LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

EXAMINATION OF ADDITIONAL ESTIMATES 2001 – 2002

ADDITIONAL INFORMATION
VOLUME 2

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

Additional Information Relating to the
Examination of Expenditure 2001 – 2002

May 2002

Attachments to Question Nos. 16 and 17 are not available electronically - please call the Secretariat on (02) 6277 3560 if you require copies.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULURAL AND INDIGENOUS AFFAIRS

(1) Output: Migration Review Tribunal

Senator Bartlett (L&C 235) asked, "In terms of all the visitor visa refusals and student visa refusals that you deal with, are you able to provide a breakdown of which countries those come from?"

Answer:

When the Migration Review Tribunal (MRT) receives applications for review it records certain information relating to review applicants and their case on the MRT's case management system (CMS). Included is information relating to the DIMIA office or overseas post where the decision was made which is the subject of the review. MRT data relating to country of citizenship is not routinely entered onto its CMS as it is not relevant to the management of its caseload.

Visitor visa refusal cases

Based on information held in relation to where visitor visa refusal cases were initially decided by DIMIA, the following information is provided in relation to visitor visa refusal cases lodged during the period from 1 July 2001 to 28 February 2002:

Office/Post where visa application decided	**Number**
Adelaide*	10
Amman	10
Ankara	9
Athens	1
Auckland	2
Bangkok	5
Beijing	14
Beirut	22
Belgrade	23
Berlin	3
Cairo	16
Colombo	17
Dandenong*	2
Dhaka	2
Dubai	3
Guangzhou	28
Ho Chi Minh City/Hanoi	7
Hobart*	3

Hong Kong	1
Islamabad	18
Istanbul	3
Jakarta	1
Manila	25
Melbourne*	12
Mexico City	1
Moscow	14
Mumbai	1
Nairobi	4
New Delhi	10
Post not identified	2
Parramatta	3
Perth*	6
Phnom Penh	3
Rangoon (renamed Yangon)	2
Rockdale*	4
Rocks*	5
Santiago De Chile	11
Shanghai	27
Singapore	1
Suva	10
Sydney*	1
Tehran	17
Vienna	1
Warsaw	3
Total	**363**

(*visitor visa applications decided within onshore offices of DIMIA)

Student visa refusals

Limited information is available as to the country of origin of applicants for review of a DIMIA decision to refuse a student visa as all such decisions are made by DIMIA staff within Australia. However, based on the limited data available as to country of origin of these applicants, the following indicative information is provided:

- Sydney Registry - Peoples Republic of China - 35%, South Korea - 11%, Indonesia - 9%, India - 8%, Bangladesh - 6%, Nepal - 5% and Vietnam - 4%.
- Melbourne Registry - India - 18%, Peoples Republic of China - 13%, Sri Lanka - 12%, Taiwan - 8%, Indonesia - 7%
- Canberra Registry - receives a significant proportion of cases from nationals of the Peoples Republic of China, Korea and Indonesia, with a slightly lower proportion from Pakistan, India, Bangladesh and Taiwan.

During the period from 1 July 2001 to 28 February 2002 a total of 383 review applications relating to the refusal of a student visa were received, 194 of these by the Sydney Registry, 166 by the Melbourne Registry and 23 by the Canberra Registry.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(2) Output: Migration Review Tribunal

Senator Scullion (L&C 236) asked, "With regard to the Migration Review Tribunal provide a brief outline of the processes and procedures."

Answer:

General

The Tribunal is an independent body that reviews certain decisions made by the Minister for Immigration and Multicultural and Indigenous Affairs or by officers who are delegates of the Minister.

The Tribunal is established under the Migration Act 1958 (the Act) and its jurisdiction, powers and statutory procedures are set out in that Act and the Migration Regulations 1994.

In making its decision, the Tribunal does not have any more discretion than the primary decision-maker, and must make a decision within the legislation. The Tribunal will apply the criteria for visas and provisions relating to the cancellation of visas, business sponsors and the points system which are contained in the Act and various regulations made under the Act.

However, the review process provides the review applicant with the right to provide further material, give comment on adverse information and to appear in person before the Tribunal. The Tribunal also has the power to conduct further investigations.

After considering all the material before it the Tribunal can overturn the decision, can substitute another decision or can return the case to the Department for reconsideration with directions. It may also affirm the original decision.

The Tribunal's objective is to provide a mechanism of review that is fair, just, economical, informal and quick.

Types of decisions reviewable by the Tribunal and who can apply to the Tribunal

The Act and the Regulations specify what kinds of decisions the Tribunal can review and who may apply for review. The general rules are that the following persons may apply for review of the following decisions:

- Persons who applied for a visa in Australia and are in Australia at time of lodging the review application may apply for the review of a decision to refuse to grant a visa.

- Persons in Australia who have had their visa cancelled, except those whose visas are cancelled automatically.

- Persons in Australia whose application to have the cancellation of their visas revoked have been refused.

- For visa applications made outside Australia a sponsor or nominator may apply for review of a visa refusal or points assessment decision. In the case of a resident return visa or visitor visa, only a parent, spouse, child, brother or sister of the visa applicant may apply for review. (This includes step-relatives but not in-laws.) In the case of visitor visas, the relative who applies for review must have been mentioned in the visa application.

- Persons who were granted a provisional partner visa overseas prior to being refused a permanent partner visa within Australia.

- Persons whose application to become a pre-qualified business sponsor or standard business sponsor has not been approved.

- Persons whose application for the renewal of approval as a pre-qualified business sponsor has not been approved.

- Persons whose approval as a pre-qualified business sponsor, or as a standard business sponsor has been revoked.

- An employer whose application for approval of a nominated position (under the Employer Nomination Scheme or the Regional Sponsored Migration Scheme) has been rejected.

- A pre-qualified business sponsor or standard business sponsor whose nomination of an activity in which an individual is proposed to be employed in Australia has been refused.

- In the case of a decision relating to lodging a security for compliance with visa conditions (a security decision), the visa applicant.

The Tribunal cannot review a decision to cancel a visa if the cancellation occurred when the visa holder was outside Australia.

The Tribunal's procedures

The Tribunal is not a court. Its task is to reconsider the case anew on the merits. The general features of a review are:

- The Minister is not represented before the Tribunal.

- The Department's role is limited to providing the Tribunal with any documents it has which relate to the case. It may sometimes make written submissions to the Tribunal.

- The applicant for review:
  - may be represented by another person;
  - may seek access to, or a copy of, written material given to the Tribunal;
  - must be informed of, and have the opportunity to comment on, the particulars of information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision;
  - other than in specific circumstances, must be given the opportunity to appear before the Tribunal to give evidence and present arguments;
  - may nominate other persons or sources that the applicant thinks the Tribunal should obtain evidence from.

- The Tribunal may obtain any information it considers relevant; it may take evidence on oath or affirmation; give information to the applicant and the Department; require the Department to conduct investigations; and summons persons or documents.

- Proceedings are generally open to the public but the Tribunal can decide to conduct proceedings in private.

- The Tribunal will engage a NAATI accredited interpreter where a person appearing before it is not proficient in English.

- The Tribunal is required to prepare a written statement of its decisions and reasons and provide copies to the Department and the applicant for review.

- Tribunal decisions may be published. Those that are published are available on the Internet.

The procedures of the Tribunal will vary from case to case but a typical case might follow these steps:

- After an application is made, the Tribunal will write to the applicant confirming that the application has been accepted and ask if he or she wishes to lodge any further documents. The Tribunal will also ask the Department to forward its documents, usually the relevant DIMIA case file.

- A case officer will prepare the case for consideration by a member having identified the relevant law and facts relating to the case.

- A Tribunal member will be constituted to the case.

- The member will review the documents in the Tribunal's possession. If a favourable decision can be reached relying only on these documents, the case will be finalised. If not, the Tribunal will either seek further information from the applicant or another person or body; or invite the applicant to comment on information which might be a reason for affirming the decision under review.

- The Tribunal invites the applicant to give oral evidence and present arguments, and to nominate other persons who could give or provide evidence and to nominate other written evidence that the Tribunal might obtain. This hearing may be held in person or in some cases by telephone or video conference.

- The preparation, and handing down or notification of a written statement of decision and reasons.

EXPLANATION OF COMPLAINTS AGAINST RRT MEMBERS
FINANCIAL YEAR 2000-2001

Date received	Nature of Complaint	Outcome
5 July 2000	The applicant expressed concern over the time for a decision to be made. An earlier Tribunal decision had been remitted by the Federal Court in September 1997 and constituted to the first Member in April 1998; that Member became unavailable to deal with it when appointed a Senior Member; the second Member was unable to finalise the matter before resigning from the Tribunal; several submissions were received from the applicant during the review necessitating consideration and referral of a document for examination as to its authenticity. A third Member to whom the application was constituted in August 2000 to be "dealt with as a matter of urgency" finalised the case in November 2000.	The applicant also complained to the Commonwealth Ombudsman about the delay in her case. The Ombudsman in his response to the Tribunal's report to him noted that: • The tribunal expedited the scheduling of the hearing of the application • Between September 1997 and June 1998 and in August-September 2000 delays were most like effected by resource and personnel constraints • The period June 1998 to July 2000 "did constitute a period of concern for this Office". After directing the matter be dealt with urgently, the Acting Principal Member wrote to the applicant expressing his regret for the delay.
11 July 2000	The applicant complained of delay in progress of the review application. The applicant's hearing had been conducted in February 2000. The Member explained that the case had raised issues requiring further research including research on legal issues which had contributed to delay in finalising the case. He undertook to give the case his top priority and finalised it in July 2000.	The Acting Principal Member wrote to the applicant indicating the Member regretted the delay and would finalise the case quickly.
19 July 2000	An applicant complained that evidence at the hearing was not given proper attention or weight by the Member and that she had appeared to place greater weight on evidence unfavourable to his case.	The Acting Principal Member replied that the weighting of evidence was up to the Member. This was a matter with which he could not and should not interfere. The applicant was advised of his right to judicial review if he felt the Member based her conclusions on error giving grounds for judicial review.
1.	1. The applicant disagreed with the tenor and	1. The Acting Principal Member replied that the weighting of

20 July 2000 2. 30 November 2000	content of the country information put at the hearing to her and indicated she believed the situation in her country made it unsafe for her. 2. The applicant's adviser complained of delay in finalising the case. The Member explained that consideration of further information from the applicant and changed circumstances in her home country had delayed finalisation. The case was finalised by the Member in December 2000.	evidence was a matter for the Member and was a matter with which he could not and should not interfere. The applicant was advised of her right to judicial review if she felt the Member based her conclusions on error giving grounds for judicial review. 2. The adviser withdrew his complaint. The Acting Principal Member however responded to him advising the Member would finalise the case in mid December 2000, which she did.
1 August 2000	The applicant complained that at the hearing the Member had "made up her mind" and that he had not had a fair hearing. He wanted his case assigned to a different Member.	The Acting Principal Member responded that the weight to be attached to evidence was a matter for the Member and with which he could and should not interfere.
9 August 2000	The applicant complained that the Member attempted to discredit her and her son at the hearing and that his manner was hostile.	The Acting Principal Member listened to parts of the tape of the hearing and concluded that the Member had acted appropriately. He had put all matters of concern to him to the applicant in a measured and polite way and listened to her responses without interruption.
22 August 2000	A person who was acting in a support role for an applicant complained that the Member had asked questions about a period of time the applicant had been in detention, which had upset the applicant.	The Acting Principal Member explained the Tribunal's inquisitorial role and Members' obligation to inquire into applicants' claims. Members were expected to treat applicants with sensitivity and in this case the Member's questions on this issue had been brief and appropriate. The Member was experienced and had undergone training in dealing with victims of torture and trauma and had acted with appropriate sensitivity.
17 October 2000	An observer of a hearing complained of an "aggressive and unfavourable" approach by the Member to the applicant's case, that the applicant had difficulty in understanding the interpreter and of the Member's "lack of knowledge" of people of the applicant's background.	The Acting Principal Member noted that the applicant had indicated at the hearing that he would have no problem understanding the interpreter but that the applicant's advisers had now raised the quality of interpretation as an issue with the Member and that consequently the issue was now one for the Member to consider. The observer was urged to place any material which might assist the applicant before the applicant's advisers.

		The Acting Principal member also noted that a member's expression of doubt about an applicant's evidence did not necessarily mean the Member was biased. In relation to the Member's knowledge of the applicant's country, the observer was urged to put any information he had to the applicant's advisers and noted it was reasonable to expect the applicant and his advisers to put relevant material to the Tribunal.
15 November 2000	The applicant's brother who had acted for her at the hearing complained that the Member had not accepted that the applicant was a refugee and had drawn his and the applicant's attention to the Minister's powers under s.417 of the Act instead. In her decision the Member essentially accepted the applicant's evidence but found there was no basis for finding the applicant's fear of being persecuted was well founded. However, the Member expressed considerable sympathy for the applicant's personal circumstances (she was a widow in her late eighties) and attempted in the hearing to explain that despite her sympathy for her situation, she had no power to decide in her favour on compassionate grounds. The Member'' reference to s.417 was designed to assist the applicant and her brother to consider this option if, as the Member indicated was likely, the applicant was not found to be a refugee. The Member drew the Department's attention to possible compassionate features of the case in her decision.	The Acting Principal Member noted the Member had accepted the veracity of the facts recounted by the applicant and there was little purpose on dwelling on them further in the hearing. The Member had tried to explain the meaning of "persecution" and why she had felt she would be unable to find that the applicant had a well founded fear of persecution in the circumstances. The Acting Principal Member noted that the Member had been "clearly moved by the age and disabilities of the applicant" and had acted appropriately.
November 2000 General issues – no	A regular observer of Tribunal hearings in detention cases wrote to share "in confidence" some of her observations about the conduct of hearings she had observed and other matters. She inquired what	The Acting Principal Member responded by welcoming her observations and the support she had given applicants by her willingness to attend hearings with them. He explained the Tribunal's policies and practices and the inquisitorial role of

specific file	training Members received, how interpreters were selected and provided comment on the quality of legal assistance provided by applicants' advisers.	Members.
15 December 2000	The applicant complained that the Member had sought a medical report from the applicant's psychiatrist about her capacity to participate in a hearing. She said this letter divulged confidential information about the applicant without her authority. The applicant sought that all further requests for medical information be put through her first.	The Acting Principal Member responded that the Member was fully within her rights to seek a medical report about the applicant's ability to attend a hearing and that the background information given to the medical practitioner was appropriate. No court or tribunal could leave it to an applicant to determine when he or she is ready to proceed with a case and the Tribunal was entitled to seek information on this issue.
20 December 2000	The applicant's adviser complained of the conduct of the hearing by the member who had concentrated, he said, on the applicant's credibility and treated the adviser as an unwelcome participant. He complained that at the conclusion of the hearing the member had indicated he would make a favourable decision, raising the applicant's hopes which were not realised when the decision was to affirm the decision of the Department.	The Acting Principal Member listened to the tapes of the 3.5 hour hearing and found that the applicant was throughout treated with courtesy and heard without interruption by the Member. The applicant and adviser were invited to make submissions and draw his attention to any matters. Although there were instances where the Member said he had difficulty believing the applicant, he sought the applicant's response and there was no indication his mind was already made up. The Member welcomed the presence of the adviser and thanked him for his attendance and allowed him to contribute during the hearing. In relation to the complaint that the member had falsely raised the applicant's hopes for a successful outcome, the Acting Principal Member found that there was no basis for this view. The Member had made it clear he had put his doubts about his claim to the applicant. The applicant did not sound like a person who felt his case had been accepted and was given no false promises or deceived about his chances.

28 March 2001	An applicant complained that at the hearing he had not had a fair chance to explain his claims, that the Member was prejudiced against him and asked a new Member be assigned to his case.	The Acting Principal Member listened to the tape of the hearing and did not accept the Member demonstrated any prejudice to the applicant or denied him an opportunity to explain his case. The Member invited the applicant to put any aspects of his case again at the end of the hearing and in written submissions after the hearing if he so chose. The applicant was advised of his right to judicial review if he considered he had grounds for an application for such review.
May 2001	The applicant's representative complained that her client was still in hand cuffs at the commencement of a video hearing and that she had not been made aware of the "off camera" presence of ACM officers in the hearing room.	The Registrar agreed that no person should be present in a hearing without the knowledge of the applicant's representative and procedures were implemented immediately to ensure this cannot happen again. In relation to the use of handcuffs, the Tribunal informed the applicant's representative and a human rights organisation, which expressed similar concerns, that the Tribunal and its Members have no power to direct how those responsible for maintaining an applicant in immigration custody should keep an applicant in custody; if the Member considered that an applicant's evidence might be tainted, or the applicant's right to a hearing compromised by the presence of security officers, the Member would have to decide if the hearing could continue in those circumstances.
29 June 2001*	The applicant complained of the decision to affirm the original decision and that the Member did not conduct further inquiries he had requested or accept his evidence and/or weigh it in his favour. He also complained of the time taken to make the decision.	The Acting Deputy Principal Member responded that the assessment of evidence and the weight to be attached to it was up to the Member. The applicant was advised of his right to seek judicial review. The time taken to finalise his case was greater than normal but this was due to the need to consider further submissions and full consideration of all the matters raised in the case. The delay was regrettable but necessary in the interests of fairness.

29 June 2001*	The applicant complained of the decision to affirm the original decision and that it was unfair. She also complained of the time taken to finalise her case, particularly the time between hearings. *These were separate complaints made by a husband and wife respectively.	The Acting Deputy Principal Member responded that the assessment and weighing of evidence was up to the Member. She was advised of her right to seek judicial review of the decision. The delay in dealing with her case was to enable her case to be dealt with her husband's case in the interests of consistency and because there were common issues of fact in the two matters. A further delay occurred when her husband made new submissions. The delay was regrettable but necessary in the interests of justice.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(3) Output: Refugee Review Tribunal

Senator McKiernan (L&C 239) asked for an explanation of the 16 complaints referred to on page 8.

Answer:

A table providing those details is attached.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(4) Output: Refugee Review Tribunal

Senator McKiernan (L&C 240) asked for an explanation as to why a significant decision of the Administrative Appeals Tribunal in SRPP [2000] AATA 878 was not included in the Refugee Review Tribunal's Annual Report.

Answer:

This was an oversight rather than a deliberate decision. The Principal Member's Report outlines significant decisions of the Federal Court in the section on judicial review. While not a decision of the Federal Court, SRPP was nevertheless a significant decision and should have been included elsewhere in the Annual Report. Reference to this is being incorporated in the Tribunal's website.

refugee review tribunal

LEGAL RESEARCH BULLETIN

Issue No.64 *2 October 2001*

NEW LEGISLATION

THE PROTECTION VISA CRITERIA AND THE CONVENTION DEFINITION

Migration Legislation Amendment Act (No. 6) 2001
No. 131 of 2001

SYNOPSIS

The *Migration Legislation Amendment Act (No.6) 2001* commenced on Monday 1 October 2001,[1] as one of a package of new laws designed to strengthen Australia's territorial integrity.

Its purpose, according to the Explanatory Memorandum (EM) is to amend the *Migration Act 1958* (the Act) to restore the application of the Refugees Convention to its proper interpretation, and to promote integrity in protection visa application and decision-making processes. Most significantly for the Tribunal, it

- clarifies and defines the references to "persecution", "membership of a particular social group", "non-political crime" and "particularly serious crime" in the Convention; and
- amends the s.36(2) protection visa criterion to make it clear that a non-citizen in Australia is eligible for a protection visa either as a person to whom Australia has protection obligations under the Convention or as a spouse or dependent of such a person.

[1] Section 2; proclamation gazetted 28 September 2001.

In addition, it

- allows the Minister, in certain circumstances, to draw a reasonable inference unfavourable to the credibility of an unauthorised arrival or protection visa applicant if they fail to provide information or to produce documentary evidence of their identity, nationality or citizenship;
- extends the s.48A bar to all non-citizens who have been refused a protection visa, irrespective of whether they made Convention claims or relied on family membership, and to non-citizens who held a protection visa that was cancelled;
- prohibits the High Court, Federal Court, Federal Magistrates Court and Administrative Appeals Tribunal from publishing the names of people who have sought protection and engage in proceedings relating to their status in Australia; and
- empowers the Minister to substitute a more favourable decision for an AAT decision in relation to a review of a decision to refuse a protection visa.

The amended provisions that are of interest to the Tribunal are set out at Attachment 1.

IMPLICATIONS FOR THE TRIBUNAL

The provisions dealing with the expressions "persecution" and "membership of a particular social group" in Article 1A(2) of the Convention impose new statutory tests to be applied in relation to type and severity of harm, motivation, *sur place* claims, and the family as a particular social group. These provisions are the main focus of this bulletin.

The provisions that deal with the expressions "non-political crime" and "particularly serious crime" in Articles 1F and 33(2) of the Convention respectively are not of direct relevance to the Tribunal as it has no jurisdiction to consider these Articles. However it is important to be aware of the amendments in cases where a potential Article 1F or Article 33 issue might arise.

The amendment to s.36(2) will have some impact for the Tribunal in relation to protection visa applications involving family members who don't make their own specific Convention claims. However its practical impact will be minimal, as it largely reflects the existing criteria set out in the relevant parts of Schedule 2 to the Migration Regulations.

The other amendments are of interest but have no direct impact on the Tribunal's operations.

APPLICATION OF THE AMENDMENTS

The provisions dealing with Convention terms (persecution, membership of a particular social group, non-political crime, and particularly serious crime) and assessment of credibility take effect **immediately**, and apply to all applications that are finalised by the Tribunal on or after 1 October 2001.

The new s.36(2) applies to protection visa applications made on or after 1 October 2001. They do not affect protection visa applications made before that date.

The suppression provisions apply in relation to proceedings or applications commenced after 1 October 2001 and the new Ministerial power applies in relation to AAT decisions made at any time.

THE AMENDMENTS IN DETAIL

Section 36(2)

Applies to protection visa applications made on or after 1 October 2001.

Section 36(2) has been amended to include certain kinds of family membership as an alternative basis for the grant of a protection visa.[2] The purpose of the amendment was to overcome the decision in *Dranichnikov v MIMA*[3] in which the Full Federal Court held that a person who applies for a visa on the basis of family membership and not as a refugee is not applying for a protection visa of the kind referred to in s.36(2). This meant that such applicants were not caught by the s.48A bar to later applications. Section 48A has also been amended to ensure that applicants who rely on family membership will not be able to make further applications.

The new s.36(2)[4] provides that a criterion for a protection visa is that the applicant is:

- a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
- a non-citizen in Australia who is the spouse or a dependant of a non-citizen:
  - to whom Australia has protection obligations under the Refugees Convention; and
  - who holds a protection visa.

This establishes family membership as an alternative to the refugee criterion, making it clear that a non-citizen in Australia is eligible for the grant of a protection visa if he or she is the spouse or a dependent of a non-citizen who is owed protection obligations and holds a protection visa.

This largely reflects the protection and family unit criteria in the relevant parts of Schedule 2 to the regulations.[5] However, unlike those criteria, s.36(2)(b) only permits a spouse or dependant of a person who is owed protection obligations to rely on family membership.[6] This means, generally, that under s.36(2) adult applicants will not be able to rely on their membership of the same family as a child who is found to be owed protection obligations. The status of the inconsistent provisions of Schedule 2 is unclear.[7] However, past experience suggests that it will only be very rarely – for example, where a child is found to be a refugee but the parents are not - that the difference would be of any practical significance.

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2 The new s.36(2) was subsequently amended by the *Migration Legislation Amendment (Judicial Review) Act 2001* to include references to the Minister's satisfaction, both in respect to the criterion generally, and in respect to whether the non-citizen is a person to whom Australia has protection obligations: see s.3 and Items 4 and 5 of Schedule 1. The Explanatory Memorandum to that Act explains that the amendment is intended to put it beyond any doubt that the Minister's satisfaction is necessary to the grant of a visa to which s.36 of the Act refers. This amendment to s.36(2) takes effect today: *Migration Legislation Amendment (Judicial Review) Act 2001* s.2; proclamation gazetted 28 September 2001.

3 [2001] FCA 769 (Lee, Finn & Merkel JJ, 22 June 2001).

4 As amended by the *Migration Legislation Amendment (Judicial Review) Act 2001*: see n.1 above.

5 See Part 785 of Schedule 2, clauses. 785.112, 785,211, 785.221 and 785.222; and the equivalent provisions in Part 866.

6 The terms "spouse" and "dependent" are not defined in the Act but they are defined in the regulations: see rr.1.03, 1.05A and 1.15A. The relevant provisions in Parts 785 and 866 of Schedule 2 ensure that all members of a family unit may be granted protection visas where one member of the family unit is a person to whom Australia has protection obligations under the Refugees Convention, whether or not that person is the "family head". See Legal Research Bulletin No. 8 for a discussion of these provisions.

