Australian Government
Migration Review Tribunal

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Strengthening Relationships

Between Registered Migration Agents and the Migration Review Tribunal

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Introduction

Thank you to the Migration Alliance for the opportunity to address you at their 2013 Annual Conference. The focus of my presentation today will be strengthening relationships between Migration Agents and the Migration Review Tribunal by providing information to assist you represent your clients effectively.

The role of the MRT

The Migration Review Tribunal (known by its acronym as 'the MRT') plays an important role in the overall scheme of visa decision making. The tribunal enables an independent and thorough review of decisions made by delegates of the Minister for Immigration and Citizenship. The MRT reviews a wide range of decisions in relation to visas other than protection visas. Applicants to the MRT include those who have applied for a range of visas in Australia and outside Australia, for example, spouse, student, skilled, business and visitor visas.

The tribunal's powers

The tribunal may exercise all of the powers and discretions conferred on the primary decision-maker, in addition to their own specific powers. The tribunals cannot, however, make a decision that is not authorised by the Migration Act or *Migration Regulations 1994* ('the Regulations'). In making decisions, the tribunal must have regard to Ministerial policy. However, the tribunals can depart from policy if the policy is contrary to the law, or if there are cogent reasons to do so.

The tribunal rarely make decisions using only the same material as the primary decision-maker. In almost all cases tribunal members have before them extensive further material that was not available to the primary decision-maker.

In conducting reviews, the tribunal must have careful regard to the procedural provisions in the Act, particularly:

- The requirement to put certain adverse information to the review applicant, and to provide the review applicant with an opportunity to comment on any such information (s.359A/s.359AA);[1]

[1] All references to legislation are references to the *Migration Act 1958* as now in force, unless otherwise specified.

- The requirement to provide the review applicant with an opportunity to appear before the tribunal to give evidence and present arguments concerning the issues arising in relation to the decision under review (s.360);
- The entitlement (subject to some exceptions) for the review applicant to have access to documents before the tribunals (s.362A or the FOI Act if the matter is finalised); and
- The requirement that the tribunal produce written statements of decision and reasons (s.368).

Caseload snapshot

The tribunal carries out its work in a complex and changing environment. It is not uncommon for the legislation to be amended several times in a year. The dynamism of the environment also comes from the fact that we do not control the number of applications in any given year. International and domestic factors including shifts in international migration patterns and government policy changes in the migration area, can affect the workload of the MRT.

Since its beginnings in 1999 the tribunal has seen significant shifts in the caseload caused by changes and trends in primary applications and in primary decision making, as well as changes to visa criteria and jurisdiction.

By way of illustration, so far in 2013-14 (to 16 September 2013), the MRT has:

- received 3,052 applications (down 15% on last year)
- decided 4,025 applications (up 102% on last year); and
- has 16,477 applications on hand (down 11% on last year).

During the 2012-13 financial year, the MRT received 16,164 applications which is the highest annual lodgement on record for the tribunal.

Of the cases on hand, student, skilled, partner, permanent business and temporary work comprise the five largest caseloads. For our two biggest caseloads, student and skilled, so far in 2013-14 (to 16 September 2013):

- the skill linked refusal caseload has decreased to 2,740 (down 17% on last year)
- the student refusal caseload has decreased to 4,487 (down 11% on last year); and
- the student cancellation caseload has decreased to 549 (down 12% on last year).

Strategies to improve processing times

The time it takes the tribunal to make a decision on a case will depend on a range of factors including the:

- visa class
- delay in allocations
- particular circumstances, and
- when the case is given to a Member to conduct the review.

On our website, every three months, we publish a table which provides a useful *guide* to how long it may take to process a case based on actual processing times for a recent six month period. This table shows average and median processing times from lodgement to decision by case category for that time period.

As you may be aware, the very high levels of lodgements in recent years have affected our processing times. The tribunals have in place and are developing further mechanisms to deal with the increase in workload. Some of the new work practices include changes to case management, streamlined hearings for some MRT cases, as well as continuing to work towards producing overall shorter decision records.

