MICHAEL JONES SOLICITOR

ACCREDITED SPECIALIST IN IMMIGRATION LAW
LAW SOCIETY OF NEW SOUTH WALES

ABN 59 514 915 529

PO Box 460
Menai Central
NSW 2234
Australia

Level 45, 680 George St
Sydney NSW 2000
(by appointment only)

Tel: +612 8003 4748
mtjones@migrantlaw.com
www.migrantlaw.com

Merits review of Migration Act decisions in the Administrative Review Tribunal

INTRODUCTION

In this paper the following abbreviations are used:

- ARTA means the Administrative Review Tribunal Act 2024;
- AIA means the Acts Interpretation Act 1901;
- (A)MA means the Migration Act 1958 as amended from the date of commencement of the ARTA.
- (C)MA means the Migration Act 1958 as in effect before the commencement of the ARTA;
- FOIA means the Freedom of Information Act 1982.
- MARA means the Migration Agents Registration Authority

The term "the Tribunal" is used to refer either to the existing Administrative Appeals Tribunal or the new Administrative Review Tribunal, depending on the context.

1 BACKGROUND

The principle Act governing merits reviews of Federal government decisions in the new Administrative Review Tribunal, including decisions about visa refusal and cancellations, is the ARTA. The new Tribunal will commence operation on 14 October 2024.

ARTA 5(1) stipulates that application of a provision of the ARTA is subject to a contrary intention in another Act, and 5(2) allows instruments made under another Act to operate in addition to, instead of or contrary to provisions of the ARTA. The (A)MA operates to alter the operation of the ARTA in substantial ways. However to the extent that the (A)MA does not express an intention to alter the operation of the ARTA, the provisions of the ARTA have effect.

2 REVIEW OF MIGRATION ACT DECISIONS IN THE ART

A significant feature of the (A)MA is that the legislation governing protection and non-protection visa reviews is amalgamated, though still with a few exceptions.

Another significant feature is that the (C)MA refers to decisions made by the Tribunal "under Part 5 or 7 or section 500", the (A)MA with some exceptions (see below), replaces this by referring to

decisions made by the Tribunal "by application under Part 5 or section 500" leaving the actual review decision to be made under ARTA 105.

(A)MA Part 5 applies to applications for review of decisions affecting both protection and non-protection visas and (C)MA Part 7 is repealed in its entirety, along with (C)MA Part 7AA dealing with the Immigration Assessment Authority, which is abolished. What were "fast track decision" under the (C)MA are treated the same as other protection visa refusals and cancellations under the (A)MA.

Under the (C)MA Part-5 and Part-7 reviewable decisions are reviewed in the Migration and Refugee Division of the Tribunal. Other decisions involving the character test in MA 501(6), certain business visa decisions under 134 and decisions of the MARA under Part 3 are reviewed in the General Division.

ARTA 196(1) establishes six "jurisdictional areas" including (a) General, (c) Migration and (e) Protection, and (2) provides that the President may establish, or abolish, one or more lists as subareas within a jurisdictional area.

While (C)MA 336N and 409 specified that Part-5 and Part-7 reviews were to be heard only in the Migration and Refugee Division, no such specification appears in the (A)MA and under ARTA 196(4) the Tribunal's powers in relation to a proceeding are to be exercised in the area or list that the President directs.

2.1 (A)MA Part 5 and the ARTA

(A)MA 336P(1) stipulates that, subject to 357A (remittal of decisions for reconsideration), the ARTA applies in relation to a review by the ART of reviewable migration decisions and reviewable protection decisions unless (A)MA Part 5 expressly provides otherwise.

(A)MA 336(2) then specifies the following provisions of the ARTA as not applying to those decisions:

(a) paragraph 21(2)(b) (notice of application to decision-maker);
(b) paragraph 21(2)(c) (notice of application to other persons made a party to the proceedings);
(c) subsection 21(3) (notice of application and right to apply to become a party);
(d) section 23 (decision-maker must give Tribunal reasons and documents—general rule);
(e) section 24 (decision-maker must give Tribunal additional statement if Tribunal requires—general rule);
(f) section 25 (decision-maker must give Tribunal additional documents within 28 days—general rule);
(g) section 27 (decision-maker must give copies of reasons and documents to other parties—general rule);
(h) section 32 (reviewable decision continues to operate unless Tribunal orders otherwise);
(i) section 85 (tribunal may remit decision to decision-maker for reconsideration);
(j) section 103 (if parties reach agreement—review of decisions only);
(k) section 107 (when Tribunal's decision on review comes into operation);
(l) section 294 (legal or financial assistance), unless the review is of a decision referred to the guidance and appeals panel by the President of the ART under section 122 of the ART Act.