7 *Dranichnikov v MIMA* [2001] FCA 769 (Lee, Finn & Merkel JJ, 22 June 2001) was concerned with the old s.36(2) which did not provide for family membership as a basis for the grant of a protection visa at all. Having regard to the express provisions of s.36(2)(b) as amended, to the extent that the regulations permit a family member who is not a spouse or dependent of a person who is owed protection obligations to rely on their family membership, they are probably beyond power. However the Tribunal is not at liberty to disregard the regulations on the basis of its own view of their validity: see *Re Adams and the Tax Agents' Board* (1976) 1 ALD 251.

Implications for the Tribunal

The amendments to s.36(2) will only affect applications involving family members, where the visa application was made on or after 1 October 2001. Protection visa applications made before 1 October 2001 involving family members are not affected in any practical way.

Protection visa applications made on or after 1 October 2001 involving family members will be governed by the new legislation, which will need to be reflected in the s.430 decision record in these cases. In practical terms, only a spouse or dependents who do not satisfy the refugee criterion may rely on their membership of the family of a person to whom Australia has protection obligations, provided they satisfy the remaining criteria.

Subdivision AL – The Convention Definition And Other Matters

Applies to all applications not finalised by the Tribunal before 1 October 2001.

Subdivision AL introduces additional provisions about protection visas. Sections 91R, 91S, 91T and 91U clarify and define expressions in the Refugees Convention that have been interpreted by the courts in ways that have caused the Government concern. The two that are of most interest to the Tribunal are those that deal with "persecution" and "membership of a particular social group". However the provisions dealing with "non-political crime" and "particularly serious crime" are also of some interest. Sections 91V and 91W deal with evidentiary matters and assessment of credibility by the primary decision-maker.

Persecution

Section 91R(1) provides that for the purposes of the Act and regulations, Article 1A(2) does not apply in relation to persecution for one or more of the Convention reasons unless:

- That reason is the **essential and significant reason**, or those reasons are the essential and significant reasons, for the persecution; and
- The persecution involves **serious harm** to the person; and
- The persecution involves **systematic and discriminatory** conduct.

Essential and Significant Reason

Where the harm feared is not solely attributable to a Convention reason, the extent to which a Convention ground must be a factor has been unclear. In *Mahesparam v MIMA*,[8] Madgwick J referred to a "substantial part"; however other cases have provided little guidance.

Under s.91R(1), persecution for one or more of the Convention reasons will not constitute persecution unless those reasons are the **essential and significant reasons** for the persecution. The EM explains that where the harm feared is attributable to a number of motivations, it will be insufficient that there are minor or non-central Convention related motivations. However, persecution for multiple motivations will satisfy the statutory test where the Convention ground or grounds in aggregate constitute at least the essential and significant motivation.[9]

[8] [1999] FCA 459 (Madgwick J, 15 April 1999).
[9] EM, paragraph 21.

Serious Harm

This requirement is consistent with what was said by the High Court in *Chan Yee Kin v MIEA*;[10] however recent cases have suggested a lower threshold.[11]

Subsection (2) sets out the following **as examples** of harm that will meet the "serious harm" test:

- a threat to the person's life or liberty;
- significant physical harassment of the person;
- significant physical ill-treatment of the person;
- significant economic hardship that threatens the person's capacity to subsist;
- denial of access to basic services, where the denial threatens the person's capacity to subsist; and
- denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

Importantly, these examples are not exhaustive, and do not prevent other serious disadvantages, including serious mental harm, from amounting to serious harm. The EM provides the following guidance:

> For instance, "serious harm" may be established where the cumulative effect of persecutory laws is sufficiently serious, such as occurred to the Jewish people in Nazi Germany between 1933 and 1938. … it is insufficient to establish an entitlement for protection under the Refugees Convention that the person would suffer discrimination or disadvantage in their home country, or in comparison to the opportunities or treatment which they could expect in Australia. … The serious harm test does not exclude serious mental harm. Such harm could be caused, for example, by the conducting of mock executions, or threats to the life of people very closely associated with the person seeking protection. In addition, serious harm can arise from a series or number of acts which, when taken cumulatively, amount to serious harm of the individual.[12]

Systematic and Discriminatory

This aspect of s.91R is not explained in the EM. It is well established that persecution involves discrimination. However the expression "systematic conduct" has had a checkered history in Australian jurisprudence on "persecution". McHugh J stated in *Chan's case*:

> A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is 'being persecuted' for the purposes of the Convention.[13]

The Tribunal's use of the expression was subsequently criticised in a number of Federal Court cases. Finally, in *MIMA v Ibrahim*,[14] the High Court reaffirmed the general principle that it is the language of the Convention that must be applied, and expressed the view that concepts such as "systematic" are likely to distract from applying the text of the Convention

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10 (1989) 169 CLR 379 per Mason CJ at 388.
11 See eg *Ahmadi v MIMA* [2001] FCA 1070 (Wilcox J, 8 August 2001). See also *Kord v MIMA* [2001] FCA 1163 (Hely J, 24 August 2001) and cases discussed therein. *Kord* has been appealed to the Full Court.
12 EM, paragraphs 24-25.
13 *Chan Yee Kin v MIEA* (1989) 169 CLR 379 at 430.
14 (2000) 175 ALR 585.

definition. McHugh J explained in that case that he had used the term "systematic conduct" in *Chan's case* "as a synonym for non-random". His Honour added:

> It is an error to suggest that the use of the expression "systematic conduct" in either *Murugasu* or *Chan* was intended to require, as a matter of law, that an applicant had to fear organised or methodical conduct, akin to the atrocities committed by the Nazis in the Second World War. Selective harassment, which discriminates against a person for a Convention reason, is inherent in the notion of persecution. Unsystematic or random acts are non-selective.[15]

In the absence of judicial guidance on the new statutory provisions, these observations provide some guidance as to the meaning of "systematic and discriminatory conduct" in s.91R(1)(c). In particular, it should be understood to mean non-random, but not necessarily organised or methodical.

Sur Place Claims - Bad Faith

Section 91R(3) deals with claims relating to conduct engaged in by an applicant in Australia and represents a significant change in the law. Its purpose was to overcome the decision in *MIMA v Mohammed* in which the majority of the Full Federal Court held that want of good faith is a factual issue with evidentiary significance in the ultimate issue to be determined, which is whether the applicant satisfies the conditions of Article 1A of the Convention, and is not a rule of law to be laid over the words of the Convention.[16]

Section 91R(3) provides that in determining whether a person has a well-founded fear of being persecuted for one or more of the Convention reasons, any conduct engaged in by the person in Australia must be disregarded unless the person satisfies the Minister (or the Tribunal on review) that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee.

Importantly, where conduct in Australia is an issue, the applicant has the practical burden of satisfying the Minister (or the Tribunal) that it was otherwise than for the purpose of strengthening his or her refugee claims.

It is unclear whether s.91(3) imports a "sole purpose" test. However, the language of the provision suggests that conduct in Australia should not be disregarded if it is attributable to some other purpose, even if strengthening refugee claims may also have been a motivation. On that view, it would appear that what is to be disregarded is conduct undertaken for the *sole purpose* of creating or strengthening refugee claims.[17]

<u>Implications for the Tribunal</u>

The new statutory qualification to the words of the Convention will govern all decisions made on and after 1 October 2001 and will need to be reflected in the s.430 statement of reasons. The elements of this qualification depart from the Tribunal's current understanding of Article 1A(2) to varying degrees. In sum -

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[15] (2000) 175 ALR 585 at [99]. The Full Federal Court in that case had expressed a similar view: (1999) 94 FCR 259 at [25].

[16] (2000) 98 FCR 405. See Legal Research Bulletin No. 43 for a discussion of the implications of this case. *Mohammed* was followed by the majority in *MIMA v Farahanipour* (2001) 105 FCR 277. Both cases are currently the subject of applications to the High Court.

[17] This construction of s.91R(3) is consistent with the general understanding of *Somaghi v MILGEA* (1991) 31 FCR 100 (at 118) prior to the decision in *Mohammed*.

- *essential and significant reason or reasons* – where the harm feared is not solely attributable to a Convention reason, the courts have left open the extent to which a Convention ground must be a factor. Section 91R clarifies that in such circumstances a convention ground must be the *essential and significant reason* for the persecution.
- *serious harm* – this aspect of s.91R reflects the test in *Chan* and overrules recent cases that appear to suggest a lower threshold.
- *systematic and discriminatory* – this aspect of s.91R requires the Tribunal to consider whether the feared conduct is systematic and discriminatory, but does not significantly change the law developed by the courts as to the kind of conduct that would qualify.
- *sur place and bad faith* – s.91R(3) overrules the law established by *Mohammed*. The Tribunal is to disregard conduct by an applicant in Australia unless it is satisfied that that conduct was otherwise than for the purpose of strengthening refugee claims.

Membership of a Particular Social Group

Section 91S deals with "membership of a particular social group" where the group in question is the family of a person who faces threats for a non-Convention reason. It was introduced to overcome the Federal Court decision in *MIMA v Sarrazola*.[18] In that case, the applicant claimed to fear harm from Colombian criminals who regarded her as responsible for her deceased brother's debt. The Court held that the Tribunal's conclusion that she was in fear simply because she was an obvious target and not for reasons of her membership of a particular social group was contrary to the facts which the Tribunal had found or accepted.

Under s.91S, in determining whether an applicant has a well-founded fear of persecution for reasons of membership of a particular social group that consists of the applicant's family, the following matters must be disregarded:

- any fear of persecution, or any persecution, that any other family member has experienced, where the fear or persecution is not for a one of the Convention reasons; and
- any fear of persecution, or any persecution, that the applicant or any other family member has experienced, where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in the first point had never existed.

Under the new provision, a person who is pursued because he or she is a relative of a person who is targeted for a non-Convention reason (such as criminal pursuit for repayment of debts) does not fall within the grounds for persecution covered in the Convention.

The EM explains that this does not prevent a family, *per se*, being a particular social group for the purpose of establishing a Convention reason for persecution. But it prevents the family being used as a vehicle to bring within the scope of the Convention persecution that is motivated for non-Convention reasons.

Implications for the Tribunal

This represents a significant change in the law on family as a particular social group. In contrast to the judicially developed law, family members of a person who is targeted for a non-Convention reason will be unable to to rely on their membership of a particular social group constituted by their family, even if the agents of persecution turn to them for reasons of their family relationship with their main target.

[18] [2001] FCA 263 (Heerey, Sundberg & Merkel JJ, 21 March 2001. *Sarrazola* is currently before the High Court.

Non-Political Crime and Particularly Serious Crime

New s.91T clarifies what constitutes a "non-political crime" under Article 1F of the convention. It provides, first, that Article 1F has effect as if the reference to a non-political crime were a reference to a crime where the person's motives for committing the crime were **wholly or mainly non-political**. Thus, it is insufficient to establish that there is some minor motivation which is political. Secondly, it defines the reference to "non-political crime" in Article 1F by reference to the definition of "political offence" in s.5 of the *Extradition Act 1988*.[19]

New s.91U clarifies what constitutes a "particularly serious crime" under Article 33(2) of the Convention, by reference to specified types of "serious" offences under Australian and foreign law that are punishable by imprisonment for life, or for a fixed term of not less than 3 years, or for a maximum term of not less than 3 years.

Implications for the Tribunal

Sections 91T and 91U are of only peripheral relevance to the Tribunal, because the Tribunal does not have jurisdiction to review decisions based on Article 1F or Article 33(2) of the Convention, or to consider these provisions in the review of decisions based on other grounds.

However, the Tribunal needs to be aware of the potential for exclusion under Article 1F or Article 33(2), because a person so excluded cannot be a person to whom Australia has protection obligations even if they are found to satisfy Article 1A(2). Therefore, if an applicant satisfies Article 1A(2) of the Convention definition but the material before the Tribunal may give rise to issues relating to Article 1F or Article 33, the remittal to the Department will need to be with a limited direction to the effect that the applicant satisfies Article 1A(2) of the Refugees Convention, and not with the more general direction that the applicant is a person to whom Australia has protection obligations under the Convention.[20]

Verification of Information and Documentary Evidence

Sections 91V and 91W address government concerns in relation to the claimed identity and background of non-citizens who enter Australia without authority, and to increase incentives for protection visa applicants, particularly those who arrive without authority, to provide travel and identity documentation.

Section 91V deals with verification of information. Subsections (1)-(3) apply to protection visa applicants. They authorise the Minister or an officer to ask the applicant to make a statement on oath or affirmation to the effect that information given in connection with their application is true. If the applicant refuses or fails to comply with such a request, and was warned at the time of the request that an unfavourable inference could be drawn in those circumstances, then the Minister may draw any reasonable inference unfavourable to his or her credibility.

A reasonable inference unfavourable to the applicant's credibility may also be drawn in some circumstances if the applicant complies with such a request. Those circumstances are that the

[19] The relevant definition in s.5 of the *Extradition Act 1988* is set out at Attachment 2.
[20] See *Daher v MIMA* (1997) 77 FCR 107, Legal Research Bulletins 22 and 59, and r.4.33(3) of the regulations.

Minister has reason to believe that the applicant was not sincere, because of the manner in which the applicant complied with the request or the applicant's demeanour in relation to compliance with the request.

Subsections (4) to (6) of s.91V contain similar provisions applicable to non-citizens who have been refused immigration clearance.

Section 91W deals with the provision of documentary evidence of the identity, nationality or citizenship of a protection visa applicant. It authorises the Minister or an officer to ask an applicant to produce for inspection documentary evidence of his or her identity, nationality or citizenship.

If the applicant refuses or fails to comply with such a request without reasonable explanation, and was warned at the time of the request that an unfavourable inference could be drawn in those circumstances, then the Minister may draw any reasonable inference unfavourable to his or her identity, nationality or citizenship.

Implications for the Tribunal

It is doubtful that these procedural provisions apply to the Tribunal.[21] In any event the Tribunal's own procedures and powers would permit it to take similar steps to verify information and to request documentary evidence, and to draw adverse inferences in appropriate cases. However, although there is no express statutory requirement on the Tribunal to give a warning before an adverse inference could be lawfully drawn,[22] it would be prudent to put an applicant on notice before drawing adverse inferences of the kind and in the circumstances contemplated by ss.91V and 91W.

Other provisions

Migration Legislation Amendment Act (No. 6) 2001 also provides for the suppression of names of protection visa applicants who have applications in the High Court, Federal Court or Federal Magistrates Court (s.91X),[23] or the Administrative Appeals Tribunal, (s.501K) and for a Ministerial discretion to set aside an AAT protection visa decision and substitute a more favourable decision. (s.501J). These provisions have no direct implications for the Tribunal.

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[21] For example, pursuant to s.415(1). Prior to the introduction of s.424A, it was held that the similar provisions of s.57 which apply to primary decision-makers did not apply to the Tribunal: *Asrat v Vrachnas & MIEA* (unreported, Federal Court of Australia, O'Loughlin J, 23 August 1996).

[22] In particular, s.424A is not concerned with the subjective thought processes of a Tribunal member: *Tin v MIMA* [2000] FCA 1109.

[23] The reference to the Federal Magistrates Court in s.91X was inserted by *Jurisdiction of the Federal Magistrates Service Legislation Amendment Act 2001* (No. 157 of 2001) s.3 and Schedule 5.

ATTACHMENT 1

THE RELEVANT PROVISIONS OF THE *MIGRATION ACT 1958* AS AMENDED

PART 2 – Control of arrival and presence of non-citizens
Division 3 – Visas for non-citizens

Subdivision A – General provisions about visas

Section 36. Protection visas

36. (1) There is a class of visas to be known as protection visas.

Note: See also Subdivision AL.

(2) A criterion for a protection visa is that the applicant for the visa is:
(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
(b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:
(i) is mentioned in paragraph (a); and
(ii) holds a protection visa.

…

Subdivision AA – Applications for visas

Section 48A. Non-citizen refused a protection visa may not make further application for protection visa

48A. (1) Subject to section 48B, a non-citizen who, while in the migration zone, has made:
(a) an application for a protection visa, where the grant of the visa has been refused (whether or not the application has been finally determined); or
(b) applications for protection visas, where the grants of the visas have been refused (whether or not the applications have been finally determined);
may not make a further application for a protection visa while in the migration zone.

(1A) For the purposes of this section, a non-citizen who:
(a) has been removed from the migration zone under section 198; and
(b) is again in the migration zone as a result of travel to Australia that is covered by paragraph 42(2A)(d) or (e);
is taken to have been continuously in the migration zone despite the removal referred to in paragraph (a).

Note: Paragraphs 42(2A)(d) and (e) cover limited situations where people are returned to Australia despite their removal under section 198.

(1B) Subject to section 48B, a non-citizen in the migration zone who held a protection visa that was cancelled may not make a further application for a protection visa while in the migration zone.

(2) In this section:

application for a protection visa
includes:
(aa) an application for a visa, a criterion for which is that the applicant is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; and
(ab) an application for a visa, a criterion for which is that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen in Australia:
(i) to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; and
(ii) who holds a protection visa; and
(a) an application for a visa, or entry permit (within the meaning of this Act as in force immediately before 1 September 1994), a criterion for which is that the applicant is a non-citizen who has been determined to be a refugee under the Refugees Convention as amended by the Refugees Protocol; and

(b) an application for a decision that a non-citizen is a refugee under the Refugees Convention as amended by the Refugees Protocol; and
(c) an application covered by paragraph (a) or (b) that is also covered by section 39 of the Migration Reform Act 1992.

Subdivision AL—Other provisions about protection visas

91R Persecution

(1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:
(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and
(b) the persecution involves serious harm to the person; and
(c) the persecution involves systematic and discriminatory conduct.

(2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of ***serious harm*** for the purposes of that paragraph:
(a) a threat to the person's life or liberty;
(b) significant physical harassment of the person;
(c) significant physical ill-treatment of the person;
(d) significant economic hardship that threatens the person's capacity to subsist;
(e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
(f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

(3) For the purposes of the application of this Act and the regulations to a particular person:
(a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;
disregard any conduct engaged in by the person in Australia unless:
(b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.

91S Membership of a particular social group

For the purposes of the application of this Act and the regulations to a particular person (the *first person*), in determining whether the first person has a well-founded fear of being persecuted for the reason of membership of a particular social group that consists of the first person's family:
(a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol; and
(b) disregard any fear of persecution, or any persecution, that:
(i) the first person has ever experienced; or
(ii) any other member or former member (whether alive or dead) of the family has ever experienced;
where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

91T Non-political crime

(1) For the purposes of the application of this Act and the regulations to a particular person, Article 1F of the Refugees Convention as amended by the Refugees Protocol has effect as if the reference in that Article to a non-political crime were a reference to a crime where the person's motives for committing the crime were wholly or mainly non-political in nature.

(2) Subsection (1) has effect subject to subsection (3).

(3) For the purposes of the application of this Act and the regulations to a particular person, Article 1F of the Refugees Convention as amended by the Refugees Protocol has effect as if the reference in that Article to a non-political crime included a reference to an offence that, under paragraph (a), (b), (c) or (d) of the definition of *political offence* in section 5 of the *Extradition Act 1988*, is not a political offence in relation to a country for the purposes of that Act.

91U Particularly serious crime

(1) For the purposes of the application of this Act and the regulations to a particular person, Article 33(2) of the Refugees Convention as amended by the Refugees Protocol has effect as if a reference in that Article to a particularly serious crime included a reference to a crime that consists of the commission of:

(a) a serious Australian offence (as defined by subsection (2)); or

(b) a serious foreign offence (as defined by subsection (3)).

(2) For the purposes of this section, a *serious Australian offence* is an offence against a law in force in Australia, where:

(a) the offence:

(i) involves violence against a person; or

(ii) is a serious drug offence; or

(iii) involves serious damage to property; or

(iv) is an offence against section 197A or 197B (offences relating to immigration detention); and

(b) the offence is punishable by:

(i) imprisonment for life; or

(ii) imprisonment for a fixed term of not less than 3 years; or

(iii) imprisonment for a maximum term of not less than 3 years.

(3) For the purposes of this section, a *serious foreign offence* is an offence against a law in force in a foreign country, where:

(a) the offence:

(i) involves violence against a person; or

(ii) is a serious drug offence; or

(iii) involves serious damage to property; and

(b) if it were assumed that the act or omission constituting the offence had taken place in the Australian Capital Territory, the act or omission would have constituted an offence (the *Territory offence*) against a law in force in that Territory, and the Territory offence would have been punishable by:

(i) imprisonment for life; or

(ii) imprisonment for a fixed term of not less than 3 years; or

(iii) imprisonment for a maximum term of not less than 3 years.

91V Verification of information

Applicant for protection visa

(1) If an applicant for a protection visa has given information to the Minister or an officer in, or in connection with, the application for the visa, the Minister or an officer may, either orally or in writing, request the applicant to make an oral statement, on oath or affirmation, to the effect that the information is true.

(2) If:

(a) the applicant has been given a request under subsection (1); and

(b) the applicant refuses or fails to comply with the request; and

(c) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister may draw an inference unfavourable to the applicant's credibility in the event that the applicant refuses or fails to comply with the request;

then, in making a decision whether to grant the protection visa to the applicant, the Minister may draw any reasonable inference unfavourable to the applicant's credibility.

(3) If:

(a) the applicant has been given a request under subsection (1); and

(b) the applicant complies with the request; and

(c) the Minister has reason to believe that, because of:

(i) the manner in which the applicant complied with the request; or

(ii) the applicant's demeanour in relation to compliance with the request; the applicant was not sincere;

then, in making a decision whether to grant the protection visa to the applicant, the Minister may draw any reasonable inference unfavourable to the applicant's credibility.

Non-citizen refused immigration clearance

(4) If:

(a) either:

(i) a non-citizen gave information to an officer when the non-citizen was in immigration clearance, and the non-citizen is subsequently refused immigration clearance; or

(ii) a non-citizen was refused immigration clearance and subsequently gave information to an officer; and

(b) the information is relevant to the administration or enforcement of this Act or the regulations;

an officer may, either orally or in writing, request the non-citizen to make an oral statement, on oath or affirmation, to the effect that the information is true.

(5) If:

(a) the non-citizen has been given a request under subsection (4); and

(b) the non-citizen refuses or fails to comply with the request; and

(c) when the request was made, the non-citizen was given a warning, either orally or in writing, that the Minister may draw an inference unfavourable to the non-citizen's credibility in the event that the non-citizen refuses or fails to comply with the request;

then, in making a decision about the non-citizen under this Act or the regulations, the Minister may draw any reasonable inference unfavourable to the non-citizen's credibility.

(6) If:

(a) the non-citizen has been given a request under subsection (4); and

(b) the non-citizen complies with the request; and

(c) the Minister has reason to believe that, because of:

(i) the manner in which the non-citizen complied with the request; or

(ii) the non-citizen's demeanour in relation to compliance with the request; the non-citizen was not sincere;

then, in making a decision about the non-citizen under this Act or the regulations, the Minister may draw any reasonable inference unfavourable to the non-citizen's credibility.

Officer

(7) A reference in this section to an ***officer*** includes a reference to a person who is a clearance officer within the meaning of section 165.

Oaths or affirmations

(8) The Minister or an officer may administer an oath or affirmation for the purposes of this section.

91W Documentary evidence of identity, nationality or citizenship

(1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.

(2) If:

(a) the applicant has been given a request under subsection (1); and

(b) the applicant refuses or fails to comply with the request; and

(c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request; and

(d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister may draw an inference unfavourable to the applicant's identity, nationality or citizenship in the event that the applicant refuses or fails to comply with the request;

then, in making a decision whether to grant the protection visa to the applicant, the Minister may draw any reasonable inference unfavourable to the applicant's identity, nationality or citizenship.