We have implemented a model of specialisation in case allocations whereby members located in Sydney and Melbourne are assigned to specialist teams. These teams are led by a senior member who acts as a practice leader for that caseload. Members in Brisbane, Adelaide and Perth are part of a mixed team, where individual members specialise in particular types of cases, depending on the available case load in those locations. Changes in the registries support member specialisation and end-to-end case processing and the registries are now working with nationally consistent procedures.

These changes had the aim of addressing the increased caseload while not diminishing the quality of reviews, and I can report that the quality of reviews and decisions remain high.

The MRT has determined its caseload strategy for the 2013-14 and key features include:

- proceeding with reviews of recent lodgements in caseloads where early decisions have the potential to slow the rate of lodgements

- proceeding with reviews of older cases in caseloads where delays have the most significant impact; generally, permanent visas where delays create hardship for applicants and sponsors.

Online Lodgement

The tribunal is currently developing online lodgement and payment capabilities on its website. Online applications will provide considerable efficiencies for you and your clients as well as the tribunals. The first phase of our online services will allow you and your clients to lodge an application online. The online lodgement function will contain a secure payment portal which will allow you to pay the application fee using either a MasterCard or Visa credit card. An application can only be successfully lodged online if a full payment of the application fee is provided.

Initially users will not be required to register for an account to lodge an application online; however should you or your client wish to save an application in progress, before it is ready to be submitted, you will need to register for an account. This will allow you to return to the application at a later stage and to complete the form and lodge the application.

The second phase will allow registered users to log in and view their application status. Individual applicants will only be able to lodge one application at a time. Migration agents will be able to create and lodge multiple applications. As a migration agent with a registered account, the online services function will allow you to log in and select applications from a list of existing applications to continue and view the statues of submitted applications.

We anticipate that the first phase of the tribunal online services will be rolled out from early 2014.

Best practice guide for migration agents

I would now like to turn to some practical matters, which will assist you to do business more effectively with the MRT.

- *Timely lodgement of applications*

It is essential that applications to the MRT are lodged within the required timeframe. Applications lodged outside the timeframes or where the MRT application fee is not paid are

not valid, as tribunal members do not have the power to override the time limits prescribed by the legislation (see: s. 347 of the Act). This was reinforced in the cases of *Taylor v MIMIA* [2005] FMCA 281 and *Song v MIMIA* [2005] FMCA 685.

If there are issues with processing a credit payment the tribunal has no obligation to keep trying to obtain funds off a credit card after the initial transaction has been declined. It is the responsibility of you and your client to ensure that adequate funds are available on the card provided and that all details, including the credit card number and expiry date are accurate.

If all supporting documentation is not immediately available, indicate what will be provided at a later date and when it will be provided. If it turns out that the information cannot be provided within that timeframe, advise the tribunal as soon as possible.

You and your clients are welcome to make written submissions at any point in time during the review process. Providing submissions well in advance of a hearing, particularly if they are long and substantive benefits you and your client. Providing submissions at an early stage it gives the Presiding Member the opportunity to clarify what the issues are and may allow for further inquiries to be conducted before the hearing. Providing submissions early may also allow the member to make a favourable decision without proceeding to hearing. Of course, if new evidence becomes available, you should send it to the tribunal immediately. The tribunal will consider material submitted until it has delivered its decision.

Tribunal staff can only deal with migration agents in regards to a particular case if you have been appointed as a representative. While this seems obvious, it is important that you provide the tribunal with evidence your client has authorised you to act as his or her representative, so that tribunal staff are able to answer any questions about the case from you. The Appointment of Representative form is available from our website.

Of the matters that come before the tribunal a fair proportion are the result of insufficient information or supporting documents being provided to the primary decision maker. Often the delegate's decision indicates what information was lacking. When applying for review it's good practice to look carefully at what material was before the primary decision maker and decide what further material can be provided to the tribunal to deal with the criteria in dispute.

