QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(1) Output: Indigenous Business Australia

Senator Payne (L&C 273) asked:

(a) It has been indicated that major new investments and those with a higher perceived risk factor are subject to external due diligence before they come to the IBA's board. Are you able to indicate how those risk ratings have been done since you have been operating and whether the risk ratings have been proven in fact as the investments have proceeded?

(b) Provide details of external expertise being sought

Answer:

(a) Indigenous Business Australia (IBA) was created in April 2001 taking over from the Aboriginal and Torres Strait Commercial Development Corporation (CDC) which was created in 1990. Since its inception in 1990, CDC and now IBA has used a range of consultants (see details in response to question 1b) to assist in the assessment and consideration of new business investment proposals.

As a result of this process or as a result of internal examination, many proposals are rejected and are not put to the IBA Board for consideration. The Board might consider certain proposals that are high risk but are offset by potential high returns and/or high community outcomes. The assessment process results in an overall high rejection rate.

Practical experience within IBA reflects outcomes in the broader financial market place. Certain industry sectors and certain types of investments (particularly green-field) have inherently higher risks than other types of investments. In most cases, these risks continue for the life of the investment though a number of green-field businesses have developed over time into medium or low risk investments.

All low-risk investments (mainly property) have continued as low risk. Over the life of CDC and now IBA investment participation, only a limited number of businesses have ceased trading and in all cases, these were green-field investments.

(b) IBA engages external expertise to either undertake a full due diligence process or to assist in elements of a due diligence process. In respect of assisting in the completion of a due diligence process, external expertise will be sought in the following areas:

- Formal property and business valuations;

- Industry specific advice on production matters such as mining and agriculture;
- Industry specific advice in respect of markets and marketing including current and future demand;
- Legal advice including investment structures, management agreements and exit strategies; and
- Building advice including construction compliance, hydraulics, plant and equipment and pest control.

Some projects may require the engagement of external expertise in one of the above areas where other projects may require the engagement of several consultants to address a range of areas of expertise.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(2) Output: Indigenous Business Australia

Senator Payne (L&C 274) asked, "Provide the Committee with a list of what falls under the functional review heading of inquiries such as risks to the IBA of staff participating as directors in the joint ventures."

Answer:

The functional reviews referred to on page 201 of the Portfolio Budget Statements, relate to IBA's Internal Audit Program (IAP). The IAP provides IBA with a comprehensive risk based coverage of its activities and where appropriate will complement the risk mitigation strategies in IBA. The IAP addresses the following types of audits:

- Control Assurance – reviews to offer reassurance that controls are operating as expected;
- Compliance Audits – examine the control structure and operation with a view to improving controls;
- Operational/Performance Audits – an holistic review of IBA's operating environment with a view to recommending strategies for performance improvements;
- IT Audits – directed at the technical aspects of the control environment.

An independent major accounting firm undertakes the IAP and reports are submitted to IBA's audit committee comprising a number of IBA directors with advice from representatives of the Office of Evaluation and Audit and the Australian National Audit Office.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(3) Output: Indigenous Business Australia

Senator Payne (L&C 275) asked, "Provide an outline of the activities and changes IBA has made that meet each of the statements on page 204 of the PBS under the heading 'Performance Information for Outcome 1'."

Answer:

Indicator 1: IBA has exited from 2 businesses this financial year and is in the process of negotiating its exit from another two –(2).

Indicator 2: IBA has made 4 new investments during 2001-02. The industries in which IBA has invested are Accommodation, Cafes & Restaurants, Mining, and Commercial Property.

Indicator 3: IBA commissioned, as a part of its internal audit plan, a report which defines IBA's Community Service Obligations in relation to its outcomes and the appropriate systems which need to be developed to capture the information required to report against this performance measure. With this information on hand IBA will be able to identify the level of support required and the costs associated with achieving this outcome for the 2002-03 financial year.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(4) Output: Indigenous Business Australia

Senator Payne (L&C 276) asked, "Under 'Investments' in the first column, you have $59.641 million to $68.006 million next year. Could you provide some details on that increase in investments against the risk categories that I asked about at the beginning of this discussion?"

Answer:

The increase in investments budgeted for will increase the level of investment in the low risk categories. The investments provided for are construction costs for a commercial property, investment in a land development and the acquisition of equity in an accommodation facility.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(5) Output: Indigenous Business Australia

Senator Payne (L&C 276) asked, "In terms of the sale of investments on page 208 of the PBS, indicate what equity instruments were sold there."

