SUBMISSION TO

THE JOINT STANDING COMMITTEE ON MIGRATION

REVIEW OF MIGRATION REGULATION 4.31B

February 2003

CONTENTS

1 PURPOSE

1.1 *Purpose*

1.1.1 The purpose of this submission is to provide the Joint Standing Committee on Migration (JSCM) with information to assist its review into the $1000 post Refugee Review Tribunal (RRT) decision fee operating by virtue of Regulations 4.31B and 4.31C of the Migration Regulations 1994.

1.1.2 This submission provides information and discussion on the following:

- provision of information on the administration and operation of the $1000 post RRT decision fee since its inception on 1 July 1997;
- analysis of the fee's effect; and
- discussion of the projected impact of removing the fee beyond June 2003.

2 BACKGROUND

2.1 *Government Objectives*

2.1.1 In developing and implementing the post RRT decision fee the Government was seeking to achieve three main aims.

2.1.2 Firstly, the Government sought to ensure that it maintained Australia's commitment to fulfilling its international obligations to refugees. These are contained in the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.

2.1.3 Secondly, the Government, concerned about the increase in unmeritorious applications for Protection visas (PV), sought to reduce the scope for abuse of the PV process. Prior to 1997 numerous people were applying for a PV in order to extend their stay in Australia, despite knowing their claims were unfounded.

2.1.4 Finally, the Government considered it appropriate that there be an effective mechanism for at least partial cost contribution for unsuccessful RRT applicants.

2.1.5 An integrated package of measures was introduced in July 1997 to fulfil these aims. The package includes:

- the implementation of a more strategic approach to managing the processing of protection visa applications, through increased priority for processing straightforward applications;

- the restriction of permission to work and access to Medicare entitlements to those protection visa applicants who, had been in Australia for fewer than 45 days in the 12 months before the date of their protection visa application; and

- the introduction of the $1000 post RRT decision fee for RRT applications lodged from 1 July 1997.

2.2 *Why the RRT Post Decision Fee was Necessary*

2.2.1 Until mid-1989 there were fewer than 500 refugee applications per year from people already in Australia. Over the following two years there was a sharp increase in people claiming refugee status, due primarily to the Tiananmen Square incident in the People's Republic of China (PRC) in June 1989. Refugee applications peaked at 16,937 during 1990-91, with about 77% coming from nationals of the PRC.[1]

2.2.2 During 1995-96, 7,770 people lawfully in Australia[2] applied for a PV and in 1996-97 that number was 10,431. By 1997 it was clear that the number of PV applications by people lawfully in Australia was increasing rapidly with a large proportion coming from nationals of countries that are generally acknowledged as producing few refugees.

2.2.3 Significant numbers were coming from countries such as Fiji, Indonesia, Malaysia, the Philippines and Thailand. In the 1996-97 financial year, the Department received PV applications from 3,845 people of those five nationalities alone and only 1% (39) of those applicants were subsequently found to engage Australia's protection.

2.2.4 Any person legally in Australia who lodged a PV application was able to obtain work rights and access to Medicare benefits. Additionally, applicants could not be returned to their home countries until after their PV applications and any reviews or appeals had been finalised. This was understood to be the motivation behind the increase in applications from traditionally low refugee producing nationalities.

2.2.5 Departmental officers and migration agents had commented that clients were asking for a '$30 work visa', the name by which a PV was becoming known.

2.2.6 With the increasing numbers of PV applications being made the cost of processing those applications was also rising. This trend was imposing an unacceptable burden on the taxpayer. Unsuccessful RRT applicants were not required to contribute to the cost of their review processing.

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[1] Until 1995, the number of applications approved differed from the number of people granted protection visas. This was because applications were made by a principal applicant, and counted as a single application, although the application may have included several members of a family unit. Since 1995 the statistics have counted members of the family unit as individual applicants in their own right.

[2] This data has been generated through the Department's protection visa case management system. There may be minor differences in previously published information due to data matching difficulty.

2.2.7 The $1000 post RRT decision fee and the other elements of the package were implemented, with effect from 1 July 1997, to address these concerns.

2.3 *History of the Fee and the Sunset Provision*

2.3.1 In 1997, when the fee was introduced, the Minister for Immigration and Multicultural Affairs agreed to the introduction of a sunset provision so that the fee would apply only to RRT applications made between 1 July 1997 and 30 June 1999. The Minister also agreed to a review of the fee being conducted by the JSCM during 1998-99.

2.3.2 The report of the JSCM Review of 1999 was tabled in Parliament in May 1999. The majority report recommended retention of the fee subject to a further sunset provision to allow for a thorough assessment to be made of the fee's effectiveness after three years.

2.3.3 Accepting the Committee's report, the Government instituted regulations extending the sunset provision to 2002. However the Government subsequently agreed to a reduction in the sunset provision to two years. Regulations were made on 20 October 1999 to continue the post RRT decision fee until 30 June 2001.

2.3.4 The report of the second JSCM review, undertaken in 2001, was tabled in Parliament in June 2001. The majority of the Committee recommended that Regulation 4.31B be maintained, be subject to a two year sunset clause commencing on 1 July 2001, and that its operation be reviewed by the Committee in early 2003.

2.3.5 Following the JSCM Review of 2001, the Government extended the sunset provision to 30 June 2003 to allow a more thorough assessment of the effectiveness of the post RRT decision fee to be conducted before that date.

2.4 *International Perspective*

2.4.1 The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* states that:

> *...the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status.* [3]

2.4.2 It is therefore open to signatory States to the Refugees Convention to develop and apply their procedures in accordance with their own legislative and administrative framework.

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[3] Office of the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status*, January 1992, para 189, p45.

2.4.3 Australia's refugee review process, including the fee and other elements of the package introduced in July 1997, is both fair and efficient. In their entirety, Australia's refugee processes compare favourably with those of other countries. This was confirmed in a statement made by the Office of the Regional Representative of the UNHCR in a submission to a Senate inquiry in August 1999:

> *As a State party to the Convention, Australia fulfils its international obligations scrupulously and fairly.* [4]

2.4.4 Dealing with asylum seekers who have no grounds for protection is an internationally significant issue. In 1983, the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) recognised this problem in its Conclusion No. 30 (XXXIV) noting that:

> *... the applications for refugee status by persons who clearly have no valid claim to be considered refugees under the relevant criteria constitute a serious problem in a number of States parties to the 1951 Convention and the 1967 Protocol. Such applications are burdensome to the affected countries and detrimental to the interests of those applicants who have good grounds for requesting recognition as refugees.*[5]

2.4.5 In 1999, the Office of the Regional Representative for Australia, New Zealand, Papua New Guinea and the South Pacific of the UNHCR stated that:

> *Migration control is a sovereign right and responsibility of States. Nevertheless, States, in acceding to the Convention, have pledged themselves to respect and observe a special regime for the protection of refugees. Preservation of the right to seek asylum remains imperative, and it is of paramount importance that the crucial distinction between refugees and ordinary migrants be maintained. Fair and efficient procedures for the identification and adjudication of refugee claims, together with measures to prevent abuse or misuse of such procedures by those seeking to circumvent normal immigration regulations, are important tools in this regard.* [6]

2.4.6 Fees are by no means uncommon as part of the refugee determination processes in other countries. Australia is the only country which has a post decision fee. Some other countries apply a fee for review, but these are borne upfront by the applicant and apply regardless of the outcome of the application.

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[4] Office of the United Nations High Commissioner for Refugees, *op. cit.*, p1432.
[5] Executive Committee of the United Nations High Commissioner for Refugees (UNHCR), 1983, Conclusion No. 30 (XXXIV).
[6] Senate Legal and Constitutional References Committee *Submissions to Inquiry into the Operation of Australia's Humanitarian and Refugee Program, Volume VII,* 1999, Submission No. 83, p1430.

3 STATISTICAL METHODOLOGY

3.1 *'Cohort' Methodology and Why it is Used*

3.1.1 The majority of data presented in this submission is based on a 'cohort' of applicants according to their year of application, rather than the year of decision. A cohort approach identifies applicants at the time of either a primary or RRT application and tracks applications through the PV or review process to establish the subsequent fate of each application. The cohort approach assists the Department in determining the effect that the 1997 package of measures has on individuals who seek to enter the PV process or apply for a review of an adverse decision.

3.1.2 Data derived from a primary application year cohort enables a more accurate analysis of RRT take-up rates, rather than making a direct comparison between the number of primary decisions made in any one year and the number of RRT applications made in that same year. Such a comparison would be significantly influenced by differences in primary review processing times and lead times in applying for review. The data reported in most of the tables and charts below is based on the year of application, either Primary or RRT.

3.1.3 An RRT application year cohort (as in Table 5.8.1T below) is used to illustrate the outcome of RRT applications over time. This provides an accurate picture of potential liability for the fee.

3.1.4 The cohort approach allows analysis of the impact of the full group of measures introduced in July 1997. That is, each financial year's figures from 1997/98 relate to applications that were lodged either to the Department or the RRT in those years and detail the decisions and actions taken since that time.

3.1.5 Each primary application lodged on or after 1 July 1997:

- was subject to the restriction on permission to work and access to Medicare to those applicants who have been in Australia for less than 45 days in the 12 months before the date of their application;

- was liable to be processed in accordance with the streamlined processing arrangements; but

- irrespective of when the primary application was made, all applications for review lodged on or after 1 July 1997 were liable for the $1000 post RRT decision fee, if the RRT affirmed the primary decision.

3.1.6 The cohort methodology also allows exclusion from the analysis of those people whose applications predate the implementation of the package, even though they received decisions after 1 July 1997.

3.1.7 There may be some differences between the cohort data presented in this submission and that reported elsewhere. Some applicants have had their primary decisions finalised, applied to the RRT, or had their RRT application recorded on the system since earlier data was extracted. As primary and review data is matched anew when each cohort is run, some data matching variations will occur. For example, changes to names may have been entered in the system. Finally, the database is a dynamic system, the integrity of which is continuously being improved as duplicate and corrupt records are found and deleted.

3.2 *Statistical Variation Which May Result in Different Totals in Tables and Charts in this Submission*

3.2.1 The methodology may result in statistical variations in some of the tables and charts in this submission, depending on whether cohort data is used and the stage in the process the cohort was established.

3.2.2 For example, Table 5.1.1T of this submission details a primary application cohort of PV applications for seven financial years. It follows all PV applications made in each financial year and details the outcome of those applications, regardless of when the later decisions were made. This data has been displayed in order to show an accurate RRT take-up rate for these applications as a basis for the later analysis.

3.2.3 In contrast, the purpose of Table 5.2.1T and Chart 5.2.1C in the submission is to show the total effect of the whole package on primary applications. To do so, the figures reflect the actual number of applications in each financial year. Total RRT lodgement figures were included for completeness but, as explained in our discussion of the cohort methodology above, these were not used in the later analysis of the effect of the fee.

3.2.4 This means that the review lodgement figures displayed in these tables are fundamentally different. The RRT lodgements shown in Table 5.1.1T could have occurred at any time either inside or outside the primary lodgement year, depending on when the primary decision was taken.

3.2.5 For example, if a person lodged their primary PV application in June 1997 and received their primary decision in September of that year, he or she would necessarily have lodged their RRT application in the financial year 1997/98. The person would not have been subject to the 45-day rule, but would be potentially liable for the fee if unsuccessful at the RRT because the RRT application was made after 1 July 1997.

3.2.6 Such a person's RRT application would have been counted in the 1996/97 financial year in the cohort based Table 5.1.1T, yet would have been recorded in the 1997/98 year in Table 5.2.1T and Chart 5.2.1C because of the necessarily different methods of counting and displaying the data.