ATTACHMENT 2

EXTRADITION ACT 1988 – SECTION 5 - EXTRACT

5. Interpretation

In this Act, unless the contrary intention appears:

…

political offence, in relation to a country, means an offence against the law of the country that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country), but does not include:

(a) an offence that is constituted by conduct of a kind referred to in:

(i) Article 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft, being the convention a copy of the English text of which is set out in Schedule 1 to the *Crimes (Aviation) Act 1991*; or

(ii) Article 1 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, being the convention a copy of the English text of which is set out in Schedule 2 to the *Crimes (Aviation) Act 1991*; or

(iii) paragraph 1 of Article 2 of the Convention on the Protection and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, being the convention a copy of the English text of which is set out in the Schedule to the *Crimes (Internationally Protected Persons) Act 1976*; or

(iv) Article III of the Convention on the Prevention and Punishment of the Crime of Genocide, being the convention a copy of the English text of which is set out in the *Genocide Convention Act 1949*; or

(v) Article 1 of the International Convention against the Taking of Hostages, being the convention of that title that was adopted by the General Assembly of the United Nations on 17 December 1979; or

(vi) Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, being the convention of that title that was adopted by the General Assembly of the United Nations on 10 December 1984; or

(vii) Article 3 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, a copy of the English text of which is set out in Schedule 1 to the *Crimes (Ships and Fixed Platforms) Act 1992*; or

(viii) Article 2 of the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, a copy of the English text of which is set out in Schedule 2 to the *Crimes (Ships and Fixed Platforms) Act 1992*;

(b) an offence constituted by conduct that, by an extradition treaty (not being a bilateral treaty) in relation to the country or any country, is required to be treated as an offence for which a person is permitted to be surrendered or tried, being an offence declared by regulations for the purposes of this paragraph not to be a political offence in relation to the country or all countries;

(c) an offence constituted by:

(i) the murder, kidnapping or other attack on the person or liberty; or

(ii) a threat or attempt to commit, or participation as an accomplice in, a murder, kidnapping or other attack on the person or liberty;

of the head of state or head of government of the country or a member of the family of either such person, being an offence declared by regulations for the purposes of this paragraph not to be a political offence in relation to the country; or

(d) an offence constituted by taking or endangering, attempting to take or endanger or participating in the taking or endangering of, the life of a person, being an offence:

(i) committed in circumstances in which such conduct creates a collective danger, whether direct or indirect, to the lives of other persons; and

(ii) declared by regulations for the purposes of this paragraph not to be a political offence in relation to the country.

refugee review tribunal

LEGAL RESEARCH BULLETIN[1]

Issue No.65 *5 October 2001*

NEW LEGISLATION

JUDICIAL REVIEW OF MIGRATION DECISIONS UNDER THE MIGRATION ACT 1958

***Migration Legislation Amendment (Judicial Review) Act* 2001**
No 134 of 2001
***Migration Legislation Amendment Act (No. 1)* 2001**
No 129 of 2001
***Jurisdiction of the Federal Magistrates Service Legislation Amendment Act* 2001**
No 157 of 2001

SYNOPSIS

Significant changes to the judicial review scheme under the *Migration Act* 1958 ("the Act") have been made by three pieces of amending legislation: the *Migration Legislation Amendment (Judicial Review) Act* 2001 ("the *Judicial Review Act*"); the *Migration Legislation Amendment (No. 1) Act* 2001 ("*MLAA (No. 1)*"); and the *Jurisdiction of the Federal Magistrates Service Legislation Amendment Act* 2001 ("the *Federal Magistrates Jurisdiction Act*").

The *Judicial Review Act* repeals and replaces Part 8 of the Act which deals with judicial review by the Federal Court. The new scheme is intended to allow for more limited judicial review of decisions made under the Act. The first part of this Bulletin outlines the main changes brought about by the *Judicial Review Act*.

The second half of this Bulletin considers the amendments made by *MLAA (No 1)*, including the introduction of a new Part 8A into the Act. The focus of *MLAA (No 1)* is on limiting the persons who may commence or continue migration-related proceedings in the Courts and, in particular, preventing multiple party actions. Time limits have also been imposed in relation to applications to the High Court.

While both of these Acts also make some other technical amendments in relation to the Act, these are of minimal relevance to the Tribunal and are therefore not considered in this Bulletin.[2]

The *Federal Magistrates Jurisdiction Act* aims to give the Federal Magistrates Court concurrent jurisdiction with the Federal Court in relation to migration-related matters. This Bulletin does not discuss the jurisdiction of the Federal Magistrates Court in any depth but, unless otherwise specified, references to the Federal Court should also be read to include a reference to the Federal Magistrates Court.

The provisions of the amending Acts are set out in Attachments to this Bulletin. Due to the complexity of the amendments, no electronic, consolidated version of the Act, as amended, is available at this point. However, it should soon become available on Legend.

APPLICATION OF AMENDMENTS

The *Judicial Review Act* commenced on 2 October 2001. Whether the new scheme applies to applications for review of Tribunal decisions will vary, in accordance with the following rules:

- Applications for judicial review by the Federal Court of a Tribunal decision lodged before 2 October 2001 will be considered by the Court under the old judicial review scheme of the Act.[3]

- Where a Tribunal decision was made on or after 2 October 2001, judicial review of the decision will be conducted by the Federal Court under the new judicial review scheme of the Act. [4]

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[2] For example, *MLAA (No 1)* makes minor amendments in relation to character and cancellation matters that do not fall within the Tribunal's review jurisdiction.

[3] *Judicial Review Act*, Item 8(1).

- Where a Tribunal decision was made before 2 October 2001 and an application for judicial review of the decision has not been lodged as at 2 October 2001, the judicial review will be considered by the Federal Court under the new judicial review scheme of the Act.[5]

In contrast, *MLAA (No 1)* has varying commencement dates. Certain provisions which amended old s.485 of the Act and introduced time limits for applications to the High Court commenced on 27 September 2001 (the date of Royal Assent). The remaining provisions of the Act commenced on 1 October 2001. However, some of those provisions have a retrospective effect. Details of these provisions are below. It is worth noting that the amendments that were made to the Act by *MLAA (No 1)* were themselves amended by the *Judicial Review Act* and the *Federal Magistrates Jurisdiction Act*.

Most of the relevant provisions of the *Federal Magistrates Jurisdiction Act* commenced on 1 October 2001. However, those provisions of the *Federal Magistrates Jurisdiction Act* which amended provisions of the Act which were inserted by the *Judicial Review Act* did not commence until 2 October 2001.[6]

IMPLICATIONS FOR THE TRIBUNAL

While the new judicial review scheme will have a direct impact on the extent to which the courts can review certain decisions under the Act, the impact on the Tribunal is less direct but significant nevertheless. The new scheme does away with the grounds of review that previously existed under s.476 and introduces a new scheme which is aimed at significantly restricting the grounds of judicial review available to applicants. As consequence, the new scheme would appear to expand the scope of Tribunal decisions which can be found to be lawful by the courts. Despite this, there is also a degree of uncertainty about whether the courts will interpret the legislative changes in a way which will restrict the scope for judicial review to the extent that Parliament seems to have intended. The Tribunal will need to await the court's interpretation of the amendments before it is possible to be more precise about the exact scope of judicial review of its decisions.

AMENDMENTS MADE BY THE *JUDICIAL REVIEW ACT*[7]

The main features of the *Judicial Review Act* are:

- repeal of Part 8 of the Act which includes the definition of "judicially-reviewable decisions";
- introduction of what is known as a "privative clause" (or ouster clause) and, related to this, the concept of a "privative clause decision" which will cover most of the Tribunal's decisions;
- the imposition of jurisdictional limits on the Federal Court in respect of which migration-related decisions it can review; and

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4 *Judicial Review Act*, Item 8(2)(a).

5 *Judicial Review Act*, Item 8(2)(b).

6 See the *Federal Magistrates Jurisdiction Act*, s.2(4) and Sch 3.

7 The following discussion takes into account the amendments made to the relevant provisions of the Act by the *Federal Magistrates Jurisdiction Act.* Once again, note that references to the Federal Court, unless otherwise specified, also refer to the Federal Magistrates Court.

- the detailing of the decisions to which the new scheme will apply, in terms of the time when they were made.

The *Judicial Review Act* also continues to prescribe matters in relation to time limits for application to the Federal Court, the parties to a review and other machinery matters which were found under the old Part 8 of the Act.

This Bulletin considers how the new scheme might be interpreted by the courts. In particular, it focuses on how the privative clause might be interpreted by the courts and what this might mean for the review of the Tribunal's decisions, an issue which is far from certain at this point.

Privative Clause Decisions - definition

The Act repeals the definition of 'judicially-reviewable decisions' in subsection 5(1) and inserts a definition of a 'privative clause decision'. The meaning of a privative clause decision is given by the new s.474(2) which states that:

> ***Privative clause decision*** means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).

Decisions that are Privative Clause Decisions

Subsection 474(3) sets out the kinds of decisions that are included within the meaning of a privative clause decision. It should be noted that the list is not an exhaustive one. A privative clause decision includes a 'decision on review of a decision'[8] which means that review decisions made by the Tribunal are privative clause decisions. This would therefore include decisions made on review by the Tribunal that it does not have the jurisdiction to review a decision of the Minister's delegate because the review application was not lodged within the required statutory time limit or the protection visa application was not a valid application. Further, it includes decisions to refuse or cancel a visa and, thus, decisions made by a delegate of the Minister to refuse or cancel a protection visa application.[9]

Decisions that are Not Privative Clause Decisions

Certain decisions are not privative clause decisions.[10] Relevantly to the Tribunal, the decisions made under the following provisions are not privative clause decisions:

- Section 421 - constitution of the Tribunal
- Section 422 - reconstitution of the Tribunal due to unavailability of member
- Section 422A - reconstitution of the Tribunal for efficient conduct of review
- Division 6 of Part 7 - offences
- Division 9 of Part 7 - establishment and membership of the Tribunal
- Division 10 of Part 7 - registry and officers of the Tribunal.

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8 Para 474(3)(i).

9 Para 474(3)(b).

10 These are set out in s.474(4).

Subsection 474(5) allows for the exclusion of other decisions from the meaning of A privative clause decision by way of regulations made under the Act. No such regulation has been made at the time of writing.

Decisions over which the Federal Court has Jurisdiction

The new s.475A states that s.476 does not affect the jurisdiction of the Federal Court under s.39B or s.44 of the *Judiciary Act* 1903, or s.39 of the *Federal Magistrates Act* 1999 in relation to a privative clause decision that is a decision made by the Tribunal or any other decision in respect of which the Court's jurisdiction is not excluded by s.476. Nor does it affect the jurisdiction of the Federal Magistrates Court under s.483A of the Act, s.44 of the *Judiciary Act* 1903 or s.32AB of the *Federal Court Act* 1976.[11]

This new section represents a change from the previous judicial review scheme in that the power conferred on the Federal Court by s.39B of the *Judiciary Act* was previously excluded in respect of decisions made by the Tribunal.[12] Section 39B of the *Judiciary Act* confers on the Federal Court original jurisdiction with respect to:

> Any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.

Section 44 of the *Judiciary Act* confers on the High Court the power to remit matters to the Federal Court. However, the Federal Court's jurisdiction to deal with matters remitted by the Federal Court is limited[13] to those matters that relate to a decision or matter in respect of which the Federal Court would otherwise have jurisdiction. According to the Revised Explanatory Memorandum to the *Migration Legislation Amendment (Judicial Review) Bill* 2001 (the *Judicial Review Bill*), this restriction is intended to apply so that a person cannot seek to bypass the restrictions imposed on the Federal Court's jurisdiction in s.476 by making a review application in the High Court and seeking to have the High Court remit the matter to the Federal Court.[14]

Further, the new s.484(1) gives the Federal Court exclusive jurisdiction in relation to privative clause decisions, except for the jurisdiction of the High Court under s.75 of the Commonwealth Constitution. To avoid doubt about this, new subsections 484(2) and (3) oust the jurisdiction of the Northern Territory Supreme Court under the *Judiciary Act* and the operation of the *Jurisdiction of Courts (Cross-vesting) Act* 1987.

Privative Clause Decisions Excluded from the Federal Court's Jurisdiction

Under the new s.476, the Federal Court does not have any jurisdiction in relation to certain privative clause decisions including:

- a primary decision, [15]

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[11] New s.483A of the Act gives the same jurisdiction to the Federal Magistrates Court in relation to migration matters as the Federal Court has. Section 32AB of the *Federal Court Act* allows for the Federal Court to remit matters to the Federal Magistrates Court. In the same way, s.39 of the *Federal Magistrates Court Act* permits the Federal Magistrates Court to refer matters to the Federal Court.

[12] Section 485(1) as in force prior to 2 October 2001.

[13] New subsection s.476(4)

[14] Para 32.

[15] Subsection 476(1). Under subsection 476(6) a 'primary decision' for the purposes of this section includes a privative clause decision that is reviewable or has been reviewed by the Tribunal, or would have been so reviewable if an application for review had been made within the required period of time. A decision by a delegate of the Minister on a protection visa application is therefore a primary decision.

- decisions by the Minister not to exercise or not to consider the exercise of her or his power under certain sections of the Act such as s.48B or s.417,[16]

- a decision of the Principal Member of the Tribunal to refer a matter to the Administrative Appeals Tribunal.[17]

The effect of this section is to restrict the Federal Court's jurisdiction to decisions made by review bodies, so that a protection visa applicant who has not exercised his or her right to merits review by the Tribunal cannot apply to the Federal Court for judicial review.

Time Limits on Applications for Judicial Review by the Federal Court

The new s.477(1) requires an application to the Federal Court under s.39B of the *Judiciary Act* for a writ of mandamus, prohibition, certiorari, injunction or declaration in respect of a privative clause decision to be made within 28 days of the notification of the decision. This does not alter the time limit that applied prior to this amendment. An equivalent provision referring to s.483A of the Act has been inserted in relation to the Federal Magistrates Court.

The Federal Court is prohibited from making an order which allows an application to be lodged outside the 28 day time limit.[18]

Subsection 477(3) is a new provision which allows the regulations to prescribe the way of notifying a person of a decision for the purposes of s.477. At the time of writing, no such regulation has been made. Therefore, the recent legislation dealing with notification under the Act will apply.[19]

Jurisdiction of the Federal Magistrates Court

As noted, the Federal Magistrates Court has now been given the same jurisdiction in relation to migration matters as the Federal Court. This jurisdiction has been established by a new s.483A of the Act which states that it applies despite any other law. Prior to this, the Federal Magistrates Court only had jurisdiction in relation to "appeals" from decisions of Tribunals, but does have the power to issue whatever writs it considers appropriate, as well as injunctions and declaratory relief.[20]

Other Amendments

Other relevant amendments made by the *Judicial Review Act* are briefly outlined below.

Persons who may Make an Application to the Federal Court

The following persons can apply to Federal Court for judicial review of a Tribunal decision:[21]

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16 Subsection 476(2).

17 Subsection 476(2A).

18 Subsection 477(2). This does also cover the Federal Magistrates Court.

19 *Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act* 2001. See also Legal Research Bulletin No. 61.

20 See *Federal Magistrates Act* 1999, ss. 10(2), 15 and 16. The new provision was inserted by s.2(4) and Sch 3, Pt 1, Item 16 of the *Federal Magistrates Jurisdiction Act*.

21 New subsection s.478.

- the Minister,
- the applicant in the review conducted by the Tribunal (in the case of a reviewable privative clause decision),
- in any other case, the person who is the subject of the decision, and
- in any case, a person prescribed by the regulations.[22]

The parties to a review are the same persons.[23]

Intervention by the Attorney-General

As under the previous regime, the Attorney-General may to intervene on behalf of the Commonwealth in proceedings resulting from an application made under s.477(1).[24]

Operation of Decision Subject to Application under s.477(1)

As under the previous regime, the making of an application under s.477 does not affect the operation of the decision which is the subject of the application, prevent the taking of action to implement the decision or prevent the taking of action in reliance on the making of the decision.[25] Neither does it prevent the Federal Court from making whatever interim orders it would otherwise be empowered to make.[26]

Changing Person Holding or Performing Duties of an Office

As previously, the Act ensures that where a person who has made a privative clause decision no longer holds office nor performs the duties of the office held, or the office no longer exists, Part 8 of the Act has effect as if the decision was made by the person presently performing the duties of the office, or as specified by the Minister.[27]

EFFECT OF THE AMENDMENTS - JUDICIAL REVIEW OF PRIVATIVE CLAUSE DECISIONS

Privative Clause Decisions are Final

Subsection 474(1) provides that:

> (1) A privative clause decision:
>
> (a) is final and conclusive; and
>
> (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

[22] At the time of writing, no such regulation has been made.

[23] New section 479.

[24] New section 480, which is equivalent to the old section 484.

[25] New section 481, which is equivalent to the old subsection 482(1).

[26] Revised Explanatory Memorandum to *Judicial Review Bill,* para 49.

[27] New section 482, which is equivalent to the old section 483.

(c) is not subject of prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

Looked at literally, it would appear from the above subsection that a privative clause decision is not subject to judicial review. However, that is clearly not the case given ss.476 and 475A. While s.476 excludes certain privative clause decisions from the Federal Court's jurisdiction, s.475A makes it clear that the Federal Court's jurisdiction under ss.39B or 44 of the *Judiciary Act* 1903 is unaffected in relation to a privative clause decision that is a decision made on a review by the Tribunal. Similarly, it is apparent that the original jurisdiction of the High Court is not excluded given that the *MLAA (No. 1)* introduces s.486A which creates time limits within which an application to the High Court in respect of a privative clause decision must be made.

What then are the implications of this new provision in the Act? It is necessary to consider the meaning and operation of a privative clause and how they have been interpreted by the courts.

What is a 'Privative Clause'?

A privative clause, also referred to as an ouster clause, is a statutory provision which purports to prohibit judicial review of the decisions of a tribunal (or inferior court).[28] Subsection 474(1) is such a privative clause. Despite the apparent intention of the legislature to exclude judicial review by inserting such clauses in statutes, the courts have generally given these clauses a more restrictive interpretation and continued to exercise their supervisory jurisdiction.[29]

In fact, it is apparent from the Revised Explanatory Memorandum to the *Judicial Review Bill*, that the legislature inserted the new s.474(1) privative clause into the Act in the expectation that it would be read down by the courts so as not to completely prohibit judicial review of decisions made under the Act, but to limit judicial review to certain grounds.[30] The Revised Explanatory Memorandum states:

> The intention of the provision is to provide decision-makers with wider lawful operation for their decisions such that, provided the decision-maker is acting on good faith, has been given the authority to make the decision concerned (for example, by delegation of the power from the minister or by virtue of holding a particular office) and does not exceed constitutional limits, the decision will be lawful.[31]

How will the Privative Clause in s.474(1) be Interpreted by the Courts?

Is the Privative Clause Unconstitutional?

An issue which commonly arises in the first instance in relation to privative clauses is whether they are unconstitutional, particularly with respect to the High Court's jurisdiction.

In relation to the High Court, the starting point is s.75(v) of the Commonwealth Constitution which vests in the High Court original jurisdiction in all matters "in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth".

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28 See Allars, *Introduction to Australian Administrative Law* (Butterworths Pty Limited, 1990), [5.139].

29 See Hotop, *Principles of Australian Administrative Law*, (6th Edition, The Law Book Company Limited, 1985) , p 321.

30 Para 15.

31 Para 15.

As a privative clause can be viewed as an attempt to oust the jurisdiction vested in the High Court under this section, it is possible that the privative clause in s.474(1) may be the subject of challenge on the basis that the clause is unconstitutional and thus invalid. The High Court has consistently held that the jurisdiction vested in the High Court by the Constitution cannot be ousted by a privative clause.[32] However, the High Court has tended to read down privative clauses and viewed them as expanding the jurisdiction of tribunals rather than being an attempt to directly oust the jurisdiction of the High Court. This 'compromise approach' was adopted in *R v Hickman; Ex parte Fox and Clinton*.[33]

In contrast, the jurisdiction of the Federal Court is conferred by statute. Furthermore, conferral of jurisdiction by statute means that the Federal Court's jurisdiction can be altered by a contrary statutory provision. Thus, there is no basis for a constitutional challenge as such.

Given that it seems unlikely that the High Court will find the privative clause in s.474(1) to be unconstitutional and thus invalid, the critical questions becomes how narrowly or broadly the courts will interpret the provision.

The Hickman Approach to Privative Clauses

From the Revised Explanatory Memorandum to the *Judicial Review Bill*, it is evident that the legislature is of the view that the privative clause will be interpreted by the courts so that the grounds on which the courts can review matters are confined to 'exceeding constitutional limits, narrow jurisdictional error and *mala fides*'.[34] This view is said to be based on the line of authority stemming from the judgment of Dixon J in the *Hickman case*.

The privative clause which was the subject of the *Hickman case* was Regulation 17 of the *National Security (Coal Mining Industry Employment) Regulations*. It provided that a decision of the Local Reference Board "shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever". The following statement by Dixon J is viewed as the authoritative statement on the effect of a privative clause in relation to the exercise by the High Court of its jurisdiction:

> [s]uch a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body. [35]

Whilst this statement, which will be referred to as the *Hickman principle*, has been cited with approval and relied upon on many occasions,[36] the three provisos of the principle have been

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[32] See for example, *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598; and *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 418.

[33] (1945) 70 CLR 598.

[34] *Migration Legislation Amendment (Judicial Review) Bill* 2001, Revised Explanatory Memorandum, para 15.

[35] At 615.

[36] For example, *R v Murray; Ex parte Proctor* (1949) 77 CLR 387; *Houssein v Under Secretary of Industrial Relations* (1982) 148 CLR 88 at 95; *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 418, 422 and 428; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 and *Darling Casino Ltd v New South Wales Casino Authority* (1997) 191 CLR 602.

subject to only limited judicial consideration.[37] Therefore, it is uncertain how s.474(1) will be interpreted by the courts.

On one view, a decision that 'relates to the subject matter of the legislation and is reasonably capable of reference to the power given to the body' is equivalent to the traditional concept of narrow jurisdictional error so that the scope of Tribunal decisions that would be lawful would expand significantly. Traditionally, a narrow jurisdictional error is committed where a tribunal: [38]

- purports to exercise jurisdiction to decide a matter other that that whose decision has been entrusted to it by statute;[39] or
- purports to exercise jurisdiction when prescribed facts or circumstances, upon whose existence its jurisdiction depends, do not exist;[40] or
- declines to exercise its jurisdiction.[41]

Under an interpretation of the *Hickman principle* which incorporates this narrow view of jurisdictional error, a privative clause such as s.474(1) would operate so that a tribunal decision would be lawful and valid as long as it was made bona fide and there was no jurisdictional error in the narrow sense. As stated above, this would appear to be the interpretation which the legislature expected would be adopted by the courts in relation to the privative clause in s.474(1). However, it is far from certain that the High Court and Federal Court will interpret the clause in this broad way. Recent commentators such as Creyke[42] and Campbell[43] have suggested that a privative clause like s.474(1) may be interpreted less literally by the courts.

Creyke states that although the privative clause is argued to be effective to exclude all but narrow jurisdictional error, the difference between jurisdictional and non-jurisdictional error has been elusive.[44] Further, she adds, the courts have consistently interpreted privative clauses in a manner which does not read their terms literally so that it is difficult to ascertain or predict their meaning.[45] Citing Dawson J in *O'Toole v Charles David Pty Ltd* ("*O'Toole*") and *Darling Casino Ltd v New South Wales Casino Control Authority* ("*Darling Casino*")[46], Creyke states that there is no suggestion the *Hickman principle* would be confined to narrow jurisdictional error. In this regard, she observes that the judgment of Brennan CJ, Dawson and Toohey JJ in *Darling Casino* noted that decisions made in breach of procedural fairness would not be protected by a broad privative clause although such a clause could protect against minor or procedural defects. Creyke also argues that the words 'reasonably referable

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37 Creyke, "Restricting Judicial Review", *AIAL Forum No 15* (30 October 1997), p 25.

38 Hotop, p 248.

39 For example, if the Tribunal purported to grant a visa to an applicant other than a protection visa.

40 For example, if the Tribunal found that the applicant is a person to whom Australia owes protection obligations under the Refugees Convention even though they are not in the migration zone at the time of determination or the Tribunal conducted a review even though the review application was not lodged within time.

41 For example, if the Tribunal had jurisdiction to review an application but refused to conduct the review.

42 See n 25.

43 Campbell "An Examination of the Provisions of the Migration Legislation Amendment Bill (No 4) 1997 Purporting to Limit Judicial Review" , (1998) 5 *Australian Journal of Administrative Law*135.

44 Creyke, p 24.

45 *Ibid*.

