

This factsheet describes [the role of the Refugee Review Tribunal](#). It explains the [Australian Government's policy on merits review and its implications](#), and explains [best practice in merits review](#). The factsheet also includes a list of [further reading](#).

### What is the role of the Refugee Review Tribunal?

The Refugee Review Tribunal (RRT) conducts merits review of decisions made by the [Department of Immigration & Border Protection](#) to refuse to grant a protection visa or to cancel a protection visa.<sup>1</sup> In other words, the RRT has the power to reconsider an asylum seeker's claim from scratch to determine whether or not he or she is a refugee in need of Australia's protection.

The powers and functions of the RRT are outlined in the [Migration Act 1958 \(Cth\)](#) and [Migration Regulations 1994 \(Cth\)](#).<sup>2</sup> Merits review by the RRT involves the reconsideration of a case by a Tribunal Member, who takes into account the law, facts and government policy as they stand at the present time to determine afresh whether Australia has protection obligations to an applicant.<sup>3</sup> In reconsidering a case, the Tribunal Member effectively 'stands in the shoes' of the primary decision-maker (an immigration official).<sup>4</sup> The Tribunal Member is bound by the same legal framework as the primary decision-maker and exercises the same powers and discretions conferred on the primary decision-maker.<sup>5</sup> However, the Tribunal Member is not limited to the material and evidence before the primary decision-maker: the Tribunal Member considers all of the evidence available, including any additional evidence from the applicant and information from other sources (such as information about conditions in the applicant's country of origin, which might have changed since the original decision was made).<sup>6</sup> The RRT may affirm the original decision, vary it, set it aside and substitute a new decision, or return a matter to the Department of Immigration for reconsideration with specific directions or recommendations.<sup>7</sup>

The aim of merits review is to ensure that the 'correct or preferable' decision is reached in a particular case.<sup>8</sup> In this sense, it can be distinguished from judicial review, which is concerned only with the very limited question whether a decision was affected by jurisdictional error. Judicial review does not permit reconsideration of the merits of the case,<sup>9</sup> both because the merits are irrelevant to the issue of whether there has been a jurisdictional error and because the judiciary has not been given the task of determining an outcome on the merits.<sup>10</sup>

### What is the Coalition Government's policy on merits review, and what are the implications?

Under the [Coalition's policy](#), access to the RRT will be removed for certain asylum seekers.<sup>11</sup> Where a departmental case officer decides to refuse to grant a protection visa, a review of the decision will be conducted by another departmental case officer.<sup>12</sup> Hence, in place of independent merits review by the RRT, reviews will be conducted by the Department of Immigration itself. If the review is unsuccessful, the asylum seeker will be removed to their country of origin or a third country.<sup>13</sup>

Abolishing merits review by the RRT raises significant concerns. A considerable number of decisions made by the Department are overturned on review each year. The overturn rate for asylum seekers arriving by boat was 83 per cent in 2010–11,<sup>14</sup> 82.4 percent in 2011–12,<sup>15</sup> and 72 per cent in 2012–13.<sup>16</sup> Although the Coalition has pointed to these overturn rates as evidence of Labor’s so-called ‘tick and flick’ approach to assessing the protection needs of asylum seekers,<sup>17</sup> the high overturn rates do not necessarily indicate that there are faults in the system of independent merits review. Indeed, according to [Associate Professor Alex Reilly](#), ‘there are good reasons to believe that the decision of the review body is likely to be more accurate than the decision of the primary decision maker, given the legal and technical expertise of administrative appeals tribunals, and the fact that they apply the rules of evidence and protect procedural rights more consistently than initial decision makers.’<sup>18</sup>

As [Tony Blair](#) remarked in the UK House of Commons:

When a right of appeal is removed, what is removed is a valuable and necessary constraint on those who exercise original jurisdiction. That is true not merely of immigration officers but of anybody. The immigration officer who knows that his decision may be subject to appeal is likely to be a good deal more circumspect, careful and even-handed than the officer who knows that his power of decision is absolute. That is simply, I fear, a matter of human nature, quite apart from anything else.<sup>19</sup>

Apart from expertise, there is also the issue of independence. RRT Members hold a statutory office and are independent of the public service.<sup>20</sup> They are appointed by the Governor-General for a fixed term of up to five years,<sup>21</sup> and may only be removed from office during the period of their appointment under certain circumstances specified by statute, such as due to ‘proved misbehaviour or physical or mental incapacity’.<sup>22</sup> Such safeguards help to ensure the independence of Tribunal Members. By contrast, under the Coalition’s policy, review will be undertaken by an official within the Department of Immigration. This gives rise to a potentially serious conflict of interest, given that the Department – led by an Immigration Minister who is intent on ‘stopping the boats’ and ending the ‘tick and flick’ approach to refugee claims – will be the only entity capable of making decisions about whether or not people are refugees.<sup>23</sup>