3.3 *DIMIA Data regarding RRT Applications in comparison to RRT Statistics*

3.3.1 Data collected by DIMIA in relation to RRT applications may differ from any data provided by the RRT for a number of reasons.

3.3.2 For example, the data displayed in Table 5.2.1T and Chart 5.2.1C is extracted from the Department's visa management system. This system counts the primary applicant and applications from family members each as individual applicants.

3.3.3 When applicants from one family group apply to the RRT to have their applications joined, the RRT can join those applications. In practice many applications are joined in this way. Each application often includes more than one applicant. Therefore, the data supplied by DIMIA and the RRT will differ as two different groups are being counted.

3.3.4 Additionally, the RRT may extract data from the historical internal DIMIA monthly reports. These figures may differ slightly from those supplied in this submission as they relate to the information available at the time that the monthly reports were compiled.

3.4 Data Includes all Applicants

3.4.1 In response to views expressed by the JSCM in their 2001 review of Regulation 4.31B, and so as to avoid any possible confusion, the data presented in this submission relates to all PV and RRT applicants, whether in the community or in detention.

4 ADMINISTRATION OF THE FEE

4.1 *Legislative and Policy Framework*

4.1.1 The fee is part of Australia's onshore protection process. A detailed description of that process is contained in Attachment A.

4.1.2 The fee is imposed under Regulations 4.31B and 4.31C of the Migration Regulations 1994. A copy of these regulations is at Attachment B.

4.1.3 It should be noted that RRT review is not available to offshore refugee applicants. This includes asylum seekers being processed in the Christmas Island, Manus Island and Nauru Offshore Processing Centres. Alternative merits review arrangements mirroring the arrangements followed by the UNHCR in its refugee status determination process are in place in these locations.

4.1.4 While maintaining Australia's commitment to upholding its international obligations in relation to refugees, the fee serves a dual role. It is an integral part of a package of measures (referred to in 2.1.5 above) designed to limit abuse of the Australian Government's procedures for fulfilling its international obligations. At the same time, in line with the Government's policy on appropriate cost contribution, it provides a mechanism for people who are found not to be refugees to contribute to the cost of their review processing.

4.1.5 In order to protect genuine asylum seekers, the fee was designed to be:

- applicable only to review by the RRT and not to the primary assessment;
- not payable where the applicant is determined by the RRT to be owed protection;
- not payable (or refunded if appropriate) if the RRT determines the applicant to be a refugee following remittal from a court; and
- not payable (or refunded if appropriate) if the Minister substitutes a more favourable decision under section 417 of the *Migration Act 1958* (the Act).

4.1.6 To ensure that the fee does not present a barrier to people who have a genuine fear of persecution, the fee becomes payable only after the RRT has made a decision. It is a post decision fee, not an application fee.

4.1.7 If the fee is not paid within 14 days of the date of the RRT letter advising the former review applicant that it has been imposed, a debt to the Commonwealth is incurred. The Department undertakes debt collection on behalf of the RRT by issuing a written invoice to the former review applicant.

4.1.8 Where RRT applications are combined, one fee only is imposed per family unit, irrespective of the number of people included in the application. This ensures that the fee is truly reflective of the work involved in processing the applications. The fee is charged on a per-case basis.

4.1.9 To facilitate cost recovery and promote a reasonable cost contribution from those people to whom Australia does not owe protection under its international obligations, subsequent access to grant of a substantive visa is restricted unless the fee is paid in full, or acceptable arrangements are made to pay the fee.

4.1.10 This restriction occurs because a criterion for grant of most substantive visas is that the applicant has no debt to the Commonwealth or, if the client does have such a debt, acceptable repayment arrangements have been put in place. A subsequent substantive visa may be granted to a person who still has a debt to the Commonwealth where acceptable repayment arrangements are in place. These can comprise a commitment to repay the debt and make a number of repayments. Such payment arrangements can be flexible to reflect the means and circumstances of the individual debtor.

4.1.11 Unsuccessful PV applicants are barred under section 98A of the Act from making further visa applications onshore, and thus the impact of the restriction on access to substantive visas is predominantly on persons overseas.

4.2 *Administration of the Fee*

4.2.1 The fee and debt recovery process involves the following steps and procedures.

4.2.2 When an adverse decision is made on a review application, the RRT notifies the applicant that it has reviewed their application and has affirmed the Department's decision that Australia's protection obligations have not been engaged. The notification letter[7] refers to the $1000 post RRT decision fee in the following manner:

> *FEE FOR TRIBUNAL REVIEW*
>
> *As the Tribunal has decided you are not entitled to a protection visa, a fee of $1000 is payable in full to DIMIA. You must pay the fee within seven (7) calendar days of notification of the decision. You are taken to be notified of the decision seven (7) working days from the date of this letter. Please read the enclosed information sheet for information about the fee.*

4.2.3 The information sheet refers to the post RRT decision fee in the following manner:

> *PAYING THE $1000 FEE FOR TRIBUNAL REVIEW*
>
> *When is the fee payable?*
>
> *Because the Tribunal decided you are not entitled to a protection visa, the fee is payable in full within seven days of notification of the Tribunal's decision. Your letter telling you the Tribunal's decision explains when you are taken to be notified of its decision.*
>
> *How do I pay the fee?*
>
> *You will need:*
>
> - *a bank cheque or money order for $1000 payable to "Department of Immigration and Multicultural and Indigenous Affairs"; and*
> - *the payment slip attached to this letter.*

[7] The Tribunal currently has eight "standard" notification letters that include post-decision fee paragraphs. These letters cover the different combinations of decision type and notification method, and differ slightly in content. All letters where the fee is payable are accompanied by an "After the decision" fact sheet, which provides further information about paying the fee and appeal rights. The extracted letter is the most frequently used of the relevant letters, and is sent as a notification of an affirm decision where the applicant (or their representative) does not attend the handing down.

Payment can only be accepted by bank cheque or money order with the payment slip attached.

Where do I send the fee?

Attach the bank cheque or money order to the payment slip and send them to:

Collector of Public Money
Department of Immigration and Multicultural and Indigenous Affairs
PO Box 25
BELCONNEN ACT 2616

Please note:

- *the fee cannot be waived or its payment postponed for financial hardship; you must pay it in full*
- *you must still pay the fee even if you apply to the Minister for Immigration and Multicultural and Indigenous Affairs on humanitarian grounds under section 417 of the Migration Act*
- *you must still pay the fee even if you apply for review of the Tribunal's decision in the Courts*
- *if the Minister makes a decision in your favour or a Court remits the Tribunal decision for reconsideration and the Tribunal makes a decision favourable to you, the fee will be refunded to you.*

What if the fee is not paid?

If the fee is not paid, you will owe a debt to the Commonwealth of Australia and you might be unable to obtain a visa in the future.

Information about paying the fee

If you have any questions about payment of this fee, contact the Collector of Public Money on (02) 6264 3964. Only the Collector of Public Money can answer questions about the fee; please do not contact other DIMIA offices or the Tribunal about the fee.

4.2.4 If a person pays the fee within 14 days of the date of the RRT's decision notification letter, the payment is recorded and no debt exists.

4.2.5 If the fee is not paid within 14 days, the names of the debtors are placed on the Department's Migration Alert List (MAL) system. The MAL listing alerts visa processing officers to the existence of the debt if the unsuccessful review applicant subsequently applies for a substantive visa. The MAL record remains until the debt is paid, or for ten years from the date of incurring the debt.

4.2.6 Departmental information about the protection visa process includes references to the $1000 post RRT decision fee in relevant documents. For example, Fact Sheet 61 *Seeking Asylum in Australia* provides that:

A $1000 RRT fee is payable when the application is rejected and the Department's decision is confirmed by the RRT.

People granted a protection visa as a result of an RRT decision and people on whose behalf the Minister intervenes in the public interest (see below) do not have to pay the fee.

4.2.7 Additionally, letters notifying applicants that their primary application for a protection visa has been refused, and of their right to review of the decision, advise of the fee in the following manner:

Please note that

- *if you apply for review to the RRT; and*
- *the RRT decides that you (and, if applicable your family unit members) are not a refugee/s,*

a post-decision fee of $1000 must be paid within 7 days of you being notified of the RRT's decision. One fee applies per family unit. If this fee is not paid, it may affect any future visa application you or your family unit members make.

5 ISSUES

5.1 *The Reliability of the Onshore Refugee Decision-Making Process*

5.1.1 Australia has established a robust, high quality process for assessing protection visa applications, which has achieved international recognition. In 1999, the Regional Office of the UNHCR, in a submission to the Senate Legal and Constitutional References Committee Inquiry into the Operation of Australia's Humanitarian and Refugee Program commented that:

> *... Australia has established an elaborate and sophisticated system for the consideration of individual asylum applications.* [8]

5.1.2 The integrity of a primary decision making process can to some extent be assessed by analysing the proportion of unsuccessful applicants who subsequently are successful on appeal to a review body and/or court.

5.1.3 Such comparisons are complicated in the case of the RRT, where the decision made by the Tribunal is a new decision on the merits of the case. A review by the RRT is not a review of the decision made at the primary stage. It is a new decision on whether protection obligations are owed to the individual concerned. The Tribunal member will make a fresh decision on the facts of the

[8] Senate Legal and Constitutional References Committee, *op. cit.*, page 433.

matter and decide the extent to which the benefit of the doubt should be extended to the applicant when making their decision.

5.1.4 Because of the nature of refugee issues, it is to be expected that with the passage of time, some people who were not refugees when assessed at primary stage may have become refugees by the time the RRT examines the case. The Tribunal can, and should, take into account any changes to the applicant's circumstances since the primary decision is made, including any events that may have occurred in the applicant's country of origin and any further claims the applicant may choose to present at the time of review.

5.1.5 Additionally those applicants in whose favour the primary decision-maker exercised his or her discretion on the benefit of the doubt, do not apply to the RRT. Therefore, there is no mechanism for establishing the proportion of these cases the RRT would have decided not to grant.

5.1.6 Given these issues it should be expected that there would be a relatively consistent, albeit low, level of RRT set-asides as part of the normal operation of a process involving availability of a full fresh merits review of the first refugee protection decision.

5.1.7 Table 5.1.1T below shows the total numbers of PV applicants by financial year of application, the number of applicants refused, subsequent RRT applications and their results for the seven financial years from 1995/96 to 2001/02. As at the date of compilation of this data, only 1279 of the primary applications received were awaiting a DIMIA decision and 5992 review applications were awaiting an RRT decision.

Table 5.1.1T – Total Number of PV Applicants and Results by Financial Year

Year PV App.	Primary Received	Primary Rejected	Primary Granted	Lodged RRT	RRT Set-Aside
1995/96	8100	6382	1195	5142	596
1996/97	11171	10043	869	8496	998
1997/98	8155	7246	693	6216	800
1998/99	8407	7237	983	6412	668
1999/00	12172	7485	4221	6755	812
2000/01	13127	8914	3325	8115	828
2001/02	8670	6526	1431	5734	247
TOTAL	**69802**	**53833**	**12717**	**46870**	**4949**

Source: Protection visa cohort.

5.1.8 Table 5.1.1T shows that 87%[9] of the people who unsuccessfully applied for protection visas in the period 1995/96 to 2001/02 sought to have that decision overturned by the RRT.

[9] RRT Applications Lodged as a percentage of Primary Rejections.

5.1.9 Despite this high review take-up rate, even with the potential for new claims to be raised and for country situations to change, the RRT has come to a different conclusion to the primary decision-maker in only 10.6%[10] of all review applications. This low rate is consistent with what could be expected in the normal operation of a full fresh merits review assessment process.

