

# Fact Sheet - Litigation Involving Migration and Citizenship Decisions

Litigation solicitor services are provided to the Department by its legal services panel. The legal services panel comprises the Australian Government Solicitor, Clayton Utz, DLA Piper, Sparke Helmore and Minter Ellison.

## Merits Review

Many departmental decisions are reviewable on their merits. The merits review is conducted by a merits review tribunal, the Administrative Appeals Tribunal (AAT).

The AAT is an independent merits review tribunal that reviews administrative decisions by government, including:

- a range of visa refusal and visa cancellation decisions (known as migration decisions)
- most onshore protection refusal decisions (known as refugee decisions); and
- character-related refusal decisions, certain cancellation decisions and citizenship refusal decisions.

The AAT undertakes an impartial investigation and the department or minister is not represented.

Departmental decisions for refugee determination in offshore protection obligation assessments are reviewable by the Independent Protection Assessment (IPA). This assessment process replaced the similar Independent Merits Review (IMR) system in March 2011. Independent protection assessments are carried out by an independent assessor who undertakes an impartial investigation of the applicant's protection claims.

All merits review tribunals have the power to set aside the departmental decision and substitute the decision of the tribunal, including making appropriate directions to the departmental decision makers. In the case of the IPA, the recommendation is to the minister.

## Judicial Review

Judicial review involves a court looking at the way in which the decision was made to determine whether the decision maker made any legal errors that lead to invalidity.

An applicant who wishes to seek judicial review of an AAT or IPA/IMR decision can seek to have that decision reviewed by the courts.

While the Migration Act 1958 includes a privative clause (section 474), this does not prevent judicial review of decisions made under the Migration Act 1958 that are tainted by jurisdictional error. Jurisdictional error covers most legal errors.

If a court finds such an error in a decision under review, it cannot substitute its own decision. The court must return the legally flawed decision to the decision maker to be reconsidered.

The Migration Act 1958 prevents class, representative or otherwise grouped court actions in immigration proceedings. There are some exceptions to this prohibition, including consolidation of proceedings by a court in certain circumstances.

## **Trends in Judicial Review**

### **Applications**

Applications to the Federal Magistrates Court and the Federal Court at first instance for judicial review of portfolio decisions had been declining since 2003–04. However in the last financial year this pattern has changed and we are now experiencing an increase in the number of applications filed at the courts.

In 2003–04, there were 3746 applications to the Federal Magistrates Court and the Federal Court at first instance. In 2009–10 this had declined to 905 applications, compared with 984 in 2010–11.

Of the 984 applications filed in 2010–11, 54 per cent were reviewing refugee decisions, 21 per cent challenged migration decisions, with the remaining 25 per cent for review of other decisions.

### **Time to Resolve Federal Court Matters**

In 2010–11, the Federal Magistrates Court and the Federal Court took approximately five months on average to resolve cases.

### **Outcomes**

A case is resolved when:

- either the applicant or the minister withdraws before hearing, or
- the court remits the decision to the decision-maker for reconsideration (applicant wins), or
- the court dismisses the application (minister wins), or
- the court makes a declaration that there is an error of law in the decision.

The table below sets out first instance Federal Court and Federal Magistrates Court resolutions for the past five financial years.

| Year    | Applicant withdrawal | Minister withdrawal | Applicant win | Minister win | Other | Total |
|---------|----------------------|---------------------|---------------|--------------|-------|-------|
| 2006–07 | 337                  | 486                 | 133           | 1790         | 3     | 2749  |
| 2007–08 | 196                  | 228                 | 97            | 1605         | 1     | 2127  |
| 2008–09 | 167                  | 202                 | 82            | 1076         | 0     | 1527  |
| 2009–10 | 115                  | 134                 | 47            | 751          | 0     | 1047  |
| 2010–11 | 155                  | 123                 | 53            | 1004         | 2     | 1337  |

## AAT Merits Review

### Jurisdiction

Up until 1 July 2015, the AAT had jurisdiction only to review the following departmental decisions on their merits:

- to refuse to grant a protection visa or to cancel a protection visa relying on Articles 1F, 32 or 33 of the Refugee Convention or section 36(2C) of the Migration Act 1958
- to cancel a business visa
- to order the deportation of a non-citizen convicted of certain crimes
- to register, or refuse to register, a person as a migration agent
- to deregister, or refuse to deregister, a person as a migration agent
- to cancel or suspend a person's registration as a migration agent
- to refuse to grant, or to cancel, a visa on the basis that the non-citizen does not satisfy the delegate of the minister that the person passes the character test
- access to information (decisions made under the Freedom of Information Act 1982)
- review of certain decisions made under the Australian Citizenship Act 2007.

From 1 July 2015, in addition to these decisions, the AAT now has jurisdiction over:

- a range of visa refusal and visa cancellation decisions under the Migration Act 1958 that had previously been reviewed by the Migration Review Tribunal (MRT); and
- most onshore protection refusal decisions under the Migration Act 1958 that had previously been reviewed by the Refugee Review Tribunal (RRT).

## Applications

Applications to the AAT have generally decreased since 2004–05. In 2004–05, there were 461 resolutions in the AAT, while in 2010–11 there were 370.

The table below sets out AAT resolutions for the previous five financial years.

| Year    | Applicant withdrawal | Minister withdrawal | Applicant win | Minister win | Other | Total |
|---------|----------------------|---------------------|---------------|--------------|-------|-------|
| 2006–07 | 89                   | 75                  | 51            | 97           | 0     | 312   |
| 2007–08 | 79                   | 103                 | 60            | 138          | 1     | 381   |
| 2008–09 | 39                   | 86                  | 44            | 129          | 1     | 299   |
| 2009–10 | 73                   | 85                  | 42            | 82           | 1     | 283   |
| 2010–11 | 89                   | 73                  | 48            | 160          | -     | 370   |

Except in cases where the minister has personally made a decision to refuse or cancel a visa on character grounds (which are not reviewable by the AAT), visa refusal and visa cancellation decisions on character grounds made in Australia involve a time-frame of 84 days for review of the decision.

The legislation deems an affirmation of the delegate's decision if the AAT does not complete its review within 84 days of the applicant being notified of the decision. To date, the AAT has always met this time-frame.

**Source: Department of Immigration and Border Protection**

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