2.2 Reviewable migration decisions

(A)MA 338 is headed "Meaning of *reviewable migration decision*". Throughout the (A)MA this term replaces "Part-5 reviewable decision" in the (C)MA. Apart from that, the changes to the existing

definitions are mostly technical. (A)MA 338(1) excludes certain decisions from the definition in the same way as (C)MA 338(1), except that the term "Part-7 reviewable decision" in para (b) is replaced by "reviewable protection decision" and para (d) referring to "fast track decisions" is repealed.

The section is an exhaustive list of the types of decisions which come within the definition (incorporating a supplementary list in the Regulations).

Apart from the change of name, there are no changes to the types of decisions that are reviewable under this section.

2.3 Reviewable protection decisions

(A)MA 338A is headed "Meaning of *reviewable protection decision*". Apart from the change of name there is no change in the types of decisions currently defined as "Part-7 reviewable decisions" under (C)MA 411, except that what were "fast track decisions" now become reviewable protection decisions to be dealt with by the Tribunal under (A)MA 338A.

2.4 Conclusive certificates

(A)339 is extended to cover conclusive certificates under both (C)MA 339 and (C)MA 411(3).

2.5 Other Migration Act decisions

Provisions relating to other reviewable decisions involving the character test in 501(6), business visa cancellations under 134 and decisions of the MARA under (C)MA Part 3 are not significantly changed in the (A)MA.

3 APPLICATION FOR REVIEW

Unless a conclusive certificate is in force under (A)MA 339, (A)MA 348 stipulates that the Tribunal must review a decision if an application to it is properly made under (A)MA 347 or 347A. A note specifies that the Tribunal has no jurisdiction if an application for review is not properly made.

3.1 Making an application

(A)MA 347 alters the requirements in (C)MA 347 and 412 for making an application for review for both reviewable migration decisions and reviewable protection decisions.

3.1.1 Prescribed matters

(A)MA 347(2) stipulates that an application must include any information, documents or fee prescribed in the Regulations. Subsection (6) disallows ARTA 34(2), which requires inclusion of information specified in a practice direction. While ARTA 34(3) stipulates that failure to comply with the direction does not invalidate the application, this is also disallowed by (A)MA 348. As a result, failure to comply with the Regulations prescribed under (A)MA 347(2) means that the application is not properly made and cannot be reviewed by the Tribunal.

3.1.2 Application forms

There is no mention of an "approved form" for review applications in the (A)MA. ARTA 34(1), which stipulates that an application to the Tribunal may be made "in writing or in any other manner specified for the application in the practice directions", is not disallowed by the (A)MA. The word "or" may suggest that an application may simply be made in writing, providing (A)MA 347(2) is complied with, although it is likely that specific forms will be required under Regulations.

3.1.3 Fees

Fees for applications to review reviewable migration decisions and reviewable protection decisions are to be set by rules to be made under ARTA 296, although (A)MA 347(2)(c)(iii) will disallow any provisions in the rules that do not require the fee to accompany the application. Currently fees for Part-7 reviews are only payable if the outcome of the review is to affirm the decision under review. It is not clear how, or if, this will be maintained under the new legislation.

3.1.4 Time limits

(A)MA 347(3) establishes two fixed time limits for both migration and protection applications, being 7 days (not *working* days as in the current Regulations) if the applicant is in immigration detention on the day of notification, and 28 days otherwise. Both periods are to be calculated "after" the day of notification, meaning that day one will be the day following the day of notification (see AIA 36(1)).

Time limit provisions in ARTA 18 and 19 are disallowed and the (A)MA time limits cannot be extended in any circumstances. However, pursuant to AIA 36(2), if the last day for doing a thing required by legislation is a Saturday, Sunday or holiday, the thing may be done on the next day that is not such a day.