Answer:

At the time of preparing the Budget Estimates IBA was in the process of negotiating the sell-down of a portion of its investment in the Katherine Government Centre and Port Botany Transfer Station. IBA does not believe that these sell-downs will be finalised in 2001-02 due to a number of commercial issues.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(6) Output: Indigenous Business Australia

Senator Ludwig (L&C 278) asked,

(a) Provide details of what new projects have been entered into in the past financial year and ones which have been exited.

(b) Provide details about the amount of the investment and the type of investment for each.

(c) Provide details of any consultancies and whether they showed a loss or a profit when they were exited.

(d) Clarify if there is a flat internal rate of return that is sought before you make an investment or any financial management tools utilised to determine whether or not an investment is sound.

Answer:

(a) IBA has entered into and exited the following projects during 2001-02:

New Projects

(i) Monkey Mia Dolphin Resort;
(ii) Fitzroy River Crossing Inn and Fitzroy River Lodge;
(iii) Diatomaceous Earth Investments;
(iv) Scarborough House.

Projects exited

(i) Geo CDC Insurance Services;
(ii) Mackenzie River Bulkhaul Pty Limited
(iii) Bonner House

(b) The details of the new investments are listed below:

Investment	Amount of Investment	Type of Investment
Monkey Mia Dolphin Resort	$3.665 million	Joint Venture
Fitzroy River Crossing Inn and Fitzroy River Lodge	$3.300 million	Partnership
Diatomaceous Earth Investments	$1.000 million	Joint Venture
Scarborough House	$2.600 million	Wholly owned

(c) Details of consultancies on exit of investments:

(i) Geo CDC Insurance Services - a major accounting firm with expertise in the insurance industry was engaged to advise on IBA's continued participation in the business. The terms of reference of the consultancy included the performance of the business, the immediate state and the future outlook of the insurance market and the prospects for the particular business given these factors. Advice was also provided on possible exit strategies. Based on the recommendations made in this report and the under-performance of the business to date, the Board of IBA made a decision to exit this investment. IBA realised a loss upon its exit from this venture. Separate advice was obtained in respect of legal issues associated with the disposal of IBA's equity.

(ii) Mackenzie River Bulkhaul Pty Limited - An industry expert was engaged to monitor the ongoing performance of this investment and another was engaged to undertake a valuation of assets to assist in disposal negotiations. IBA realised a loss upon its exit from this venture. Separate advice was obtained in respect of legal issues associated with the disposal of IBA's equity.

(iii) Bonner House – a design and construction company was engaged to provide advice on refurbishment options and costings for Bonner House and associated plant and equipment. Based on the content of the subsequent report, a decision was made to dispose of the asset. While the building sold for less than carrying value, income during the 10 years of ownership resulted in this being an overall good investment.

(d) IBA policy seeks to invest in businesses that are assessed as being, or likely to be, commercially viable. The projected rate of return must be in the vicinity of the current rate of return for that particular industry sector, or as a minimum comparable with the 10 year bond rate plus an appropriate risk margin.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(7) Output: Aboriginal and Torres Strait Islander Commission

Senator Ludwig (L&C 255) asked for the costs supplied to the applicants through the legal aid provisions in the Gunner and Cubillo case.

Answer:

While ATSIC itself did not incur any direct expenditure on this case, ATSIC did provide grant funding to the NT Stolen Generation Litigation Unit (NTSGLU) to cover its operational expenses and manage the Gunner/Cubillo litigation. The NTSGLU operated as a unit within the North Australian Aboriginal Legal Aid Service (NAALAS) of Darwin.

Attributing precise costs specifically relating to this case is difficult because of the accounting treatment of overheads by the NTSGLU and NAALAS, however the following final break-up of costs is available:

Year	**Operational Costs**	**Brief-out expenses specifically for Gunner & Cubillo**	**Total Grant to NTSGLU**
1996/97	575,000	125,000	700,000
1997/98	364,000	250,000	614,000
1998/99	336,380	777,240	1,113,620
1999/00	342,040	638,021	980,061
2000/01	137,225	161,118	298,343
Totals	**$1,754,645**	**$1,951,379**	**$3,706,024**

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(8) Output: Aboriginal and Torres Strait Islander Commission

Senator Scullion (L&C 255) asked for the costs supplied to the applicants through the legal aid provisions of the Native Title process in the Yorta Yorta case.

Answer:

The Aboriginal and Torres Strait Islander Commission (ATSIC) has provided funding to meet the legal aid costs of the Yorta Yorta claimants from when the claim commenced in the Federal Court in February 1993 through to the appeal in the High Court in May 2002.