5.1.10 Accordingly, any study of the impact of the fee upon PV applicants should proceed from the general precept that unsuccessful applicants for PV receive thorough and competent assessment of the merits of their claims through the primary decision-making process.

5.2 *The Fee as Part of an Integrated Package*

5.2.1 As detailed in paragraph 2.1.5 above, the fee operates as part of an integrated package of measures designed to limit the opportunity for, and attractiveness of, the pursuit of unmeritorious protection visa applications. The other elements of the package include a restriction in the provision of permission to work and access to Medicare to those applicants who have been in Australia for less than 45 days in the 12 months before the date of their protection visa application, and the adoption of more strategic processing of applications to deal with unmeritorious claims expeditiously.

5.2.2 Overall, the package represents a staged approach to the management of unmeritorious PV applications. The restriction on Medicare and work rights and the shorter primary processing times are designed to impact at the primary application level while the fee is targeted at those applicants considering pursuing unmeritorious applications to the review stage.

5.2.3 It is difficult to specifically ascribe changes in the profile of PV applicants to individual policy measures contained within the package, as the package operates as a whole. However, some effects can be identified that clearly reflect upon specific aspects of the package.

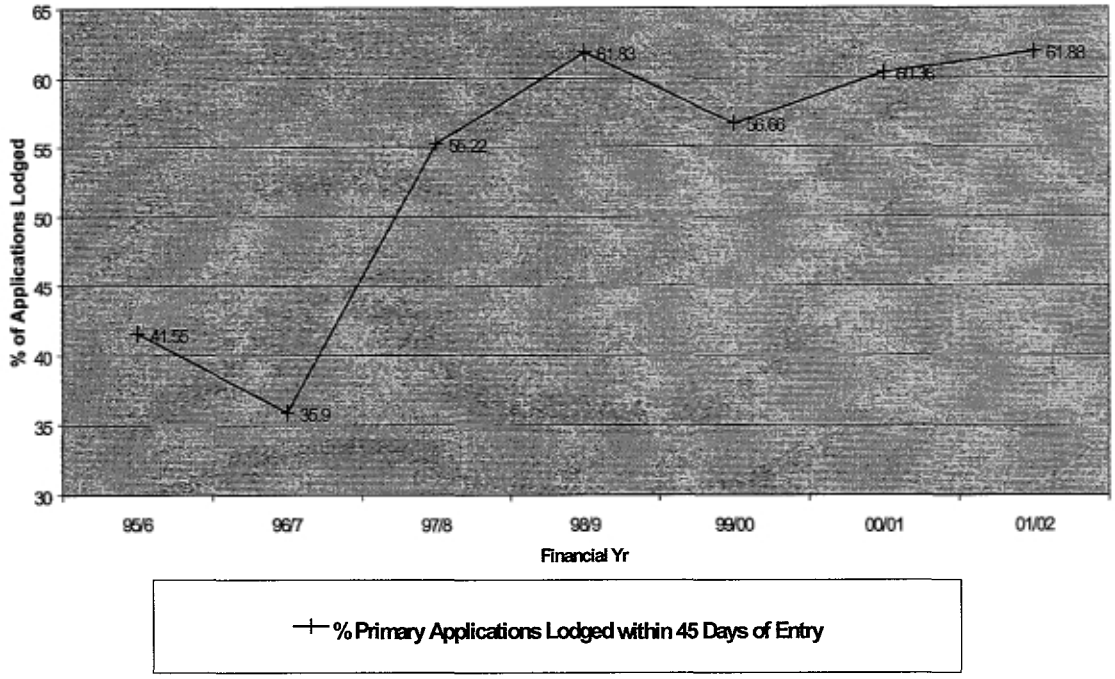
5.2.4 Table 5.2.1T and Chart 5.2.1C illustrate the change in applicant behaviour in terms of the number of days spent in Australia prior to making a protection visa application in the period from 1 July 1995 to 30 June 2002.

Table 5.2.1T - Percentage of Applicants who Applied for a PV Within 45 days of Entry

	1995/6	1996/7	1997/8	1998-99	1999/00	2000/01	2001/02
Ave. all Nationalities	41.55	35.90	55.22	61.83	56.66	60.36	61.88

[10] Reviews Set Aside as a percentage of the total finalised applications (that is the Primary Applications received less those on-hand at Primary and Review stage).

5.2.1C - Percentage of Applicants who Applied for a PV within 45 Days of Entry



Source: Annual activity.

5.2.5 Following the introduction of the package in July 1997, there was a substantial rise in the proportion of primary applicants who lodged their applications within 45 days of entering Australia. This proportion rose significantly from 35.9% in 1996/97 to 55.22% in 1997/98. Further, the number of applications lodged within 45 days has consistently remained above 55% since 1997, and has risen by 5% in the three years from 1 July 1999.

5.3 *The Effect of the Package*

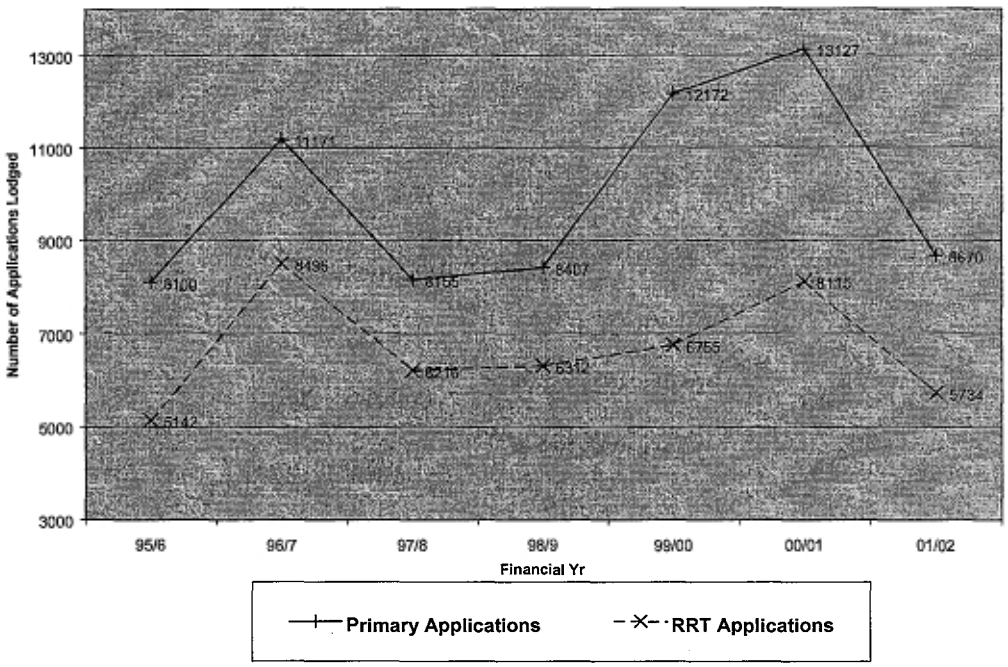
5.3.1 In combination with the other elements of the package, evidence suggests the number of primary applications made by people who were not in need of protection has reduced because of the fee's existence.

5.3.2 Table 5.3.1T and Chart 5.3.1C show the number of people applying for PVs at the primary level and to the RRT by financial year of application.

Table 5.3.1T- Total PV Applications: Primary and RRT

	95/96	96/97	97/98	98/99	99/00	00/01	01/02
Primary	8100	11171	8155	8407	12172	13127	8670
RRT	5142	8496	6216	6412	6755	8115	5734

5.3.1C - Total PV Applications: Primary and RRT



Source: Protection visa cohort.

5.3.3 Table 5.3.1T and Chart 5.3.1C show that the number of people lodging primary applications rose substantially, from 8,100 in 1995-96 to 11,171 the following year, and then fell drastically by 3,016 after the package was introduced.

5.3.4 While the number of primary applications increased significantly in 1999-00 and 2000-01, primarily due to increased numbers of unauthorised boat arrivals, the number of PV applications lodged in 2001-02 is some 2,500 (22%) less than the number lodged in the financial year preceding the introduction of the fee in July 1997.

5.3.5 Similarly, while applications for review by the RRT also increased in the 1999-00 to 2000-01 period, the number of review applications lodged in 2001-02 was some 2,700 (32.5%) lower than the numbers of applications received by the RRT before the commencement of the fee in July 1997.

5.4 *Identifying Abuse of the Protection Visa System*

5.4.1 Any evidence of an effect of the fee in isolation from the other elements of the 1 July 1997 package would be found in changes since the commencement of the fee to the behaviour patterns of PV applicants who have no grounds for protection.

5.4.2 Identification of applications from PV applicants who have no grounds for protection is a complex matter as there are people from most countries in the world who may conceivably be refugees, or otherwise might qualify for Australia's protection under its international obligations.

5.4.3 Not all unsuccessful PV applicants are intentionally misusing the onshore protection process. Applicants may harbour subjective fears for their safety where those fears are not objectively based. Because these applicants genuinely, if incorrectly, perceive they are in danger, they are by definition *bona fide*.

5.4.4 Conceptually, the group of unsuccessful PV applicants comprises two sub groups, defined by the applicants' own view of their grounds to Australia's protection. They are:

- *bona fide* applicants who genuinely fear for their safety if they were to return to their country of origin or have legitimate grounds to seek Ministerial consideration in their case; and

- applicants who do not genuinely fear for their safety and are misusing the PV system for other reasons, such as work rights and Medicare cover, prolonging lawful stay and/or the possibility of obtaining permanent residence through provision of fraudulent claims.

5.4.5 No data is kept which could exhaustively sort DIMIA systems data on refused PV applicants into these two subgroups. Such a classification would involve the case manager making an assessment of an applicant's motivations in applying for protection. Judgements on such matters would require careful case specific consideration by case managers. Notwithstanding the above, the evidence points to continuing misuse of the PV system.

5.5 *Continuing Abuse of the Protection Visa System*

5.5.1 There is a general understanding among those that work in the refugee assessment field that there is a significant level of systematic abuse of refugee assessment processes by people without genuine grounds for a country's protection. This is true for Australia as well as internationally.

5.5.2 Despite the effect that the fee and the other elements of the package have had to limit applications from people who have no grounds for protection at the primary and review level, the Australian data indicates that there is still a substantial level of abuse of the PV process.

5.5.3 Accurately quantifying the level of that abuse can be difficult. However in general, evidence of the existence of primary and RRT applications from applicants who have no grounds for protection can be seen in the excessive numbers of unpursued and unsuccessful applications made each year.

5.5.4 As Table 5.1.1T above indicates, over the past 7 years some 79% of primary applications and some 89% of applications to the RRT have been refused. One can conceive of a situation where a person may unwittingly pursue an asylum claim either through lack of knowledge or because of misleading information from advisors. It is unrealistic to attribute all of the

successful primary and review applications to such scenarios. Extensive information is available on the protection visa process and is provided to applicants in forms and correspondence. Most applicants are in the community where they can access advice from a range of NGO community networks or migration agent sources. It would appear realistic to conceive that a substantial percentage of the 50,857 protection visa applicants found not to be refugees over the last 7 years held some degree of knowledge as to their lack of refugee claims.

5.5.5 A further indicator of the level of non *bona fide* applications at the RRT level is the number of decisions that are affirmed by the RRT without the applicant appearing to give evidence. Under section 425 of the Act, if the RRT is unable to make a favourable decision in respect of a case on the papers it must give the applicant(s) an opportunity to appear before it to give evidence.

5.5.6 A *bona fide* applicant, truly believing that a mistake has been made in the primary assessment of their refugee application could be expected to ensure that they provide evidence to the RRT to support their case. This is particularly so given that the RRT invitation to a hearing indicates that the Tribunal is not minded to approve/remit the case on the material lodged.