46 *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232; *Darling Casino Ltd v New South Wales Casino Authority* (1997) 191 CLR 602. Quoted ibid, p 26

to the power' in the *Hickman principle* was 'ripe for expansion' and would permit the courts to quarantine only decisions which were collateral, preliminary or procedural in nature, other than decisions in breach of fair process.[47]

Also relying on *O'Toole*, Campbell submits that fraud, unreasonableness and taking into account of irrelevant considerations may go to whether a decision was made bona fide and it is not clear to what extent bona fides embraces aspects of natural justice although it would appear to do so to some extent.[48] Campbell also refers to the observation of another commentator that the application of the *Hickman principle* can rarely be certain because so much depends on the attitude by the individual judge to as to whether a decision 'relates to' the subject matter of the legislation conferring power on the tribunal and whether they are 'reasonably capable' of reference to that power.[49] Ultimately, however, it appears that Campbell does not envisage a privative clause such as s.474(1) will be interpreted as broadly as that predicted by Creyke. While he observes that there is little in the way of specific judicial guidance available to judges in applying the *Hickman* principle and that this could lead, to some extent, to an ad hoc approach, he concludes that the discretion judges have to determine whether the *Hickman* provisos are satisfied, would only be of assistance where some doubt existed as to whether or not the provisos were satisfied.[50]

AMENDMENTS MADE BY MLAA (No 1)

Further Restrictions on Court Proceedings

The substantive aspect of *MLAA (No 1)* is the introduction of a new Part 8A into the Act, entitled "Restrictions on court proceedings". This part collates several matters in relation to judicial review. It prevents class or representative actions in both the Federal Court and the High Court; limits the persons who have standing before the Federal Court in migration matters; and purports to apply time limits within which applications for judicial review must be lodged with the High Court. Relevant amendments and additions to this new Part have also been introduced by the *Judicial Review Act* and the *Federal Magistrates Jurisdiction Act*, although some with a slight time lag.[51]

The High Court

Time limits

An application to the High Court for one of the prerogative (now often called constitutional) writs, an injunction or a declaration in respect of privative clause decisions[52] must now be made within 35 days of actual (as opposed to deemed) notification of the decision.[53]

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47 Creyke, p 26.

48 P 148. In *O'Toole*, Dawson J stated that the bona fides proviso of the *Hickman principle* embraced 'at least some aspects of natural justice' (at p 305). In their joint judgment, Deane, Gaudron and McHugh JJ appeared to think it possible that a breach of the rules of natural justice might bring a case within the other provisos of the *Hickman principle* (at p 287).

49 P 154.

50 *Ibid* at 155.

51 Part 1 of Sch 1 to *MLAA (No 1)* commenced on Royal Assent: that is, 27 September 2001. This is when s.486A in its original terms came into effect. Part 2 of Sch 1 to *MLAA (No 1)* commenced on 1 October 2001. This is when ss.486B and 486C came into effect in their original terms. Relevant parts of the *Federal Magistrates Jurisdiction Act* commenced on 1 October 2001. The *Judicial Review Act* commenced on 2 October 2001.

52 See s.486A. As originally drafted, s.486A referred to decisions covered by s.475(1), (2) or (4) (that is both judicially-reviewable decisions and those decisions that were stated not to be judicially reviewable). This was amended to refer to privative clause decisions by s.3 and Sch 1 of the Judicial Review Act. As to what constitutes a privative clause decision, see the discussion above.

53 Contrast this with the equivalent provision for the Federal Court which continues to rely on deemed notification: see new s.477. The

Subsection (2) prohibits the High Court from making an order that effectively allows an applicant to make an application outside that time period. Subsection (3) allows for regulations to prescribe the way of notifying a person of a privative clause decision for the purposes of this section.[54]

Application of Amendment

These time limits will apply to any decisions covered by s.476 that were made on or after the date of Royal Assent of MLAA (No 1); and to all privative clause decisions, as defined by the new s.474 of the Act, from 2 October 2001, except where an application for judicial review of the decision had been lodged before that date.[55] Relevantly to the Tribunal, that means that any Tribunal decisions made from 27 September 2001 will be covered by the new rules. Other Tribunal decisions which were made before this date would also be covered by the new rules, if no application for review had been made before 2 October 2001.[56]

It is possible that the High Court might hold this section of the Act to be unconstitutional and therefore invalid. In *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*, Deane and Gaudron JJ observed:

> The various legislative powers which are conferred upon the Parliament by s 51 of the Constitution are all "subject to" the provisions of s 75. That being so, the jurisdiction which s 75(v) confers and the right of a relevantly affected person to invoke it **cannot be withdrawn, negated or diminished by the Parliament**.[57] [emphasis added]

It has been suggested that precluding a person's right to invoke the Court's jurisdiction after a specified time would have this effect. [58] This is supported by Mason CJ's comments in the same case to the effect that legislative attempts to regulate the way in which a court is to exercise its discretion may amount to an attempt to exclude the jurisdiction of the Court.[59]

Implications for the Tribunal

Future case law will establish the validity or otherwise of this section. From the Tribunal's perspective, this provision only impacts on information that the Tribunal might give in relation to review rights of applicants. Given the uncertainty regarding the validity of this provision, it would be advisable for the Tribunal to be non-specific in this respect.

It is likely that applicants will continue to apply to the High Court for review on the restricted grounds available.[60] Therefore, s.486A is not expected to have any significant impact on the finalisation periods for applicants.

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purpose of the distinction is to mitigate the likelihood of a successful constitutional challenge to the imposition of time limits on the High Court.

54 As at the time of writing, no such regulations have been made.

55 For application of s.486A, see s.3 and Sch 1, Pt 1, item 5(3) of *MLAA (No 1)*; and s.3 and Sch 1, Pt 2, Item 8 of the *Judicial Review Act*.

56 As long as they fit within the (broad) definition of a 'privative clause decision'. See s.3 and Sch 1 to the Judicial Review Act.

57 (1995) 183 CLR 168, at 205, referring to *R v Commonwealth Rent Controller; Ex parte National Mutual Life Association of Australasia Ltd* (1947) 75 CLR 361 at 369; *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 606, 610, 614.

58 C. Campbell, 'An examination of the Provisions of the *Migration Legislation Amendment Bill (No 4)* 1997 Purporting to Limit Judicial Review', (1995) 5 AJAL 135, at 148.

59 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, at 183. Campbell contrasts this with the High Court's own Rules, which contain a discretion in O 55 r 30: see *ibid*. The same argument does not appear to apply to the Federal Court.

60 As to which, see the discussion on privative clauses and their effect on judicial review.

Intervention by Attorney-General

MLAA (No 1) inserts a provision into the Act which allows for the Attorney-General, on behalf of the Commonwealth, to intervene in a High Court proceeding under s.486A; permits the High Court to make costs orders against the Commonwealth in such circumstances; and observes that the Attorney-General is taken to be a party to the proceeding.[61] This has no implications for the Tribunal. It is an equivalent provision to that which relates to Federal Court proceedings.[62]

Operation of Decision

The *Judicial Review Act* inserts provisions into the Act to the effect that the making of an application for review does not affect the operation of the original decision, or prevent the taking of action to implement that decision or reliance on the decision. Section 486AB confirms this in relation to applications to the High Court.[63]

Application of Amendment

Section 486AB will apply to any privative clause decision in respect of which an application for review is lodged with the High Court on or after 2 October 2001.[64]

Implications for the Tribunal

Pending the outcome of any review by the High Court, s.486AB means that the decision the subject of review will continue to have legal effect. The Revised Explanatory Memorandum to the Judicial Review Bill suggests that this provision will mean that, if the privative clause decision "results in a person becoming or remaining an unlawful non-citizen", action to detain or remove that person would be lawful, subject to any other provisions of the Act or any interim orders that the Court might make.[65] The provision does not have any implications for the Tribunal itself.

Multiple Parties to an Action

The new legislation expressly seeks to prevent class, representative or otherwise grouped court actions in relation to migration matters being lodged in either the Federal or the High Court. However, consolidation of proceedings is allowed for in accordance with Rules of Court, if this is considered desirable for the efficient conduct of proceedings. Furthermore, standing provisions have been tightened in relation to applications to the Federal Court so that, even if s.486B does not prevent an interested person, other than a person the subject of a decision or other specified person, from commencing such proceedings, s.486C will prevent such a person from commencing or continuing a proceeding that raises any issue in relation to the validity, interpretation or effect of any provision of the Act or regulations.

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61 See new s.486AA.

62 See new s.480 which is in near identical terms to the repealed s.484 of the Act.

63 For the equivalent provision in relation to the Federal Court, see new s.481. This is in near identical terms to repealed s.482(1) of the Act.

64 See s.3 and Sch 1, Pt 2, Item 8 of the *Judicial Review Act*.

65 *Migration Legislation Amendment (Judicial Review) Bill* 2001, Revised Explanatory Memorandum, at par 62.

Class or Representative Actions

There is now a significant limitation on having multiple parties in any proceeding in either the High Court or the Federal Court that:

> raises an issue in connection with visas (including if a visa is not granted or has been cancelled), deportation or removal of unlawful non-citizens

Section 486B prohibits representative or class actions; the joinder of plaintiffs or applicants or addition of parties; and any person being a party to a proceeding jointly with, on behalf of, for the benefit of, or representing one or more other persons, however that is described. The one exception is for consolidation of proceedings. While consolidation of proceedings in such matters are generally not permitted, the relevant court may allow such consolidation if it is permitted under other laws (including Rules of Court)[66] *and* it is considered desirable for the "efficient conduct of proceedings".[67] However, there is no right of appeal if the relevant court decides not to consolidate proceedings.

These prohibitions and limitations are stated to have effect despite any other law, including the relevant parts of the *Federal Court of Australia Act* 1976 and Rules of Court that might otherwise allow for such joint or representative proceedings. However, s.486B(6) does allow for subsequent legislation to override this prohibition if it specifically states that it applies despite s.486B.

The legislation also sets out some exceptions to the general prohibition. In particular, s.486B(7) allows for joint parties or representative type actions where the applicants are members of the same "family", as defined by the regulations;[68] where a person becomes a party to the proceeding in performing that person's statutory functions;[69] where the Attorney-General of the Commonwealth or a State or Territory is involved in the proceeding; or where the regulations prescribe that a person may become involved in such a proceeding.[70]

Application of Amendment

Section 486B has retrospective effect. It applies to any proceeding where the application to commence the proceeding was filed on or after 14 March 2000. However, it does not apply to such proceedings where the substantive hearing began before 1 October 2001. Nor does it apply to an application for leave to appeal or any other appeal proceedings where the original court proceeding was filed before 14 March 2000.[71] In relation to the Federal Magistrates Court, this section only applies to proceedings that are instituted after 1 October 2001.[72]

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66 The *High Court Rules* 1952 provide in O 31 r 7 that "proceedings may be consolidated at any time by order of the Court or a justice". The *Federal Court Rules* provide in O 29 r 5 that the Court may consolidate several proceedings if it appears that a common question of law or fact arises, the rights of relief claimed arise out of the same (series of) transaction(s), or it is otherwise desirable to do so.

67 Section 486B(2).

68 No such regulations had been made at the time of writing.

69 The exception is aimed to allow for persons such as the Human Rights and Equal Opportunity Commissioner to be a party to multiple party proceedings: see *Migration Legislation Amendment (No2) Bill* 2000, Explanatory Memorandum, at par 17.

70 Item 11 of Sch 1, Pt 2 of MLAA (No 1) seeks to allow any such regulations to have retrospective effect, ie from 14 March 2000, despite s.48 of the *Acts' Interpretation Act* 1901 (Cth). The aim of such regulations will be to provide for the 'next friend' of a minor or mentally disabled person to be involved in such proceedings if necessary: see *Migration Legislation Amendment (No2) Bill* 2000, Explanatory Memorandum, at par 17. No such regulations had been made at the time of writing.

71 See s.3 and Sch 1, Pt 2, Item 7 of *MLAA (No 1)*.

72 See the *Federal Magistrates Jurisdiction Act*, s.2(6) and Sch 4, Pt 2, Item 9. This is because that Court only acquired jurisdiction in relation to immigration matters as from that date.

Where any existing proceedings to which s.486B applies contravene the prohibitions outlined above, the relevant court must treat those proceedings as if it had never had jurisdiction to hear them.[73] However, *MLAA (No 1)* states that, where this is the case, any person who has an interest in such a proceeding may commence a fresh proceeding in the matter within 28 days after commencement of the amendments, in accordance with the Act as amended by *MLAA (No 1)* and any other laws relating to the proceedings.[74]

As noted, s.486B applies to proceedings that raise an issue "in connection with" visas. The courts have generally given this phrase a broad meaning to the effect that it merely requires a relation between one thing and another. In particular, no causal relationship between the matters said to be connected is required.[75] A broad interpretation of this phrase means that s.486B would appear to cover all the Tribunal's decisions and procedures that might be the subject of review, since they could be said to relate to protection visas. The interpretation of this phrase will vary with the context, however. The Full Federal Court has approved a statement of Davies J that:

> The terms may have a very wide operation but they do not usually carry the widest possible ambit, for they are subject to the context in which they are used, to the words with which they are associated and to the object or purpose of the statutory provision in which they appear.[76]

In this case, it is clearly the intention of the legislature, as indicated by the specific inclusions of circumstances where a visa is not granted or has been cancelled that this provision is aimed to cover most, if not all migration-related litigation.

Implications for the Tribunal

This provision is unlikely to have a significant impact on the Tribunal itself. In particular, the class actions in *Herijanto*, *Muin* and *Lie* were filed before the retrospective date referred to. It will prevent, or at least restrict, the likelihood of similar actions involving the Tribunal being brought in the future.

Standing generally

Section 486C states that only specified persons may continue or commence a proceeding in the Federal Court that raises an issue:

- in connection with visas (including if a visa is not granted or has been cancelled), deportation or removal of unlawful non-citizens; ***and***
- that relates to the ***validity, interpretation or effect*** of a provision of the Act or the regulations.

This is the case whether or not the proceeding raises any other issue.

As of 2 October 2001,[77] those persons may be:

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[73] See s.3 and Sch 1, Pt 2, Item 8(1) of *MLAA (No 1)*. Note that the Commonwealth must refund any fee paid to a Court by a person, upon application, where this occurs. Where the proceeding was brought on behalf of more than one person, the fee must be refunded to a person authorised in writing by all such persons for this purpose: see *ibid*, Item 10.

[74] See s.3 and Sch 1, Pt 2, Item 8(2) of *MLAA (No 1)*. Reference is made specifically to the laws relating to standing and any requirements that a fee be paid.

[75] See *MIMA v Singh* (2000) 98 FCR 469, at 477; 175 ALR 503, at 509.

[76] *Burswood Management Ltd v Attorney-General (Cth)* (1990) 23 FCR 144, at 146, quoting Davies J in *Hatfield v Health Insurance Commission* (1987) 15 FCR 487, at 491.

[77] The *Judicial Review Act* amended s.486C(2). *MLAA (No 1)* commenced on 1 October 2001. In its original form, the persons who could continue or commence a proceeding were set out in more detail in s.486C(2). However, the amendment had no *practical* effect on persons who can continue or commence a proceeding.

- the parties to a review of a privative clause decision, as mentioned in s.479;[78]
- the Attorney-General of the Commonwealth, a State or a Territory;
- a person who commences or continues the proceeding in performing the person's statutory functions;[79] or
- any other person prescribed by the regulations.[80]

The limitation is stated to have effect despite any other law. However, s.486C(6) does allow for subsequent legislation to override this provision, if it specifically states that it applies despite s.486C.

Subsection (4) states that nothing in s.486C allows a person to commence or continue a proceeding that the person could not otherwise commence or continue. This means that a person cannot obtain standing to commence or continue a proceeding by relying on s.486C. Rather, s.486C merely confirms that someone has standing to commence or continue a proceeding, or limits standing provisions that were in effect prior to commencement of *MLAA (No 1)* and the *Judicial Review Act*. It does not provide the specified persons with a right to make an application to the Federal Court, raising an issue in connection with a visa that relates to the interpretation of the Act, for example.

Application of Amendment

Section 486C covers any proceeding in the Federal Court's jurisdiction:
- under Part 8 of the Act;
- under s.39B of the *Judiciary Act* 1903;
- under s.44 of the *Judiciary Act* 1903 (remittals from the High Court); and
- under any other law.

It has the same retrospective effect as s.486B. That is, it covers the continuation of proceedings whose application was filed on or after 14 March 2000,[81] as well as the commencement of new actions in the Court. Again, if existing proceedings to which s.486C applies contravene the restrictions on standing, the Federal Court must treat those proceedings as if it had never had jurisdiction to hear them.[82] However, in relation to the Federal Magistrates Court, this only applies to proceedings that are instituted after 1 October 2001.[83]

As with s. 486B, s.486C applies to proceedings that raise an issue "in connection with" visas.[84] In addition, for s.486C to apply, the issue must relate to the validity, interpretation or effect of a provision of the Act or regulations. It would be a rare occasion where an issue "in connection with visas" did not *relate to* one of the specified matters. This creates an overlap

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78 This would include the Minister and the applicant before the Tribunal, where relevant: See above, p 7.

79 See note 69 above.

80 Item 11 of Sch 1, Pt 2 of MLAA (No 1) seeks to allow any such regulations to have retrospective effect, ie from 14 March 2000. However, item 11 still refers to subparagraph 486C(2)(c)(iv) of the Act which is repealed by the *Judicial Review Act*. See also note 70 above.

81 Other than proceedings where the substantive hearing began before 1 October 2001, or appeals where the original application was filed before 14 March 2000.

82 See s.3 and Sch 1, Pt 2, Item 8(1) of MLAA (No 1). In contrast to proceedings which contravene s.486B, there is no provision for fresh proceedings to be launched where this occurs. Note also that the Commonwealth must refund any fee paid to a Court by a person, upon application, where this occurs: see *ibid*, Item 10.

83 See the *Federal Magistrates Jurisdiction Act*, s.2(7) and Sch 4, Pt 2, Item 10. This is because that Court only acquired jurisdiction in relation to immigration matters as from that date.

84 See notes 75, 76 above.

between s.486C and the standing provisions of new ss.478 and 479 of the Act, but s.486C(4) clarifies that the standing provisions in ss.478 and 479 are the rules that are applicable to s.477 applications for review.

Implications for the Tribunal

The commencement of s.486C will have minimal impact upon the Tribunal. It does not directly impact on the Tribunal's practice or procedure. Moreover, it would be a rare case where someone other than an applicant would seek review of her or his decision.

Amendments to old Part 8 of the Migration Act

The *MLAA (No 1)* also amended Part 8 of the Act, before that Part was repealed and substituted by the provisions in the *Judicial Review Act*.

The *MLAA (No 1)* amended s.485 of the Act to clarify the Federal Court's actual jurisdiction to review decisions. The purpose of the amendments was to ensure that the Federal Court did not obtain any extra jurisdiction or powers to make orders simply because the High Court remitted (part of) an application for review to the Federal Court.[85]

In this respect, *MLAA (No 1)* reinforced the fact that the Federal Court's jurisdiction under the Act was limited to judicially-reviewable decisions, as defined in s.475(1). A new s.485A clearly stated that the Federal Court did not have jurisdiction in respect of decisions covered by s.475(2) and (4).[86]

Application and Implications for the Tribunal

These amendments have limited impact on the Tribunal for two reasons:

- The amendments commenced on Royal Assent which was given on 27 September 2001. The *Judicial Review Act* commenced on 2 October 2001. This means that, in effect, the amendments to Part 8 of the Act will only be applicable to proceedings begun in the High Court or Federal Court upon remittal, or matters remitted by the High Court to the Federal Court between these dates.[87]
- the amendments are more by way of clarification than substantive effect and simply clarify the Federal Court's jurisdiction to review migration matters.

CONCLUSION

The most significant change to the judicial review system under the Act is the insertion of the privative clause in s.474(1) by the *Judicial Review Act*. Privative clause decisions, as defined by s.474 appear to include most of the decisions made by the Tribunal. However, while the privative clause appears to altogether exclude judicial review in relation to all such Tribunal decisions, this is not the case. As indicated by the existence of s.475A and other provisions

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[85] That is, the Federal Court could still only review judicially-reviewable decisions, as defined by s.475, on the grounds set out under old s.476. The limitations on standing, parties to a review and the powers of the Federal Court on that review set out in old ss.479-481 were also clearly stated to apply.

[86] This includes RRT-reviewable decisions, a decision of the Principal Member of the Tribunal to refer a matter to the Administrative Appeals Tribunal and a decision of the Minister not to exercise or consider exercising the s.417 discretionary power to substitute a more favourable decision for that of the RRT. See also new s.476.

[87] See s.3 and Sch 1, Pt 1, Item 5(1), (2) of *MLAA (No 1)*; and s.3 and Sch 1, Pt 2, Item 8(1) of the *Judicial Review Act*. Given the short time period, the amended version of s.485 will apply to very limited numbers of applications. Note also that the amendments made to the old Part 8 by way of giving concurrent jurisdiction to the Federal Magistrates Court only applied as from 1 October 2001: see s.2 and Schedules 1 and 4 of the *Federal Magistrates Jurisdiction Act*.

regarding the review by the Federal Court in relation to privative clause decisions, privative clauses have traditionally been interpreted by the High Court in such a manner as to leave some restricted avenues of review open to applicants.

Nevertheless, the new legislation has potentially significant implications for the Tribunal as it has the scope to dramatically reduce the grounds on which Tribunal decisions can be reviewed by the Federal and High Courts. The case law suggests that the grounds of review may be limited to such matters as:

- bad faith;
- narrow jurisdictional error, as that concept is described above; and
- exceeding constitutional limits.

It would appear to be a rare Tribunal decision that would fall subject to such a ground of review. However, there is still quite a degree of uncertainty as to how the clause will in fact be interpreted by the courts so that it is very difficult to predict the extent of the apparent limitations on judicial review. This will become clearer as applications for judicial review under the new scheme are decided by the courts.

In contrast, the amendments made by *MLAA (No 1)* are unlikely to have any significant impact on the judicial review of Tribunal decisions.

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ATTACHMENT 1

RELEVANT PROVISIONS FROM THE MIGRATION LEGISLATION AMENDMENT (JUDICIAL REVIEW) ACT 2001, AMENDING PARTS 8 AND 8A OF THE MIGRATION ACT 1958

1 Short title

This Act may be cited as the *Migration Legislation Amendment (Judicial Review) Act 2001*.

2 Commencement

(1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.

(2) Subject to subsection (3), Schedule 1 commences on a day to be fixed by Proclamation.

(3) If Schedule 1 does not commence under subsection (2) within the period of 6 months beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

3 Schedule(s)

Subject to section 2, each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1--Judicial review

Part 1--Amendments

…

Migration Act 1958

…

7 Part 8

Repeal the Part, substitute:

Part 8--Judicial review

Division 1--Privative clause

474 Decisions under Act are final

(1) A privative clause decision:

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

(2) In this section:

privative clause decision means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).

(3) A reference in this section to a decision includes a reference to the following:

(a) granting, making, suspending, cancelling, revoking or refusing to make an order or determination;

(b) granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa);

(c) granting, issuing, suspending, cancelling, revoking or refusing to issue an authority or other instrument;

(d) imposing, or refusing to remove, a condition or restriction;

(e) making or revoking, or refusing to make or revoke, a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article;

(g) doing or refusing to do any other act or thing;

(h) conduct preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation;

(i) a decision on review of a decision, irrespective of whether the decision on review is taken under this Act or a regulation or other instrument under this Act, or under another Act;

(j) a failure or refusal to make a decision.

(4) For the purposes of subsection (2), a decision under a provision, or under a regulation or other instrument made under a provision, set out in the following table is not a privative clause decision:

Decisions that are not privative clause decisions

Item	Provision	Subject matter of provision
1	section 213	Liability for the costs of detention, removal or deportation
2	section 217	Conveyance of removees
3	section 218	Conveyance of deportees etc.
4	section 222	Orders restraining non-citizens from disposing of property
5	section 223	Valuables of detained non-citizens
6	section 224	Dealing with seized valuables
7	section 252	Searches of persons
8	section 259	Detention of vessels for search
9	section 260	Detention of vessels/dealing with detained vessels
10	section 261	Disposal of certain vessels
11	Division 14 of Part 2	Recovery of costs
12	section 269	Taking of securities
13	section 272	Migrant centres
14	section 273	Detention centres
15	Part 3	Migration agents registration scheme
16	Part 4	Court orders about reparation
17	section 353A	Directions by Principal Member
18	section 354	Constitution of Migration Review Tribunal
19	section 355	Reconstitution of Migration Review Tribunal
20	section 355A	Reconstitution of Migration Review Tribunal for efficient conduct of review
21	section 356	Exercise of powers of Migration Review Tribunal
22	section 357	Presiding member

23	Division 7 of Part 5	Offences
24	Part 6	Establishment and membership of Migration Review Tribunal
25	section 421	Constitution of Refugee Review Tribunal
26	section 422	Reconstitution of Refugee Review Tribunal
27	section 422A	Reconstitution of Refugee Review Tribunal for efficient conduct of review
28	Division 6 of Part 7	Offences
29	Division 9 of Part 7	Establishment and membership of Refugee Review Tribunal
30	Division 10 of Part 7	Registry and officers
31	regulation 5.35	Medical treatment of persons in detention

(5) The regulations may specify that a decision, or a decision included in a class of decisions, under this Act, or under regulations or another instrument under this Act, is not a privative clause decision.