The claim has been one of the longest running and largest in Australia, and is very significant for all parties in terms of the legal issues it has raised. There were initially 500 respondents opposed to the claim, including the States of Victoria, New South Wales and South Australia, the Murray Darling Basin Commission, Murray Irrigation Limited, Telstra and various other major respondents. At the trial stage, altogether, the Court sat for 114 days and heard evidence from 201 witnesses. The trial transcript ran to 11,664 pages.

Accordingly, the costs to ATSIC have been significant. From February 1993 to June 2002, solicitor's costs and barristers' fees associated with representing the Yorta Yorta through various stages have totalled $2,755,000 (approximately). Those stages have included the compulsory mediation before the Deputy President of the National Native Title Tribunal from 1994 to 1995; the Federal Court hearing before Justice Olney from 1996 to December 1998; the appeal to the Full Court of the Federal Court from then until 2001; the recently finalised High Court appeal commenced in 2001; and the various negotiations that have occurred from time to time to settle the matter, particularly with the State of Victoria.

Over the same period of time the claimants' solicitors and barristers have carried out a significant amount of pro bono legal work, estimated at a value of $2,500,000 (approximately).

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(9) Output: Aboriginal and Torres Strait Islander Commission

Senator Ludwig (L&C 258) asked for a copy of the new accountability framework developed by the Department of Family and Community Services (FACS) and ATSIC?

Answer:

The new accountability framework is encapsulated in the attached *Common Reporting Framework for State, Territory and ATSIC Housing Plans*, which has been distributed to all jurisdictions.

COMMON REPORTING FRAMEWORK FOR STATE, TERRITORY AND ATSIC INDIGENOUS HOUSING PLANS

Background to the Common Reporting Framework for State, Territory and ATSIC Indigenous Housing Plans

In May 2001, Commonwealth, State and Territory Housing Ministers approved a statement of new directions for Indigenous housing, *Building a Better Future: Indigenous Housing to 2010*. In approving *Building a Better Future*, Ministers committed to providing safe, healthy and sustainable housing for Indigenous people. It was agreed that all jurisdictions will report annually to Housing Ministers and the Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs on achievements against the outcomes in *Building a Better Future.*

In the 2001-02 Budget, $75 million was allocated over four years to expand the supply of healthy housing and related infrastructure in rural and remote areas. As part of the Budget initiative, the Commonwealth requires improved accountability, focusing on outcomes, for all Commonwealth Indigenous-specific housing funds (new and existing Aboriginal Rental Housing Program [ARHP] and Community Housing and Infrastructure Program [CHIP]). This is consistent with the implementation of *Building a Better Future* (page 7)—all governments want to know the level of success in reducing housing need and achieving improved housing and health outcomes for Indigenous people.

As part of the Budget initiative, all Commonwealth Indigenous-specific housing funds are to be targeted to areas where there are no public or private housing options, particularly in rural and remote areas. Through the Commonwealth State Housing Agreement (Bilateral Agreements), the Commonwealth will work with States and Territories to improve Indigenous peoples' access to mainstream public housing in regional and urban centres. All States and Territories will be required to have an Indigenous housing agreement with the Commonwealth and ATSIC in order to receive ARHP funds (both existing and new) and CHIP funds. States and Territories are encouraged to improve Aboriginal and Torres Strait Islander peoples' access to home ownership through a range of State and Territory strategies.

The Commonwealth's priority is to use Indigenous-specific housing funds not only to provide new houses but, importantly, to improve the functionality of existing houses in rural and remote communities through upgrades and regular maintenance, and provide training for Indigenous community housing organisations to manage their houses and tenancies. *Building a Better Future* is the framework for achieving these objectives. In the short term, this may mean that there is reduction in the provision or purchase of new houses. Over time, the balance between construction and purchase and management and maintenance funding should reach a ratio for sustainability of housing of about 70:30 or 65:35.

Indigenous Housing Plan Common Reporting Framework

A Common Reporting Framework has been prepared to assist in the development of State, Territory and ATSIC Indigenous housing strategic and annual program plans. It is based on *Building a Better Future* and is also informed by plans developed by States and Territories who are implementing the Housing Ministers' reforms. The Common Reporting Framework will apply to Indigenous housing plans commencing 2002/03. In accordance with the Budget initiative, the Common Reporting Framework includes national goals and timeframes for reducing Indigenous housing need by improving Indigenous housing outcomes, particularly in rural and remote areas. While the Common Reporting Framework

emphasises rural and remote Indigenous housing outcomes, housing plans need to incorporate targets and strategies for addressing all Indigenous housing need.

The national goals are derived from available data sources including the 1996 Census and 1999 Community Housing and Infrastructure Needs Survey. The purpose of setting goals is to have a benchmark against which improvements can be measured. This will assist in reporting to governments on the success of *Building a Better Future*. One of the key tasks of the 2002-03 planning process for each State and Territory, therefore, is to set baselines for establishing targets against objectives in future years. The Commonwealth accepts that States and Territories will have different starting points when establishing baselines and targets.