5.5.7 It could be expected that an applicant appealing to the RRT only to extend his or her stay in Australia would be less likely to follow through with providing information or attending an interview when requested by the Tribunal. If a person knew he or she was not a genuine refugee, and suspected that after the RRT hearing they would face removal from Australia, he or she may choose not to attend a hearing when invited and would be less likely to maintain current contact address information with the Department or the Tribunal.

5.5.8 The effect of the fee on abuse of the protection visa process can be assessed by combining data on people choosing not to appear before the RRT when offered the opportunity, with a statistical study of specific groupings of applicants where the proportion of persons who have no grounds for protection or *bona fide* applications can be expected to be higher.

5.5.9 To isolate likely concentrations of persons who have no grounds for protection and *bona fide* applications, nationalities of applicants can be divided into groups according to the historical likelihood of success of each nationality over time. Each group's data can then be analysed by comparison with all other nationalities not included in the group and the average of all nationalities combined.

5.5.10 Analysis by nationality is a valid methodology because the principal determining factor in whether a person is a refugee is the situation in the country of that person's nationality. Additionally, people of the same nationality often share similar backgrounds and have similar claims to refugee status.

5.5.11 A higher concentration of *bona fide* applicants can be expected to be found in the group of nationalities with historically high success rates. This is

for two reasons. Firstly, because all successful applications can be considered to be *bona fide* and secondly, because a high approval rate can be an indication that the situation in the countries of origin is more severe from a perspective of human rights abuses than that in other countries.

5.5.12 The converse is also true. Applications from persons who have no grounds for protection can be expected to be concentrated more in the group of nationalities with low success rates. A lower approval rate tends to point to any adverse situation in their countries of origin being less severe or widespread from a perspective of human rights abuses than that in other countries.

5.5.13 Accordingly in order to study the effect of the fee, nationalities with statistically significant application rates have been categorised into 'high refugee producing' ('HRP') and 'low refugee producing' ('LRP') groups. For the purpose of this submission 'HRP' nationalities are those nationalities from which, over the seven financial years 1995/96 to 2001/02, ten or more applicants have applied for PV and the grant rate is 50% or above. 'LRP' nationalities are those from which, over the same period, ten or more applicants have applied for PV and the grant rate is below 2%.

5.5.14 It needs to be emphasised that these groupings of nationalities are for statistical analysis of the effect of the fee only for the purposes of the Joint Standing Committee on Migration's current inquiry, and have no role in the individual assessment of applications for PVs. Each PV application is assessed objectively on its own merits without pre judgement as to its *bona fides*.

5.5.15 Any positive effects of the fee in limiting applications from persons who have no grounds for protection should be seen most clearly in the group of 'LRP' nationalities.

5.5.16 Any negative effects of the fee should be seen in the group of 'HRP' nationalities.

5.5.17 Table 5.5.1T below shows data collected by the RRT, relating to RRT decisions for the five financial years since the introduction of the fee for applicants of 'LRP' and 'HRP' nationalities and all nationalities combined. This data details decisions on the merits of the case where the RRT has affirmed the primary refusal without the applicant appearing to offer evidence. This data is also expressed as a percentage of the total number of decisions made for people of those groupings.

Table 5.5.1T - RRT Reviews Affirmed Without Applicant Appearing (AWA)- 'High Refugee Producing' (HRP) and 'Low Refugee Producing' (LRP) Nationalities Compared to All Nationalities- 1997/98 to 2001/02.

Year	Nationality Group	AWA	Total Decisions	% Total Decisions
1997-98	LRP	1762	3712	47.5
	HRP	8	433	1.9
	All Nationalities	2334	6971	33.5
1998-99	LRP	680	1677	40.5
	HRP	10	476	2.3
	All Nationalities	2511	7422	33.8
1999-00	LRP	1380	2569	53.7
	HRP	9	498	1.8
	All Nationalities	2384	6586	36.2
2000-01	LRP	1185	2177	54.4
	HRP	8	689	1.1
	All Nationalities	2111	5646	37.3
2001-02	LRP	662	1537	43.7
	HRP	4	827	0.4
	All Nationalities	1551	5467	28.4
TOTAL 97-02	LRP	5669	11672	48.5
	HRP	39	2923	1.3
	All Nationalities	10891	32092	33.9

Source: Annual activity provided by the RRT.

5.5.18 In the five years since the introduction of the fee, in 33.9% of all RRT decisions the primary decision has been affirmed, on the merits of the case, without the applicant appearing. In all such cases the RRT was required to invite the applicant to attend a hearing to give evidence in support of their claims.

5.5.19 However, in some 48% of the cases decided by the RRT for people from 'LRP' nationalities from July 1997 to June 2002, the decision of the departmental officer was affirmed without the applicant appearing before the Tribunal. This is a statistically significant figure for nationalities that produce the least number of refugees. It means that nearly half the cases decided by the RRT were decided against the applicant without the applicant availing themselves of the offered opportunity to attend a hearing and give evidence in support of their claims.

5.5.20 This figure contrasts radically with the equivalent measure for applicants of 'HRP' nationality. For these cases fewer than 2% were decided by the RRT against the applicant where the applicant did not avail themself of the opportunity to attend a hearing.

5.5.21 It is theoretically possible to conceive of an applicant who did not attend a hearing despite being offered the opportunity to do so, who was a refugee but simply did not understand the system. Realistically however, as flagged in paragraph 5.5.4 above, extensive information on the review process is available from letters to applicants, departmental Fact Sheets, legal professionals, migration agents and advisers, and community networks. A person in fear of persecution can be expected to take reasonable steps to put their case for protection and understand the process for so doing. By the time

a person reaches the stage of being invited to attend an RRT hearing on their case, they will have had many weeks or months to gain this understanding.

5.5.22 In over 77% of all review cases, applicants use a migration agent to assist them with their RRT applications. Given all these circumstances, it would appear unrealistic to conceive that innocent misunderstanding or ignorance of processes has accounted for the 10891 cases in five years where review applicants did not attend a Tribunal hearing when invited (as shown in Table 5.5.1T).

5.5.23 The most reasonable explanation is that in the majority of these cases the applicants are not seriously pursuing their claim for refugee status. This is evidence of the existence of continuing misuse of the PV process even after the introduction of the package of which the fee is a part.

5.5.24 A further indicator of the continuing level of misuse of the PV process is the high proportion of unsuccessful review applications which continue to be made by people of 'LRP' nationality. As can be seen from Table 5.6.2T below, 'LRP' nationalities stand out for having a substantial number of applications lodged over the past five years, although there has been an overall reduction in the rate since the introduction of the fee.

5.5.25 Table 5.5.2T below shows the number of PV applications, subsequent RRT applications and successful outcomes[11] for people from all 'LRP' nationalities over the five financial years since the commencement in July 1997 of the package of measures of which the fee is a part. These figures are compared to the total number of applications from people of all nationalities over the same period.

Table 5.5.2T - PV Applications - 'Low Refugee Producing' (LRP) Nationalities - 1997/98 to 2001/02.

	Primary App's	**RRT App's**	**Successful Outcomes**
Total LRPs	15123	12471	142
Total All Nationalities	50531	33232	14008
LRPs as % of All Nat	**29.9**	**37.5**	**1.0**

Source: Protection visa cohort.

5.5.26 As this table illustrates, protection visa applicants from 'LRP' nationalities account for almost 30% of all primary applications and 37.5% of RRT applications made since the introduction of the package. However, despite their prominence in gross application terms, 'LRP' nationalities generate 1 % of the total number of subsequent visa grants.

5.5.27 It is unreasonable to claim, given the level of community, private and professional immigration advice and assistance available, that all people of

[11] The number of successful outcomes is the total of the number of persons granted at the primary (Departmental) stage, the number of persons set aside (remitted) by the RRT, either at first instance or after remittal from a Court, and the number granted visas by Ministerial intervention under section 417.

'LRP' nationalities who were unsuccessful in seeking Australia's protection between 1 July 1997 and July 2002 were *bona fide* applicants. This may be the case in some instances. However given the magnitude of the numbers involved, the Department is of the view that many, if not most of these people, were applying for refugee status in Australia in order to extend their stay in this country for non-protection reasons.

5.5.28 The evidence supports the conclusion that the package of measures has had a marked effect in deterring misuse of Australia's onshore protection process. Nevertheless, there remains a significant incidence of abuse by persons who have no grounds for protection but continue to lodge applications at both the primary and review levels.

5.5.29 The problem of misuse of the PV system is complex. The integrity of the system is maintained by minimising misuse in ways which strengthen and preserve the reliability of the process and Australia's capacity to identify and protect those who are refugees. Therefore strategies need careful planning and development, as rarely will one strategy alone present a solution. The 1997 package of measures can be seen to have beneficial effect on integrity, contributing to a significant reduction in misuse, and to providing a continuing brake on misuse, although not eliminating it entirely.

5.6 *The Fee's Effect on Abuse*

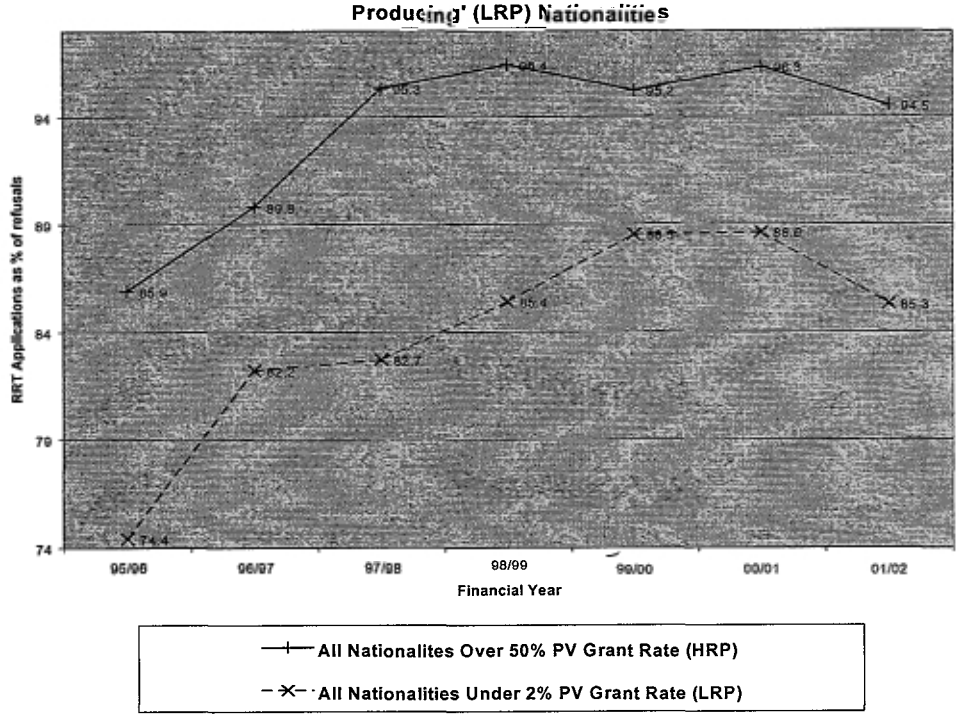
5.6.1 If the fee has been effective in reducing applications to the RRT from persons who have no grounds for protection, that effect should be identifiable in the RRT take-up rate for applicants of 'LRP' nationality from 1997/98 onwards. This is because the fee applies only after the applicant has passed through the review process following a negative primary decision.