Division 2--Provisions relating to privative clause decisions

475 This Division not to limit section 474

This Division is not to be taken to limit the scope or operation of section 474.

475A Section 476 not to affect the jurisdiction of the Federal Court in certain cases

Section 476 does not affect the jurisdiction of the Federal Court under section 39B or 44 of the *Judiciary Act 1903* in relation to:

(a) a privative clause decision that is a decision made on a review by a Tribunal under Part 5 or 7 or section 500; or

(b) any other decision in respect of which the Court's jurisdiction is not excluded by section 476.

476 Federal Court does not have any other jurisdiction in relation to certain privative clause decisions

(1) Despite any other law, including sections 39B and 44 of the *Judiciary Act 1903*, the Federal Court does not have any jurisdiction in relation to a primary decision.

(2) Despite any other law, including sections 39B and 44 of the *Judiciary Act 1903*, the Federal Court does not have any jurisdiction in respect of a decision of the Minister not to exercise, or not to consider the exercise, of the Minister's power under subsection 37A(2) or (3), section 48B, paragraph 72(1)(c), section 91F, 91L, 91Q, 345, 351, 391, 417 or 454.

(2A) Despite any other law, including sections 39B and 44 of the *Judiciary Act 1903*, the Federal Court does not have any jurisdiction in respect of:

(a) a decision of the Principal Member of the Migration Review Tribunal or of the Principal Member of the Refugee Review Tribunal to refer a matter to the Administrative Appeals Tribunal; or

(b) a decision of the President of the Administrative Appeals Tribunal to accept, or not to accept, the referral of a decision under section 382 or 444.

(2B) Despite any other law, including sections 39B and 44 of the *Judiciary Act 1903*, the Federal Court does not have any jurisdiction in respect of a decision of the Minister under Division 13A of Part 2 to order that a thing is not to be condemned as forfeited.

(4) Despite section 44 of the *Judiciary Act 1903*, the High Court must not remit a matter to the Federal Court if it relates to a decision or matter in respect of which the Federal Court would not have jurisdiction because of this section.

(5) The reference in subsection (2) to section 345 is a reference to section 345 of this Act as in force before the commencement of Schedule 1 to the *Migration Legislation Amendment Act (No. 1) 1998*.

(6) In this section:

primary decision means a privative clause decision:

(a) that is reviewable, or has been reviewed, under Part 5 or 7 or section 500; or

(b) that would have been so reviewable if an application for such review had been made within a specified period.

477 Time limits on applications for judicial review

(1) An application to the Federal Court under section 39B of the *Judiciary Act 1903* for:

(a) a writ of mandamus, prohibition or certiorari; or

(b) an injunction or a declaration;

in respect of a privative clause decision in relation to which the jurisdiction of the Federal Court is not excluded by section 476 must be made to the Federal Court within 28 days of the notification of the decision.

(2) The Federal Court must not make an order allowing, or which has the effect of allowing, an applicant to lodge an application referred to in subsection (1) outside the period specified in that subsection.

(3) The regulations may prescribe the way of notifying a person of a decision for the purposes of this section.

478 Persons who may make application

An application referred to in subsection 477(1) may only be made by the Minister and:

(a) if the privative clause decision concerned was reviewable under Part 5 or 7 or section 500 of this Act and a decision on such a review has been made--the applicant in the review by the relevant Tribunal; or

(b) in any other case--the person who is the subject of the decision; or

(c) in any case--a person prescribed by the regulations.

479 Parties to review

The parties to a review of a privative clause decision resulting from an application referred to in subsection 477(1) are the Minister and:

(a) if the privative clause decision concerned was reviewable under Part 5 or 7 or section 500 of this Act and a decision on such a review has been made--the applicant in the review by the relevant Tribunal; or

(b) in any other case--the person who is the subject of the decision; or

(c) in any case--a person prescribed by the regulations.

480 Intervention by Attorney-General

(1) The Attorney-General may, on behalf of the Commonwealth, intervene in a proceeding resulting from an application referred to in subsection 477(1).

(2) If the Attorney-General intervenes in such a proceeding, the Federal Court may make such orders as to costs against the Commonwealth as the court thinks fit.

(3) If the Attorney-General intervenes in such a proceeding, he or she is taken to be a party to the proceeding.

481 Operation etc. of decision

The making of an application referred to in subsection 477(1) does not:

(a) affect the operation of the decision; or

(b) prevent the taking of action to implement the decision; or

(c) prevent the taking of action in reliance on the making of the decision.

482 Changing person holding, or performing the duties of, an office

If:

(a) a person has, in the performance of the duties of an office, made a privative clause decision; and

(b) the person no longer holds, or, for whatever reason, is not performing the duties of, that office;

this Part has effect as if the decision had been made by:

(c) the person for the time being holding or performing the duties of that office; or

(d) if there is no person for the time being holding or performing the duties of that office or that office no longer exists--such person as the Minister specifies.

483 Section 44 of the Administrative Appeals Tribunal Act 1975

Section 44 of the *Administrative Appeals Tribunal Act 1975* does not apply to a privative clause decision.

484 Exclusive jurisdiction of Federal Court

(1) The jurisdiction of the Federal Court in relation to privative clause decisions is exclusive of the jurisdiction of all other courts, other than the jurisdiction of the High Court under section 75 of the Constitution.

(2) To avoid doubt, despite section 67C of the *Judiciary Act 1903*, the Supreme Court of the Northern Territory does not have jurisdiction in matters in which a writ of mandamus or prohibition or an injunction is sought against the Commonwealth or an officer of the Commonwealth in relation to privative clause decisions.

(3) To avoid doubt, jurisdiction in relation to privative clause decisions is not conferred on any court under the *Jurisdiction of Courts (Cross-vesting) Act 1987*.

7A Subsection 486A(1)

Omit "decision covered by subsection 475(1), (2) or (4)", substitute "privative clause decision".

7B After section 486A

Insert:

486AA Intervention by Attorney-General

(1) The Attorney-General may, on behalf of the Commonwealth, intervene in a proceeding resulting from an application referred to in subsection 486A(1).

(2) If the Attorney-General intervenes in such a proceeding, the High Court may make such orders as to costs against the Commonwealth as the court thinks fit.

(3) If the Attorney-General intervenes in such a proceeding, he or she is taken to be a party to the proceeding.

486AB Operation etc. of decision

The making of an application referred to in subsection 486A(1) does not:

(a) affect the operation of the decision; or

(b) prevent the taking of action to implement the decision; or

(c) prevent the taking of action in reliance on the making of the decision.

7C Subsection 486C(1)

Omit "(the ***relevant issue***)".

7D Subsection 486C(2)

Repeal the subsection, substitute:

(2) Those persons are:

(a) a party to a review mentioned in section 479; or

(b) the Attorney-General of the Commonwealth or of a State or a Territory; or

(c) a person who commences or continues the proceeding in performing the person's statutory functions; or

(d) any other person prescribed by the regulations.

Part 2--Application provisions

8 Application

(1) If an application for judicial review of a decision under the *Migration Act 1958* is lodged before the commencement of this Schedule, the *Migration Act 1958*, the *Administrative Appeals Tribunal Act 1975* and the *Administrative Decisions (Judicial Review) Act 1977*, as in force immediately before that commencement, apply in respect of the application, and in respect of the review, as if this Schedule had not been enacted.

(2) The *Migration Act 1958* and the *Administrative Decisions (Judicial Review) Act 1977*, as amended by this Schedule, apply in respect of judicial review of a decision under the *Migration Act 1958* if:

a) the decision was made on or after the commencement of this Schedule; or

(b) the decision:

(i) was made before the commencement of this Schedule; and

(ii) as at that commencement, an application for judicial review of the decision had not been lodged.

(3) A reference in subitem (1) or (2) to an application for judicial review of a decision is a reference to:

(a) an application for review of the decision under:

(i) section 44 of the *Administrative Appeals Tribunal Act 1975*; or

(ii) Part 8 of the *Migration Act 1958*; or

(iii) the *Administrative Decisions (Judicial Review) Act 1977*; or

(b) an application for a writ of mandamus, prohibition or certiorari or an injunction or a declaration in respect of the decision under:

(i) section 75 of the Constitution; or

(ii) section 39B or 67C of the *Judiciary Act 1903*.

(4) The amendments made by items 7A and 7B apply to decisions made after the commencement of those items.

(5) The amendments made by items 7C and 7D apply in relation to proceedings that are commenced after the commencement of those items.

ATTACHMENT 2
RELEVANT EXTRACTS OF:

MIGRATION LEGISLATION AMENDMENT ACT (NO. 1) 2001

No. 129, 2001

1 Short title

This Act may be cited as the *Migration Legislation Amendment Act (No. 1) 2001*.

2 Commencement

(1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.

(2) Subject to subsection (3), the following provisions commence on a day or days to be fixed by Proclamation:
  (a) Part 2 of Schedule 1;
  (b) items 5, 6 and 7 of Schedule 2.

(3) If a provision mentioned in subsection (2) does not commence under that subsection within the period of 6 months beginning on the day on which this Act receives the Royal Assent, the provision commences on the first day after the end of that period.

(4) Part 1 of Schedule 2 is taken to have commenced on 1 June 1999, immediately after the commencement of item 23 of Schedule 1 to the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998*.

(4A) Item 7A of Schedule 2 is taken to have commenced on 16 December 1999, immediately after the commencement of item 11 of Schedule 1 to the *Border Protection Legislation Amendment Act 1999*.

(5) Items 8 and 9 of Schedule 2 are taken to have commenced on 1 June 1999.

(6) Item 10 of Schedule 2 is taken to have commenced on 1 March 2000, immediately after the commencement of item 5 of Schedule 2 to the *Migration Legislation Amendment (Migration Agents) Act 1999*.

3 Schedule(s)

Subject to section 2, each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Jurisdiction and proceedings of courts
Part 1—Amendments commencing on Royal Assent

Migration Act 1958

1 Subsection 485(1)

Omit "or decisions covered by subsection 475(2) or (3)".

2 Subsection 485(3)

Repeal the subsection, substitute:

(3) If a matter relating to a judicially-reviewable decision is remitted to the Federal Court under section 44 of the *Judiciary Act 1903*, the Court must treat the matter as if it were a judicially-reviewable decision under section 476 or 477 (as appropriate) of this Act.

(4) The limitations, powers and requirements of this Division (other than section 478) apply to the matter mentioned in subsection (3). In particular, the only grounds of review available to the Federal Court are those provided for in section 476 or 477 (as appropriate).

3 After section 485

Insert:

485A Federal Court does not have any jurisdiction in relation to non-judicially-reviewable decisions

In spite of any other law, including sections 39B and 44 of the *Judiciary Act 1903*, the Federal Court does not have any jurisdiction in respect of decisions covered by subsection 475(2) or (4).

4 After Part 8

Insert:

Part 8A—Restrictions on court proceedings

486A Time limit on applications to the High Court for judicial review

(1) An application to the High Court for a writ of mandamus, prohibition or certiorari or an injunction or a declaration in respect of a decision covered by subsection 475(1), (2) or (4) must be made to the High Court within 35 days of the actual (as opposed to deemed) notification of the decision.

(2) The High Court must not make an order allowing, or which has the effect of allowing, an applicant to make an application mentioned in subsection (1) outside that 35 day period.

(3) The regulations may prescribe the way of notifying a person of a decision for the purposes of this section.

5 Application of amendments

(1) The amendments made by items 1 and 3 apply in relation to proceedings (including applications for leave to appeal or other appeal proceedings) begun after this Part commences.

(2) The amendment made by item 2 applies to matters remitted to the Federal Court after this Part commences.

(3) The amendment made by item 4 applies to decisions made after this Part commences.

Migration Act 1958

6 At the end of Part 8A

Add:

486B Multiple parties in migration litigation

Application of section

(1) This section applies to all proceedings (***migration proceedings***) in the High Court or the Federal Court that raise an issue in connection with visas (including if a visa is not granted or has been cancelled), deportation, or removal of unlawful non-citizens.

Consolidation of proceedings

(2) Consolidation of any migration proceeding with any other migration proceeding is not permitted unless the court is satisfied that:

(a) the consolidation would otherwise be permitted under other relevant laws (including Rules of Court); and

(b) the consolidation is desirable for the efficient conduct of the proceedings.

(3) No appeal lies from a decision by the court not to consolidate proceedings under subsection (2).

Other joint proceedings etc.

(4) The following are not permitted in or by a migration proceeding:

(a) representative or class actions;

(b) joinder of plaintiffs or applicants or addition of parties;

(c) a person in any other way (but not including as a result of consolidation under subsection (2)) being a party to the proceeding jointly with, on behalf of, for the benefit of, or representing, one or more other persons, however this is described.

Relationship with other laws

(5) This section has effect despite any other law, including in particular:

(a) Part IVA of the *Federal Court of Australia Act 1976*; and

(b) any Rules of Court.

(6) However, this section does not apply to a provision of an Act if the provision:

(a) commences after this section commences; and

(b) specifically states that this section does not apply.

Exceptions to general rules

(7) This section does not prevent the following persons from being involved in a migration proceeding:

(a) the applicants in the proceeding and any persons they represent, if:

(i) the regulations set out a definition of ***family*** for the purposes of this paragraph; and

(ii) all of those applicants and other persons are members of the same family as so defined;

(b) a person who becomes a party to the proceeding in performing the person's statutory functions;

(c) the Attorney-General of the Commonwealth or of a State or Territory;

(d) any other person prescribed in the regulations.

486C Persons who may commence or continue proceedings in the Federal Court

(1) Only the persons mentioned in this section may commence or continue a proceeding in the Federal Court that raises an issue (the ***relevant issue***):

(a) in connection with visas (including if a visa is not granted or has been cancelled), deportation, or removal of unlawful non-citizens; and

(b) that relates to the validity, interpretation or effect of a provision of this Act or the regulations;

(whether or not the proceeding raises any other issue).

(2) Those persons are:

(a) in the case of a proceeding under Part 8:

(i) if the decision that gives rise to the relevant issue is covered by paragraph 475(1)(a) or (b)—the applicant in the review by the relevant Tribunal; or

(ii) if the decision that gives rise to the relevant issue is covered by paragraph 475(1)(c)—the person who is the subject of the decision; or

Note: A person cannot commence or continue a proceeding in respect of a decision covered by subsection 475(2) or (4) because the Federal Court has no jurisdiction in respect of those decisions. See section 485A.

(b) in the case of any other proceeding:

(i) a person who is the subject of a visa decision (see subsection (7)) that gives rise to the relevant issue; or

(ii) a person who is the subject of a deportation decision (see subsection (7)) that gives rise to the relevant issue; or

(iii) a person who is the subject of a removal action (see subsection (7)) that gives rise to the relevant issue; or

(iv) a person who may appeal to the Federal Court under section 44 of the *Administrative Appeals Tribunal Act 1975* in respect of a visa decision or a deportation decision (see subsection (7)) that gives rise to the relevant issue; or

(c) in any case:

(i) the Minister; or

(ii) the Attorney-General of the Commonwealth or of a State or Territory; or

(iii) a person who commences or continues the proceeding in performing the person's statutory functions; or

(iv) any other person prescribed in the regulations.

Scope of rule

(3) This section applies to proceedings in the Federal Court's jurisdiction under Part 8 of this Act, section 39B or 44 of the *Judiciary Act 1903* or any other law.

(4) To avoid doubt, nothing in this section allows a person to commence or continue a proceeding that the person could not otherwise commence or continue.

Relationship with other laws

(5) This section has effect despite any other law.

(6) However, subsection (5) does not apply to a provision of an Act if the provision:

(a) commences after this section commences; and

(b) specifically states that it applies despite this section.

Definitions

(7) In this section:

deportation decision means a decision relating to the deportation of a person.

removal action means an action to remove a person.

visa decision means a decision relating to a visa (including if the visa is not granted or has been cancelled).

7 Application of amendments

(1) The amendments made by this Part apply to a proceeding if the application to commence the proceeding is filed in a court on or after 14 March 2000.

(2) However, the amendments do not apply:

(a) if the relevant court began the substantive hearing of the proceeding before this Part commenced; or

(b) to an application for leave to appeal, or any other appeal proceeding, filed on or after 14 March 2000 if the application to commence the original court proceeding was filed before 14 March 2000.

8 Transitional—proceedings that contravene new section 486B

(1) If:

(a) a proceeding was begun before this Part commences; and

(b) section 486B of the *Migration Act 1958*, as amended by this Part, applies to the proceeding (see item 7); and

(c) the proceeding contravenes that section when this Part commences;

the court must treat the proceeding as if the court had lacked jurisdiction to hear the proceeding when it was begun.

(2) Despite any other time limit, a person who has an interest in such a proceeding may commence a fresh proceeding in relation to the matter concerned within 28 days after this Part commences, so long as the person complies with the *Migration Act 1958*, as amended by this Part, and all other laws relating to such proceedings (including a law relating to standing or requiring a fee to be paid).

(3) However, subitem (2) does not apply to a person in respect of a proceeding if item 9 applies to the proceeding.

9 Transitional—proceedings that contravene new section 486C

If:

(a) a proceeding was begun before this Part commences; and

(b) section 486C of the *Migration Act 1958*, as amended by this Part, applies to the proceeding (see item 7); and

(c) the proceeding contravenes that section when this Part commences;

the court must treat the proceeding as if the court had lacked jurisdiction to hear the proceeding when it was begun.

10 Transitional—refund of application fees

(1) If:

(a) a person has paid a fee to a court in respect of a proceeding; and

(b) because of the operation of item 8 or 9, the proceeding does not continue;

then, on application, the Commonwealth must refund the fee to the person.

Note: Section 28 of the *Financial Management and Accountability Act 1997* contains a standing appropriation for the refund of such fees.

(2) If the fee was paid in respect of a proceeding brought on behalf of more than one person, then the Commonwealth must refund the fee to a person authorised in writing by all such persons to receive the refund.

11 Transitional—regulations

Despite section 48 of the *Acts Interpretation Act 1901*, a regulation made for the purposes of paragraph 486B(7)(a) or (d) or subparagraph 486C(2)(c)(iv) of the *Migration Act 1958*, as amended by this Part, may provide that the regulation is taken to have had effect from the beginning of 14 March 2000.

ATTACHMENT 3
RELEVANT EXTRACTS OF:

Jurisdiction of the Federal Magistrates Service Legislation Amendment Act 2001

No. 157, 2001

1 Short title

This Act may be cited as the *Jurisdiction of the Federal Magistrates Service Legislation Amendment Act 2001*.

2 Commencement

(1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.

(2) Items 5 to 28 of Schedule 1 do not commence if Schedule 1 to the *Migration Legislation Amendment (Judicial Review) Act 2001* commences on or before the day on which this Act receives the Royal Assent.

(3) Items 26 and 27 of Schedule 1 do not commence if Part 1 of Schedule 1 to the *Migration Legislation Amendment Act (No. 1) 2001* commences on or before the day on which this Act receives the Royal Assent.

(4) Schedule 3 commences immediately after the later of the following:
  (a) the commencement of section 1;
  (b) the commencement of Schedule 1 to the *Migration Legislation Amendment (Judicial Review) Act 2001*.

(5) Items 1, 2, 3 and 9 of Schedule 4 do not commence if Schedule 1 to the *Migration Legislation Amendment (Judicial Review) Act 2001* commences on or before the day on which this Act receives the Royal Assent.

(6) Subject to subsection (5), items 1, 2, 3 and 9 of Schedule 4 commence immediately after the later of the following:
  (a) the commencement of section 1;
  (b) the commencement of Part 1 of Schedule 1 to the *Migration Legislation Amendment Act (No. 1) 2001*.

(7) Items 4, 5, 6, 7, 8 and 10 of Schedule 4 commence immediately after the later of the following:
  (a) the commencement of section 1;
  (b) the commencement of Part 2 of Schedule 1 to the *Migration Legislation Amendment Act (No. 1) 2001*.

(8) Schedule 5 commences immediately after the later of the following:
  (a) the commencement of section 1;
  (b) the commencement of Part 1 of Schedule 1 to the *Migration Legislation Amendment Act (No. 6) 2001*.

3 Schedule(s)

Subject to section 2, each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendment of the Migration Act 1958 conferring jurisdiction on the Federal Magistrates Court in migration matters

Part 1—Amendment of the Migration Act 1958

1 Subparagraph 42(2A)(e)(ii)

Omit "High Court or the Federal Court" (wherever occurring), substitute "High Court, the Federal Court or the Federal Magistrates Court".

2 Subsection 114(1)

After "Court,", insert "the Federal Magistrates Court,".

3 Subsection 137G(1)

After "Court", insert "or the Federal Magistrates Court".

4 Subsection 153(2)

Omit "or the Federal Court", substitute ", the Federal Court or the Federal Magistrates Court".

5 Part 8 (heading)

Repeal the heading, substitute:

Part 8—Review of decisions by Federal Court or Federal Magistrates Court

6 Division 2 of Part 8 (heading)

Repeal the heading, substitute:

Division 2—Review of decisions by Federal Court or Federal Magistrates Court

Note: The heading to section 475 is altered by inserting "**or Federal Magistrates Court**" after "**Court**".

7 Subsection 476(1)

After "Court", insert "or the Federal Magistrates Court".

8 Subsection 477(1)

After "Court", insert "or the Federal Magistrates Court".

9 Subsection 477(2)

After "Court", insert "or the Federal Magistrates Court".

10 Subsection 478(1)

After "application", insert "made to the Federal Court".

11 After section 478

Insert:

478A Application for review by Federal Magistrates Court

(1) An application made to the Federal Magistrates Court under section 476 or 477 must:

(a) be made in such manner as is specified in the Rules of Court made under the *Federal Magistrates Act 1999*; and

(b) be lodged with a Registry of the Federal Magistrates Court within 28 days of the applicant being notified of the decision.

(2) The Federal Magistrates Court must not make an order allowing, or which has the effect of allowing, an applicant to lodge an application outside the period specified in paragraph (1)(b).

12 Subsection 481(1)

After ", the Federal Court", insert "or the Federal Magistrates Court".

Note: The heading to section 481 is altered by inserting "**and Federal Magistrates Court**" after "**Court**".

13 Paragraph 481(1)(a)

Omit "Court", substitute "court".

14 Paragraph 481(1)(b)

Omit "Court", substitute "court".

15 Paragraph 481(1)(d)

Omit "Federal Court", substitute "court".

16 Subsection 481(2)

After ", the Federal Court", insert "or the Federal Magistrates Court".

17 Paragraph 481(2)(c)

Omit "Federal Court", substitute "court".

18 Subsection 481(3)

After "Court", insert "or the Federal Magistrates Court".

19 Subsection 482(1)

After "Court", insert "or the Federal Magistrates Court".

20 After subsection 482(2)

Insert:

(2A) If an application is made to the Federal Magistrates Court under section 476 or 477 in relation to a judicially-reviewable decision, the Federal Magistrates Court or a Federal Magistrate may make such orders of the kind referred to in subsection (3) as that Court or Magistrate considers appropriate for the purpose of securing the effectiveness of the hearing and determination of the appeal.

21 Subsection 482(3)

After "(2)", insert "or (2A)".

22 After subsection 482(4)

Insert:

(4A) The Federal Magistrates Court or a Federal Magistrate may, by order, vary or revoke an order in force under subsection (2A) (including an order that has previously been varied under this subsection).

23 Subsection 482(5)

After "(2)", insert "or (2A).

24 Subsection 485(1)

Omit "Federal Court does", substitute "Federal Court and the Federal Magistrates Court do".

Note: The heading to section 485 is altered by omitting "**does**" and substituting "**and Federal Magistrates Court do**".

25 Subsection 485(2)

Repeal the subsection, substitute:

(2) Subsection (1) does not affect the jurisdiction of the Federal Court or the Federal Magistrates Court in relation to appeals under section 44 or 44AA of the *Administrative Appeals Tribunal Act 1975*.

26 Subsection 485(3)

After "Court" (first occurring), insert "or the Federal Magistrates Court".

27 Subsection 485(3)

Omit "Federal Court" (last occurring), substitute "court".

28 Section 486

Omit "Federal Court has", substitute "Federal Court and the Federal Magistrates Court have concurrent".