3.1.5 Who can apply, and where they must be

(A)MA 347A(6) disallows ARTA 17 and 35 for making applications.

3.1.5.1 Reviewable migration decisions

(A)MA 347A(1) sets out who can apply to review a reviewable migration decision, in the same terms as (C)MA 347(2).

(A)MA 347A(2) sets out where the applicant for review must be at the time of applying for review, in the same terms as (C)MA 347(3).

(A)MA 347A(3) stipulates that in the case of a decision reviewable under 338(7A) the visa applicant must have been physically present in the migration zone at the time of the decision, matching (C)MA 347(3A).

3.1.5.2 Reviewable protection decisions

(A)MA 347A(4) stipulates that an application to review a reviewable protection decision must be made be the person who is the subject of the decision, and 347A(5) requires that the person must have been present in the migration zone at the time of the decision. These provisions match (C)MA 412(2) and (3).

Note that a decision to refuse a protection visa while the applicant was not present in Australia is *not* a reviewable protection decision because of (A)MA 347A(5). It is therefore not excluded from review as a reviewable migration decision under (A)MA 338(1)(b).

4 POWERS OF THE TRIBUNAL

4.1 Decisions on review

Under the (C)MA the Tribunal makes its decision to review Part-5 or Part-7 decisions under that Act (349 and 415). The powers of the Tribunal to affirm, vary or set aside and substitute a decision under (C)MA 349(2)(a), (b) and (d) are repealed leaving the Tribunal to exercise the equivalent powers under ARTA 105(a), (b) and (c)(i).

However, the Tribunal's power under (C)MA 349(2)(c) to remit an application for "reconsideration in accordance with such directions or recommendations of the Tribunal as are permitted by the regulations" is not replaced by the equivalent power in ARTA 105(c)(ii), and continues to be exercised under (A)MA 349(2), which a clarification that in doing so the Tribunal sets aside the original decision (not explicitly stated in the (C)MA).

The (C)MA also refers in various places to decisions made by the Tribunal "under… section 500", the (A)MA replaces this with "by application… under section 500", making it clear that the decision on review is made under the ARTA. Without specific amendment, this appears to also be the case for business visa cancellation reviews under 134.

The power to dismiss for non-attendance under (C)MA 349(2)(e) is also repealed and replaced by more extensive powers under ARTA 95 to 97 and 99 to 101 (see below).

4.1.1 Special rule for reviewable protection decisions

(A)MA 367A is in the same terms as repealed (C)MA 423A in requiring the Tribunal in a protection decision review to draw an inference unfavourable to the credibility of a claim or evidence not raised or presented before the primary decision was made.

4.1.2 Privative clause decisions

The definition of a "privative clause decision" in (C)MA 474(4) covers "a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under **this Act** or under a regulation or other instrument made under **this Act**" [emphasis added]. The definition is nor relevantly altered by the (A)MA. The fact that most review decisions will in future be made under ARTA 105 seems to take them outside of the definition, with significant implications for the judicial review provisions in the MA.

5 REVIEW PROCEDURES

5.1 General procedures

(C)MA 353(a) and 420(a), which state that the Tribunal is not bound by technicalities, legal forms or rules of evidence, are repealed. However ARTA 50(1) requires the Tribunal to "act with as little formality and technicality as a proper consideration of the matters before the Tribunal permits" and ARTA 52 says that the Tribunal is not bound by the rules of evidence.

(C)MA 353(b) and 420(b) which require the Tribunal to "act according to substantial justice and the merits of the case", are repealed. The ARTA does not contain an equivalent provision, although the simplified outline in ARTA 3 says that the Tribunal "reviews decisions on their merits", and ARTA 9(a) lists as one of the objectives that the Tribunal must pursue in providing an independent mechanism of review that it be "fair and just".

5.2 Who can participate in the review proceedings

ARTA 22(1)(a) and (b) name the review applicant and the decision-maker as parties to a review. However, the ARTA introduces a distinction between "participating" and "non-participating" parties to an application for review. For migration and protection reviews (A)MA 348A stipulates that the Minister will be a non-participating party. This reflects the current practice of the Tribunal.