5.6.2 Table 5.6.1T and Chart 5.6.1C display this data.

Table 5.6.1T - RRT Take-up Rates 'High Refugee Producing' (HRP) and 'Low Refugee Producing' (LRP) Nationalities

	1995-96 (%)	1996-97 (%)	1997-98 (%)	1998-99 (%)	1999-00 (%)	2000-01 (%)	2001-02 (%)
HRP Nationalities	85.9	89.8	95.3	96.4	95.2	96.3	94.5
LRP Nationalities	74.4	82.2	82.7	85.4	88.5	88.6	85.3
Difference HRP to LRP	11.5	7.6	12.6	11	6.7	7.7	9.2

5.6.1C RRT Take-up Rates 'High Refugee Producing' (HRP) and 'Low Refugee Producing' (LRP) Nationalities



Source: Protection visa cohort.

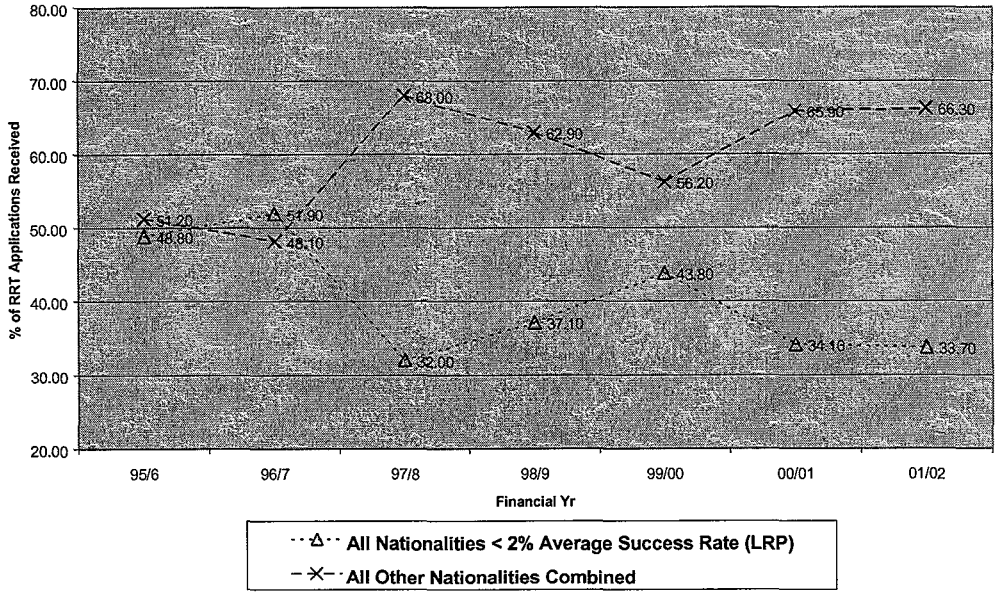
5.6.3 It is apparent that the fee has had an effect on the numbers of applications to the RRT by people found to have no basis for protection. 'LRP' nationalities review take-up rates were increasing by almost 8% per annum before the fee and other elements of the package were introduced on 1 July 1997. Immediately after the introduction of the package the increase in the rate for this group fell to less than 3% per annum. This rate stabilised in 2000/01, and in the following year, the 'LRP' rate dropped by over 3%. In comparison, the 'HRP' rate rose sharply after the introduction of the package and has remained consistent at over 94%. It could therefore be concluded that the RRT take-up rate for people of 'LRP' nationalities, who have a greater proportion of claimants who have no grounds for protection, would clearly be significantly higher without the fee.

5.6.4 This effect is also reflected in the proportion of applicants who were of 'LRP' nationality and who applied to the RRT, over the period 1995/96 to 2001/2002. Table 5.6.2T and Chart 5.6.2C below show this data.

Table 5.6.2T- RRT Applications 'Low Refugee Producing' (LRP) Nationalities

	1995-96	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02
LRP Nationalities	699	4312	2796	2102	3140	2734	1986
LRP as % of total	48.8	51.9	32	37.1	43.8	34.1	33.7
All Others	733	3987	5927	3558	4028	5268	3901
Others as % of total	51.2	48.1	68	62.9	56.2	65.9	66.3
Total	1432	8299	8723	5660	7168	8002	5887

5.6.2C - Percentage of RRT Applications from 'Low Refugee Producing' (LRP) Nationalities



Source: Review cohort.

5.6.5 As Table 5.6.2T above shows, in 1995/96 there were 699 RRT applicants from 'LRP' nationalities, representing around 49% of all RRT applicants in total. However, by 1996/97 the proportion of RRT applicants from 'LRP' nationalities had grown to almost 52%. This means that in 1996/97, more than half the applicants to the RRT in were of nationalities that had less than a 2% overall chance of success.

5.6.6 Following the introduction of the fee in 1997, the trend towards an increasing concentration of 'LRP' applications was reversed. 'LRP' applications greatly decreased, and the proportion of applications from all other nationalities increased. By 2001/02, the proportion of LRPs had decreased to 33% – 18% lower than the pre-fee level. DIMIA considers that this is significant evidence of the effect of the fee on PV applicants with no grounds for protection.

5.6.7 DIMIA expects that the effect of the fee will be more clearly seen as RRT processing times continue to improve. As the RRT is able to make decisions over progressively shorter time periods, the financial disincentive posed by the fee will carry more weight. That is, the cost benefit balance will have worsened for those people weighing up whether to apply to the RRT on financial/economic grounds and who expect to be unsuccessful at review.

5.7 *The Fee's Effect on Bona Fide Applicants*

5.7.1 As with the positive effects of the fee, indications of any negative effects upon *bona fide* applications would be found in a reduction in the review take-up rate since the introduction of the fee.

5.7.2 Chart 5.6.1C above illustrates that a general reduction has not occurred in 'HRP' take up rates, with rates for 'HRP' applicants being significantly higher following the introduction of the fee. Further, 'HRP' rates have consistently remained above 94%.

5.7.3 If the fee is having any negative effect on *bona fide* applicants applying to the RRT, then due to the concentration of *bona fide* applicants within the group of 'HRP' nationalities that effect should be seen most readily in that group from 1997/98 financial year. At all times since the introduction of the fee the take-up rate for people from these nationalities has remained well above pre-July 1997 levels.

5.7.4 The data strongly suggests that people with a fear of persecution, whether subjective or objective, are not deterred from making an RRT application by the existence of a post review decision fee.

5.7.5 It is unlikely that a person would be deterred from applying for review by a $1000 fee they did not expect to have to pay because they were genuine refugees. For those applicants who are not refugees but whose decision to use the PV process is driven by other motives - such as prolonging stay in Australia and obtaining work rights - the prospect of the $1000 fee could be expected to have some weight as a discouraging factor.

5.8 *Cost Recovery Issues*

5.8.1 The Government is committed to the concepts of 'user pays' and appropriate cost recovery. This ensures that unfair taxation burdens or fee structures are not placed on persons who are not gaining any benefit from the service in question. Further, the Government considers that it is appropriate to recover costs of unsuccessful RRT applications from the applicants.

5.8.2 The RRT Annual Report 2001-2002 provides that, pursuant to a Funding Agreement with the Department of Finance and Administration, funding of $2,400 is provided per application finalised.[12] The current level of the post review decision fee at $1000 is, considered to be reasonable and appropriate. It represents a significant, but still only partial, contribution to the cost of review decisions by people who are found not to be refugees. Importantly, the current level represents a significant cost of review still being borne by the taxpayer.

5.8.3 Table 5.8.1T shows the number of people who have made RRT applications since 1 July 1997, and the outcome of those applications. The fee has been imposed, or there is potential for the fee to be imposed, if the RRT does not set aside the primary decision (and there is a subsequent RRT set aside after court action or no Ministerial intervention to grant a visa on public interest grounds).

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[12] Refugee Review Tribunal, *Annual Report 2001-2002*, p21. For the purposes of the Purchasing Agreement, one finalised case equates to 1.34 applications.

Table 5.8.1T – Number of People Potentially Liable for the Fee – 1997/98 to 2001/02

RRT Application Year	Applied Review	Review Affirmed	Review Set-Aside	Review Otherwise Resolved	Review On-hand
1997/98	8723	6514	1286	845	78
1998/99	5660	4428	637	465	130
1999/00	7168	5717	742	469	239
2000/01	8002	5644	828	548	983
2001/02	5887	2192	471	320	2904
TOTAL	**35440**	**24495**	**3964**	**2647**	**4334**

Source: Review cohort.

5.8.4 To date over 24,000 people have been found to be liable for the imposition of the post review decision fee.

5.8.5 Table 5.8.2T below shows the amount of fee payments received in each of the five years since the introduction of the fee.

Table 5.8.2T – Net Revenue Received – 1997/98 to 2001/02

	1997/98	1998/99	1999/00	2000/01	2001/02
Net Revenue Received ($)	104,000	381,855	832,600	1,356,791	649,275

Source: Annual financial activity from the Departments financial information management system (SAP).

5.8.6 From just over $100,000 in the first financial year, fee receipts increased to over $1.3 million in 2000/01. This continuing increase in receipts can be attributed to two factors. Firstly, the potential pool of repaying debtors continues to rise. This is because unsuccessful applicants from previous years are included in the potential repayment pool if their debt remains unpaid. Also, to a lesser extent, a number of debtors are applying each year for other substantive visas to remain in, or return to, Australia.

5.8.7 In 2001/02 the figure dropped to $649,275. While it is difficult to determine precisely the reasons for this decrease, it is most likely that the fall in the number of review applications and subsequent review affirmed decisions by the RRT, is a contributing factor (refer 5.8.1T above).

5.8.8 At 30 June 2002 there were approximately 4,243 debts outstanding, although that number is not inclusive of those debts that have been written-off in line with standard accounting procedure. Those written-off debts are still recoverable and the MAL listing remains active.[13] Of course the fee does not pose any impediment to a former PV applicant wishing to leave Australia. A significant number of those whose decision is affirmed by the RRT and who depart Australia do not pay the $1000 fee first.

[13] See 3.2 above.

5.8.9 Since the introduction of the fee 68 fees have been paid in full from overseas posts. This indicates that the fee is not posing an insurmountable impediment to former PV applicants wishing to return to Australia, and also ensures that unsuccessful applicants have some incentive to contribute to the cost of their RRT reviews even if they leave Australia without paying the fee.

5.9 *The Fee and Australia's International Obligations*

5.9.1 As noted and accepted in the 1999 Review by the JSCM[14], the Office of International Law of the Attorney General's Department advised the Department that the imposition of the fee does not breach any of Australia's international obligations. In the 1999 Review of the fee by the JSCM, the Committee also noted that:

> *There is no evidence that Regulation 4.31B breaches Australia's international obligations in the Refugees Convention.* [15]

5.9.2 In the JSCM's 2001 Review, the Committee considered that there were no new arguments to cause it to change this view.[16]

5.9.3 Two submissions to the two previous inquiry by the JSCM argued that the fee breached Article 29 of the Refugees Convention. That Article states:

> *The Contracting States shall not impose upon refugees duties, charges or taxes of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.*[17]

5.9.4 This argument fails for two reasons. Firstly, the fee is not payable by refugees. It is not even liable to be paid by people still in the refugee determination process and availing themselves of an RRT review. It is levied only upon those people found not to be refugees by the RRT, and is refunded or waived if the decision of the RRT is subsequently changed, or the Minister substitutes a more favourable decision on public interest grounds.

5.9.5 Secondly, as noted in the Report of the JSCM in May 1999,[18] other review bodies and Courts dealing with persons in similar circumstances, charge a fee. For example, persons seeking merits review of migration visa decisions face an up-front Migration Review Tribunal fee of $1,400.

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[14] The Joint Standing Committee on Migration (JSCM), *Review of Migration Regulation 4.31B*, 1999, p 39.
[15] *Ibid.*,p37.
[16] The Joint Standing Committee on Migration (JSCM), *Review of Migration Regulation 4.31B*, 2001, p33.
[17] The Convention Relating to the Status of Refugees 1951, Article 19.
[18] JSCM, *ibid.*, 2001, p 24.