If the information is available, providing it to the tribunals promptly may facilitate a decision on the papers to be made. Don't wait for the tribunal to ask for it, as it is well-established that the tribunal is not obliged to make out the applicant's case.[2]

- *Addressing the criteria in dispute*

In each case, you should ensure that you fully understand the relevant provisions of the migration legislation that relate to your client's application and provide only evidence and submissions that address the criteria in dispute. It is up to you to ensure that your clients understand what the critical issues are in their applications, and that focussing on the issues can aid in the timely resolution of the review.

Do not assume that the tribunal has access to all of the documents and information submitted to the Department in relation to past visa applications. If you need to you can access the documents before the MRT in the case under section 362A of the Migration Act. To access documents on a finalised MRT case you will need to lodge a request under the *Freedom of Information Act 1982.*

- *Relevance of evidence to criteria in dispute*

Submissions should be concise and to the point. If you need to provide supporting materials such as newspaper cuttings, references, letters of support or photographs, an explanation as to why it is relevant and how it affects the application would assist the Presiding Member. Similarly, where several witnesses give oral evidence before the tribunal on a complex issue, a written submission summing up the legal arguments and addressing the issues in dispute after the hearing can assist the Presiding Member.

- *Provision of documents in languages other than English*

Documents are in a language other than English, should be translated by a NAATI accredited translator for them to be considered by the tribunal. The original documents (or certified copies of them) and the translations should be provided to the Presiding Member.

Responding to tribunal correspondence

It is important to reply to correspondence from the tribunals promptly, as there are usually legislated time limits to respond. If there is likely to be any significant delay or if any

[2] See *Abebe v the Commonwealth of Australia* (1999) 197 CLR 510 at 576 per Gummow and Hayne JJ.

deadline imposed cannot be met, notify the Presiding Member immediately to seek an extension of time. Migration agents should apply for extensions of time before the previous time expires. Not responding in time can have serious consequences, including the loss of your clients right to a hearing.

- *Include tribunal file numbers in correspondence*

It is always helpful to the tribunal if you continuously quote the file number on your correspondence and provide the applicant's full name. Always use the same form and spelling as was provided in the application for review. In turn, the tribunal will quote your client reference number in any correspondence.

Lodging a request for a fee reduction

The MRT application fee of $1604 Australian dollars is payable in all cases except when applying for review of a bridging visa decision that resulted in a person being placed in immigration detention.

The fee may be reduced to $802 Australian dollars (or $802 will be refunded if the full fee has been paid) if the Registrar or an authorised tribunal officer is satisfied that payment of the fee has caused, or is likely to cause, severe financial hardship to the review applicant.

A fee reduction request cannot be made after the end of the prescribed period for the application to be lodged unless the applicant paid the full fee and is therefore seeking a refund of the fee. A fee reduction request cannot be accepted after the tribunal has decided the matter.

Once a fee reduction request is received, an authorised tribunal officer will assess the request and make the decision based on the information you and your client have provided the tribunal. For fee reduction requests made a significant period of time after an application for review has been lodged, the authorised officer must consider whether the payment caused severe financial hardship to the review applicant at the time the application for review was lodged, not at the time of the request.

The authorised officer assessing the request may also refer to other information in the possession of the tribunal such as information the review applicant may have provided to the Australian government regarding their income and financial situation.

When lodging a fee reduction request it is essential that your client provides supporting documents including;

- bank and credit card account statements displaying current balances and transactions over the past month
- a current payslip or payment statements from Centrelink.

You may also provide other documents that demonstrate payment of the fee has caused your client or is likely to cause your client, severe financial hardship, such as:

- evidence of rent, board or mortgage payments
- utility, medical or other bills
- evidence of receipt of any financial benefits (such as a Centrelink payment, child support payment, workers compensation, or as a holder of a Commonwealth health care card, pensioner concession card or seniors health card)
- evidence that another agency or organisation has, in respect to you, waived, reduced or not imposed a fee (such as legal aid or pro bono migration assistance)
- evidence of investment income.

A *Request for Fee Reduction* form is available on our website and must be accompanied by supporting documentation.

Requesting priority processing

Requests for priority processing should be in writing and should include supporting documents, such as medical reports, if these are available. If there are special circumstances that would warrant the tribunal giving your client's case priority, you can request that the tribunal consider granting priority processing. The tribunal will consider the request carefully and advise you of its decision in writing.