Without independent merits review, asylum seekers seeking redress for poorly-made departmental decisions will have only one option: judicial review. Although the Coalition has indicated that it plans to implement a ‘non-statutory’ assessment and review process,<sup>24</sup> presumably with the intention of making departmental decisions immune to judicial review,<sup>25</sup> the Coalition cannot, consistently with the Australian Constitution, remove the jurisdiction of the High Court to review administrative decisions for jurisdictional error (that is, errors of law).<sup>26</sup> In 2003, the [High Court](#) held that any law that sought to remove such jurisdiction would be unconstitutional.<sup>27</sup> Moreover, the only remedy available to the court if satisfied that a jurisdictional error had been made would be to return the matter to the Department to be re-decided, rather than to the RRT as is currently the case. This would have the potential to create a stand-off between the executive and judicial branches of government.

The RRT plays an important role in Australia’s refugee status determination system. By seeking to ensure that the ‘correct or preferable’ decision is reached in a particular case, the RRT protects the rights and interests of individual asylum seekers. The RRT also performs the broader function of upholding the rule of law in Australia, by enhancing the openness and accountability of government and by improving the quality and consistency of government decision-making.<sup>28</sup> Removing the possibility of independent merits review of departmental decisions may result in people being returned to

persecution and other forms of serious harm, and undermine confidence in Australia's refugee status determination system.

## What is best practice on merits review?

[UNHCR](#) recommends that applicants who have not been recognized as refugees by a primary decision-maker 'should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system'.<sup>29</sup> Moreover, they should 'be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending'.<sup>30</sup>

EU law stipulates that asylum seekers must have access to full merits and judicial review, pursuant to article 46(3) of the recast [Asylum Procedures Directive](#).

In [New Zealand](#), asylum seekers may appeal to the Immigration and Protection Tribunal to have their protection claim reconsidered on the merits.<sup>31</sup>

The US permits asylum seekers to apply for merits review. If asylum is denied by an immigration judge, then there is a right of appeal to the Board of Immigration Appeals.<sup>32</sup>

In Canada, asylum seekers have their initial claim assessed by the independent Immigration and Refugee Board of Canada (rather than a government official). Certain asylum seekers can appeal on the merits to the Refugee Appeal Division; others are prohibited if they come from [designated countries](#) (those presumed to be 'safe' because they do not normally produce refugees). The use of designated countries (or 'safe third country' lists) has been strongly criticized for undermining the *individual* nature of asylum claims and for violating the principle of non-discrimination in article 3 of the Refugee Convention. Access to merits review should not be contingent on one's country of origin.

The European Council on Refugees and Exiles ([ECRE](#)) recommends that the following procedures should be in place for asylum seekers to appeal against a first-instance decision to refuse to grant a protection visa:

- Asylum seekers should have 'the right and the means to appeal, both on the merits of the application and the legality of the decision, to a judicial or other independent competent body';
- Asylum seekers should be allowed to remain in the country pending a decision on the appeal;
- Asylum seekers should be given sufficient time to prepare an appeal;
- Asylum seekers who lack sufficient resources should be provided access to free legal advice and representation in preparing for an appeal and in appearing before an appellate body;
- Asylum seekers should have the right to an oral hearing before an appellate body;
- The appellate body 'should consist of legally qualified personnel with specialist knowledge of international and national refugee and human rights law and continuing specialist training';
- The appellate body should provide full reasons for its decision, promptly and in writing, to the asylum seeker;
- Asylum seekers should have the opportunity to request judicial review of the decision of the appellate body.<sup>33</sup>

The Coalition government's policy would fail to satisfy at least four of these best-practice procedures.

## Further reading

'Refugees to be Denied Permanent Residency under Coalition's Plan to "Determine Who Comes Here"', ABC News, 16 August 2013

Department of Immigration and Border Protection, Fact Sheet 9 – Litigation Involving Migration and Citizenship Decisions (March 2012)

Downes, Garry, 'Tribunals in Australia: Their Roles and Responsibilities' (2004)

European Council on Refugees and Exiles, Guidelines on Fair and Efficient Procedures for Determining Refugee Status (September 1999)

MacDonald, Angela, Merits Review of Refugee Status Decision Making (Speech delivered at Global Manager Refugee and Humanitarian Conference, Sydney, 15 March 2012)

Migration Review Tribunal and Refugee Review Tribunal, Annual Report 2011–12 (2012)