Note: The heading to section 486 is altered by inserting "**and Federal Magistrates Court**" after "**Court**".

29 Subsection 500(6)

Omit all the words after "that has been", substitute:

made by:

(a) the Tribunal; or

(b) a presidential member under section 41 of the *Administrative Appeals Tribunal Act 1975*; or

(c) the Federal Court of Australia or a Judge of that Court under section 44A of that Act; or

(d) the Federal Magistrates Court or a Federal Magistrate under section 44A of that Act.

Part 2—Application of amendments

30 Application of amendments

The amendments of the *Migration Act 1958* made by this Schedule apply in relation to:

(a) an application made under section 476 of that Act on or after the commencement of this item for review of a judicially-reviewable decision made on or after the commencement of this item; and

(b) an application made under subsection 477(1) of that Act on or after the commencement of this item in respect of a failure to make a judicially-reviewable decision that ought reasonably to have been made in a period that ends on or after the commencement of this item; and

(c) an application made under subsection 477(2) of that Act on or after the commencement of this item in respect of a failure to make a judicially-reviewable decision that is required to be made in a period that ends on or after the commencement of this item.

Schedule 3—Amendments linked to the Migration Legislation Amendment (Judicial Review) Act 2001

Part 1—Amendment of the Migration Act 1958

1 Section 475A

After "*1903*", insert "or section 39 of the *Federal Magistrates Act 1999*, or the jurisdiction of the Federal Magistrates Court under section 483A of this Act, section 44 of the *Judiciary Act 1903* or section 32AB of the *Federal Court of Australia Act 1976*,".

2 Paragraph 475A(b)

Omit "Court's", substitute "court's".

Note: The heading to section 475A is altered by inserting "**or Federal Magistrates Court**" after "**Court**".

3 Subsection 476(1)

Omit ", including sections 39B and 44 of the *Judiciary Act 1903*, the Federal Court does", substitute "(including section 483A, sections 39B and 44 of the *Judiciary Act 1903*, section 32AB of the *Federal Court of Australia Act 1976* and section 39 of the *Federal Magistrates Act 1999*), the Federal Court and the Federal Magistrates Court do".

Note: The heading to section 476 is altered by omitting "**does**" and substituting "**and Federal Magistrates Court do**".

4 Subsection 476(2)

Omit ", including sections 39B and 44 of the *Judiciary Act 1903*, the Federal Court does", substitute "(including section 483A, sections 39B and 44 of the *Judiciary Act 1903*, section 32AB of the *Federal Court of Australia Act 1976* and section 39 of the *Federal Magistrates Act 1999*), the Federal Court and the Federal Magistrates Court do".

5 Subsection 476(2A)

Omit ", including sections 39B and 44 of the *Judiciary Act 1903*, the Federal Court does", substitute "(including section 483A, sections 39B and 44 of the *Judiciary Act 1903*, section 32AB of the *Federal Court of Australia Act 1976* and section 39 of the *Federal Magistrates Act 1999*), the Federal Court and the Federal Magistrates Court do".

6 Subsection 476(2B)

Omit ", including sections 39B and 44 of the *Judiciary Act 1903*, the Federal Court does", substitute "(including section 483A, sections 39B and 44 of the *Judiciary Act 1903*, section 32AB of the *Federal Court of Australia Act 1976* and section 39 of the *Federal Magistrates Act 1999*), the Federal Court and the Federal Magistrates Court do".

7 Subsection 476(4)

After "Federal Court" (wherever occurring), insert "or the Federal Magistrates Court".

8 After subsection 477(1)

Insert:

(1A) An application to the Federal Magistrates Court under section 483A for:

(a) a writ of mandamus, prohibition or certiorari; or

(b) an injunction or a declaration;

in respect of a privative clause decision in relation to which the jurisdiction of the Federal Magistrates Court is not excluded by section 476 must be made to the Federal Magistrates Court within 28 days of the notification of the decision.

9 Subsection 477(2)

After "Court", insert "or the Federal Magistrates Court".

10 Subsection 477(2)

After "subsection (1)", insert "or (1A)".

11 Section 478

Omit "subsection 477(1)", substitute "section 477".

12 Section 479

Omit "subsection 477(1)", substitute "section 477".

13 Subsection 480(1)

Omit "subsection 477(1)", substitute "section 477".

14 Subsection 480(2)

After "Court", insert "or Federal Magistrates Court (as the case requires)".

15 Section 481

Omit "subsection 477(1)", substitute "section 477".

16 After section 483

Insert:

483A Jurisdiction of the Federal Magistrates Court

Subject to this Act and despite any other law, the Federal Magistrates Court has the same jurisdiction as the Federal Court in relation to a matter arising under this Act.

17 Subsection 484(1)

Repeal the subsection, substitute:

(1) The jurisdiction of the Federal Court and the Federal Magistrates Court in relation to privative clause decisions is exclusive of the jurisdiction of all other courts, other than the jurisdiction of the High Court under section 75 of the Constitution.

Note: The heading to section 484 is altered by inserting "**and Federal Magistrates Court**" after "**Court**".

Part 2—Application of amendments

18 Application of amendments

The amendments of the *Migration Act 1958* made by this Schedule apply in relation to applications made under section 477 of that Act after the commencement of this item.

Schedule 4—Amendments linked to the Migration Legislation Amendment Act (No. 1) 2001

Part 1—Amendment of the Migration Act 1958

1 Subsection 485(3)

Omit "under section 44 of the *Judiciary Act 1903*, the Court", substitute "or the Federal Magistrates Court under section 44 of the *Judiciary Act 1903*, section 32AB of the *Federal Court of Australia Act 1976* or section 39 of the *Federal Magistrates Act 1999*, the court".

2 Subsection 485(4)

After "Court", insert "or the Federal Magistrates Court".

3 Section 485A

Omit ", including sections 39B and 44 of the *Judiciary Act 1903*, the Federal Court does not have", substitute "(including sections 39B and 44 of the *Judiciary Act 1903*, section 32AB of the *Federal Court of Australia Act 1976* and section 39 of the *Federal Magistrates Act 1999*), neither the Federal Court nor the Federal Magistrates Court has".

Note: The heading to section 485A is altered by omitting "**does**" and substituting "**and Federal Magistrates Court do**".

4 Subsection 486B(1)

Omit "or the Federal Court", substitute ", the Federal Court or the Federal Magistrates Court".

5 Subsection 486C(1)

After "Court", insert "or the Federal Magistrates Court".

Note: The heading to section 486C is altered by inserting "**or Federal Magistrates Court**" after "**Court**".

6 Subsection 486C(2) (note)

Omit "has", substitute "and the Federal Magistrates Court have".

7 Subsection 486C(3)

After "*1903*", insert ", section 39 of the *Federal Magistrates Act 1999*".

8 After subsection 486C(3)

Insert:

(3A) This section applies to proceedings in the Federal Magistrates Court's jurisdiction under Part 8 of this Act, section 44 of the *Judiciary Act 1903*, section 32AB of the *Federal Court of Australia Act 1976* or any other law.

Part 2—Application of amendments

9 Application of amendments made by items 1, 2 and 3

The amendments of the *Migration Act 1958* made by items 1, 2 and 3 of this Schedule apply in relation to proceedings instituted after the commencement of this item.

10 Application of amendments made by items 4, 5, 6, 7 and 8

The amendments of the *Migration Act 1958* made by items 4, 5, 6, 7 and 8 of this Schedule apply in relation to proceedings instituted after the commencement of this item.

refugee review tribunal

LEGAL RESEARCH BULLETIN

Issue No. 66 *3 October 2001*

NEW LEGISLATION

Border Protection, Migration Zone and Other Matters

***Border Protection (Validation and Enforcement Powers) Act* 2001, No.126 of 2001**
***Migration Amendment (Excision from Migration Zone) Act* 2001, No.127 of 2001**
***Migration Amendment (Excision from Migration Zone)(Consequential Provisions) Act* 2001, No.128 of 2001**

***Migration Legislation Amendment (No.5) Act* 2001, No.130 of 2001**

SYNOPSIS

Amendments have been made to the *Migration Act* 1958 (the *Migration Act*) by several Acts. The *Border Protection (Validation and Enforcement Powers) Act* 2001 (*BP(VEP)* Act), *Migration Amendment (Excision from Migration Zone) Act* 2001 (the *Excision Act*) and *Migration Amendment (Excision from Migration Zone)(Consequential Provisions) Act* 2001 (*Excision Consequential Provisions Act*) form a package of legislation which is intended to discourage unauthorised arrivals and people smuggling activities and implement greater control over who enters the Australian migration zone.

The *Migration Legislation Amendment Act* (No. 5) 2001 (*MLAA No.5*) is to clarify that the provision of information to officers under the *Migration Act* by certain private sector entities does not breach statutory privacy obligations.

IMPLICATIONS FOR THE TRIBUNAL

The amendments do not have any direct impact on the functions of the Refugee Review Tribunal (the Tribunal). The border protection package of legislation may have an indirect effect in terms of a reduction in 'boat cases' entering the protection visa system, resulting in a reduction of review applications for such cases to the Tribunal. The amendments from the *MLAA No. 5* will have no impact on the Tribunal as it relates to the disclosure of a particular kind of information to officers as defined in ss 5 and 488B of the *Migration Act*, which does not relate to Tribunal officers.

APPLICATION OF THE AMENDMENTS

As certain of the amending Acts are intended to have retrospective effect, there are different times of application for the various amendments.

The *BP(VEP)* Act commenced by Royal Assent on 27 September 2001.[1] The provisions in Part 2 of the Act apply to validate any action taken by the Commonwealth during the period 27 August 2001 to 27 September 2001 and include a bar on any legal proceedings (including those currently ongoing) against the Commonwealth in relation to that action (without affecting the High Court's original jurisdiction under s.75 of the Constitution).[2] The remaining provisions of the *BP(VEP)* Act, containing amendments to the *Customs Act* 1901 and the *Migration Act*, apply from the date of commencement.

The *Excision Act* commenced by Royal Assent on 27 September 2001.[3] The amendments it made depend for their application on the "excision time" which is defined as follows:

- for Territories of Christmas Island and Ashmore and Cartier Islands - 2pm on 8 September 2001 by legal time in the Australian Capital Territory; or
- for the Territory of Cocos (Keeling) Islands - 12 noon on 17 September 2001 by legal time in the Australian Capital Territory;or
- for any external Territory or island that is prescribed by the regulations for the purposes of

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1 See s.3.

2 27 August 2001 is the date on which Australia first took actions in relation to the vessel *MV Tampa*, see Explanatory Memorandum to the *Border Protection (Validation and Enforcement Powers) Bill 2001*, p.2 at [7].

3 See s.2, *Migration Amendment (Excision from Migration Zone) Act* 2001.

the definition of excised offshore place - the time when the regulations commence; or
- for Australian sea or resources installations - 27 September 2001.[4]

The *Excision Consequential Provisions Act* commenced on 27 September 2001.[5] This means that the new set of Class XB visas included in the amended Migration Regulations also came into effect on that date. The amendment introducing a bar on certain legal proceedings relating to offshore entry persons applies to proceedings instituted on or after the day on which the Excision Consequential Provisions Act received Royal Assent, on 27 September 2001. The bar also applies to the continuation of proceedings instituted before that day, being proceedings instituted after the excision time for the excised offshore place.[6]

MLAA No. 5 commences on 21 December 2001, immediately after the commencement of Schedule 1 to the *Privacy Amendment (Private Sector) Act* 2000.[7]

MAIN FEATURES

Border Protection (Validation and Enforcement Powers) Act 2001

The main features of the *BP(VEP)* Act are the validation of the Commonwealth's past action in relation to the MV Tampa and the introduction of powers allowing similar action to be taken in the future.

Part 2 of the *BP(VEP)* Act relates to the validation of certain actions. These provisions are concerned with validating actions taken by the Commonwealth and its officers and people acting on behalf of the Commonwealth in relation to the vessels *MV Tampa* and *Aceng* during the period 27 August and 27 September 2001 and places a bar on legal proceedings against those involved in the action taken.

Schedule 1 of the *BP(VEP)* Act sets out amendments to the *Customs Act* 1901 which give certain powers in respect of people on detained ships or aircraft, including powers to move and search people and return people to detained ships.

Schedule 2 of *BP(VEP)* Act sets out amendments to the *Migration Act* which give similar powers to those set out in relation to the Customs Act 1901 on moving and searching persons on detained ships and aircraft with two additions:
- the definition of "immigration detention" is amended so as not to include people on ships or aircraft detained under the relevant section of the *Migration Act* or persons found on detained ships or aircraft who are taken by an officer to a place outside Australia;[8] and
- the amendments impose manadatory penalties for certain offences under the *Migration Act* which relate to people-smuggling.

Implications for the Tribunal

These provisions will have no direct bearing on the Tribunal. They do not directly affect

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4 Section 5(1) *Migration Act*, 1958 as amended by item 2, Schedule 1, *Migration Amendment (Excision from Migration Zone) Act* 2001.
5 See s.2, *Migration Amendment (Excision from Migration Zone)(Consequential Provsions) Act 2001.*
6 *Ibid*., s.4.
7 Section 2, *Migration Legislation Amendment Act (No. 5)* 2001.
8 Subsection 5(1)(subparagraph (b)(v) of the definition of immigration detention) as amended by item 1, Schedule 2 *Border Protection (Validation and Enforcement Powers) Act* 2001.

participation in the protection visa application process. They have been introduced as part of a package which is intended to discourage or prevent potential unauthorised arrivals.[9] If successful in this regard, these amendments may have the indirect result of reducing the number of protection visa applications from 'boat cases' and hence reducing review applications to the Tribunal.

Migration Amendment (Excision from Migration Zone) Act 2001 and *Migration Amendment (Excision from Migration Zone)(Consequential Provisions) Act* 2001

The main features of the *Excision Act* are changes to the content of the "migration zone" by the introduction of the *excised offshore place* and the general exclusion from the visa application process of non-citizens who enter an excised offshore place unlawfully.

The *Excision Act* excises the following places from the migration zone and defines them as "excised offshore places":

- Christmas Island
- Ashmore and Cartier Islands;
- Cocos (Keeling) Islands;
- any other prescribed external Territory;
- any prescribed island that forms part of a State or Territory; and
- an Australia sea or resourced installation.[10]

The *Excision Act* inserted s.46A in the *Migration Act*.[11] Section 46A(1) provides that an application for a visa is not valid if it is made by a person in Australia who unlawfully entered Australia at an excised offshore place after the excision time for that offshore place. Section 46A(2) provides that the Minister may make a written determination that it is in the public interest that the bar on making a valid application is not to apply to a particular person. Consequently, any person who arrives unlawfully at any of the above excised offshore places can now only make an application for any visa under the *Migration Act* with the permission of the Minister.

The *Excision Act* is intended to work in conjunction with the *Excision Consequential Provisions Act* which provides powers for dealing with non-citizens who entered Australia at an excised offshore place after the relevant excision time without a visa. The main features of the *Excision Consequential Provisions Act* are:

- it gives discretionary power to an officer to detain a non-citizen who is in, or seeking to enter, an excised offshore place (known as an *offshore entry person*);[12]
- introduces a power to take an offshore entry person from Australia to a declared country in certain circumstances and that this does not amount to immigration detention;[13]
- bars legal proceedings relating to the entry, status and detention of a non-citizen who entered Australia at an offshore entry place and the exercise of the power to take such a person to a

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9 See Explanatory Memorandum to the *Border Protection (Validation and Enforcement Powers) Bill 2001*, p.2 at [4]-[5].

10 Subsection 5(1), (definition of excised offshore place and excision time) as amended by item 1 and item 2, Schedule 1 *Migration Amendment (Excision from Migration Zone) Act* 2001.

11 Item 4, Schedule 1 *Migration Amendment (Excision from Migration Zone) Act* 2001.

12 Section 189(4) Migration Act 1958 as amended by item 4, Schedule 1 *Migration Amendment (Excision from Migration Zone)(Consequential Provsions) Act 2001*.

13 Section 198A Migration Act 1958, as amended by item 6, Schedule 1 *Migration Amendment (Excision from Migration Zone)(Consequential Provsions) Act 2001*; see also fn 7.

declared country (but without affecting the High Court's jurisdiction under s.75 of the Constitution);[14] and

- it amends the Migration Regulations to create a new class of visa called the Refugee and Humanitarian (Class XB) visa.[15] This new class of visa includes two new subclasses of offshore visa - 447 Secondary Movement Offshore Entry (Temporary) and 451 Secondary Movement Relocation (Temporary).

Implications for the Tribunal

There is no direct effect on the Tribunal from these provisions, but the Tribunal is likely to be affected indirectly in its workload. The inability to lodge a visa application except by the Minister's leave, and the introduction of a specific category of "offshore" visas for persons who enter Australia at an offshore entry place, means that such persons will be less able to apply for protection visas. Consequently, this legislation is likely to result in a reduction in the number of 'boat cases' going through the protection visa system and applying to the Tribunal.

The new visa subclasses in Class XB are not protection visas, and as such, decisons to refuse to grant them are not reviewable by the Tribunal under s.411 of the *Migration Act*. As the new visa categories are offshore visas and the visas are not able to be granted while the person is in the migration zone, a refusal to grant such a visa does not appear to be reviewable by the MRT either.

***Migration Legislation Amendment Act (No 5)* 2001**

The purpose of the *MLAA No.5* is to ensure that airline and shipping companies, as well as some travel agents, can continue to provide information relating to individuals' travel to and from Australia to an officer under the *Migration Act*[16], without breaching the *Privacy Act* 1988 (*Privacy Act*).[17]

Implications for the Tribunal

There are no direct implications for the Tribunal from this provision. The provision is consequential to amendments to the *Privacy Act*, which place certain privacy obligations on private sector organisations and has nothing to do with participation in the protection visa application process. It has been introduced to authorise lawful disclosure of information by private sector organisations to officers as defined in ss5 and 488B(3) of the *Migration Act* (which does not relate to Tribunal officers) after the commencement of Schedule 1 to *Privacy Amendment (Private Sector) Act* 2000 on 21 December 2001.

Contact officer:
Kate Buring, Legal Section
Sydney
(ext 5970)

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[14] Section 494AA Migration Act 1958, as am. by item 7 Schedule 1 *Migration Amendment (Excision from Migration Zone)(Consequential Provsions) Act 2001*.

[15] Schedule 2 *Migration Amendment (Excision from Migration Zone)(Consequential Provsions) Act 2001*.

[16] see s. 5 of the *Migration Act* 1958 and s.488B(3) of the *Migration Act* 1958 as amended by Item 1, Schedule 1 *Migration Legislation Amendment (No.5) Act* 2001.

[17] See p.2 Explanatory Memorandum to *Migration Legislation Amendment Bill (No.5) 2001.*

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(5) Output: Refugee Review Tribunal

Senator Bartlett (L&C 246) asked for a copy of the legal bulletins which gave members information on changes to legislation.

Answer:

The relevant Legal Research Bulletins (issue numbers 64, 65 and 66) are attached.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(6) Output: Refugee Review Tribunal

Senator McKiernan (L&C 247) asked for details of that training [in relation to the privative clause legislation]: the curriculum, the duration, the length. Could you also provide the Committee with information as to the number of members who partook of that additional training, and also who were the trainers, the lecturers, tutors or whatever was required.

Answer:

Information sessions were conducted in both Sydney and Melbourne to alert Tribunal Members to introduction and effects of the privative clause Legislation (Migration Legislation (Judicial Review) Act 2001).

In Melbourne, on 10 October 2001, an information session was conducted by the Assistant Director, Legal (Melbourne) for Melbourne based Members. The topics covered by the sessions included:

- The Limitation of Rights of Judicial Review (the privative clause, time limits, class actions);
- Excision of Certain Territories from the Migration Zone;
- Clarification of the Definition of Refugee;
- Changes to the Protection Visa Criteria.

The duration of the session was approximately 1.5 hours and all Melbourne members were in attendance.

The impact of the privative clause was also discussed at a training session on litigation issues undertaken by John Matthews, Assistant Secretary, Legal Services and Litigation Branch, DIMIA on 8 February 2002 in Melbourne. The session ran for 1.25 hours, a considerable amount of that time was devoted to the privative clause. No exact count was kept of the number of members in attendance, but the recollection of relevant officers is that nearly all members were there.

In Sydney, the privative clause legislation was the subject of a session at the annual RRT/MRT Members conference in November 2001. The session was conducted on 2 November 2001 by Stephen Gaegler SC and Dale Watson, Co-manager, Migration Litigation, Australian Government Solicitor and was of approximately 1.5 hours duration. The session discussed the possible impact of the privative clause legislation. All Sydney and Melbourne based Tribunal Members who were not on leave at that time were in attendance at the conference, although the Tribunal does

not have a record of actual numbers of attendees at individual sessions.

In addition, the privative clause legislation was the subject of discussion at the monthly Sydney Members' Meeting held on 4 October 2001. Twenty-seven Sydney based Members were in attendance. The Meeting included a discussion of the privative clause legislation and associated border protection legislation introduced in the same sitting by the Tribunal's Assistant Director, Legal, Sydney.

In addition to training sessions, the Tribunal has produced and distributed to all members detailed Legal Research Bulletins, which address the issues raised in the new legislation.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(7) Output: Internal Product

Senator Cooney (L&C 230) asked whether there is any discretion in the legislation as enacted by the Parliament to allow waiver to be offered or granted in relation to the 28-day time limit to apply to the Federal Court for review of decisions made under the *Migration Act*.

Answer:

The *Migration Act* provides for a strict 28-day time limit to apply to the Federal Court for review. Time runs from the date that the person concerned is deemed notified of the Refugee Review Tribunal (RRT) decision. This time limit was originally inserted into the *Migration Act* in 1994.

The Federal Court has no discretion to extend the 28-day time limit for applications to apply for review of an RRT decision. It is a matter for the Federal Court to establish whether the factual circumstances of each case are such that the court has jurisdiction to review the matter.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(8) Output: Internal Product

Senator Robert Ray (L&C 271) asked about resources needed to check if there was any email contact between the Minister's staff and DIMIA on the subject of children being thrown overboard on 7, 8, 9, 10 and 11 October and 7, 8 and 9 November.

Answer:

Data storage and recovery is managed for DIMIA by CSC, our external service provider. Advice from CSC indicates that email messages are stored and can be recovered. In respect of the nominated dates in October and November, for email exchanges involving only staff in Minister Ruddock's office, there are an estimated 10,400 emails stored. Costs to retrieve these emails are estimated at $65,000. Time to complete an analysis of the retrieved emails for any that may relate to the SIEV4 incident is estimated to be 8 weeks.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(9) Output: Internal Product

Senator Robert Ray (L&C 277) asked in relation to the call received by the Secretary on 8 November, check the PABX to see whether it records the originating phone number.

Answer:

DIMIA's voice and communication services are managed by our external service provider, Optus. Optus has advised that this information is not recorded in the PABX in DIMIA.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: **19 and 22 February 2002**

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(10) Output: Internal Product

Senator Ludwig asked:

Update question no.7 asked by Senator McKiernan at the budget estimates hearings on 29 and 30 May concerning detailed revenues raised through the variety of charges levied by the Department.

How much has been raised, from charges and fees relating to:

a) All visa classes both temporary and permanent;
b) Application fees to access the Migration related Tribunals;
c) Citizenship applications;
d) Cost recovery associated with failed refugee applications;
e) Translating and Interpreting Services; and
f) Any other significant ($50,000) revenue raised by the Department for the Commonwealth.

Answer:

The amounts raised from charges for the past six financial years and part of the current financial year are reported below. The figures reported for the years 1995/96, 1996/97 and 1997/98 are based on cash accounting information. The figures for 1998/99 and onwards are based on accrual accounting information.

All visa classes both temporary and permanent ($'000)

1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02 (Feb)
91,828	116,463	144,787	185,707	186,457	220,721	148,202

Second instalment of visa application in respect of Adult Migrant English Program (AMEP) ($'000)

1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02 (Feb)
8,129	9,225	10,405	12,744	6,799	6,598	3,788

Second instalment of visa application in respect of Health cost ($'000)

1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02 (Feb)
9,881	8,107	2,691	5,325	9,123	4,134	1,701

Application fees to access the Migration related Tribunals ($'000)

1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02 (Feb)

667	234	167	1,807	10,182[1]	10,882 [1]	5,301[1]

[1] Migration related Tribunals were administered under the Immigration Department until 30 June 1999. From 1 July 1999, the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT) became prescribed agencies under the *Financial Management and Accountability Act 1997*. The Tribunals have advised their revenue raised from application fees from this date are:

	1999/00	**2000/01**	**2001/02 (Feb)**
Migration Review Tribunal	$5,856	$4,952	$2,839 **(Jan)**
Refugee Review Tribunal	$4,326	$5,930	$2,462 **(Feb)**
Total	**$10,182**	**$10,882**	**$5,301**

The figure reported for the RRT is the accrued revenue from the post-decision fees. The actual amount received is considerably less than this, with the balance written off. Less than 10% of post decision fees are actually paid. The actual amount collected for RRT are:

	1999/00	**2000/01**	**2001/02 (Feb)**
Refugee Review Tribunal	$762	$741	$473 **(Feb)**

Migration Internal Review Office (MIRO) ($'000)

1995/96	**1996/97**	**1997/98**	**1998/99**	**1999/00**	**2000/01**	**2001/02 (Feb)**
981	1,068	3,267	4,255	[2]	N/A	N/A

[2] MIRO ceased to exist from 31 May 1999. From 1 June 2000, MIRO functions merged with the MRT.