The types of cases which are given priority for constitution are listed in the *Principal Member Direction 01 Constitution and Prioritisation* and include: cases involving persons being held in immigration detention; all visa cancellation cases; close family visitor refusal cases; and cases involving vulnerable persons. A case can also be given priority because of special circumstances.

All bridging visa (detention) cases are constituted immediately after lodgement of the application for review. All other cases from applicants in immigration detention are

constituted within two working days of the lodgement of the application for review, including cases where the department's documents have not yet been received. All other priority cases are constituted as soon as possible.

Priority for all other cases is by date of lodgement of the application for review, although there is scope for groups of cases with similar issues to be allocated as a batch or for us to target particular caseloads. Requests for priority are not granted automatically and are considered carefully before priority is granted. You will be advised in writing whether or not priority is granted.

Role of migration agents at tribunal hearings

MRT hearings are mostly conducted in person, by video conference or by telephone. As proceedings before the MRT are inquisitorial, it is important for migration agents to be mindful that the hearing is only one part of the overall review process. This contrasts with the adversarial system where, as a general rule, all the evidence relied on by the parties must be led at trial. The hearing therefore supplements the information already provided to or obtained by the MRT, which will normally include not only any information provided to the tribunal by applicants or by you as their representatives, but also the Department's file containing the original application for a visa.

If the tribunal asks for specific information prior to the hearing, either informally or pursuant to the Migration Act, you should not rely on providing it at the hearing, as the Member may be able to make a favourable decision on the papers before the hearing if the information is provided sooner.

In keeping with the inquisitorial nature of the tribunal, a migration agent usually has a limited role in the hearing, unless a member considers it appropriate in the circumstances of a particular case to permit the migration agent to present arguments or to address the tribunal (see s.366A).

Generally, the Member will give the migration agent an opportunity to make oral submissions at the end of the hearing but, under the legislation, is not obliged to do so. You should fully inform your client about the issues that the Member will be addressing at the hearing. If your client also has a clear understanding of the issues to be considered at the hearing, they are less

likely to go away feeling that they have not had a fair hearing because issues they expected to be addressed were not.

If the case turns on an objective criterion that the applicant clearly cannot meet, and there is no disagreement as to the facts, make sure they understand the situation, and think about advising them whether there is anything to be gained by persisting with the application.

The tribunals are committed to providing a professional and courteous service to review applicants and others. Hearings are kept as informal as possible though there does need to be some degree of formality associated with the swearing in of persons giving evidence, recording proceedings and so on.

Members should be addressed formally or as 'Member'. Migration agents are expected to be on time. With a large caseload there are heavy demands on the tribunal hearing facilities. Interpreters are costly and are booked to be in attendance before the hearing. Delays therefore add to the cost of proceedings.

Applicants are asked to arrive at least 15 minutes before the start of their scheduled hearing, to allow the preliminary procedures to take place, and it is in their interest for you to be there with them. Although it is understood that things do occasionally go wrong at the last minute, early advice of the need for a hearing postponement is appreciated.

- *The role of the interpreter*

You should clearly indicate on the tribunal application forms and hearing forms if an interpreter is required to assist the applicant or a witness, the language or dialect required and any special requirements. For instance, applicants can request a female interpreter in a sensitive case.

Before, during and after hearings the interpreter is obliged to interpret and to abide by the Australian Institute of Interpreters and Translators Incorporated Code of Ethics in regard to impartiality and professional conduct. It is tribunal policy not to engage an interpreter if that person is also a migration agent. Applicants and advisors are not permitted to bring their own interpreter. If your client has any difficulties in communicating using the interpreter during a hearing, bring it to the Presiding Member's attention straight away.

- *Witnesses*

An applicant is entitled to give notice that he or she wants the tribunal to obtain oral or written evidence from other persons. In practice, applicants are invited to nominate witnesses in the hearing form sent out with the letter inviting the applicant to appear before the tribunal.