Indigenous housing strategic plans and annual program plans should address the four objectives and strategies contained in *Building a Better Future* and include long term and annual goals and targets against the objectives to enable reporting on outputs and outcomes. Other objectives and strategies can be included to reflect individual State's and Territory's additional Indigenous housing priorities.

There are other important drivers that will impact on Indigenous housing planning. In order to address social and economic disadvantage, the Council of Australian Governments has agreed priority action in key areas including reviewing and re-engineering programs and services to ensure they deliver practical measures that support families, children and young people. As *Australians Working Together* emphasises, current Commonwealth policy is to have strong, robust communities so that individuals and families can truly engage in economic and community life. Housing has an important role in alleviating social problems and strengthening families and communities when 'joined up' with other community service initiatives.

Structure of Indigenous Housing Plans

As has been agreed over the past few years, and based on best practice examples, a useful structure for developing Indigenous housing annual plans includes:

- contextual information about the status of Indigenous housing in the State or Territory, including for example:
  - number and tenure of houses by ATSIC region;
  - linkages between Indigenous housing and mainstream public and community housing programs;
  - demographic profile of the population accessing Indigenous housing;
  - program funds;
  - level of housing need and projected need;
  - number and characteristics of Indigenous community housing organisations (ICHOs); and
  - home ownership strategies.

- strategies to achieve the four objectives in *Building a Better Future: Indigenous Housing 2010:*
  - identify and address unmet housing need of Indigenous people;
  - improve the capacity of Indigenous community housing organisations and involve Indigenous people in planning and service delivery;
  - achieve safe, healthy and sustainable housing; and
  - co-ordinate program administration.

- details of how strategies to achieve the four objectives will be implemented and baseline data and annual targets for each strategy;
  - each state/territory needs to use its own data to set baselines and targets;

- an annual performance report that provides:
  - an analysis of the cost, quantity and quality of work undertaken over the preceding financial year;
  - an analysis of the success or failure of strategies in meeting targets, reducing need and achieving outcomes;
  - a financial report against various program elements; and
  - details of how strategies will be adjusted to improve outcomes.

Protocol for Submitting Annual Plans and Performance Reports

A protocol to streamline the process for submitting annual plans and performance reports, securing approval from the Minister for Family and Community Services and ATSIC Chairperson, and expediting the release of ARHP and CHIP funds is at Attachment B.

COMMON REPORTING FRAMEWORK FOR STATE, TERRITORY AND ATSIC INDIGENOUS HOUSING PLANS

NATIONAL GOALS	STATE AND TERRITORY BASELINE INFORMATION (CURRENT YEAR TARGETS)	STRATEGIES	REPORTING INFORMATION
Building a Better Future Objective 1: Identify and address unmet housing needs of Indigenous people			
Reduce crowding and homelessness • By 2006, the number of Indigenous households with 2 or 3 families and/or high average occupancy rates will be significantly reduced	States and Northern Territory should examine own data on crowding and homelessness, and establish a baseline of need and progressive targets for the mid term • Establish number of Indigenous family households with 2 or 3 families - Set targets for reducing number of crowded households in 2002-03 - Set targets for 2003-04 etc • Establish average occupancy rate per household - Set targets for reduction in average occupancy rate in 2002-03 - Set targets for 2003-04 etc	• Target housing at communities with highest levels of housing need using a multi-measure approach • Work with the key stakeholders to improve access for Indigenous people to mainstream public housing, home ownership and other forms of housing assistance • FaCS and ATSIC to negotiate with state housing authorities in the development of the next CSHA to identify and implement strategies to improve access by Indigenous people to mainstream public housing	**Provide information on achievements against targets:** • Reduction in average occupancy rates per household (State/Territory level) - Number of people occupying the houses divided by number of bedrooms in the houses • Reduction in number of 2 and 3 family households • Number of Indigenous applicants for mainstream public housing during the financial year (ie. total applications over the year) • Number of Indigenous applicants for mainstream public housing as at 30 June (ie. number of applications still current at 30 June)