5.10 *The Fee's Effect on Requests to Access the Minister's Power under section 417*

5.10.1 Access to the Minister's power to intervene under section 417 of the Act is not via an application process. It is enlivened by an RRT decision to affirm a refusal of an application at the primary processing stage.

5.10.2 All affirmed cases, on return from the RRT, are assessed as a matter of course by departmental officers against the Minister's public interest guidelines for possible referral for Ministerial consideration, as are subsequent requests from unsuccessful RRT applicants and third parties. A copy of these guidelines is at Attachment C.

5.10.3 Those unsuccessful RRT applicants, for whom the Minister chooses to exercise his public interest powers under section 417, are not easily classified by nationality. This is because the Minister exercises his power to grant a visa for diverse reasons reflecting the issues flagged in his guidelines, and these criteria are not dependent on the person's nationality.

5.10.4 To the extent that a person, irrespective of their likelihood of being found to be a refugee, believes that the Minister would intervene to grant a visa in their case, the post review decision fee would not appear to be a disincentive to pursuing a review application in order to seek access to the Minister's intervention power.

5.10.5 Over the seven years from 1995/96 to 2001/2002, the Minister and the former Minister exercised their powers to grant a visa to people of 91 different stated nationalities.

5.10.6 Table 5.10.1T below shows the number of requests to the Minister to substitute a more favourable decision under section 417 of the Act over the past six financial years, as a proportion of RRT affirmed decisions.

Table 5.10.1T – The Minister's Public Interest Power under Section 417

	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02	6 YEAR TOTAL
Requests	1668	4320	4236	3649	2890	3681	20,444
RRT Affirm Decisions	3498	5310	5265	5096	4630	4272	28,071
Req as % of Aff. Decisions	47.68	81.36	80.46	71.61	62.42	86.17	71.62
Interventions	79	55	154	179	260	199	926
Interventions as % of Aff. Decisions	2.26	1.06	2.92	3.51	5.62	4.67	3.34

Source: Annual activity provided by DIMIA and the RRT.

5.10.7 The number of requests for the Minister to exercise his public interest powers under section 417 of the Act remains at an average of around 3,500 per year. It is difficult to draw reliable conclusions about trends on Ministerial

intervention decisions as the numbers are far too small and the nature of the public interest criterion applied by the Minister reflects the highly case specific nature of the reasons for intervention. However, in general there seems to be a slightly higher level of intervention in the later three years (1999-2002) than the preceding three years, notwithstanding that the number of RRT affirm decisions in the later three year period is slightly lower than the number of RRT affirm decisions made in the earlier three year period. However, even this conclusion may not be reliable because, as the 1990's progressed, there may have been an increase in the number of failed asylum seekers remaining in Australia and making multiple requests for intervention. Importantly, if the Minister intervenes in a case, any post RRT decision fee imposed is waived or refunded.

5.11 *Alternatives to the Fee*

5.11.1 In submissions to the previous JSCM Reviews, it was argued that the restriction of work rights and access to Medicare to those applicants who have been in Australia for less than 45 days in the 12 months before the date of their protection visa application, and the improved primary processing times, were sufficient deterrents to persons making applications when they have no grounds for protection. The alternative proposed was the elimination of the fee.

5.11.2 This option assumes that there is neither incentive nor opportunity in Australia for a person without work rights to find work, and that all persons who have no grounds for protection apply outside the 45-day limit. This is not the case. Both incentive and opportunity to work without legal permission exist and, as shown in paragraph 5.2.5 above, the majority of PV applications are now lodged within the 45-day limit for work rights.

5.11.3 The cost of seeking Australia's protection at the primary stage is token only, at $30 for a PV application. This is appropriate. However, removal of the post review decision fee would remove the only financial disincentive facing people who have no grounds for protection who want to use the asylum/appeal system to prolong their stay in Australia. The current requirement for community PV applications to be received within 45 days, to enable the applicant to be able to work legally while their application is under consideration, is discussed at paragraph 5.2. With the expectation of a quick primary decision often in a matter of weeks, a prospective applicant who has no grounds for protection must then weigh up the benefit of seeking extra time in Australia earning money, against the expected $1000 cost of pursuing an unsuccessful review of their PV application by the RRT.

5.11.4 Additionally, the post review decision fee is the only element of the July 1997 package of measures that impacts solely at the review stage. Therefore, to remove the fee, would remove the only direct disincentive deterring applicants who have no grounds for protection from proceeding to the RRT. As shown at Table 5.6.1T, the RRT take up rates for 'LRP' countries are currently some 9.2% lower than for HRP countries. This difference in 2001-02

alone equates to a saving of some $820,800 in RRT processing costs which can be wholly or mostly attributed to the disincentive of the $1000 fee.

5.11.5 Another alternative proposed was to have the RRT impose the fee only on vexatious or manifestly unfounded applications. There are a number of reasons why this is not a realistic option.

5.11.6 Given that the attractiveness of the PV process to an applicant who has no grounds for protection lies in the opportunities to prolong their stay in Australia, linking liability for the post review decision fee to a further decision about motivation and 'worthiness' of the application would serve to make the review process more costly and time consuming. Requiring such further decision by the Tribunal also creates further opportunities for litigation by those inclined toward misuse of the process in order to delay finalisation of their case.

5.11.7 Such an assessment function would tend to distract the RRT from its core responsibility for identifying those people to whom Australia owes protection obligations under the Refugees Convention.

5.11.8 To impose the fee only on vexatious or manifestly unfounded applications also makes the fee appear as a penalty, whereas it operates currently as a non-punitive partial cost recovery mechanism. The application of penalties is not an appropriate role for the RRT. Courts appropriately apply penalties. Legislation may be needed to create an offence that in turn raises issues of adversarial and more formal processes, which could compromise the effectiveness of the Tribunal.

5.11.9 Another alternative raised was an extension of the 'waiver provision' to allow the RRT to waive the fee in 'genuine' cases. This option raises many of the same issues as the option relating to manifestly unfounded applications. There are questions of review of the decision, complexity, imposing an additional decision-making step on the process, the dilution of the role of the RRT and an outcome that provides more opportunity and encouragement to people who are not refugees to seek to prolong their stay in Australia. It could be expected that an overwhelming majority of RRT applicants whose status is affirmed by the Tribunal would seek a waiver of the fee, creating a substantial additional workload for the RRT and opportunities for delaying litigation from those not granted a waiver.

5.11.10 In the 2001 Review, the JSCM found that, as there was no evidence that the fee dissuaded *bona fide* asylum seekers from pursuing review, there was no need to grant exemptions.[19]

5.11.11 The existing arrangements for waiving of debts to the Commonwealth and for persons to make satisfactory arrangements to pay debts in order to access Australian visas are considered adequate.

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[19] JSCM, *op cit.*, 2001, p37.

5.11.12 The post RRT decision fee is a generally applicable, non-discriminatory, cost recovery measure and, as such, it carries legal and policy integrity. As it is effective in limiting applications to the RRT from persons who have no grounds for protection, and does not negatively affect *bona fide* applicants, there is no reason to change its applicability.

5.12 *Migration Agents and the Fee*

5.12.1 Some submissions to the previous reviews by the JSCM on Regulation 4.31B asserted that abuse of the PV system was the result of unethical behaviour by migration agents. In particular, there were allegations that in some instances agents or advisers may not be explaining the situation to applicants when recommending the lodgement of a PV application and may give false encouragement to applicants to pursue review. Those submissions recommended that specific and far-reaching changes be made to the regulation of the migration advice industry. These have since been addressed in the 2001 Review of Statutory Self-Regulation of the Migration Advice Industry.

5.12.2 These allegations raised fundamental issues about the competence and ethical standards of migration agents. The Migration Agents Registration Authority, the migration advice industry regulator, has developed a robust and accountable complaints mechanism. This mechanism, similar to other regulatory bodies, is available to all clients and is the appropriate avenue for redress by clients who find they have been poorly advised on any migration issue.

5.12.3 Arguments were raised with the Committee during its last consideration of the $1000 fee sunset provision that agents should be held liable for the fee rather than unsuccessful review applicants. The Department concurs with the Committee's conclusion at that time that such an approach would 'create many difficulties' and would leave unclear the position of review applicants who do not have an adviser.

5.12.4 As paragraph 5.5.4 notes, there is extensive information publicly available on PV and review processes. Notwithstanding that many potential applicants seek advice and assistance from migration agents before applying for review, it is reasonable to expect that by the time they reach the review stage of processing a significant majority will have an understanding of the nature and purpose of the review process. Accordingly, while applicants may be misled or poorly advised by migration agents, it is reasonable to conclude that many of those people who pursue unmeritorious review applications do so knowing that they have low prospects of succeeding at review.

5.12.5 The 2001-02 Review of the Statutory Self-Regulation of the Migration Advice Industry recommended that the Department develop more effective means of sanctioning agents who lodge high numbers of vexatious, unfounded or incomplete applications.

5.12.6 Currently, the Migration Agents Registration Authority, the migration advice industry regulator, has limited power in relation to the issue of vexatious activity by agents. The Code of Conduct, which is legally binding on all registered migration agents provides that an agent:

- should be frank and candid about prospects of success when assessing a client's request for assistance in preparing a case or making an application (Clause 2.6);

- should not hold out unsubstantiated or unjustified prospects of success, when asked by a client to give his or her opinion about the probability of a successful outcome for the client's application (Clause 2.7); and

- must not encourage the client to lodge an application under the Migration Act or the Migration Regulations which is vexatious or grossly unfounded (for example, an application [that] has no hope of success); and must advise the client that, in the agent's opinion, the application is vexatious or grossly unfounded; and if the client still wishes to lodge the application, the agent must obtain written acknowledgment from the client of that advice (Clause 2.17).

5.12.7 Many agents with high application refusal rates (some with a 100% refusal rate) deal solely with PV applications. These agents then proceed to lodge applications at the RRT on behalf of their clients. Thus, currently, agents are not effectively being discouraged from being involved in cases with no hope of success. Proposed legislative changes stemming from the Review, if passed by Parliament, will expressly discourage such activity by registered migration agents.

6 THE EFFECT OF CESSATION OF THE FEE

6.1 *The Community Effect of Cessation of the Fee*

6.1.1 In the Department's view, allowing the sunset clause to cease the application of the fee on 30 June 2003 would send inappropriate messages to both the Australian community in general, and to those who are contemplating making an attempt to stay here for non-refugee related reasons. It would remove a significant plank of the Government's package of measures aimed at combating the misuse of the onshore refugee process, which can bring the credibility of refugee protection into disrepute, and divert processing resources from applications by people in need of protection.

6.1.2 The Australian community, while believing in fair play, has a substantial commitment to ensuring that, as far as possible, our system is not open to misuse. The Government believes that the fee, as part of the package of measures designed to provide a disincentive to applications from people who have no grounds for protection, indicates to the Australian people its commitment to the limitation of abuse of the PV process.

6.2 *The International Effect of Cessation of the Fee*

6.2.1 There is strong evidence to suggest that those intent on abusing onshore protection processes are influenced when deciding which country to enter by international perceptions about which countries are 'easier targets'.

6.2.2 It is imperative that Australia does not send a message to the international community in general, and potential applicants overseas who have no grounds for protection in particular, that it is reducing its commitment to discouraging the misuse of its onshore protection processes.

6.2.3 The cessation of the fee would send a message to the international community that Australia is relaxing its controls on applications from persons who have no grounds for protection. It could also result in an increase in numbers of non *bona fide* temporary visa applicants offshore, whose aim is to extend their stay in Australia, courtesy of costly primary and review PV processes.

