaining arrangements similar to those presently in place under ss 476 and 476A of the *Migration Act* under which the Federal Circuit Court is conferred with the lion's share of original jurisdiction in relation to judicial review of migration decisions.

Tribunal reform

In my 2009 paper, referred to above, I argued that the provisions in the *Migration Act* which establish a procedural code for the MRT-RRT and which state that the procedures supplant the procedural fairness hearing rule[45] ought to be repealed. I remain of the view expressed in that paper. I note that the ARC in its report on judicial review referred to above has noted that 'endeavours to achieve compliance with the code have not necessarily enhanced the fairness of the review process, at considerable cost to efficiency and increased litigation.'[46]

A more fundamental matter relates to the place of the MRT-RRT in the overall structure of the Commonwealth system of merits review tribunals.

In 1994, the ARC, in a report entitled *Better Decisions: Review of Commonwealth Merits Review Tribunals*, proposed that the Commonwealth administrative review tribunals be merged into a single, new Administrative Review Tribunal (ART). The proposal was aimed at realigning the Commonwealth merits review system with the vision of the Kerr[47] and Bland Committees[48] that persons affected by administrative action of Commonwealth agencies should have available to them a general merits review tribunal the creation of which would avoid the waste of resources inherent in a proliferation of tribunals.

The ARC proposed that the ART have two tiers. The first tier would have seven divisions, a Welfare Rights Division, a Veterans' Payments Division, a Migration Division, a Commercial and Major Taxation Division, a Small Taxation Claims Division, a Security Division and a General Division.[49] Appeals would lie, with leave, from the first tier to a second tier review panel. Judicial review under the *ADJR Act* would be available to correct legal error by the ART.

In 2000 Attorney-General Daryl Williams QC introduced into the Parliament two Bills intended to give effect to the ARC's report, the Administrative Review Tribunal Bill and the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill. The Bills were the subject of much debate inside and outside the Parliament and ultimately did not proceed.

However, the thinking behind the ART remains sound. A single merits review tribunal would streamline merits review, remove duplication and inefficiencies and improve performance. Having at the Commonwealth level several tribunals which perform a similar review function but with separate membership, training programs and resources, staff, premises, case management and corporate services systems, is wasteful of resources. The existence of separate tribunals also limits career progression opportunities for members and staff.

In his *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio* (January 2012),[50] Mr Stephen Skehill recommended that the ART proposal be adopted by government as the most desirable outcome to achieve efficiencies in merits review tribunal operations. Justice Duncan Kerr, President of the Administrative Appeals Tribunal, has also said recently that the underlying philosophy of the ARC's ART proposal remains sound.[51]

I agree with Stephen Skehill and Justice Kerr. In addition to the benefits mentioned above, the creation of an ART would have the benefit of assisting access to merits review by applicants. It is further worth noting that there have been several changes in the operating environments of the existing merits review tribunals which may serve to overcome some of the points of difficulty that arose when the ART was being considered by the Parliament in 2000.

As Stephen Skehill noted in his report, a major matter that would need to be addressed in carrying the ART proposal forward would be the large capital investment that would need to be made by government to establish a case management system capable of efficiently handling the many thousands of cases coming before the ART. Also needing to be addressed would be issues concerning premises for the ART in each of the capital cities and elsewhere. To carry the ART proposal forward, two task forces may be necessary, one to work up a new legislative package and the other to deal with all the practical systems, premises and personnel issues associated with creation of the new tribunal.

A matter concerning the appointment of members of tribunals that should be addressed irrespective of any further consideration of the ART proposal is whether it is desirable that the policy and guidelines that the Australian Public Service Commission administers for making appointments to statutory offices[52] are appropriate in relation to the making of appointments of members of independent review tribunals. The guidelines require that the departmental Secretary or his or her delegate chair the assessment panel making recommendations in relation to appointments.

That requirement may cause questions to arise whether assessment processes are impartial and whether member independence is compromised in cases where the tribunal concerned is a specialist tribunal whose role is to review decisions of officers of the Secretary's department. While in my experience member appointment processes in the MRT and RRT have proceeded solely on the basis of merit and without any suggestion of partiality by the Secretary, what is important to public confidence in the independence of the tribunals is the appearance of impartiality in the appointment process. In order to avoid any question arising about this, it would be preferable for the Secretary not to have the role of chairing the assessment committee, particularly in a case where the appointments concerned are being made to a tribunal conducting reviews of decisions of officers of the Secretary's Department.