NATIONAL GOALS	STATE AND TERRITORY BASELINE INFORMATION (CURRENT YEAR TARGETS)	STRATEGIES	REPORTING INFORMATION
• By 2006, the number of Indigenous households with 2 or 3 families and/or high average occupancy rates will be significantly reduced (cont.)			• Number of Indigenous tenants (families or households) in mainstream public housing at 30 June • Number of Indigenous families or individuals who have achieved home ownership through - ATSIC home ownership program - State or Territory based Indigenous-specific home ownership programs - First Home Owners Scheme - Properties sold to Indigenous tenants by Indigenous housing authorities, mainstream public housing agencies or ICHOs
• By 2006, number of families living in improvised dwellings in rural and remote areas will be significantly reduced	• Establish number of dwellings required to house families living in improvised dwellings - Set targets for number of new houses required to reduce the number of families living in improvised dwellings for 2002-03 - Set targets for 2003-04 etc		• Reduction in number of people living in improvised dwellings - Number of new dwellings - Total cost of new dwellings - Average cost of new dwellings

NATIONAL GOALS	STATE AND TERRITORY BASELINE INFORMATION (CURRENT YEAR TARGETS)	STRATEGIES	REPORTING INFORMATION
• By 2005, 100% of new houses will be designed and built to minimise impact of crowding on people's health	• Establish percentage of new houses that will be designed and built to meet household's profile to ensure that the national goal is achieved by 2005 - Set target for new houses that will be designed and built to meet household's profile for 2002-03 - Set targets for 2003-04 etc • Establish number of houses that need design modifications to minimise the impact of crowding - Set targets for houses designed and built to minimise the impact of crowding for 2002-03 - Set targets for 2003-04 etc	• Design, build or upgrade houses to minimise the impact of crowding on people's health (meet the *National Framework for the Design, Construction and Maintenance* using the *National Indigenous Housing Guide* and/or State and Territory Indigenous housing standards, refer to 2.5 of the *National Indigenous Housing Guide*) • Develop and implement innovative ways of reducing crowding eg. visitor camps built in areas of high transitory populations	**Provide qualitative information on:** • Strategies to minimise impact of crowding on people's health • Innovative community initiatives to reduce crowding eg. visitor camps in areas of high transitory populations • Success of activities undertaken to meet targets • Reasons for not achieving targets

NATIONAL GOALS	STATE AND TERRITORY BASELINE INFORMATION (CURRENT YEAR TARGETS)	STRATEGIES	REPORTING INFORMATION
Building a Better Future Objective 2: Improve the capacity of Indigenous community housing organisations (ICHO) and involve Indigenous people in planning and service delivery			
Train ICHO managers • By 2005, all ICHOs will have managers who have accredited housing management training	States and Northern Territory should examine own baseline data and set progressive targets against the national goal • Establish number (and percentage) of ICHO managers who require accredited training - Set target for 2002-03 - Set target for 2003-04 etc • Establish amount of funding (or hours) required from State or Territory training authorities to train ICHO workers and members of boards of management - Set target for 2002-03 - Set target for 2003-04 etc	• Implement the *National Skills Development Strategy for Indigenous Community Housing Management* (NSDS) including the national work plan developed by the NSDS Implementation Working Group • Implement *Guidelines for Indigenous Housing Asset Management* • Recruit Indigenous people to fill vacant property and tenancy management positions	**Provide information on achievements against targets:** • Number and percentage of ICHO managers who participated in accredited housing management training during the financial year • Number and percentage of Indigenous housing workers and Indigenous housing board members who participated in accredited housing management training during the financial year • Number and percentage of ICHO managers who completed accredited housing management training during the financial year • Number and percentage of Indigenous housing workers and Indigenous housing board members who completed accredited housing management training during the financial year

NATIONAL GOALS	STATE AND TERRITORY BASELINE INFORMATION (CURRENT YEAR TARGETS)	STRATEGIES	REPORTING INFORMATION
Train ICHO managers • By 2005, all ICHOs will have managers who have accredited housing management training (cont.)			• Funds provided in year by State or Territory Indigenous housing authority for training ICHO staff • Funds provided (or number of training hours) in year by State Training Authority for training of ICHO staff • Number of ICHO managers, Indigenous housing workers and Indigenous housing board members who participated in other skills development training during the financial year • Number of ICHO managers, Indigenous housing workers and Indigenous housing board members who completed other skills development training during the financial year

NATIONAL GOALS	STATE AND TERRITORY BASELINE INFORMATION (CURRENT YEAR TARGETS)	STRATEGIES	REPORTING INFORMATION
Train ICHO managers • By 2005, all ICHOs will have managers who have accredited housing management training (cont.)			• Employment outcomes as at 30 June - Number of Indigenous people with accredited training in housing or tenancy management employed as ICHO property and/or tenant managers - Number of Indigenous people with non-accredited training in housing or tenancy management employed as ICHO property and/or tenant managers - Total number of people (Indigenous and non-Indigenous) with accredited training in housing or tenancy management employed as ICHO property and/or tenant managers - Total number of people (Indigenous and non Indigenous) with non accredited training in housing or tenancy management employed as ICHO property and/or tenant managers