ARTA 22(1)(c) allows for other persons to apply to be parties to a review. This is disallowed by (A)MA 348A(2).

ARTA 62 allows a non-participating party to apply to be made a participating party. This is also disallowed by (A)MA 348A(3)(a).

ARTA 63(2) allows the Tribunal to order a non-participating party to do certain things including appearing before the Tribunal, giving written submissions or participating in the proceeding. (A)MA 348A(4) stipulates that such an order may only be made by the President or Deputy President of the Tribunal.

5.3 Representation

(C)MA 276(1)(d) includes in the definition of immigration assistance "representing the visa applicant or cancellation review applicant in proceedings before a court or review authority in relation to the visa application or cancellation review application". This is not changed in the (A)MA.

The definition of "review authority" in (C)MA 275 is limited to the Tribunal reviewing a Part-5 or Part-7 decision. This definition is repealed and references to the term in (C)MA 276 are replaced with "the ART". As a result, the definition of immigration assistance in the (A)MA would cover representatives in reviews under MA 134 (business visas) and 500 (character refusals and cancellations) as well as reviews under (A)MA Part 5.

A person who gives immigration assistance must be either a registered migration agent or a practising lawyer, unless otherwise exempt. Although ARTA 66 allows for a party to a proceeding before the Tribunal to choose "another person" to represent them, the clear intention of (A)MA 276 is to limit the representative to people who can give immigration assistance under the MA.

ARTA 66(3) contains provisions which allow the Tribunal to order that a party not be represented by the person they have appointed if that person:

- has a conflict of interest in representing the party;
- is not acting in the best interests of the party;
- presents an unacceptable safety risk to any person; or
- presents an unacceptable privacy risk to any peron; or
- is otherwise impeding the Tribunal.

(C)MA 366A, which could be interpreted to restrict a representative in Part-5 reviews to present arguments or address the Tribunal only in "exceptional circumstances", is repealed. ARTA 67 allows for the appointment of a "litigation supporter" if the party does not have decision-making ability and the appointment is necessary, taking into account the availability and suitability of other measures that would allow the party to participate in the proceeding.

The limitation of this provision to someone who does not have "decision-making ability" implies that it may not apply in a case of mere inability to communicate due to a physical disability.

ARTA 293(2) gives a legal practitioner or other person appearing before the Tribunal on behalf of a party the same protection and immunity as a barrister appearing for a party in proceedings in the High Court.

5.4 Natural justice

The concept of an "exhaustive statement of the natural justice hearing rule" has been kept in the (A)MA, with 357A(2C) overriding any requirement for the Tribunal to observe any principle or rule of common law.

(A)MA 357A essentially replicates the operation of (C)MA 357A and 422B. The requirement in (C)MA 357A(3) and 422B(3) to act in a way that is fair and just is not retained in (A)MA Part 5, but is incorporated in the objectives of the Tribunal in ARTA 9(a).

5.4.1 Adverse information

The obligations on the Tribunal under (A)MA 359A cover both migration and protection reviews, and are altered to remove the distinction between giving adverse information in writing or at the hearing. (A)MA 359A makes no mention of how the information is to be given other than "in the way that the Tribunal considers appropriate in the circumstances", although if it is given in writing it must be given by one of the methods in (A)MA 379A.

The requirement in (C)MA 359A(1)(c) that the Tribunal invite the applicant to "comment on or respond to" the information is amended to remove the words "or respond to". The ruling of Jagot J in *MIAC v Saba Bros* [2011] FCA 233 is therefore no longer relevant.

The list of exclusions to the requirement to give adverse information in (A)MA 359A(4) is extended to include information "that was included, or referred to, in the written statement of the decision that is under review" and a further provision is added allowing for the Regulations to prescribe other types of information that may be excluded.

(A)MA 359A(4A) stipulates that the ART is not required to give particulars of information mentioned in subsection (4) to the applicant before making a decision on the application under ARTA 105 or (A)MA 349.