Citizenship applications ($'000)

1995/96	**1996/97**	**1997/98**	**1998/99**	**1999/00**	**2000/01**	**2001/02 (Feb)**
5,344	7,048	7,512	9,337	8,536	8,971	7,225

Cost recovery associated with failed refugee applications fees ($'000)

Charges (3)	1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02 (Feb)
Legal fees	***	***	***	477	2,858	2,846 (D)	3,021 (D)
Detention and removal fees	***	***	***	9,241	7,895	19,911	9,353
Detention Costs Written Off					7,052	18,000	8,097
Detention Costs Collected					202	420	524

(3) Under the *Migration Act 1959*, an unlawful non-citizen who is either detained, removed or deported may be liable to pay the Commonwealth the cost of the detention, removal or deportation. Under this policy, this cost is recovered by issuing the person concerned an invoice for the relevant cost. Legal costs associated with failed refugee application are also recovered by the Commonwealth in the same way. However, only a small amount (less than 1%) is actually recovered. The unrecovered amount is subsequently written off. The figure given in the above table reflects amount accrued rather than the cash amount received.

(D) Departmental Expenses

Translating and Interpreting Services ($'000)

1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02 (Feb)
6,647	7,203	6,456	6,094	11,697	9,479	11,001

Any other significant (more than $50,000) revenue ($'000)

	1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02 (Feb)
Appropriation former years	***	***	***	4,192	1,142	518	368
Miscellaneous revenue	***	***	***	2,609	1,439	8,529	229
On Arrival Accommodation Residence Contribution	***	***	***	1,055	682	320	422
Freedom of Information	***	***	***	199	Less than $50	Less than $50	Less than $50
Misc Revenue overpayment	***	***	***	64	150	388	293
Forfeited bond money	***	***	***	80	889	1,062	818
AMEP Resolution of Status	***	***	***	Less than $50	1,343	N/A	N/A
Migration Agent Registration Authority	596	804	1,203	1,692	1,554	1,826	1,536
Infringement notices for breach of provisions of migration legislation, mainly to passenger carriers (Airlines)	3,858	4,255	6,637	9,289	15,212	19,188	8,024
S31 Interest income	0	0	0	Less than $50	1,794	5,951	1,711
S31 MARA recovery cost	***	***	***	Less than $50	200	350	Less than $50

Write back-assets Previously written off	***	***	***	2,827	480	Less than $50	90
S31 Cluster 3 management office recoveries	***	***	***	Less than $50	861	1,376	982
S31 forfeiture of bond monies	***	***	***	Less than $50	102	Tfrd to Admin above	Tfrd to Admin above
S31 sale of seized assets	***	***	***	Less than $50	74	Less than $50	Less than $50
S31 rent utility contribution	***	***	***	598	Less than $50	85	Less than $50
S31 Longitudinal survey	***	***	***	51	50	Less than $50	Less than $50
S31 research and statistical services	***	***	***	67	Less than $50	Less than $50	Less than $50
S31 Sale surplus items	***	***	***	112	139	149	95
S31 Sale in-house products	***	***	***	Less than $50	184	136	187
S31 misc recovery of costs	***	***	***	1,438	1,500	1,733	2,757
S31 Migration application package	***	***	***	1,610	2,166	2,296	1,475
S31 Telephone contribution	***	***	***	62	67	83	Less than $50
S31 Sale publication	***	***	***	104	Less than $50	Less than $50	Less than $50
S31 Recovery of Corporate Costs	***	***	***	237	227	3,481	245
S31 sale of asset-stores	***	***	***	5,406	Less than $50	Less than $50	Less than $50

***The financial management information system used prior to 1 July 1998 did not separately identify revenues against each of these categories. Information to answer this question may only be derived manually from source documents. Due to time and resource constraints and the relative small value of the receipt item, such a task cannot be undertaken at this time.

Aggregate figures for DIMIA for those years are provided to illustrate overall movements (see table below). These aggregate figures include the revenues in the individual categories reported above.

Revenue aggregate figures ($'000)

	1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02 (Feb)
Non s31 Revenue	115,448	151,362	181,653	235,927	233,339	304,129	176,196
s31 Revenue	26,225	11,891	10,352	22,728	23,596	28,641	21,899
Total	141,673	163,253	192,005	258,655	256,935	332,770	198,095

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AFFAIRS PORTFOLIO

(11) Output 1.1: Non-Humanitarian Entry and Stay

Senator Ludwig (L&C 307) asked, 'In respect of Senator Carr's question in relation to the 69, which is question no.12, of former Astral students who have gone to new providers, he questioned how many had gone on to Bridge College. Of those 69 who have obviously gone on to Bridge College, is there a change in those figures who have had their visas cancelled, reviewed or other wise granted?'

Answer:

24 former Astral College students subsequently enrolled at Bridge College. The following is a breakdown of their current visa status.

- 4 are currently unlawful non-citizens after having had their visas cancelled for breaching condition 8202 at Astral College.

- 2 have had their visas cancelled (post their enrolment at Bridge College) for breach of condition 8202 ('satisfy course conditions') at Astral College and have since departed Australia;

- 5 were interviewed in respect of visa cancellation. Decisions have subsequently been made not to cancel their visas as holders were found not to have breached conditions;

- 13 abided by condition 8202 at Astral College and were granted new visas to attend Bridge College.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(12) Output 1.1: Non-Humanitarian Entry and Stay

Senator Ludwig (L&C 307) asked, 'In respect of Senator Carr's question no.13 in which he asked 'Are the directors of this college ' – that is Astral – in the country, and when did you last have contact with them?' The question arising out of that is whether or not any charges or follow up has been undertaken in relation to directors of Astral? I assume you still know if they are in the country.'

Answer:

As the Department does not have accurate dates of birth for the former directors we are unable to accurately confirm the whereabouts and the visa status of the former directors.

However, the Department's Movement Records database shows 2 people whose name details match closely to the 2 former directors. These 2 people are holders of 457 (Business Long Stay visas). The database shows that one of these persons departed Australia in February 2002, and the other is still in Australia.

The question of further action in relation to the directors of Astral is a matter for the Department of Education, Science and Training (DEST).

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(13) Output 1.1: Non-Humanitarian Entry and Stay

Senator Ludwig (L&C 307) asked: "In relation to question no.19, Senator McKiernan asked, 'What is the average delay between date of lodgement and the queue date allocated to applicants for aged parent migration?' I wonder if you could update that provision as to whether or not those figures have changed — that is, the persons queued and the median processing time for queue date in weeks. It was 116 and persons queued was 1,291. Perhaps you could then provide the comparative data as to how that has gone."

Answer:

Median Processing Time to Queue Date
Offshore and Onshore Parent Visas (Subclasses 103 & 804)

Period	**Persons Queued**	**Median processing time to Queue date (Weeks)**
1/8/2001 — 31/1/2002	2,228	111

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(14) Output 1.1: Non-Humanitarian Entry and Stay

Senator Ludwig (L&C 307) asked: "In relation to question no. 20 in 1.1, Senator McKiernan asked, 'How much consolidated revenue is the fund holding in terms of applications fees related to the aged parent class?' I ask whether or not that figure can be updated as well".

Answer:

Estimated number of parent cases in the pipeline as at 31 January 2002 where a first instalment of the Visa Application Charge (VAC) was paid:	= 13,206
Estimate of the total amount of the first instalment of the VAC deposited in the Consolidated Revenue Fund:	= A$ 15.1 million

The VAC is a charge for each application (case) and not for individual applicants. Application charges have varied over time. The estimated number of parent cases includes both aged and working age parents offshore as they are in the same visa subclass (subclass 103). Onshore application is only available to aged parents (subclass 804).

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(15) Output 1.1: Non-Humanitarian Entry and Stay

Senator Ludwig (L&C 307) asked, "In relation to question No. 21 which refers to the number of 457 visas issued to workers in the building industry, provide a breakdown to about 20 or 30 broad occupations."

Answer:

Under the Australian Standard Classification of Occupations (ASCO) building workers come under the classification of construction tradespersons. All "building workers" come within this broad grouping which includes structural construction tradespersons, final finishes construction tradespersons and plumbers.

Occupations of subclass 457 visa holders are based on data collected from nomination applications completed by the Australian employer. Every 457 long stay temporary worker must have an approved nomination before they can obtain a visa.

The attached tables show all nomination approvals by occupation for building workers in 2000-01 and for the first half of 2001-02.

In 2000-01 building worker nomination approvals represented 1.1% of all nomination approvals, while for the first half of 2001-02 it represented 0.9% of all nominations approved.

Subclass 457 Nomination Approvals for Building Workers - 01 July 2001 to 31 December 2001

No	ASCO Code	Occupation	Approvals
1	441613	STONEMASON	21
2	441611	WALL AND FLOOR TILER	20
3	441113	CARPENTER	9
4	442111	PAINTER AND DECORATOR	7
5	443115	DRAINER	7
6	441111	CARPENTER AND JOINER	5
7	441101	SUPERVISOR, CARPENTRY AND JOINERY TRADESPERSONS	3
8	442311	FLOOR FINISHER	3
9	441301	SUPERVISOR, ROOF SLATERS AND TILERS	2
10	441311	ROOF SLATER AND TILER	2
11	441411	BRICKLAYER	2
12	441601	SUPERVISOR, WALL AND FLOOR TILERS AND STONEMASONS	2
13	441115	JOINER	1
14	441511	SOLID PLASTERER	1
15	442301	SUPERVISOR, FLOOR FINISHERS	1
16	443101	SUPERVISOR, PLUMBERS	1
17	443113	GASFITTER	1
18	443117	ROOF PLUMBER	1
19	441181	APPRENTICE CARPENTER AND JOINER	0
20	441211	FIBROUS PLASTERER	0
21	442101	SUPERVISOR, PAINTERS AND DECORATORS	0
22	442201	SUPERVISOR, SIGNWRITERS	0
23	443111	GENERAL PLUMBER	0
Total			**89**

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(16) Output 1.1: Non Humanitarian Entry and Stay

Senator Cooney (L&C 307) asked if the Department could provide a copy of the report prepared by Professor Bob Birrell, Ian Dobson, Virginia Rapson and Fred Smith concerning the brain gain and brain drain.

Answer:

A copy of the report 'Skilled Labour: Gains and Losses', prepared by Professor Bob Birrell, Ian R. Dobson, Virginia Rapson and T. Fred Smith is attached.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(17) Output 1.1: Non Humanitarian Entry and Stay

Senator Ludwig (L&C 309) asked the Department to provide a copy of the report prepared by Access Economics as a consequence of their research study into the impact of immigration on state and territory budgets and their studies regarding the fiscal impact of migrants to Australia.

Answer:

The report 'Impact of Migrants on the Commonwealth Budget' is attached. The study into the impact of immigration on State and Territory budgets will be provided as soon as it is finalised and released by the Minister.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(18) Output 1.2: Refugee and Humanitarian Entry and Stay

Senator Harradine asked re Mr Shahraz Kiane:

(a) What is the current status of the visa application of the family of Mr Shahraz Kiane, the Pakistani national and Australian citizen who died in May last year after setting himself on fire outside Parliament House? Why is it that seventeen months after being assured of expeditious treatment in her case, Ms Yasmin's application still has not been finalised?

(b) The first application was lodged almost six years ago. What are the reasons for the delays in processing the application?

(c) Does the Department consider such delays inhumane?

(d) How many letters and/or other forms of representation did the Department and/or the Minister receive from counselling services, doctors and/or other organisations/individuals warning of Mr Kiane's deteriorating mental state and on what dates? How did the Department/Minister respond?

(e) Why was the estimated cost of medical care for Annum Kiane increased from $420,745.00 to $750,000?

(f) Did the Department take into consideration the family's undertaking to cover the $750,000? How does the Department view such undertakings in other applications where there may be a family member with an illness or disability?

(g) How has the Department responded to the Ombudsman's report of August 2001 which stated: "…my examination of DIMA's files raised serious concerns about the fairness and professionalism of its decision-making processes in this case, and suggested to me that the rejection was tainted by bias and irrelevant considerations, and the decision maker failed to make appropriate use of the discretion available to waive the health criterion…The history of this case is one of administrative ineptitude and broken promises…This delay does not seem to me to represent reasonable process, particularly given the humanitarian issues involved."? Does the Department acknowledge flaws in its handling of the application?

(h) How has the Department acted on the Ombudsman's recommendation that the Migration Regulations be reviewed to make it "easier and quicker for persons granted refugee status after their arrival in Australia to be permitted to have their immediate family members join them"?

(i) Under what circumstances does the Department/Minister decide to waive health criteria? How many applications have been granted following a waiving of the health criteria and for what reasons were waivers made?

(j) Has the Minister considered waiving the health criteria for Annum Kiane?

(k) Has the Department ever requested or received advice on how denying visas to the family of Australian citizens on the basis of disability affects Australia's obligations under the 1975 UN Declaration on the Rights of Disabled Persons; the 1990 Convention on the Rights of the Child and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in 1993? Does the Department consider that refusal of a visa on the basis of the costs of caring for a disabled person might be an issue of discrimination on the basis of disability?

Answer:

(a) Ms Yasmin's third application for a refugee and humanitarian (migrant) (class BA) visa was received on 15 September 2000. The application was in the process of finalisation when, on 2 April 2001, Mr Kiane harmed himself. Finalisation was deferred as a consequence of this incident, and for the duration of Ms Yasmin's subsequent visit to Australia (a class BA visa cannot be granted while the applicant is in Australia).

As a result of the death of Mr Kiane, Ms Yasmin's proposer for the purpose of her application, she no longer meets the criteria for grant of a visa under the family reunion provisions of subclass BA. After Ms Yasmin's return to Pakistan in July 2001, the Department sought to assist her to pursue her application under the alternative provisions for the grant of a class BA visa. (The alternative provisions require the decision-maker to be satisfied that the applicant is *subject to persecution* in her home country.)

The Department wrote to her or her representative in August and October 2001 and again in January 2002 requesting her to present further information she thought relevant in support of her claims under the alternative provisions. At the end of January 2002, Ms Yasmin advised the Department to proceed with the application on the basis of existing information. The Department is now finalising the application.

(b) Mr Kiane was eligible to sponsor his wife for a spouse visa under the Migration Program as soon as he became a permanent resident in October 1996. However, Ms Yasmin applied for a class BA refugee and humanitarian visa. This first application was received in November 1996 and refused seven weeks later in January 1997. (The application was refused because Ms Yasmin was found not to meet the requirement that she be *subject to persecution*.)

The second application, which relied on the family reunion provisions of the Humanitarian Program introduced in July 1997, was received in March 1998 and refused 14 months later in July 1999.

The third application, which also relied on the family reunion provisions, was received in September 2000 and was in the process of finalisation at the time Mr Kiane harmed himself. As a result of his death, the application has had to be reassessed against the alternative criteria described in the answer to the previous question.

(c) As is clear from the answer to the previous question, there were substantial periods when there was no application in processing.

(d) On 21 December 1996, while the first application was pending, the post in Islamabad received a letter from Mr Kiane's counsellor at Torture Rehabilitation and Network Service ACT (TRANSACT). The counsellor noted that Mr Kiane had responded well to treatment, but was concerned that a delay in his being reunited with his family could have a deleterious effect on his physical and psychological health.

The application was refused three weeks later and the letter notifying Ms Yasmin of the decision suggested she make enquiries about eligibility requirements for a spouse visa with a view to lodging an application. Ms Yasmin did not subsequently apply for a spouse visa.

On 21 March 1997 Ms Yasmin wrote to the post acknowledging the decision letter and enquiring about the possibility of a short visit to Australia to see her husband whose health was suffering as a result of the family's separation. The post wrote back on 28 April 1987, inviting her to lodge an application for a visitor visa, but she did not do so.

On 19 August 1998, the day that Ms Yasmin was interviewed in connection with her second application, the post received another faxed letter from Mr Kiane's former TRANSACT counsellor. The counsellor noted that Mr Kiane's psychological condition had improved greatly, but warned that it could deteriorate if the application process was protracted. On the same day, following the interview, the post wrote to Ms Yasmin to initiate public interest (health and police) checks.

On 1 February 2001, during the processing of the third application, a family and community support worker from Belconnen Community Service wrote to Minister Ruddock on Mr Kiane's behalf. She described how he had presented to the service in an obviously depressed state and asked for her assistance in approaching the Minister for help in the matter of his family's visa application. Senator Patterson, the Minister's Parliamentary Secretary, replied on 27 March 2001 stating that the case was nearing completion and her comments would be referred to the case officer.

On 27 March 2001 the Department received a covering letter and letter from Companion House (formerly TRANSACT). The letter detailed Mr Kiane's mental health since he was first seen at TRANSACT in 1996. At the time the fax was received, an assessment for a waiver of the health criteria in respect of Anum was being prepared and the points raised by TRANSACT were incorporated into it.

(e) The Medical Officer of the Commonwealth (MOC) who, for the purpose of the third application, provided the opinion that Anum did not meet health criteria

commented as follows on the difference between his estimate of costs and that of three years earlier.

> *As a general point the assessment of children gets more refined as the child gets older and a more accurate picture develops. In 1998 the clinical psychologist who carried out the assessment (a very comprehensive assessment) comments that there was possibly room for some optimism and improvement. This has not happened and the higher costing is appropriate.*

In addition, the second costing takes into account income support, which the first could not. In 1999, a decision of a single judge of the Federal Court (the Seligman case) meant that income support could not be counted at the time of decision on Ms Yasmin's second application. Following an appeal to the Full Federal Court, income support can again be estimated and taken into consideration for an opinion on 'significant costs'. The second costing for Anum therefore takes into account the full estimated costs, for special education to age 16 ($60,000), disability support pension ($637,000), and carer payment, mobility support and community resources ($53,000).

(f) Yes, the Department noted the family's undertaking.

While it may be reasonably assumed that family members will continue to provide a level of care and support for the applicant, this is not guaranteed and cannot be permitted to continue at a level below the community funded standard to which all Australians are entitled. If the applicant becomes a resident of Australia, she will be eligible for Medicare benefits and family and community entitlements or other Commonwealth, state, local government funded support or concessions.

Consideration of an undertaking requires not only acceptance of the willingness of the sponsor or related parties to provide care and support, but also an assessment of the reality of any stated ability. If the visa was granted, Anum would be entitled to a very high level of care and support from professionals with appropriate training and facilities. There would have to be very firm substantial evidence that optimum care, as expected for an Australian, could be provided privately, either at personal expense or from the skill resources of the family. The applicant's mother had undertaken to care for her daughter herself and to call on her sister-in-law, an Australian citizen trained in respite care of disabled young people, should further assistance be needed. Although this would presumably have been a continuation of current care arrangements for Anum in Pakistan, it cannot be enforced in Australia. As a minimum, she would be entitled to disability support pension from the age of 16, and, depending on her circumstances, considered likely at different times in her life to require respite care, supported employment, supported accommodation and mobility support.

(g) In detailed comments on the Ombudsman's recommendations and draft report (incorporated in his final report), the Department raised significant concerns about the Ombudsman's selective use of information and failure to recognise that the application of the health criterion is based on long-standing government policy.

The Department had previously acknowledged that the language used to document

the decision on the second application was inappropriate, although the decision itself had been lawfully made. To remedy the complainant's grievance, the Department had made the offer to consider a fresh application.

The Department's response to the Ombudsman's report noted that while the Department does not accept the findings of the investigation, issues arising from the case would be considered in the review of legislation underpinning the offshore component of the Humanitarian Program.

(h) In a humanitarian program with limited numbers of places, priority must be given to refugees and others who are in urgent need of the protection that resettlement offers and have no other avenue of finding a solution to their plight. It would be an anomaly for overseas family members who face no immediate danger and who have the option of applying under the family stream of the Migration Program, to use a place in the Humanitarian Program ahead of those in greater need.

(i) Waiver consideration is reserved for applications generally in the spouse/partner, children or humanitarian visa classes, where the level of compassionate and compelling circumstances is already strong. The decision to admit a person to Australia when a health concern has been identified is a complex and sensitive issue. In exercising the waiver provision, the decision-maker is noting that an applicant has already been found by the MOC not to meet some parts of the public interest criterion 4007 (or 4006A, in the case of some temporary entrants). The waiver provision is triggered when an applicant has been found to come within the scope of 4007(1)(c). Paraphrased, this means that a person would be likely to require health care or community services likely to result in (a) significant costs or (b) prejudice to the access of an Australian citizen or permanent resident to care.

It is the MOC who determines that the estimated costs would be likely to be beyond a significant level, using costings drawn from medical fee schedules, surgery costs, Diagnostic Related Group costings, special education requirements, social security benefit schedules, disability assessment tables, pharmaceutical benefits schedules and the like. The estimate is to be a lifetime cost (for benefit payment this is assumed to be to age 65) and to be a nationwide average, rather than what might actually be available in a particular location. The MOC is required only to find that costs 'would be likely' to be incurred, that is, a 51 per cent likelihood, but in practice, MOCs aim for a minimum of 70 per cent certainty in costings. The estimates on the whole tend to the conservative, even though they can reach hundreds of thousands of dollars or over a million dollars. This finding is compared to an Australian average use of health and related welfare services per annum. An MOC would not usually find a person to have exceeded that amount until costs of more than $20,000 were clearly entailed.

Delegates of the Minister are able to exercise waiver on cases where they have determined that the cost is not 'undue', and may do so without a further referral process when costs are below $200,000. The estimated costs with waiver exercised was over $26,000,000 in 2000-01. In view of the increasing aggregate figures, the Minister asked in 1997 to see all cases costing greater than $200,000 where the visa officer was of a mind to waive. Where the visa officer is not of a mind to waive the health criterion there is no requirement to refer the case.

The Department's Procedures Advice Manual lists some of the factors that may be taken into account in considering whether to waive health criteria. They include (but are not limited to):

> *the extent of social welfare, medical, hospital or other institutional or day care likely to be required in Australia. Officers should not assume that the applicant's current circumstances accurately reflect their future care needs. The fact that an applicant does not currently use such services, for example, may be due merely to the non-availability or the cost of such services or the applicant's current state of health (eg. the applicant's disease may be in remission);*
>
> *the education and occupational needs of, and prospects for the applicant in Australia over the whole period of intended stay;*
>
> *the potential for the applicant's state of health to deteriorate, taking into account not only the known medical factors but also influences such as the strains of adjusting to a new environment, life-style, occupation etc (as applicable to the visa class and the individual);*
> *the overall lifetime (or lesser period according to the intended length of stay) charge to Australian public funds;*
>
> *the willingness and ability of a sponsor, family member or other person or body to provide care and support at no public cost. In this regard it needs to be recognised that commitments such as payment of private health insurance or undertakings do not exclude the possibility of public cost (all permanent residents have a right to Medicare treatment, for example);*
>
> *factors preventing the sponsor from joining the applicant in the applicant's own country;*
>
> *whether there are Australian children of the relationship who would be adversely affected by a decision not to waive;*
>
> *the location and circumstances of family members of the applicant and the sponsor;*
>
> *the merits of the case eg. the strength of any humanitarian or compassionate factors* (reasonable weight is to be given to humanitarian circumstances).

In 2000-01, the health objection was waived in 112 cases. Fifty cases involving costs over $200,000 and totalling approximately $24,000,000 were referred to the Minister. Forty-seven of these were found to be compelling (88 per cent of cases with a total cost of approximately $21,000,000).

(j) The Minister considered a brief presenting the case for waiving the health criteria in respect of Anum in April 2001. He subsequently returned it to the Department with a request for further information. That information, which required the post in Islamabad to make various enquiries of third parties, did not become available until after Mr Kiane's death.

