"Should Tribunals be required to meet performance criteria and, if so, how would they be defined and enforced"

I have been asked to talk about the issue of whether Tribunals should be required to meet performance criteria and, if so, the extent to which such criteria should be defined and enforced.

This relates to performance criteria for the Tribunals themselves and also to individual tribunal members.

It is a challenging topic in as much as any system which attempts to measure the performance of quasi judicial decision makers, such as Tribunal members, must also ensure that the independence of decision makers is not compromised or infringed upon in any way. Further, there is a need to consider what it is that any system of performance assessment is seeking to measure. For example, whilst the number of decisions produced or the ability of Members to meet decision deadlines are relatively straightforward accountability measures, how does such a system measure the quality of decisions– whether they are well-written and lawful or whether the review process has been conducted fairly?

As Principal Member of two Tribunals, the Refugee Review Tribunal (RRT) and the Migration Review Tribunal (MRT), which currently employ performance criteria in assessing Tribunal performance, I have been asked to share my experience of such matters. However, before embarking on such a discussion, I think it is important that I provide you with some background information about what the Tribunals do and how they operate in order that you can understand the context within which their performance is assessed.

RRT

The RRT, which commenced operations in July 1993, was established under the Migration Act 1958 to review decisions of the Minister for Immigration Multicultural and Indigenous Affairs to refuse to grant or to cancel protection visas.

The principal criterion of a protection visa is that the applicant for the visa is a non-citizen in Australia, or the family member of a non-citizen, to whom Australia has protection obligations under the UN Convention and Protocol relating to the Status of Refugees. Generally speaking, Australia has protection obligations to a person who is a refugee as defined by Article 1A(2) of the UN Convention relating to the Status of Refugees.

The Tribunal is an inquisitorial merits review tribunal. It exercises the same powers and discretions as the primary decision maker and makes binding decisions. The Principal Member is the executive officer of the Tribunal and is responsible for its overall operation and administration. However, Members are independent in the discharge of the review function and neither the Minister nor the Department of Immigration nor the Principal Member has the power to intervene in a Member's decision making role.

Members are appointed by the Governor General on recommendation of Cabinet. There are currently 64 Members of the Tribunal, 38 of whom are full time whilst 26 are part time. Lengths of appointment vary, however, a majority (51) of the current membership were appointed to 3 year terms on 1 July 2001. Members are appointed from a wide range of backgrounds and are selected for the variety of skills that they possess, with a view to ensuring the highest standards of Member performance in carrying out the responsibilities of

the role. Many Members are lawyers or ex-refugee advocates, whilst many others have backgrounds in organisations with links to asylum seeker communities. Several have backgrounds in international relations, a number, for example, having previously been employed by the Department of Foreign Affairs and Trade.

The Tribunal is funded by a Purchasing Agreement with the Department of Finance which provides funding for each finalised application. In the 2001/2002 financial year, the Tribunal received 4,929 new cases and finalised 5,865 cases (this included both new and on hand cases). The new cases represented approximately 88% of applicants who were unsuccessful at the primary determination stage seeking review by the Tribunal. Over two thirds of applications received were sourced by applicants from China, Indonesia, India, Fiji, Afghanistan, Sri Lanka, Iran, Thailand, Malaysia and Bangladesh.

The Tribunal is required by legislation to pursue the objective of providing a mechanism of review that is "fair, just, economical, informal and quick" and is not bound by legal technicalities or rules of evidence. The notions of fair and just are sometimes viewed as competing interests against the requirement that the Tribunal be economical, informal and quick. However, these obligations should not be seen as competing but rather as complementary, with the task of the Tribunal being to balance these objectives.