6.3 *The Revenue Effect of Cessation of the Fee*

6.3.1 As shown in paragraph 5.8.6 above, the fees received have steadily increased to a significant level. Conservatively, cessation of the operation of the fee would result in revenue reduction of some $650,000 per annum. The potential loss in future years could be higher but is difficult to estimate.

6.4 *The Effect of Cessation on Review Applications*

6.4.1 Removal of the fee would remove the disincentive effect on review applications from persons who have no grounds for protection shown in paragraphs 5.3 and 5.4 above. This is likely to result in an immediate increase in applications to the RRT by persons who do not have grounds for protection and, because of the weakening of the overall package of measures, a probable increase in unmeritorious primary applications.

6.4.2 The removal of the fee could result in the costs to the RRT increasing significantly if 'LRP' flow on rates rise to 'HRP' levels. Potentially most, if not all, of this cost could be incurred if the 1997 package of measures was undone. Given that the fee is the only element focussing solely on the review stage, it would appear reasonable to assume that the fee is responsible for most of the cost savings at review.

7 CONCLUSION

7.1 *The Government's Commitment to Australia's International Obligations*

7.1.1 The Government maintains its commitment to meeting Australia's international obligations as defined by the Refugees Convention. The introduction of the post review decision fee does not restrict the definition of people requiring protection, nor does it narrow Australia's obligations to those seeking protection. Because the fee is payable only after an adverse decision of the RRT, it does not restrict the access of potential refugees to the protection process.

7.1.2 The introduction of the fee, together with the other elements of the package introduced on 1 July 1997, enables Australia to more efficiently and effectively identify those individuals who require Australia's protection and to provide them with such protection.

7.2 *Summary of the Impact of the Fee*

7.2.1 The fee has now been operating for five full years and there is clear evidence of a reduction in RRT application numbers. There has been a significant change in the RRT take-up rate for 'LRP' nationalities since the introduction of the fee. This supports the conclusion that the fee is acting as a disincentive for applicants who have no grounds for protection proceeding to the RRT.

7.2.2 It is reasonable to assume that the imposition of the fee would act as a disincentive for applicants who have no grounds for protection, and whose judgement about accessing the RRT will be predominantly economic. Given the clear difference in review take up rates between 'HRP' and 'LRP' nationalities (paragraph 5.6 refers), it is also reasonable to conclude that whatever the current level of misuse of the RRT is, and it clearly remains significant, it would be higher without the fee.

7.2.3 Further, the package as a whole appears to have had a positive effect in limiting primary applications from people who have no grounds for protection.

7.2.4 At the same time, since the introduction of the fee in July 1997, there has been no perceivable negative effect on *bona fide* applicants. This is evidenced in the continually strong RRT take-up rates for people of 'HRP' nationalities.

7.3 *Conclusion*

7.3.1 Maintaining the current sunset provision, and so allowing the fee to cease from 1 July 2003 would:

- send an inappropriate message about the Australian Government's intentions regarding abuse of the protection process to the Australian and international community, and to potential applicants with no grounds for protection;

- remove the only element of the 1997 package that impacts at the review stage, thus resulting in an increase in applications from persons who have no grounds for protection;

- reduce Commonwealth revenue by at least $650,000 per annum;

- remove an avenue for partial cost contribution; and

- expose the Commonwealth to a significant rise in unmeritorious review applications with flow on costs to the tax payer in the order of $820,800 per year.

7.3.2 The analysis of the impact of the fee now stretches over 5 years of its operation. The data shows that the fee is effective in controlling applications from people who have no grounds for protection, and providing for cost recovery without having a negative effect on *bona fide* applicants. To impose another sunset provision with the concurrent requirement for detailed further review within a short space of a few years no longer appears necessary.

7.3.3 Accordingly, on all the evidence, the most appropriate course would be to remove the sunset provision from Regulation 4.31B and allow further review of the regulation imposing the post RRT decision fee, along with all other regulations, to be undertaken when appropriate.

ATTACHMENT A

AUSTRALIA'S PROCEDURES FOR PROCESSING PROTECTION VISA APPLICATIONS

Overview

- Australia's protection visa regime has been structured to be non-adversarial, thorough and objective.

- Applications for protection visas may be made by anyone physically present in Australia. People seeking asylum in Australia may be granted one of two types of refugee visas:

- If they arrive lawfully in Australia, and are found to require protection, they may be granted a Protection Visa (PV) which enables them to live permanently in Australia.

- If they arrive in Australia unlawfully and are found to require protection, they may be granted a Temporary Protection Visa (TPV), which provides temporary residence for three years in the first instance and applies to protection visa applications lodged on or after 20 October 1999. From 1 November 2000, the Migration Regulations were amended to provide that people who have been immigration cleared on fraudulent documents, also only have access to the TPV in the first instance.

- The determination process and the broader regime have been the subject of extensive external scrutiny, including by Parliament, which has reviewed the process on a number of occasions.

- The determination process comprises, in the first instance, the examination and determination of protection visa applications by delegates of the Minister who are officers of the Department of Immigration and Multicultural and Indigenous Affairs. An independent merits review of unsuccessful asylum claims is available on application to the Refugee Review Tribunal.

- Asylum seekers in the community have access to Australia's public health system, and to work rights if they need them, while their application is being considered provided that they have been in Australia for less than 45 days in the 12 months before the date of their protection visa application. If it takes more than 6 months to decide their case, they may apply for assistance to meet their health, accommodation and food needs.

Procedures for Processing Community- Based Protection Visa Applications

- Applications are lodged on the form 866 (Application for a Protection Class XA Visa). A $30 fee is payable for a single applicant or a whole family application.

- All applications for a protection visa are assessed on a case by case basis under determination procedures designed to ensure that decision making is consistent and undertaken in a fair manner.

- A trained case officer is assigned to each case and is responsible for assessing and determining the applicant's claims against the UN Convention and Protocol Relating to the Status of Refugees (the "Refugee Convention").

- The case officer may seek further information from the applicant at interview where interpreters, chosen with regard to cultural and gender sensitivities, are provided wherever required.

- Procedural fairness is incorporated in the process: under the Code of Procedures in the Migration Act 1958, case officers are required to provide applicants with an opportunity to comment on adverse third party information which is specific to them and may result in the refusal of the application.

- If an applicant is found not to engage Australia's protection obligations, they are provided with the case officer's detailed written decision record, outlining findings of fact and the reasoning for the decision, and advised of their right to have the decision reviewed by the Refugee Review Tribunal. The advice also informs the client of the existence of the $1000 post RRT decision fee.

- When an applicant is found to engage Australia's protection obligations, health and character checks are undertaken. Provided that the character checks are clear and the applicant is not considered a danger to the security of Australia, a protection visa is granted.

- A Permanent Protection Visa gives a refugee:

- permanent residence;

- access to Australia's public health system;

- permission to work;

- access to welfare benefits;

- permission to travel and enter Australia for five years after grant; and

- eligibility to apply for citizenship after two years permanent residence.

    - A Temporary Protection Visa gives a refugee:

- three year temporary residence in the first instance. TPV holders are able to apply for a further protection visa which may be granted after 30 months if they still need protection at that time;

- access to Australia's public health system;

- permission to work;

- access to a limited range of welfare benefits (including Special Benefit, Rent Assistance, Maternity and Family Allowances and Family Tax Payment); and

- eligibility for referral to the early health assessment and intervention program and torture and trauma counselling.

    - The TPV provides no rights for people to bring their families into Australia and does not provide an automatic right of return to Australia if the TPV holder departs Australia.

The Review Process

An important element of that system is the Refugee Review Tribunal (RRT). The RRT is an independent, specialist, non-adversarial merits review Tribunal that removes the need for applicants to access a costly, time-consuming, adversarial judicial review process in order to have their primary decision reviewed.

The RRT has developed substantial expertise in the determination of claims for protection under Australia's international obligations.

- Applicants rejected at the primary stage may seek review of the primary decision by an independent statutory review body, the Refugee Review Tribunal (RRT).

- The RRT undertakes a full merits review and is able to affirm (or uphold) the primary decision, remit a decision with directions, set aside the primary decision and substitute in its place a decision that Australia owes the applicant protection obligations, or vary the decision.

- Where the Tribunal is not able to make a decision in favour of the applicant "on the papers", it must offer the applicant an oral hearing,

along with the opportunity for the applicant to notify the Tribunal of any person(s) from whom they wish the Tribunal to obtain oral evidence. Oral hearings are non-adversarial. Rather they are informal and are not bound by technicalities or rules of evidence to enable the applicant to present their claims and provide responses to Tribunal questions without formality. Hearings are held in private to protect the applicant's privacy and safety. Appropriate interpreters are provided to assist applicants where required. Applicants may be accompanied at the Tribunal; however only the applicant has the right to address the Tribunal.

- In making its decision, the Tribunal is not bound by the information or evidence available to the primary decision-maker, but is able to take account of new information, evidence and arguments, whether presented at an oral hearing, in written submissions or obtained independently by the Tribunal.

- The Tribunal is also bound by the requirements of procedural fairness and must provide the applicant with an opportunity to comment on any adverse third party information that is of material importance and specific to their case.

- Applicants are provided with a written notice of the Tribunal's decision within 14 days of the decision being made. The notice sets out the decision, reasons for the decision, findings on any material questions of fact, and evidence or any other material on which the findings of fact were based. The applicant is also offered the opportunity to obtain a copy of the tape of any oral hearing.

- From mid 1999 applicants are required to be invited to a formal handing down of Tribunal decisions on all cases except where an *ex tempore* decision is made at the time the applicant is heard by the Tribunal.

Minister's power to intervene to grant a visa

- In addition, under s417 of the Act, the Minister has a non-compellable and non-delegable power to substitute for an RRT decision another decision more favourable to the applicant where he believes it is in the public interest to do so.

- Each case where the RRT affirms a refusal decision is assessed against the Minister's guidelines for the identification of unique or exceptional cases that he may wish to consider.

- This intervention power provides the Minister with the ability to intervene and grant a visa in cases that *inter alia* raise Australia's international obligations under the Convention Against Torture, the

International Covenant of Civil and Political Rights and the Convention on the Rights of the Child.

Judicial review

- An applicant may appeal an RRT decision to the Federal Court if there has been an error of law. Applicants may also pursue avenues of judicial review to the High Court either having exhausted Federal Court avenues, or direct to the High Court's original jurisdiction.

Bridging visas

- An applicant for a protection visa, unless they have arrived in Australia unlawfully, is usually granted a bridging visa that will provide them with lawful status and permission to remain in Australia during the processing of their application for a protection visa.

- The bridging visa ceases 28 days after notification of a decision that a person is not a refugee. If a review application is made to the RRT during that 28-day period the bridging visa remains active and provides lawful status for the duration of the processing of the RRT application. It ceases 28 days after notification of a decision by the RRT that a person is not a refugee.

ATTACHMENT B

MIGRATION REGULATIONS 1994

Regulation 4.31B. Review by the Tribunal - fee and waiver

4.31B.(1) *The fee for review by the Tribunal of an RRT-reviewable decision is $1000.*

(2) *The fee is payable within 7 days of the time when notice of the decision of the Tribunal is taken to be received by the applicant in accordance with section 441C of the Act.*

Note Under regulation 4.40, notice of a decision of the Tribunal is given by one of the methods specified in section 441A of the Act.

(3) *However, if:*

(a) the Tribunal determines that the applicant for the visa that was the subject of the review is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol-the fee is not payable; and

(b) a fee has been paid under this regulation and, following the Tribunal's determination, the matter in relation to which the fee was paid is remitted by a court for reconsideration by the Tribunal-no further fee is payable under this regulation.