McAdam, Jane and Ben Saul, 'Inefficient Coalition Asylum Policy Will Flood the Courts', The Sydney Morning Herald, 16 August 2013

McBeth, Adam, 'Refugee Tribunal a Check against the Culture of No', The Drum, 21 March 2013

Reilly, Alex, 'FactCheck: Are Australia's Refugee Acceptance Rates High Compared with Other Nations?', The Conversation, 20 August 2013

Twomey, Anne, 'Preventing Asylum Seekers from Accessing the Courts', Constitutional Critique (19 August 2013)

Williams, George, 'Coalition Would Find Asylum Processing Plan Fails on Two Fronts', The Sydney Morning Herald, 26 August 2013

Wroe, David and Bianca Hall, 'Doubts Whether Refugee Test Can Be Tougher', The Sydney Morning Herald, 3 July 2013

## Endnotes

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<sup>1</sup> See Department of Immigration and Border Protection, *Fact Sheet 9 – Litigation Involving Migration and Citizenship Decisions* (March 2012) <<http://www.immi.gov.au/media/fact-sheets/09litigation.htm>>; Migration Review Tribunal and Refugee Review Tribunal, *Our Role and Services* <<http://www.mrt-rrt.gov.au/About-Us/Our-role-and-services.aspx>>; Migration Review Tribunal and Refugee Review Tribunal, *Annual Report 2011–12* (2012) Part 2 <<http://www.mrt-rrt.gov.au/getattachment/Forms-and-publications/Annual-Reports/MRTRRTAR201112.pdf.aspx>>. The Administrative Appeals Tribunal (AAT) also conducts merits review of certain decisions that may affect asylum seekers and refugees, including decisions to refuse to grant a protection visa or to cancel a protection visa, based on Articles 1F, 32 or 33 of the Refugee Convention or 36(2C) of the *Migration Act 1958* (Cth); decisions to deport a non-citizen convicted of certain crimes; decisions to cancel a visa on the basis that a non-citizen does not pass the character test: AAT, *Decisions Subject to Review (Jurisdiction as at 31 December 2012)* <<http://www.aat.gov.au/docs/JurisdictionList31December2012am.pdf>>.

<sup>2</sup> Migration Review Tribunal and Refugee Review Tribunal, *Legislation, Policy and Guidelines* <<http://www.mrt-rrt.gov.au/Conduct-of-reviews/Legislation-policies-and-guidelines.aspx>>.

<sup>3</sup> Refugee Review Tribunal, *The Review Process* (July 2013) 1 <<http://www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=628ea67c-743b-472c-8c85-9062aa4571f2>>; Migration Review Tribunal and Refugee Review Tribunal, *Annual Report 2011–12*, above n 1, 6.