Under a Ministerial Direction issued pursuant to the Migration Act 1958 (Direction No.14 of 1999) I am required, as the Principal Member, to set performance targets for, and priorities in relation to, the processing of cases. The Deputy Principal Member monitors the Tribunal's caseload and develops strategies for the constitution of cases to ensure that, where possible, productivity gains are achieved. The annual productivity targets for Members are arrived at after an assessment is made of the caseload on hand, an estimate is made of the number of detention and non-detention cases that the Tribunal is likely to receive and an assessment is made of the anticipated complexity of cases from the different countries which comprise the Tribunal's caseload. Consultations are held with Members before targets are finalised.

Caseloads are categorised into hard, less complex, and easy classifications, according to the complexity of the cases from the different countries that comprise the caseload. Cases are further classified into detention or non-detention, torture/trauma, financial hardship, or Federal Court remittals. The timeline for production of a decision in detention cases is 70 days, whilst in non-detention cases it is 118 days. Members receive a mix of each category, the aim being to balance the need to address large volume/high profile countries, thereby reducing backlogs, whilst achieving efficiencies by enabling Members to specialise in particular countries.

For the 2002/03 financial year, full-time Sydney Members have a caseload target of 125 (comprised of a mix of hard, less complex, and easy cases), whereas full-time Melbourne Members have a target of 115. [1] This difference in target reflects regional variations in country caseload composition and the complexity of cases undertaken by Members. However, these designations are not precise classifications of the Tribunal's caseload and individual "less complex" cases may subsequently prove to be more time-consuming than "hard" cases. This type of consideration signals a need for caution in the use of raw data as a measurement of performance and signifies that other performance measures are necessary to provide a comprehensive picture of Tribunal performance

[1] Part Time Members have pro rata no targets depending on the number of days worked

MRT

The MRT was established on 1 June 1999, replacing the former Immigration Review Tribunal and the Migration Internal Review Office within the Department of Immigration and Multicultural and Indigenous Affairs. The Tribunal was established on the basis that a single level of merits review of decisions would be more efficient and effective than the then existing review arrangements. Like the RRT, the MRT's objective is to provide a mechanism of review that is fair, just, informal, economical and quick and it also is an inquisitorial merits review Tribunal.

The MRT reviews decisions made by the Minister or by delegates of the Minister. Decisions able to be reviewed by the MRT include decisions to refuse a visa (other than a protection visa), onshore decisions to cancel a visa, and certain sponsorship decisions. Apart from the differing jurisdictions and minor procedural differences, the MRT has the same power and structure as the RRT.

Members are appointed by the Governor General on recommendation of Cabinet. There are currently 52 Members of the Tribunal, 13 of whom are full time whilst 39 are part time. Lengths of appointment vary – a significant number of Members were appointed upon the Tribunal's inception in June 1999, whilst several others have since been appointed to terms expiring in June 2004. As with the RRT, Members are appointed from a wide range of backgrounds. Many are part-time Members of other tribunals or boards, whilst others hail from a background in either private, community or government legal practice. 40 of the current membership hold formal legal qualifications.

Like the RRT the Tribunal is funded by a Purchasing Agreement with the Department of Finance which provides funding for each finalised application. In the 2001/2002 financial year, the Tribunal received 8,531 new cases and finalised 8,583 cases. As with the RRT, the Principal Member is required to set performance targets for, and priorities in relation to, the processing of cases (Ministerial Direction No.11 of 1999).

One of the measures introduced by the Tribunal to increase productivity is a case review model which involves Tribunal staff initially analysing cases and preparing a "first examination" document. This is then reviewed and expanded by the Member to become the Tribunal's final statement of reasons for the decision. The introduction of the case review model has resulted in a substantial increase in the number of cases that each Member is able to deal with. The consequent effect has been a decrease in the overall cost of reviews without the quality of decisions being diminished.