(k) The *Migration Act 1958* has always contained provisions relating to health requirements. These provisions have continually been given bipartisan parliamentary support. All persons entering Australia under the *Migration Act 1958* need to meet health criteria, unless a decision is made in individual cases to waive these requirements. Federal Court cases related to the health criteria accept this basic framework. From the time of introduction of the *Disability Discrimination Act 1992*, Parliament has decided that immigration decisions should be exempted from the operation of that act.

The health component of the public interest criteria is designed to protect the Australian community from public health risks and from significant drains on health and welfare services in terms of costs or use of health resources in scarce supply. It nevertheless retains a mechanism to look at individual cases to see if all the circumstances of the case justify putting aside the health requirement.

The health criterion is central to the maintenance of the migration and humanitarian programs. Not having the health criterion would require significant additional public expenditure in health and welfare budgets.

The Department has received advice about the *United Nations Declaration on the Rights of Disabled Persons (1975)*, but not about how refusing the grant of visas to the families of Australian citizens on the basis of disability affects Australia's obligations under that declaration. The Department has been advised that the declaration does not operate to bind Australia, either in international or domestic law. While the declaration is cited in the explanatory memorandum to the *Disability Discrimination Act 1992*, section 52 of that act provides for an exemption to migration matters.

Advice was also received that:

- a decision to reject an application for a visa from a person with a disability is not inconsistent with, or contrary to, the *United Nations Declaration on the Rights of Disabled Persons* or any other human right identified in the *Human Rights and Equal Opportunity Commission Act 1986* (the HREOC Act), provided that the decision is based on a policy of protecting the Australian community's standards of public health and safety, public expenditure on health and welfare, or access to health services;

- a regulation which requires all applicants (including applicants with a disability) for a particular class of visa to satisfy health criteria is not inconsistent with, or contrary to, the declaration or HREOC Act human rights, provided the regulation is based on a policy of protecting the Australian community's standards of public health and safety, public expenditure on health and welfare, or access to health services; and

- a decision made in accordance with a regulation to reject an application for a migration visa from a person with a disability, on the basis that she or he would be a financial burden on the Australian community, is not inconsistent with, or contrary to, the declaration or HREOC Act human rights.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(19) Output 1.2: Refugee and Humanitarian Entry and Stay

Senator Faulkner (L&C 275 & 280) asked whether there was any DIMA involvement in the meeting with the UNHCR on 10 October.

Answer:

Yes, two senior officers of DIMA met with members of the Canberra office of the UNHCR on 10 October 2001.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(20) Output 1.2: Refugee and Humanitarian Entry and Stay

Senator McKiernan (L&C 310) asked for the total number of persons who entered Australia under the refugee and humanitarian entry program.

Answer:

Of the 15,134 places available for the 2000-2001 program year, 13,733 visas were granted. The 15,134 available places comprised 12,000 new places set by the Government for that program year, plus 3,134 places carried over from the previous year. The breakdown of visa grants for 2000-2001 is as follows:

7,992 offshore grants including:
- 3,997 grants for Refugee visa classes;
- 3,116 grants for Special Humanitarian Program visa classes; and
- 879 grants for Special Assistance Category visa classes.

5,741 onshore grants including:
- 4,452 grants for Temporary Protection visas;
- 1,125 grants for Permanent Protection visas; and
- 164 Temporary Humanitarian Concern visas.

1,645 places were carried over into the 2001-2002 program year. This includes 1,401 unused places plus 37 places being the total number of TPV holders who had departed Australia at 30 June 2001 and 207 unused places from 1999-2000 program year where visas were granted but applicants did not travel to Australia for various reasons.

The base program for 2000-2001, set at 12,000 places, was met.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(21) Output 1.2: Refugee and Humanitarian Entry and Stay

Senator McKiernan (L&C 310-311) asked with regards to applications in this program from overseas posts, provide fuller information on the numbers and the length of time it takes to process them.

Answer:

The average processing time for offshore humanitarian applications varies greatly between posts and depending on the visa subclass under which the applications are considered, ie. the Refugee subclasses or Special Humanitarian Program subclass. The average processing time is also influenced by other factors such as the number of applications in the pipeline for each post and the length of time taken for medical and security clearances.

Following is a table of average processing times from application lodgement to visa grant by post by visa categories for 50 and 75 per cent of applications at humanitarian posts processed by the posts over a six months period from July to December 2001*.

	Refugee			SHP		
Post	Total cases granted	Time in weeks for **50%** of cases	Time in weeks for **75%** of cases	Total cases granted	Time in weeks for **50%** of cases	Time in weeks for **75%** of cases
Ankara	31	61	85	18	93	115
Athens	25	58	92	26	88	106
Bangkok	2	10	29	9	59	125
Beirut	25	74	89	2	152	170
Belgrade	90	49	75	61	73	92
Cairo	60	25	45	54	79	99
Islamabad*	9	83	119	13	116	149
Nairobi	104	52	60	75	88	126
New Delhi	0			5	31	117
Tehran	8	70	80	5	131	148
Vienna	128	66	79	76	90	107
Worldwide **	484	57	76	362	85	108

* Islamabad was unable to finalise cases for the period of some 3 months from 19 September to 13 December 2001 when the office was temporarily relocated to Bangkok.

** Worldwide includes posts with small number of cases not shown on table.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(22) Output 1.2: Refugee and Humanitarian Entry and Stay

Senator McKiernan (L&C 312) asked to be provided with a copy of the outcome document or documents from the Geneva meeting on refugees.

Answer:

The meeting referred to is the *UNHCR Ministerial Meeting of States Parties to the 1951 Convention and its 1967 Protocol relating to the Status of Refugees* held on 12-13 December 2001 in Geneva.

The relevant documents are firstly, *Australia's Statement*, delivered by Mr Ruddock at this meeting; and secondly, the *Declaration of States Parties to the 1951 Convention and its 1967 Protocol relating to the Status of Refugees*" adopted on 13 December 2001 in Geneva. Both documents are attached.

AUSTRALIA

UNITED NATIONS HIGH COMMISSION FOR REFUGEES

MINISTERIAL MEETING
OF STATE PARTIES TO THE CONVENTION
RELATED TO THE STATUS OF REFUGEES

Statement by

THE HONOURABLE PHILIP RUDDOCK

Minister for Immigration and Multicultural and Indigenous Affairs

AUSTRALIA

Geneva
12 December 2001

MINISTERIAL MEETING OF STATES PARTIES
TO THE CONVENTION RELATED TO THE STATUS OF REFUGEES

AUSTRALIAN STATEMENT

1. Mr Chairman, I am honoured to be part of this Ministerial meeting to celebrate the 50th anniversary of the Refugees Convention, the international instrument that gives protection and hope to the world's refugees. On behalf of the Government of Australia, I pay tribute to the 50 years of dedication by the staff of the UNHCR who work - and at times most unfortunately give up their lives - to assist states in implementing the Convention.

2. Australia was there at the beginning. We were the 6th state to accede to the Convention. We strongly believed in its principles when we signed - we still believe in them - and we are committed to honouring them.

3. There are some that question the relevance of the instrument itself in this new century. I am not one of them.

4. The Convention, firmly grounded in fundamental human rights, is the cornerstone of the international protection system - such an instrument would probably be impossible to achieve today.

5. But is today's international protection system failing refugees? Are the mechanisms set up by states being subverted in ways never intended, putting at risk our best intentions? Are we paying such attention to the legal rights of asylum-seekers that we are neglecting the basic needs of refugees?

6. Let us ask ourselves some challenging questions.

7. First, not all refugees have equitable access to status determination and to durable solutions in a reasonable time. How can we make the system fairer?

8. Secondly and a related point, some countries of first asylum have borne a disproportionate load in hosting large populations of refugees for many years. How can responsibility-sharing be made to work?

9. Thirdly, people are forsaking opportunities for protection in neighbouring countries and are using people smugglers and the asylum system to seek access to western countries - and some are tragically dying in the attempt.

10. Fourthly, failure to return rejected asylum-seekers, whether through lack of will or lack of cooperation by countries of origin and transit, perpetuates incentives for abuse of the asylum system. How can we remove those incentives?

11. Fifthly, just to find the relatively few refugees among those who seek asylum, western countries are spending over ten times UNHCR's budget. When are we going to address an overly legalistic system that uses up our capacity to help

prevent refugee situations at source? Are we going to wait until the already too few resettlement countries no longer have any capacity or willingness to resettle the most vulnerable refugees?

12. Sixthly, asylum systems are beset with identity, nationality and claims fraud of such dimensions that the community's willingness to support refugees is being eroded. That community support is essential if states are to be able to continue humanitarian action and resettlement. How can we safeguard that support?

Mr Chairman

13. These matters are not the fault of the Refugees Convention, but of the evolved international protection system.

14. We look to the High Commissioner for Refugees, with strong guidance from his Executive Committee, to provide the personal leadership necessary to meet the fundamental challenge to the system.

15. This challenge is the nexus between regular migration, irregular migration and people smuggling, return and readmission, asylum and integration. UNHCR's Global Consultations this year have made a valuable beginning in developing understanding of the nexus. That understanding must now lead to practical and cooperative action that acknowledges that refugee flows are but one part of global people movement.

Mr Chairman

16. Let me give two examples.

17. In the Asia-Pacific region, we have forged a practical partnership between neighbouring governments and Australia, working in cooperation with UNHCR and IOM. These arrangements provide access to effective asylum procedures, arrange for the provision of protection for those who need it and for the return home of those who do not, while vigorously combating the crime of people smuggling.

18. The second example concerns displaced Afghans.

19. The September 11 terrorist attacks placed even greater pressure on the international protection system, not only in terms of increased outflows, but also on the willingness of states to provide asylum and resettlement.

20. But at a time of promise in discussions on the political future of Afghanistan, we are presented with an opportunity for which Afghans have waited 20 years. We can show how the international community can weld together peace-keeping; humanitarian and development aid; and return of Afghans to participate in the rebuilding of their nation, whether they be skilled nationals, refugees, economic migrants or failed asylum-seekers. The returns can be planned and organised in ways that ensure that Afghans return in safety and dignity but that do not provide further incentives for illegal movement.

Mr Chairman

21. The Refugees Convention proffers a deceptively simple response to persecution. When a refugee flees directly across a border to secure their safety from persecution, provision of international protection is moral and straightforward.

22. But the world's political and legal systems and uneven generosity, overlaid with the actions of those who seek to misuse and exploit the institution of asylum, create more complex problems that require more sophisticated responses.

23. We must be open to innovative and possibly radical approaches; we need to build new coalitions; and we must create comprehensive and integrated solutions.

24. We urge states and the High Commissioner to work together to create a viable international protection system, robust and effective enough to last the next 50 years.

Mr Chairman

25. Australia has benefited greatly from the 600,000 refugees we have resettled and we celebrate their contribution to our community. We pay tribute to the courage of the world’s refugees - we must not fail them in these endeavours.

Thank you.

MINISTERIAL MEETING OF STATES PARTIES
to the 1951 Convention and/or its 1967 Protocol
relating to the Status of Refugees

DECLARATION

As adopted on 13 December 2001 in Geneva at the Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, reaffirming the commitment of the States Parties

Preamble

We, representatives of States Parties to the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol, assembled in the first meeting of States Parties in Geneva on 12 and 13 December 2001 at the invitation of the Government of Switzerland and the United Nations High Commissioner for Refugees (UNHCR),

1. Cognizant of the fact that the year 2001 marks the 50 th anniversary of the 1951 Geneva Convention relating to the Status of Refugees,

2. Recognizing the enduring importance of the 1951 Convention, as the primary refugee protection instrument which, as amended by its 1967 Protocol, sets out rights, including human rights, and minimum standards of treatment that apply to persons falling within its scope,

3. Recognizing the importance of other human rights and regional refugee protection instruments, including the 1969 Organisation of African Unity (OAU) Convention governing the Specific Aspects of the Refugee Problem in Africa and the 1984 Cartagena Declaration, and recognizing also the importance of the common European asylum system developed since the 1999 Tampere European Council Conclusions, as well as the Programme of Action of the 1996 Regional Conference to Address the Problems of Refugees, Displaced Persons, Other Forms of Involuntary Displacement and Returnees in the Countries of the Commonwealth of Independent States and Relevant Neighbouring States,

4. Acknowledging the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law,

5. Commending the positive and constructive role played by refugee-hosting countries and recognizing at the same time the heavy burden borne by some, particularly developing countries and countries with economies in transition, as well as the protracted nature of many refugee situations and the absence of timely and safe solutions,

6. Taking note of complex features of the evolving environment in which refugee protection has to be provided, including the nature of armed conflict, ongoing violations of human rights and international humanitarian law, current patterns of displacement, mixed population flows, the high costs of hosting large numbers of refugees and asylum-seekers and of maintaining asylum systems, the growth of associated trafficking and smuggling of persons, the problems of safeguarding asylum systems against abuse and of excluding and returning those not entitled to or in need of international protection, as well as the lack of resolution of long-standing refugee situations,

7. Reaffirming that the 1951 Convention, as amended by the 1967 Protocol, has a central place in the international refugee protection regime, and believing also that this regime should be developed further, as appropriate, in a way that complements and strengthens the 1951 Convention and its Protocol,

8. Stressing that respect by States for their protection responsibilities towards refugees is strengthened by international solidarity involving all members of the international community and that the refugee protection regime is enhanced through committed international cooperation in a spirit of solidarity and effective responsibility and burden-sharing among all States,

Operative Paragraphs

1. Solemnly reaffirm our commitment to implement our obligations under the 1951 Convention and/or its 1967 Protocol fully and effectively in accordance with the object and purpose of these instruments;

2. Reaffirm our continued commitment, in recognition of the social and humanitarian nature of the problem of refugees, to upholding the values and principles embodied in these instruments, which are consistent with Article 14 of the Universal Declaration of Human Rights, and which require respect for the rights and freedoms of refugees, international cooperation to resolve their plight, and action to address the causes of refugee movements, as well as to prevent them, *inter alia*, through the promotion of peace, stability and dialogue, from becoming a source of tension between States;

2. Recognize the importance of promoting universal adherence to the 1951 Convention and/or its 1967 Protocol, while acknowledging that there are countries of asylum which have not yet acceded to these instruments and which do continue generously to host large numbers of refugees;

4. Encourage all States that have not yet done so to accede to the 1951 Convention and/or its 1967 Protocol, as far as possible without reservation;

5. Also encourage States Parties maintaining the geographical limitation or other reservations to consider withdrawing them;

6. Call upon all States, consistent with applicable international standards, to take or continue to take measures to strengthen asylum and render protection more effective including through the adoption and implementation of national refugee legislation and procedures for the determination of refugee status and for the treatment of asylum-seekers and refugees, giving special attention to vulnerable groups and individuals with special needs, including women, children and the elderly;

7. Call upon States to continue their efforts aimed at ensuring the integrity of the asylum institution, *inter ali*a, by means of carefully applying Articles 1F and 33 (2) of the 1951 Convention, in particular in light of new threats and challenges;

8. Reaffirm the fundamental importance of UNHCR as the multilateral institution with the mandate to provide international protection to refugees and to promote durable solutions, and recall our obligations as State Parties to cooperate with UNHCR in the exercise of its functions;

9. Urge all States to consider ways that may be required to strengthen the implementation of the 1951 Convention and/or 1967 Protocol and to ensure closer cooperation between States parties and UNHCR to facilitate UNHCR's duty of supervising the application of the provisions of these instruments;

10. Urge all States to respond promptly, predictably and adequately to funding appeals issued by UNHCR so as to ensure that the needs of persons under the mandate of the Office of the High Commissioner are fully met;

11. Recognize the valuable contributions made by many non-governmental organizations to the well-being of asylum-seekers and refugees in their reception, counselling and care, in finding durable solutions based on full respect of refugees, and in assisting States and UNHCR to maintain the integrity of the international refugee protection regime, notably through advocacy, as well as public awareness and information activities aimed at combating racism, racial discrimination, xenophobia and related intolerance, and gaining public support for refugees;

12. Commit ourselves to providing, within the framework of international solidarity and burden-sharing, better refugee protection through comprehensive strategies, notably regionally and internationally, in order to build capacity, in particular in developing countries and countries with economies in transition, especially those which are hosting large-scale influxes or protracted refugee situations, and to strengthening response mechanisms, so as to ensure that refugees have access to safer and better conditions of stay and timely solutions to their problems;

13. Recognize that prevention is the best way to avoid refugee situations and emphasize that the ultimate goal of international protection is to achieve a durable solution for refugees, consistent with the principle of *non-refoulemen*t, and commend States that continue to facilitate these solutions, notably voluntary repatriation and, where appropriate and feasible, local integration and resettlement, while recognizing that voluntary repatriation in conditions of safety and dignity remains the preferred solution for refugees;

14. Extend our gratitude to the Government and people of Switzerland for generously hosting the Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(23) Output 1.2: Refugee and Humanitarian Entry and Stay

Senator Bartlett (L&C 317) asked in relation to emails received from Bangkok concerning the processing of split family applications in Islamabad, provide details of the split family applications in Islamabad.

Answer:

From the list provided by Senator Bartlett to the Department, one case was lodged in Tehran in April 2000. Our office in Tehran has advised that health and character checks for this case would occur by late March 2002.

The post in Islamabad is now processing all SHP cases lodged at that office up to 31 July 2000. This will include the four split family cases on Senator Bartlett's list, which were lodged up to that time.

A few other cases listed under the proposers' names could not be identified as the list does not contain the applicants' names or correct file number. The Department will reply separately about these cases once additional case information to identify the case has been provided.

As at the end of February 2002, there are 66 split family applications comprising 375 people in the pipeline in Islamabad.

Of these, 3 cases (totalling 3 people) are split family members of proposers who arrived in Australia from offshore humanitarian program. Two of these cases have been assessed. One is waiting for its turn to be considered.

The remaining 63 cases (totalling 372 people) are split family members of proposers who were unauthorised arrivals and were subsequently granted Permanent Protection visas. Of this group, 3 cases (totalling 3 people) have been assessed. The rest are waiting for their turn to be considered.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(24) Output 1.2: Refugee and Humanitarian Entry and Stay

Senator Bartlett (L&C 317) asked how many split family applications are 2½ years old or older?

Answer:

There are 9 split family cases (totalling 40 people) in the Islamabad pipeline that are 2½ years or older. Of this group, 3 cases (totalling 6 people) have been approved and are waiting for visa grant. 1 case (totalling 3 people) has been assessed and is waiting for a decision. The balance of 5 cases are being assessed.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(25) Output 1.2: Refugee and Humanitarian Entry and Stay

Senator Bartlett (L&C 320) asked for a country breakdown of the 131 people granted visas through the Minister's use of the power under section 417 of the *Migration Act 1958* in the first six months of 2001/02 program year.

Answer:

The nationality of these 131 people is as follows:

Nationality	Number of Visas Granted	Nationality	Number of Visas Granted
East Timor	**16**	El Salvador	**2**
Lebanon	**14**	Latvia	**2**
Sri Lanka	**10**	Philippines	**2**
Fiji	**9**	PRC	**2**
Palestine	**8**	Romania	**2**
Ethiopia	**6**	Somalia	**2**
India	**5**	Thailand	**2**
Indonesia	**5**	Turkey	**2**
Iran	**5**	Benin	**1**
Czechoslovakia	**4**	Colombia	**1**
Ecuador	**4**	Egypt	**1**
Eritrea	**4**	Jordan	**1**
Israel	**4**	Nigeria	**1**
Albania	**3**	Pakistan	**1**
Kampuchea (Cambodia)	**3**	Peru	**1**
Tonga	**3**	Syria	**1**
Yugoslavia	**3**	Uganda	**1**
		Total	**131**

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(26) Output 1.2: Refugee and Humanitarian Entry and Stay

Senator McKiernan (L&C 331) asked, "How many case officers are now occupied in processing in our detention and processing centres?"

Answer:

In February 2002, there were 94 DIMIA case managers working on the protection visa caseload, some of whom worked on detention and processing centre applications. There were a further 25 trained officers working in other areas of the Department who could be deployed when required.

During this time there were 48 case managers occupied in processing the 830 primary Protection Visa applications from applicants in Immigration detention.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(27) Output 1.2: Refugee and Humanitarian Entry and Stay

Senator McKiernan (L&C 332) asked, "How many cases that are outstanding over 14 weeks are ones that are being funded because the department is waiting for another agency, either in Australia or overseas, to provide further information?"

Answer:

Of the 504 people in detention on 1 March 2002 awaiting a primary decision for more than 14 weeks, 286 or 57% are funded. The resolution of these cases is dependent on the provision of information from agencies external to DIMIA, either in Australia or overseas.

We are reviewing the funding arrangements in the Purchasing Agreement with the Department of Finance and Administration, in the light of recent changes to protection visa determination processes aimed at enhancing the integrity of decision making. These changes include linguistic analysis and effective protection checks, which are conducted by agencies external to DIMIA.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(28) Output 1.2: Refugee and Humanitarian Entry and Stay

Senator Schacht (L&C 241) asked:

a) In respect of the people who have been granted refugee status by the review tribunal in the last two years, what was the time it took for each of them to complete the checks and therefore, be released from the detention centre with a temporary/permanent visa?

b) What was the average time, the median time, people were kept in detention – of those who were in detention – before they were released as a result of having to wait for their checks to be completed?

Answer:

a) For cases remitted by the Refugee Review Tribunal in 1999-2000, 25% were granted within 12 days of remittal, 50% within 36 days and 75% within 79 days. For cases remitted in 2000-2001, 25% were granted within 20 days, 50% within 34 days and 75% within 61 days.

b) A protection visa cannot be granted at the primary stage until all criteria are met. Therefore, all checks must be completed before a decision can be made.

Front-end loading of protection visa checks was introduced into the entry process for unauthorised boat arrivals to minimise processing delays. Checks with significant lead times largely beyond DIMIA's control, such as overseas identity, health and character, are initiated at the start of application processing. They run concurrently with other protection visa related processes.

When a protection visa application is refused at the primary stage, incomplete processing checks such as health and character are suspended. This allows DIMIA to focus resources on unfinalised primary applications. Suspended health and character checks are re-activated once an application is remitted by the RRT.

25% of protection visa applications lodged in 1999-2000 received a primary decision within 93 days, 50% within 141 days and 75% within 207 days. This compares with protection visa applications lodged in 2000-2001, where 25% received a primary decision within 58 days, 50% within 80 days and 75% within 110 days.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 19 and 22 February 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(29) Output 1.2: Refugee and Humanitarian Entry and Stay

Senator McKiernan asked what is the legal status of the Christmas Island and Cocos Island centres, how does the processing of claims of the asylum seekers differ in each of the centres and how does this differ from the processing of claims for people in Nauru, Woomera etc?

Answer:

The centres at Christmas Island and Cocos (Keeling) Island are places of immigration detention approved by the Minister in writing under subparagraph (b)(v) of the definition of "immigration detention" contained in subsection 5(1) of the Migration Act 1958.

The processing of claims for refugee status for persons on the Australian mainland (including detention centres and in the community) involves assessments by trained case managers of protection claims within the established protection visa framework and a merits review of unfavourable decisions by the Refugee Review Tribunal.

Assessment of claims for refugee protection made by unauthorised arrivals on excised offshore places such as Christmas Island and Cocos (Keeling) Island and on Nauru and Manus Island involves a refugee determination process which is conducted by the same trained DIMIA officers who perform onshore protection visa assessments. The process follows the refugee determination process used by UNHCR. This process provides a review opportunity by more senior DIMIA officers for those persons found not to be refugees.

In line with UNHCR arrangements, the process does not rely on the involvement of professional advisers to asylum seekers. DIMIA officers are responsible for actively exploring all possible grounds for refugee protection with the asylum seeker. Written applications and statements of claims are not required and the identification and exploration of claims is undertaken in interviews conducted with qualified interpreters when needed.

The refugee determination process on excised offshore places, Nauru and Papua New Guinea informs advice to the Minister for Immigration and Multicultural and Indigenous Affairs, together with advice on any resettlement opportunities in other countries for those found to be refugees.

For offshore entry persons, the Minister has the power to allow a visa application to be made where this is in the public interest. This allows for Australia to provide access to appropriate protection for offshore entry persons who are refugees where

protection is not available in other countries.

Those persons on declared countries who are not offshore entry persons and are found to be refugees can be invited to apply for offshore visas to Australia should protection not be available in other countries.

Senate Legal and Constitutional Legislation Committee

Immigration and Multicultural and Indigenous Affairs Portfolio

Questions on notice from Additional Estimates Hearing 19, 22 February 2002

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8.	271	2 April
9.	277	2 April
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18.	Written	15 April
19.	275 & 280	17 April
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21.	310-311	17 April
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