(4) *If 2 or more applications for review are combined in accordance with regulation 4.31A, only 1 fee is payable for reviews that result from those applications.*

(5) *This regulation applies in relation to a review of a decision only if the application for review was made on or after 1 July 1997 and before 1 July 2003.*

Regulation 4.31C. Refund (or waiver) of fee for review by the Tribunal

4.31C.(1) *This regulation applies to a review of a decision if:*

(a) both:

(i) on review by a court, the decision is remitted for reconsideration by the Tribunal; and

(ii) the Tribunal determines that the applicant for the visa that was the subject of the review is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(b) the Minister, under section 417 of the Act, has substituted for the decision of the Tribunal a decision that is favourable to the applicant.

(2) *A fee paid under regulation 4.31B, or liable to be paid under regulation 4.31B, in relation to a decision to which this regulation applies is to be refunded, or waived, as the case requires.*

ATTACHMENT C

MSI 225: MINISTERIAL GUIDELINES FOR THE IDENTIFICATION OF UNIQUE OR EXCEPTIONAL CASES WHERE IT MAY BE IN THE PUBLIC INTEREST TO SUBSTITUTE A MORE FAVOURABLE DECISION UNDER s345, 351, 391, 417, 454 OF THE MIGRATION ACT 1958

MIGRATION SERIES INSTRUCTION

Instructions in this Migration Series (MSIs) relate to: the Migration Act 1958; the Migration Regulations and other related legislation [as amended from time to time].

MSIs are a temporary instruction format only; they are intended for ultimate incorporation into PAM. It is the responsibility of the program area to ensure that the information in this MSI is up-to-date. It will be reviewed 12 months from date of issue but will remain current until formally replaced, re-issued or deleted. For information on the status of this MSI see the latest Instructions and Legislation Update or contact Instructions and Forms Coordination (IFCO) Section.

The attached guidelines were signed by the Minister for Immigration and Multicultural Affairs on 31 March 1999.

In order to ensure that all officers have ready access to this information, the guidelines have been registered as a Migration Series Instruction.

Review Section, Central Office is preparing more detailed advice on associated administrative procedures, for officers using these guidelines. That advice will be included in a replacement version of this MSI as soon as possible.

Philippa Godwin
Acting First Assistant Secretary
Refugee and Humanitarian Division

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CONTENTS

MINISTERIAL GUIDELINES FOR THE IDENTIFICATION OF UNIQUE OR EXCEPTIONAL CASES WHERE IT MAY BE IN THE PUBLIC INTEREST TO SUBSTITUTE A MORE FAVOURABLE DECISION UNDER s345/351/391/417/454 OF THE MIGRATION ACT 1958

1 Purpose

1.1 The purpose of these Guidelines is to:

- inform Department of Immigration and Multicultural Affairs officers of the unique or exceptional circumstances in which I may wish to consider exercising my public interest powers under s345*, 351*, 391*, 417 or 454 of the Migration Act 1958, as the case may be, to substitute for a decision of the relevant decision maker, a decision more favourable to the person concerned in a particular case;

- set out the unique or exceptional circumstances in which I may wish to consider exercising those powers;

- inform Department of Immigration and Multicultural Affairs officers of the way in which they should assess whether to refer a particular case to me so that I can decide whether to consider such intervention;

- inform people who may wish to seek exercise of my public interest powers of the form in which a request should be made.

2 Legislative Framework

2.1 I have power, but no duty to consider whether to exercise that power, under sections 345, 351, 391, 417 and 454 of the Migration Act 1958 (the Act), as the case may be, to substitute a more favourable decision, for a decision of the Migration Internal Review Office (MIRO)*, the Immigration Review Tribunal (IRT)*, the Administrative Appeals Tribunal (AAT) in respect only of IRT or RRT reviewable decisions, or the Refugee Review Tribunal (RRT), if I consider such action to be in the public interest. For example:

2.2 Section 417. Minister may substitute more favourable decision

417. (1) If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.

The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances.

3 When the public interest power is not available

3.1 As my public interest powers only allow me to substitute a more favourable decision for a decision of MIRO, the AAT (in respect of an IRT or RRT-reviewable decision) IRT or the RRT, I am not able to use this power until the relevant review authority has made a decision in a particular case. I cannot use this power to grant a visa when the review authority has not yet made a decision or when an application to the review authority has not been made.

3.2 Where a decision is quashed or set aside by a Court and the matter is remitted to the decision maker to be decided again, I am not able to use my public interest power as there is no longer a review decision for me to substitute.

3.3 Officers must advise me of the commencement and outcome of Court proceedings challenging a decision in relation to any case that has been referred to me.

3.4 It would not usually be appropriate to consider substitution of a more favourable decision for that of a MIRO officer while an IRT application were in progress. Unusual circumstances would need to be established to suggest that exercise of my public interest power should be considered prior to the IRT making a decision on the matter.

4 Unique or Exceptional Circumstances

4.1 The public interest may be served through the Australian Government responding with care and compassion to the plight of certain individuals in particular circumstances. My public interest powers provide me with a means of doing so.

4.2 Cases may fall within the category of cases where it is in the public interest to intervene if a case officer is satisfied that they involve unique or exceptional circumstances. Whether this is so will depend on various factors and must be assessed by reference to the circumstances of the particular case. The following factors may be relevant, individually or cumulatively, in assessing whether a case involves unique or exceptional circumstances.

4.2.1 Particular circumstances or personal characteristics that provide a sound basis for a significant threat to a person's personal security, human rights or human dignity on return to their country of origin, including:

- persons who may have been refugees at time of departure from their country of origin, but due to changes in their country, are not now refugees; and it would be inhumane to return them to their country of origin because of their subjective fear. For example, a person who has experienced torture or trauma and who is likely to experience further trauma if returned to their country; or

- persons who have been individually subject to a systematic program of harassment or denial of basic rights available to others in their country, but this treatment does not constitute Refugee Convention persecution as it is not sufficiently serious to amount to persecution or has not occurred for a Convention reason;

4.2.2 Substantial grounds for believing a person may be in danger of being subject to torture if required to return to their country of origin, in contravention of the International Convention Against Torture (CAT). Article 3.1 of the Convention provides:

'No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture.'

[Torture is defined by Article 1 of the Convention as follows:

'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in

an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'.]

4.2.3 Circumstances that may bring Australia's obligations as a signatory to the *Convention on the Rights of the Child* (CROC) into consideration. Article 3 of the Convention provides:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

4.2.4 Circumstances that may bring Australia's obligations as a signatory to the *International Covenant on Civil and Political Rights* (ICCPR) into consideration. For example:

- the person would, as a necessary and foreseeable consequence of their removal or deportation from Australia, face a real risk of violation of his or her human rights, such as being subject to torture or the death penalty (no matter whether lawfully imposed);

- issues relating to Article 23.1 of the Convention are raised. Article 23.1 provides:

"The family is the natural and fundamental group unit of society, and is entitled to protection by society and the State."

4.2.5 Circumstances that the legislation could not have anticipated;

4.2.6 Clearly unintended consequences of legislation;

4.2.7 Intended, but in the particular circumstances, particularly unfair or unreasonable, consequences of legislation;

4.2.8 Strong compassionate circumstances such that failure to recognise them would result in irreparable harm and continuing hardship to an Australian family unit (where at least one member of the family is an Australian citizen or Australian permanent resident) or an Australian citizen;

4.2.9 Exceptional economic, scientific, cultural or other benefit to Australia;

4.2.10 The length of time the person has been present in Australia (including time spent in detention) and their level of integration into the Australian community;

4.2.11 The age of the person; or

4.2.12 The health and psychological state of the person.

5 Other Considerations

5.1 Cases identified as involving unique or exceptional circumstances will sometimes raise issues relevant to my consideration of whether or not it may be in the public interest to substitute a more favourable decision in the case. If relevant, countervailing issues that case officer should draw to my attention include, but are not limited to:

5.1.1 Whether the presence or continued presence of the person in Australia would pose a threat to an individual in Australia, Australian society or security or may prejudice Australia's international relations (having regard to Australia's international obligations).

5.1.2 Whether there are character concerns in relation to the individual, particularly in relation to criminal conduct.

5.1.3 Whether the person need not return to the country in which a significant threat to their personal security, human rights or human dignity has occurred or is likely to occur, because they have rights of entry and stay in another country.

5.1.4 Whether the person is likely to face a significant threat to their personal security, human rights or human dignity only if they return to a particular area in their country of origin and they could reasonably locate themselves safely, elsewhere within that country.

5.1.5 The degree to which the person co-operated with the Department and complied with any reporting or other conditions of a visa.

Outcome of my Consideration

5.2 If I decide to consider a person's case I may ask, amongst other things, that certain health and character assessments be made or that an assurance of support or other surety be sought before I make a final decision about whether or not I wish to substitute a more favourable decision.

5.3 I may decide not to substitute a more favourable decision for that of a review authority.

5.4 If I decide to substitute a more favourable decision for that of a review authority, I will grant what I consider to be, in the circumstances, the most appropriate visa.

6 Application of these Guidelines

6.1 I direct that the following procedures be applied to ensure the effective and efficient administration of my powers under s345, 351, 391, 417 and 454 (hereafter referred to as my public interest powers):

Post-decision procedures

6.2 When a case officer receives notification of an IRT, RRT or AAT3 decision that is not the most favourable decision for the applicant they are to assess that person's circumstances against these Guidelines and:

- bring the case to my attention in a submission so that I may consider exercising my power because the case falls within the ambit of these Guidelines; OR

- make a file note to the effect that the case does not fall within the ambit of my Guidelines.

6.3 When a MIRO review officer or Tribunal member is of the view that a particular case they have decided may fall within the ambit of these Guidelines they may refer the case to the Department and their views will be brought to my attention using the process outlined in 6.5 below.

- comments by members of review authorities do not constitute an initial 'request' for the purposes of 6.6 below.

Requests for the exercise of my public interest powers

6.4 Requests can be made in writing by the person seeking my intervention, their agents or supporters.

6.5 When a written request for me to exercise my power is received, a case officer is to assess that person's circumstances against these Guidelines and:

- for cases falling within the ambit of these Guidelines, bring the case to my attention in a submission so that I may consider exercising my power; OR

- for cases falling outside the ambit of these Guidelines, bring a short summary of the case in a schedule format to my attention recommending that I not consider exercising my power.

'Repeat' requests for the exercise of my public interest powers

6.6 If a written request for me to exercise my public interest powers is received after the case has previously been brought to my attention as the

result of a previous request (in a schedule or as a submission) a case officer is to assess the request and:

- for cases then falling within the ambit of these Guidelines, bring the case to my attention as a submission so that I may consider exercising my power; OR

- for cases remaining outside the ambit of these Guidelines (because the letter does not contain additional information or the additional information provided, in combination with the information known previously, does not bring the case within the ambit of these Guidelines) reply on my behalf that I do not wish to consider exercising my power.

No limitation of the Minister's powers

6.7 My ability to exercise my public interest powers is not curtailed in a case brought to my attention in a manner other than that described above.

6.8 Where appropriate, I will seek further information to enable me to make a decision whether to consider exercising, or to exercise, my public interest powers.

6.9 Every person whose case is brought to my attention will be advised of my decision, whether it is a decision to refuse to consider exercising my public interest powers or a decision following consideration of the exercise of those powers.

7 Removal Policy

7.1 Section 198 of the Act, broadly speaking, requires the removal of unlawful non-citizen detainees who are not either holding or applying for a visa. A request for me to exercise one of my public interest powers is not an application for a visa and, unless the request leads to grant of a bridging visa, such a request has no effect on the removal provisions.

Philip Ruddock

31 Mar 1999