Because of the size of the MRT's caseload, it is clearly not possible to commence work on all applications immediately they are received. It is therefore necessary for the Tribunal to allocate cases for action in accordance with an agreed set of priorities, which are determined by the Principal Member. In setting these priorities, I take into account a number of factors including: date of lodgement of the review application, legislative requirements that certain cases be given priority, and the circumstances of individual cases before the Tribunal. As well there are timelines for cases to be finalised. Where people are in detention and have applied for a Bridging Visa, the Tribunal usually has to complete its decision within 7 working days of lodgement of the application for review with the Tribunal. For other cases

there are different timelines ranging from 90 days to 180 days. These may vary from time to time to reflect trends in caseloads and member availability.

Under the funding case management model adopted by the Tribunal, Members have a target of finalising two standard cases per day. However, because the Tribunal deals with a diverse range of cases, some of which are more or less time consuming than a standard case, a case weighting system is used to categorise different types of cases. Factors that determine a case weighting includes the complexity or significance of the issues involved, the number of processing steps that may be involved, and the overall target of two standard cases per Member day. Currently 5 different weighting classifications are used and these provide a guide to Members as to an average length of time that should be spent on different types of cases. The case weightings are also used for allocation, case constitution and performance measurement purposes. Productivity tables and other statistics by member are available within the Tribunal on the Tribunal's Intranet.

Performance appraisals

Upon their appointment to the Tribunal, Members of both Tribunals are required to sign Performance Agreements whereby they agree to perform their role in accordance with the Member Code of Conduct and any Practice Directions given by the Principal Member. The Agreement also acknowledges the need for Members to comply with timelines for the completion of decisions and to meet productivity targets set by the Principal Member. However, the Agreement underlines the need to ensure that the performance appraisal process does not in any way compromise Members' decision-making independence.

The objectives of the appraisal process are in part threefold: to foster and maintain high standards of performance; to recognise excellence and to identify and address areas of sub-standard performance; and to provide a basis for the Tribunal's recommendations for Member reappointments.

As publicly funded bodies Tribunals are expected to meet their obligations of providing a mechanism of review that is fair, just, economical, informal and quick (ss 353 (MRT) 420 (RRT) Migration Act 1958). They are of course accountable through the Minister responsible for the administration of the Migration Act to Parliament and the public.
In the case of the RRT for example, the Tribunal has a range of criteria by which it measures performance at all levels (and its compliance with s420 of the Act) that range from the quality and quantity of decisions themselves, through to the whole of the decision making process. These criteria are set out broadly in the Tribunal's Corporate Plan and are reported on in the Annual Report. Performance indicators include:

- Compliance with legislative requirements and lawful decision making
- Compliance with time standards
- Accessibility
- Consistency
- Currency
- Cost effectiveness

Broadly speaking, there are 6 criteria against which Members are evaluated:

1. Compliance with the Code of Conduct;
2. The ability to deliver prompt, concise, quality decisions which are consistent with Tribunal jurisprudence and which conform with applicable administrative and migration law principles;
3. The ability to adopt effective work practices, comply with time lines and achieve productivity targets;
4. The ability and willingness to interact effectively with colleagues and staff in the process of decision-making and in the collegiate life of the Tribunal;
5. The ability to conduct hearings expeditiously and effectively and, in the process, to interact sensitively with applicants and other persons involved.
6. Compliance with attendance and dress standards.

In assessing Members' performance, the following source materials may be considered:

a) Member's decisions;
b) Tapes & observation reports of hearings;
c) Case and Member personnel files;
d) Statistical indicators; including meeting timeline averages
e) Any written observations of executive Members, colleagues, Tribunal staff, applicants, persons involved in the Tribunal process and members of the public;
f) Any other material which it is appropriate to use in all of the circumstances.