Endnotes

1 This number includes the Principal Member, Deputy Principal Member and Senior Members.
2 See below for a breakup of case numbers.
3 *Migration Act*, s 353 (MRT); s 420 (RRT).
4 Section 414A(1) of the *Migration Act* provides that the 90-day time limit starts on the day on which the Secretary of the Immigration Department gives the Registrar of the RRT the documents required under s 418(2) of the Act, ie the delegate's decision statement.
5 *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934 at 943; *Re Drake and MIEA (No. 2)* (1979) 2 ALD 634 at 642.
6 For a discussion of the inquisitorial nature of RRT proceedings , see *Re Ruddock; Ex parte Applicant S154/2002* (2003) 201 ALR 437, [57]; *SZBEL v MIMA* (2006) 231 ALR 592, [40].
7 Migration Act, s 354.
8 Migration Act, s 365.
9 Migration Act, s 429.
10 Migration Act, s 421.
11 Senate, Hansard, Legal and Constitutional Affairs Legislation Committee, 27 May 2013.
12 China (PRC), eg has for many years constituted a reasonably significant cohort of cases and the set aside rate for these cases has tended to hover around 20%. The current set aside rate for Afghanistan, on the other hand, is 86%.
13 Publication is through the AustLII website.
14 In preparing decisions of the RRT for publication, staff of the tribunals edit them so that they do not contain information which may identify the applicant or his or her dependants or relatives (*Migration Act 1968 (Cth)*, s 431(2)). Section 91X of the Act should also be noted. It prohibits the names of applicants for protection visas from being published in the High Court, Federal Court or Federal Circuit Court. That is why cases in those courts involving protection visa applicants use letters instead of actual names when referring to applicants.
15 These statistics are taken from annual reports of the MRT and RRT which can be found on the website of the tribunals, www.mrt-rrt.gov.au.
16 Monthly caseload statistics are published on the tribunals' website: www.mrt-rrt.gov.au.
17 The 2013 Budget Statement for the MRT-RRT says that the tribunals expect to receive around 23,000 applications for review in 2013-2014.
18 The word 'appeal' is used here to refer to what in Australia is more commonly referred to as 'review on the merits'.
19 See UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (December 2011), p 37-38.
20 www.justice.gov.uk/statistics/tribunals/annual-stats.
21 A disturbing account of apparent inconsistency in decision making between different immigration judges and different immigration courts can be found in J Ramji- Nogales, A Schoenholtz, P Schraq (Foreword by Senator Edward Kennedy), *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press, 2009).
22 www.justice.gov/eoir/efoia/FY12AsyStats-Current.
23 There were 2 nationals from Australia who brought asylum appeals!
24 www.irb-cisr.gc.ca.
25 As is apparent from the short titles of these Acts, Australia is not the only country that has adopted the unfortunate practice of using the short title of an Act to make a political statement.
26 http://www.cic.gc.ca/english/department/media/releases/2012/2012-11-30.asp.
27 *Migration Act 1968 (Cth)* s 36.
28 Principally the *International Covenant on Civil and Political Rights, the Convention Against Torture and the Convention on the Rights of the Child.*
29 In the EU the concept is referred to as 'subsidiary protection'.
30 *Migration Act* 1958 (Cth) s 36(2)(aa)
31 Oxford University Press, Oxford 2007.
32 A comprehensive analysis may be found in chapter 10 of the RRT *Guide to Refugee Law* which is published on the MRT-RRT website: www.mrt-rrt.gov.au.
33 [2012] FCAFC 147.
34 The meaning of 'real risk' in s 36(2)(aa) has recently been considered by a Full Federal Court of five Justices in *MIAC v SZQRB* [2013]FCAFC 33.
35 The term 'migration decisions' refers here also to refugee decisions.
36 Report No 50, September 2012.
37 Professor John McMillan usefully summarises the position in a recent article,'Restoring the ADJR Act in Federal Judicial Review*' (2013)* 72 *AIAL Forum* 12.
38 'Controlling Migration Litigation*'* (2009) 63 *AIAL Forum* 29.
39 I have not set out judicial review figures for the MRT because they are of very little significance when regard is had to the number of MRT decisions.

40 Some applications for judicial review remain outstanding at the end of each year, with the result that published numbers of set aside decisions for a particular year may need small correction in later years.
41 At p 14.
42 See the numbers presented in Table 4 of the ARC's report, p 68.
43 At fn 37.
44 72 *AIAL Forum* 12 at p14.
45 See *Migration Act*, s 357A, s 422B.
46 *Federal Judicial Review in Australia*, Report No. 50, para 6.21.
47 Commonwealth Administrative Review Committee (Parliamentary Paper No 144 of 1971).
48 Committee on Administrative Discretions (Parliamentary Paper No 316 of 1973).
49 With the Administrative Appeals Tribunal now having been given jurisdiction under the National Disability Insurance Scheme, creation of an ART today would require consideration being given to the establishment of a further division, a National Disability Insurance Division.
50 A copy of the report may be found on the website of the Department of Finance and Deregulation, www.finance.gov.au.
51 Comments made at AIAL seminar, Canberra, 1 May 2013, *Carving out the Philosophy of their Tribunals' Existence.*
52 *Merit and Transparency: Merit based selection of APS agency heads and APS statutory office holders* (3rd ed, August 2012).