NATIONAL GOALS	STATE AND TERRITORY BASELINE INFORMATION (CURRENT YEAR TARGETS)	STRATEGIES	REPORTING INFORMATION
Train ICHO managers • By 2005, all ICHOs will have managers who have accredited housing management training (cont.)			• Percentage of ICHOs with property and/or tenant managers who have completed accredited training in housing and/or tenancy management as at 30 June **Provide qualitative information on:** • Effectiveness of strategies • Reasons for not achieving targets • Progress in implementing NSDS and national work plan
Streamline the Indigenous community housing sector • By 2005, improve the efficiency and sustainability of ICHOs [1]	• Identify number of organisations that require assistance - Set target for number of ICHOs that will be provided with assistance during 2002-03 - Set target for number of ICHOs that will be provided with assistance during 2003-04 etc	• Develop and implement best practice management and funding models for sustainable ICHOs	**Provide qualitative information on:** • Number of ICHOs whose performance has improved and require less intervention and support • Measures and structures in place to ensure effective management of housing and tenancies • Effectiveness of strategies

NATIONAL GOALS	STATE AND TERRITORY BASELINE INFORMATION (CURRENT YEAR TARGETS)	STRATEGIES	REPORTING INFORMATION
Implement housing management plans • By 2005, all ICHOs will have a housing management plan that includes policies on rent collection, rent arrears management and asset management	• Identify number and percentage of ICHOs that have a housing management plan in place - Set target for number of ICHOs that will have a housing management plan in place in 2002-03 - Set target for 2003-04 etc	• ICHOs to implement housing management plan that includes policies on rent collection, rent arrears management and asset management	**Provide information on achievements against targets:** • Number of ICHOs that have implemented a housing management plan that includes policies on rent collection, rent arrears management and asset management
• By 2005, national average rental income for Indigenous community housing will increase by a minimum of 10%[2]	Establish annual targets to improve rent levels, collection and arrears • Identify current average weekly rent level for all ICHOs in the State or Territory - Set target for 2002-03 - Set target for 2003-04 etc • Identify total rent arrears for all ICHOs in the State or Territory in current financial year - Set target for 2002-03 - Set target for 2003-04 • Set annual target to increase average weekly rent collection to achieve national goal by 2005 - Set target for 2002-03 - Set target for 2003-04 etc	• FaCS and ATSIC to work with Centrelink to improve marketing of Centrepay to ICHOs	• Total weekly rent charged by all ICHOs in the State or Territory as at 30 June • Average and range (lowest, highest) of weekly rent being charged per property across the State/Territory as at 30 June • Total weekly rent collected by all ICHOs in the State or Territory as at 30 June • Average and range (lowest, highest) of weekly rent collected as at 30 June

NATIONAL GOALS	STATE AND TERRITORY BASELINE INFORMATION (CURRENT YEAR TARGETS)	STRATEGIES	REPORTING INFORMATION
• By 2005, national average rental income for Indigenous community housing will increase by a minimum of 10%[3] (cont.)	• Establish annual targets to reduce rent arrears each financial year - Set target for 2002-03 - Set target for 2003-04 etc • Establish annual targets to increase use of Centrepay or similar scheme - Number of ICHOs using Centrepay or similar deduction scheme - Set target for use of Centrepay 2002-2003 - Set target for 2003-2004 etc		• Total rent arrears for all ICHOs in the State or Territory as at 30 June • Use of Centrepay as at 30 June – Number of ICHOs – Number of tenants of ICHOs • Use of other rent deduction schemes as at 30 June – Number of ICHOs – Number of tenants of ICHOs • Number of tenants of ICHOs accessing Rent Assistance as at 30 June **Provide qualitative information on:** • Effectiveness of strategies • Reasons for not achieving targets