The tribunal is not required to obtain evidence (orally or otherwise) from a witness nominated by an applicant, (although the Presiding Member will have regard to the applicant's wishes). If calling witnesses at a hearing, be sure they are necessary. Speak to the witnesses (or the applicant) beforehand so you know what they are going to say and why their evidence is relevant. Large numbers of witnesses attesting to matters that are not in dispute is not helpful and may unnecessarily prolong the hearing.

Evidence from experts such as psychologists or psychiatrists is usually received in writing and such experts are not usually called to give oral evidence at the hearing. Evidence from experts, other than psychologists and psychiatrists, may be given at a hearing.

The tribunals have published "*Guidelines on Expert Opinion Evidence*" which applicants or their representatives should ensure are given to an expert where an expert opinion is sought.[3] The guidelines explain that "[A]n expert providing an opinion does so to assist the tribunal in matters relevant to the expert's area of expertise and is not an advocate for the applicant or any other party".[4]

Role of ministerial intervention

Under ss.351 of the Migration Act, the Minister may substitute for a decision of the tribunal a decision that is more favourable to an applicant if the Minister thinks that it is in the public interest. Tribunal members have no statutory obligation to consider whether matters should be referred to the Minister for the consideration of his or her powers under s.351. Nor is there any statutory power to make a binding recommendation in this regard. The powers under ss.351 may only be exercised by the Minister personally. However, where a tribunal member considers a case should be brought to the Minister's attention it may be referred to

[3] Migration Review Tribunal and Refugee Review Tribunal "*Guidelines on Expert Opinion Evidence*" published 18 May 2009 at [3]. Go to http://www.mrt-rrt.gov.au/Files/HTML/P-C-GU-GuidanceExpertOpinionEvidence.html

[4] Migration Review Tribunal and Refugee Review Tribunal "*Guidelines on Expert Opinion Evidence*" published 18 May 2009 at [9].

the Department and the member's views will generally be brought to the Minister's attention.[5]

The Minister has issued guidelines setting out the circumstances in which the Minister may wish to consider exercising their public interest powers under ss.351, how a person may request consideration of the exercise of these powers, and informing officers of the Department when to refer a case to the Minister for consideration.[6]

If the tribunal does not have jurisdiction to conduct a review, the Minister has no power under section 351 to intervene.

The Tribunal Guideline "*Referrals for Ministerial Intervention*" specifies the appropriate procedure for referring a matter to the Minister for humanitarian consideration and notes that members should have regard to the ministerial guidelines when considering whether or not a case should be drawn to the attention of the Minister. [7]

In accordance with this guideline, where an applicant requests a member to refer a case to the Department and the member decides not to do so, the member will refer to the request in the statement of decision and reasons and note that the applicant may make a request directly to the Minister.

Accordingly, when seeking that a matter be referred to the Department by the tribunal, migration agents should have close regard to the Minister's guidelines and should address in their written and/or oral submissions whether their client's circumstances fall within one or more unique or exceptional circumstances identified in the guidelines.

The decision

The Member may make an oral decision, either at the end of the hearing or later, which may be conveyed to the applicant or their representative. If an oral decision is made, the date of decision is the date the oral decision is conveyed to the applicant or their representative. The Member will provide a full written decision within 14 days.

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5 PAM3: Act – Ministerial powers – Minister's guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J), registered 24 March 2012 at [15].

6 PAM3: Act – Ministerial powers – Minister's guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J), registered 24 March 2012.

7 Go to http://www.mrt-rrt.gov.au/Files/HTML/P-C-TG-15-ReferralsMinisterialIntervention.html.

If there is no oral decision, the Member will endeavour to make their decision as soon as possible. Under the legislation, the tribunal is required to give a copy of the decision statement to the applicant and the Secretary of the Department within 14 days after the decision is made. However, in practice the decision statement is dispatched on the day the decision is made or on the following working day.

Once the decision has been dispatched, the tribunal is unable to consider further submissions or reopen the matter.

Conclusion

Migration practitioners must keep abreast of the developments in the tribunal procedures and policies to ensure that they are able to provide reliable and timely advice to their clients. The forms I have mentioned are available on our website.