5.4.2 Information given orally

(C)MA 359AA and 359A(3) are repealed, and while (A)MA 359A(1)(b) applies to both written and oral invitations requiring the Tribunal to ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review, the requirements under (C)MA 359AA(1)(iii) and (iv), that the applicant be advised that he or she may seek additional time and that the Tribunal will adjourn the review if it considers that additional time is reasonably necessary, are not reproduced in the (A)MA.

5.5 Access to documents

(C)MA 362A(1), entitling an applicant in a Part-5 review to have access to any written material given or produced to the Tribunal for the purposes of the review, is amended to state that "the applicant is entitled to request that the Department provide access to any written material, or a copy of any written material, given or produced to the ART by the Department for the purposes of the review". This applies to both migration and protection reviews.

It is not clear whether the request is to be made to the Tribunal or direct to the Department.

(A)MA 362A(1) provides that if a request is made the Department must provide the applicant with access to the material, although the entitlement continues to be limited so as not to override any requirements of the *Privacy Act 1988*, and does not apply after a written decision has been given under (A)MA 368.

FOIA 3A makes it clear that restrictions under that Act are not intended to limit, prevent or discourage the exercise of any other power to give access to information or documents.

5.6 The hearing

In ARTA 4 the term "case event", is defined as:

- a hearing of the proceeding;
- a directions hearing in relation to the proceeding;
- a dispute resolution process

including a part of any of the above.

(C)MA 360 requiring the Tribunal to invite an applicant to a hearing to "give evidence and present arguments relating to the issues arising in relation to the decision under review" is repealed.

While the ARTA does not explicitly state that an applicant has a right to a hearing, ARTA 106 contains a heading *Tribunal may make decision without hearing in certain circumstances*, implying that the default position would be that there should be a hearing. ARTA 72 requires the Tribunal to give a participating party (ie the applicant) written notice of the date, time and place of a case event. ARTA 73(1) allows parties to attend by themselves or through a representative, but 73(2) allows the Tribunal to order that the party attend in person, whether their representative attends or not.

ARTA 69 creates a general rule that hearings must be in public except where the practice directions or the Tribunal itself order all or part of a hearing be in private. However (A)MA 367B specifies that protection review hearings must be in private.

(C)MA 359B setting time limits to respond to "natural justice" requests, and 359C taking away the right to a hearing if the time limits are not adhered to, are repealed. However either ARTA 100 or 106(4) may apply if replies are not given within a reasonable time (see below).

5.6.1 Dismissal without a hearing – no consideration of the evidence

(C)MA 349(2)(e) and 362B, which only apply to summary dismissal for non-attendance without consideration of the evidence, are repealed. Instead, ARTA 95 to 97 and 99 to 101 apply, giving the Tribunal a discretion to dismiss an application without any consideration of the issues in the following circumstances:

- 95 – the applicant withdraws the application at any time;
- 96 – the applicant consents to the application being dismissed;
- 97 – the Tribunal is satisfied that the decision is not reviewable;
- 99 – the applicant fails to appear at a case event and the Tribunal is satisfied that the applicant received appropriate notice of the date, time and place of the case event;
- 100 – the applicant fails within a reasonable time to "proceed with the application" or comply with the Act or an order in relation to the proceeding;
- 101 – the Tribunal is satisfied that the application is frivolous, vexatious, misconceived or lacking in substance, or has no reasonable prospects of success, or is otherwise an abuse of the process of the Tribunal. Under this provision the Tribunal may make an order preventing the applicant from making another application of a specified kind without the leave of the Tribunal, and such an order has effect despite any other provision of the ARTA or any other Act.

ARTA 98, allowing for dismissal if an application fee is not paid within the time prescribed, is disallowed by (A)MA 347(2)(c)(iii) which provides that an application is not properly made if not accompanied by any prescribed fee.

If an application is dismissed under ARTA 99, 100 or 101, (A)MA 386C disallows the provisions for reinstatement in ARTA 102 and replaces them with the following procedures:

- within 28 days after receiving notification of the dismissal, the applicant may apply to the Tribunal for reinstatement of the application;
- if the applicant applies for reinstatement within the 28 day period, the Tribunal may either reinstate the application if it considers it appropriate to do so, or confirm the decision to dismiss.

As with the current situation, if an applicant fails to apply for reinstatement within the 28 day period, the Tribunal will have no choice but to confirm the dismissal.