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- <sup>4</sup> See, eg, Garry Downes, 'Tribunals in Australia: Their Roles and Responsibilities' (2004) <<http://www.aat.gov.au/Publications/SpeechesAndPapers/Downes/pdf/tribunals.pdf>>.
- <sup>5</sup> Migration Review Tribunal and Refugee Review Tribunal, *Our Role and Services*, above n 1.
- <sup>6</sup> Angela MacDonald, *Merits Review of Refugee Status Decision Making* (Speech delivered at Global Manager Refugee and Humanitarian Conference, Sydney, 15 March 2012) 3 <[http://www.mrt-rrt.gov.au/getattachment/Information-for/Community-\(General-public\)/Community-speeches-and-presentations/P-C-2012-03-PU-speech-GlobalManagerRef-HumConfDPM.pdf.aspx](http://www.mrt-rrt.gov.au/getattachment/Information-for/Community-(General-public)/Community-speeches-and-presentations/P-C-2012-03-PU-speech-GlobalManagerRef-HumConfDPM.pdf.aspx)>.
- <sup>7</sup> *Migration Act 1958* (Cth) s 415.
- <sup>8</sup> Migration Review Tribunal and Refugee Review Tribunal, *Our Role and Services*, above n 1. See generally *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589.
- <sup>9</sup> Department of Immigration and Border Protection, above n 1.
- <sup>10</sup> *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-6.
- <sup>11</sup> Liberal Party of Australia and National Party of Australia, *The Coalition's Policy to Clear Labor's 30,000 Border Failure Backlog* (August 2013) 7 <<http://lpaweb-static.s3.amazonaws.com/Policies/ClearLabor30000BorderFailureBacklog.pdf>>.
- <sup>12</sup> *Ibid* 8.
- <sup>13</sup> *Ibid*.
- <sup>14</sup> Department of Immigration and Citizenship, *Asylum Statistics – Australia: Quarterly Tables – March Quarter 2013* (Commonwealth of Australia, 2013) 13 <[http://www.immi.gov.au/media/publications/statistics/asylum/\\_files/asylum-stats-march-quarter-2013.pdf](http://www.immi.gov.au/media/publications/statistics/asylum/_files/asylum-stats-march-quarter-2013.pdf)>. The overturn rate is the percentage of total review outcomes that result in an overturned decision.
- <sup>15</sup> *Ibid*.
- <sup>16</sup> Evidence to Senate Legal and Constitutional Affairs Legislation Committee (Estimates), Parliament of Australia, 27 May 2013, 7 (Ms Kay Ransome, Principal Member, Migration Review Tribunal and Refugee Review Tribunal).
- <sup>17</sup> Liberal Party of Australia and National Party of Australia, above n 11, 7; 'Refugees to be Denied Permanent Residency under Coalition's Plan to "Determine Who Comes Here"', *ABC News*, 16 August 2013 <<http://www.abc.net.au/news/2013-08-16/asylum-seekers-to-be-denied-residency-under-coalition/4890968>>; Jared Owens, 'Rejected Boatpeople Sail through Tribunal', *The Australian*, 18 March 2013 <<http://www.theaustralian.com.au/national-affairs/policy/rejected-boatpeople-sail-through-tribunal/story-fn9hm1gu-1226599409100#>>.
- <sup>18</sup> Alex Reilly, 'FactCheck: Are Australia's Refugee Acceptance Rates High Compared with Other Nations?', *The Conversation*, 20 August 2013 <<http://theconversation.com/factcheck-are-australias-refugee-acceptance-rates-high-compared-with-other-nations-17151>>.
- <sup>19</sup> Tony Blair, *Hansard*, vol 213, col 43 (2 November 1992) <<http://www.publications.parliament.uk/pa/cm199293/cmhansrd/1992-11-02/Debate-3.html>>.
- <sup>20</sup> Angela MacDonald, above n 6, 2.
- <sup>21</sup> *Migration Act 1958* (Cth) s 461.
- <sup>22</sup> *Migration Act 1958* (Cth) s 468.
- <sup>23</sup> Jane McAdam and Ben Saul, 'Inefficient Coalition Asylum Policy Will Flood the Courts', *The Sydney Morning Herald*, 16 August 2013 <<http://www.smh.com.au/federal-politics/federal-election-2013/inefficient-coalition-asylum-policy-will-flood-the-courts-20130816-2s18e.html>>.
- <sup>24</sup> Liberal Party of Australia and National Party of Australia, above n 11, 7.
- <sup>25</sup> Anne Twomey, 'Preventing Asylum Seekers from Accessing the Courts', *Constitutional Critique* (19 August 2013) <[http://blogs.usyd.edu.au/cru/2013/08/preventing\\_asylum\\_seekers\\_from\\_1.html](http://blogs.usyd.edu.au/cru/2013/08/preventing_asylum_seekers_from_1.html)>. On the legality of the so-called 'non-statutory' refugee status assessment that was introduced on Christmas Island in 2008, see Michelle Foster and Jason Pobjoy, 'A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's "Excised" Territory' (2011) 23 *International Journal of Refugee Law* 583.
- <sup>26</sup> *Australian Constitution* s 75(v). See also Twomey, above n 25; George Williams, 'Coalition Would Find Asylum Processing Plan Fails on Two Fronts', *The Sydney Morning Herald*, 26 August 2013 <<http://www.smh.com.au/comment/coalition-would-find-asylum-processing-plan-fails-on-two-fronts-20130826-2smda.html#ixzz2hBwxm1fa>>.
- <sup>27</sup> *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476.
- <sup>28</sup> Migration Review Tribunal and Refugee Review Tribunal, *Annual Report 2011–12*, above n 1, 6.
- <sup>29</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979) [192(vi)] <<http://www.unhcr.org/3d58e13b4.html>>.
- <sup>30</sup> *Ibid* [192(vii)].
- <sup>31</sup> *Immigration Act 2009*, s 193.

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<sup>32</sup> 8 CFR 1003.1(b); *Matter of A-S-B-*, 24 I&N Dec 493, 496 (BIA 2008); *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec 209 (BIA 2010). See also 8 CFR 1208.14(c)(1) and 8 USC 1225(b)(1)(B).

<sup>33</sup> European Council on Refugees and Exiles, *Guidelines on Fair and Efficient Procedures for Determining Refugee Status* (September 1999) 30–31 <<http://www.ecre.org/component/downloads/downloads/146.html>>.