As well, it should be noted that a Member's personnel file may contain written complaints from registered migration agents, applicants and others about a Member's handling of matters before the Tribunals. These are not usually high in number (over the last year, less than 20 in total on the RRT and a handful on the MRT) but can be quite time consuming to deal with. As all complaints are taken very seriously they are fully examined and this often entails listening to hearing tapes especially where there have been allegations of bias, lack of good faith, rudeness and other unfortunate perceptions of a Members' conduct. After a thorough investigation that includes seeking the Member's comments on the substance of the complaint a written response is provided to the complainant. Furthermore, the Tribunal takes cognisance of comments made by the Courts where judicial review of Tribunals decisions occurs. Although the introduction of a "privative clause" into the Migration Act was expected to lead to a decrease in the number of judicial reviews of the Tribunal's decisions in reality a large number of appeals continue to be lodged and the Court is not backward in commenting on a Member's conduct of a particular case especially where it is perceived that gratuitous or patronising remarks have been made by a Member.

The Principal Member has directed the Members of both Tribunals to act in a courteous and sensitive manner with applicants and their representatives at all times. The Courts have emphasised that Members in inquisitorial proceeding should avoid what may be interpreted as sarcasm or facetious or flippant remarks. In *C v Minister for Immigration and Multicultural Affairs* (2000) FCA 1649 the Full Court of the Federal Court expressed its concern with the manner in which the hearing in that case had been conducted and highlighted at paragraph (8) one exchange where the Member criticised a submission which the Tribunal had received from Amnesty International, saying:

'I think it's an extraordinary use of Amnesty's reputation and their time, money and energy. It cannot possibly carry any weight whatsoever.'

'It does nothing for Amnesty's reputation as far as I'm concerned.'

'As I say it won't be encouraging me to buy a badge.'

In *Sarbjit Singh v Minister for Immigration and Ethnic Affairs* (unreported, Federal Court, Lockhart J, 18 October 1996) the Court characterised as 'unfortunate' the following remarks made by the Member in the course of the hearing in that case:

'I mean you must think we're stupid or something?"

'So you know I've just shown that these documents can't be believed. Either you can't be believed or they can't. Or maybe both (Laughs).'

'I mean you know you've dug your own grave, really in this matter.'

Such comments by the Court would lead to a Member being counselled about his/her conduct at a hearing and if it is thought that extra or special training is needed in the circumstances this would be arranged.

The performance appraisals conducted focus on both productivity and quality. It should be emphasised that assessments or appraisals of this nature do not interfere with the independence of the Tribunal. Performance appraisals are not concerned with addressing the outcome of particular cases, but with performance overall, and they serve to ensure the Tribunal is meeting its obligations towards its stakeholders.

Members are given a copy of any source material used in their performance appraisal and are provided with a reasonable opportunity to reply or submit contrary material.

Balancing the need for quantitative vs qualitative performance measures

Generally speaking, budgetary and time standards are easily measured. As mentioned before the funding of both Tribunals is directly linked to productivity. Productivity targets are established for both full and part time members and are intended to guide the flow of individual work in large part. Member productivity is monitored on a monthly basis and Senior Members initially are intended to raise any difficulties in this area with the individual members.

With regard to the Tribunal itself (not individual members), reports are produced and Quarterly Reports which largely contain general comments on performance including productivity are sent to the Minister each quarter.

Compliance with time standards for the processing of cases is also relatively easy to measure. As noted the Tribunals have established minimum times by which hearings are to be conducted, decisions given and cases resolved. There are of course factors which may interfere with time standards (for example, delays in the applicant obtaining evidence), but these are taken into account when assessing Member performance.

The timeliness and cost effectiveness of decisions must also be considered in light of those quality based performance criteria directed at ensuring obligations for a fair and just review mechanism.

Thus in any system of performance appraisal, tensions inevitably exist between the need to achieve productivity targets whilst also ensuring quality of outcomes. There is a natural tendency to place greatest emphasis on quantitative measures, such as numbers of decisions written, not least because of the desire to be seen to be measuring performance using data that is capable of objective benchmarking.

However, such an approach does limit the ability to recognize and reward effort in areas other than those measured by quantitative criteria and cannot provide the whole story of a Members' performance. How, for example, does such a system recognize mentoring or policy work undertaken by Members? How does such a system measure the quality of decisions written by Members? In my view, this is a tension that any effective performance measurement system must reconcile.