5.6.2 Decision without a hearing – Tribunal considers the evidence

Five circumstances are listed in ARTA 106 permitting the Tribunal to make a decision without a hearing "after considering the documents and things given to the Tribunal". These are, relevant to migration and protection reviews:

- 106(2) – all of the parties consent;
- 106(3)(b)(i) – the decision is wholly in favour of the applicant;
- 106(3)(b)(ii) – the applicant requests that a decision be made without a hearing;
- 106(4) – a party fails to comply with the ARTA or an order of the Tribunal in relation to the proceeding within a reasonable time;
- 106(5) – a participating party (ie the applicant) fails to appear at a case event and the Tribunal is satisfied that the party received appropriate notice of the date, time and place of the case event.

In each of these circumstances, it must appear to the Tribunal that the issues for determination can be adequately determined without a hearing.

Note that ARTA 106(5) provides the Tribunal with an alternative to summary dismissal under ARTA 99 or 100 (see above), as did the repealed (C)MA 362B(1A)(a) as an alternative to (1A)(b). The Tribunal's discretion to choose one or the other is not restricted.

5.6.3 Witnesses

(C)MA 361, limiting the right of an applicant to call witnesses and removing any obligation on the Tribunal to agree to hear a witness, is repealed. The only provisions in the ARTA that specifically mention witnesses are:

- 70(1) giving the Tribunal power to make orders prohibiting or restricting the publication of information about parties or witnesses, including their identity;
- 77 allowing for the payment of witness fees in certain circumstances;
- 79(h) requiring expert witnesses to give evidence at the same time;
- 293(3) giving witnesses the same protection and penalties as witnesses in proceedings in the High Court.

The fact that witnesses are referred to in those sections ARTA and the requirement in ARTA 9(a) that the review mechanism be "fair and just" would imply that a party has a right to call witnesses and the Tribunal should hear from them unless it would be unreasonable or impractical to do so.

5.6.4 Interpreters

(C)MA 366C is repealed. ARTA 68 permits a person appearing before the Tribunal to request that an interpreter be appointed for them, and the Tribunal must comply with the request unless it considers that the person does not need an interpreter to communicate with the Tribunal or understand evidence and submissions.

Even if a person does not request an interpreter, the Tribunal is required to appoint one if it considers that the person requires one for those purposes.

The Tribunal is not prevented from appointing an interpreter in other situations.

Other provisions of ARTA 68 concern conflicts of interest, and oaths and affirmations of interpreters.

6 MINISTERIAL INTERVENTION POWERS

The personal powers of the Minister under (C)MA 351 and 417 to substitute a more favourable decision for a decision of the Tribunal are replaced by (A)MA 351 in relation to:

- decisions under (A)MA 349 to set aside and remit a decision in accordance with permitted orders and recommendations;
- decisions under (A)386C concerning reinstatement of an application dismissed under ARTA 99, 100 or 101;
- decisions under ARTA 105.

The reference to decisions under ARTA 105 presumably must be read to apply only to reviews of decisions originally made under the MA.

(C)MA 501J allowing the Minister to substitute a more favourable decision for a decision of the AAT to affirm a decision to refuse or cancel a protection visa is amended only to the extent of substituting "ART" for "AAT".

7 ART GUIDANCE AND APPEALS PANEL

Part 5 of the ARTA (not to be confused with Part 5 of the (A)MA) establishes a Guidance and Appeals Panel, described in the simplified outline in ARTA 121 as a way of constituting the Tribunal at a more senior level to:

(a) review some decisions made by decision-makers; or
(b) re-review some decisions that have been reviewed by the Tribunal.

Under ARTA 122(1) referrals to the Panel may be made by the President, if satisfied that:

(i) the application raises an issue of significance to administrative decision-making; and
(ii) it is appropriate in the interests of justice that the Tribunal be constituted by the guidance and appeals panel for the purposes of the proceeding in relation to the application.

Under ARTA 123 a party to a proceeding may apply to the President to refer a decision under ARTA 105 to the Panel. However (A)MA 500AA stipulates that applications to the President under this provision "generally" cannot be made except in relation to decisions under Part 3 (concerning decisions of the MARA).

Michael Jones

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