NATIONAL GOALS	STATE AND TERRITORY BASELINE INFORMATION (CURRENT YEAR TARGETS)	STRATEGIES	REPORTING INFORMATION
Building a Better Future Objective 3: Achieve safe, healthy and sustainable housing			
Improve the functionality of houses			**Provide information on achievements against targets:**
• By 2008, 90% of critical health hardware[4] in houses will be fully functional and enable healthy living practices	• Provide a baseline of current stock condition - Set target for each year so that national goal for 2008 is achieved	• Implement *National Framework for the Design, Construction and Maintenance of Indigenous Housing* using the *National Indigenous Housing Guide* and/or State and Territory Indigenous housing standards[8]	• Number and percentage of houses that were constructed or acquired to *National Framework for the Design, Construction and Maintenance of Indigenous Housing* (using the *National Indigenous Housing Guide* and/or State and Territory housing standards)
• From 2002, 100% of new houses at handover will meet the requirements of the *National Framework for the Design, Construction and Maintenance of Indigenous Housing* using the *National Indigenous Housing Guide* and/or State and Territory Indigenous housing standards	• Set target at 100% of new houses to meet requirements of the *National Framework for the Design, Construction and Maintenance of Indigenous Housing* using the *National Indigenous Housing Guide* and/or State and Territory Indigenous housing standards at handover	• Check quality of new and upgraded houses at handover against the *National Framework for the Design, Construction and Maintenance of Indigenous Housing*	• New houses (constructed and purchased) – Total and average expenditure on new houses in rural and remote areas – Total and average expenditure on new houses in urban areas
• By 2008, there will not be a backlog of houses requiring replacement • By 2005, there will not be a backlog of houses requiring upgrades[5]	• Establish baselines of the backlog of houses requiring upgrades[5] and replacement to meet national target – Set targets for upgrading or replacing houses for 2002-03 – Set targets for 2003-04 etc		• Number and percentage of houses that were upgraded[5] to *National Framework* standard (enable safety and the first five healthy living practices as a minimum)

NATIONAL GOALS	STATE AND TERRITORY BASELINE INFORMATION (CURRENT YEAR TARGETS)	STRATEGIES	REPORTING INFORMATION
• By 2008, achieve capital[6] to recurrent[7] funding ratio of about 70:30	• Establish existing ratio (capital[6] to recurrent[7] funding) – Set targets so that national ratio is achieved by 2008	• Develop capital[6]/recurrent[7] funding ratio to target more funds to asset management and maintenance • Maintain houses to ensure safety and enable the critical healthy living practices	• Upgrades[5] – Total and average expenditure on upgrades in rural and remote areas – Total and average expenditure on upgrades in urban areas • Total capital[6] expenditure over the financial year • Total recurrent[7] expenditure over the financial year – Indigenous housing authority and/or ATSIC funds – Rent collected by ICHOs • Number and percentage of houses maintained to *National Framework* standard (enable safety and the first four healthy living practices as a minimum) • Maintenance – Total and average expenditure on emergency and cyclical maintenance[9] in rural and remote areas – Total and average expenditure on emergency and cyclical maintenance in urban areas

NATIONAL GOALS	STATE AND TERRITORY BASELINE INFORMATION (CURRENT YEAR TARGETS)	STRATEGIES	REPORTING INFORMATION
Improve the functionality of houses (cont.)			• Total emergency and cyclical maintenance[9] expenditure over the financial year • Number of ICHOs that have cyclical maintenance[9] programs **Provide qualitative information on:** • Effectiveness of strategies • Reasons for not achieving targets • Quality assurance strategies

NATIONAL GOALS	STATE AND TERRITORY BASELINE INFORMATION (CURRENT YEAR TARGETS)	STRATEGIES	REPORTING INFORMATION
Building a Better Future Objective 4: Co-ordinate program administration			
Sign Indigenous housing agreements • By 30 June 2002, all jurisdictions will have signed Indigenous housing agreements	• Set targets for coordinating housing programs and coordinating housing with other programs eg infrastructure, health, community capacity building	• Finalise and implement Indigenous housing agreements – Establish 'whole of state' strategic plan for Indigenous housing – Implement 'whole of state' needs assessment and distribution of funds process – Establish notional or actual pooling of Indigenous housing funds • Develop and implement agreements with other service providers	**Provide qualitative information on:** • Effectiveness of Agreement • Effectiveness of strategies • Partnerships that have been established • Examples of good practice in program integration • Reasons for not achieving targets

[1] Estimates indicate that up to 25 per cent of ICHOs are unsustainable. If regionalisation is preferred strategy for improving the sustainability of ICHOs then targets should include consideration of factors such as size of organisations, number of organisations in the practical catchment area, cultural relationships between organisations, traditional ownership, management history, and achievable economies of scale.
[2] According to CHINS 1999, national average rent collected by Indigenous community housing organisations is $35 per week.
[3] According to CHINS 1999, national average rent collected by Indigenous community housing organisations is $35 per week.
[4] Critical health hardware refers to the health hardware required to ensure safety within and around the house and to enable the first five healthy living practices (refer to *National Framework for the Design, Construction and Maintenance of Indigenous Housing*; page 3).
[5] Upgrades, in the absence of an agreed definition, is work required to bring a house to a safe, healthy and sustainable condition, ie. at minimum, enable safety and the first 5 healthy living practices eg rewiring house, new kitchen/bathroom, verandah to reduce impact of crowding.
[6] Capital funds refers to funding for housing construction, purchase and upgrades.
[7] Recurrent funds refers to funding for maintenance, insurance, rates and charges and administration of Indigenous community housing.
[8] State and Territory Indigenous housing standards are a part of the National Framework and should be consistent with the principles contained in the National Framework.
[9] Cyclical maintenance, in the absence of an agreed definition, is annual assessment of houses and work required following the assessment eg replacing hot water system, replacing faulty light switch, regrouting tiles.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(10) Output: Aboriginal and Torres Strait Islander Commission