It is difficult to identify a single measure of criteria directed at quality in decision making. Client satisfaction, community response, judicial review outcome and benchmarking with other like organisations may have their attractions. However, many of these have their limits. Client satisfaction, for example, is difficult to measure as it may often be influenced by the outcome of the particular case. Similarly, performance at judicial review, whilst a useful indicator, may often be misleading and can never be a definitive measure, perhaps even more so now with the introduction of the "privative clause". Furthermore, the appeal rate of a Tribunal's decisions, or a particular Member's decisions may not paint the full picture. Reasons for unsuccessful applicants seeking judicial review, particularly in the immigration field, may vary widely. It may be related to the quality of the decision or may equally be a mechanism by which an applicant can prolong their stay in Australia. As well, in the MRT/RRT experience, matters are dismissed and Tribunal decisions set aside by the Courts for a variety of reasons not necessarily reflecting the quality or otherwise of the decision under review. Applications may be dismissed because there is no error in the Tribunal decisions but in this jurisdiction where grounds of review have been extensively narrowed such dismissal may not necessarily amount to an endorsement of the quality or correctness of the decision in question. The converse is also true of successful judicial review applications.

As noted earlier, in many respects, it is difficult to employ qualitative measures of Member performance. For example, in October 2001 the "privative clause" introduced by Parliament had the effect of severely limiting the availability of judicial review of Migration Act decisions. Accordingly, the ability of the Tribunals over the past year to employ court appeal outcomes as an indicator of the quality of Tribunal decisions was similarly restricted. However, the fact that qualitative measures of performance are more difficult to employ than quantitative measures does not mean that we should resile from their use.

In recognition of the need to incorporate a greater emphasis on qualitative measures of Member performance, the role of Senior Members of both Tribunals now include responsibility for managing the performance of a designated group of Members.

Maintaining and improving productivity, consistency and quality is a challenge and Senior Members will increasingly be involved in the monitoring, mentoring and development of Tribunal Members. This will enable Senior Members to become more familiar with the work

of individual Members, the manner in which they conduct their hearings, and any factors that might have an impact on Members' performance.

This role will be both collegiate and supportive in emphasis and will feed into the ongoing feedback and formal appraisal of Members' work. Senior Members will initially undertake Members' draft performance appraisals, before input comment and feedback is sought from the Principal Member (or, in the RRT, The Deputy Principal Member) and the Member concerned. In this way, those most familiar with the work of a particular Member will have responsibility for promoting their professional development and the quality and consistency of their decisions.

Whilst Senior Members will adopt primary responsibility for monitoring and mentoring the performance of Members, as the Principal Member I will continue to retain overall responsibility for management and performance issues across both Tribunals, in the RRT with the assistance of the Deputy Principal Member. This includes responsibility for addressing performance and appraisal issues which arise out of Senior Member appraisals of Members' performance.

Members' performance appraisals have been and remain an ongoing activity of both Tribunals.

Conclusion

In summary, there is little doubt in my mind that both quantitative and qualitative performance measures such as those employed by the RRT and the MRT will continue to play an important role in assessing the performance both of the Tribunals themselves and of their individual members. I also accept that it is entirely valid to measure Tribunal performance for the reason that administrative tribunals are ultimately answerable to the Australian public and must ensure that they function efficiently, effectively and fairly and that taxpayer monies are responsibly spent. I consider that this responsibility is entirely reconcilable with the principle of independent decision-making and that the Tribunal's experience in employing performance appraisals of its membership has successfully demonstrated this fact. With the increased emphasis on qualitative measures of performance, such as those that are being implemented in both the RRT and the MRT, I am confident that the Tribunals' overall performance in deciding cases, fairly, justly, economically, informally and quickly can only be enhanced.