Senator Ludwig (L&C 286/287) asked:

In relation to 'Welfare reform – participation' on page 144 of the Portfolio Budget Statement:

a) Provide details of how far the negotiations with communities have proceeded and what types of capacity building there are.

b) Provide a copy of any style or types of agreements that are used.

Answer:

a) The first year of the Community Participation Agreement/Capacity Building initiative was to focus on the development of the implementation framework. Many aspects of this initiative have previously been untested and ATSIC has been working closely with the Department of Family and Community Services (FaCS) and Centrelink and has also consulted and examined implementation issues with the Mutitjulu community in the Northern Territory, the Murdi Paaki region in New South Wales, the Tjurabalan region in Western Australia and the Cape York region in Queensland. A broader range of consultations is expected to take place in June and early July 2002. The implementation framework is very close to finalisation and negotiations around developing formal Community Participation Agreements are expected to be held with communities as early as July 2002.

In terms of capacity building, the first year funding has also assisted with promoting Indigenous good governance structures and processes in communities, strengthening administrative and managerial functions, and building individual capacities to contribute to and participate in community development initiatives.

b) The format of proposed sample agreements are still in development by ATSIC, FaCS and Centrelink and are expected to be completed as part of the implementation framework. It is intended that there will be a range of agreements developed as part of implementing the CPA measure and that these agreements will be developed at a both community and individual level. It is expected that a copy of the type of agreements to be used will be available for information by the end of July 2002.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(11) Output: Aboriginal and Torres Strait Islander Commission

Senator Ludwig (L&C 288) asked for details of ATSIC's languages program.

Answer:

As part of the Commonwealth's response to the recommendations in the Human Rights and Equal Opportunity Commission's *Bringing Them Home* report, ATSIC was allocated $11.25m over four years, starting in 1998-99 to establish a national Link Up network.

The ATSIC Board also responded to the *Bringing Them Home* report by allocating $9m over three years (beginning in 1999-00) for a new Language Access Initiatives Program (LAIP). This ATSIC initiative was in addition to the $11.25m allocated by the Commonwealth for the establishment of a national Link-Up network.

The LAIP funds supplemented ATSIC's *Preservation of Indigenous Languages and Recordings* (PILR) program. The aim of PILR is to support community initiatives to preserve and maintain Indigenous languages, increase community access to language and promote language awareness and cultural knowledge. No other Commonwealth, State or Territory program targets Indigenous languages in communities as specifically as ATSIC's PILR program.

The table below details the funds that have been expended from ATSIC under this output group (PILR was previously referred to as Aboriginal and Torres Strait Islander Languages Initiatives Program – ATSILIP). Figures include the $9m LAIP funding.

Year	Amount ($ '000)
1998-1999	4,446
1999-2000	7,485
2000-2001	7,625
2001-2002*	7,955

* Note that this is an estimate figure only and will not be confirmed until after the close of the 2001-2002 financial year.

To try to assist in meeting the need to preserve Indigenous languages, the ATSIC Board has increased the base allocation of language funds to $5.0m in 2002-03. From this total an amount of $0.3m is for LAIP activities that were not completed within timeframes or within budget from the 2001-02 year.

LAIP was designed to target five specific areas of need. These were: endangered languages; feasibility studies/strategic plans; archive management and development; publications and broadcast; and capital infrastructure. Fifty percent of the available funding was to be distributed to programs targeting endangered languages, and the other 50% among the remaining four priority areas.

LAIP has been a very successful and popular program as it has enabled smaller community groups to respond to and address language needs, issues and opportunities on a discrete project basis. An analysis of 89 projects completed (mostly those funded in 1999-00 and 2000-01), shows interesting trends. Briefly these are:

- 12 dictionaries have been produced, including one in three versions;
- 57 books have been published, 1,000 handouts for distribution at the Olympics, and 126 resource publications have been produced;
- Numerous hours of video, and countless photos have been digitised and catalogued;
- 19 projects involved archiving, including the use of digital methods, some being foundations for future dictionaries;
- Up to 100 people directly benefited from at least 2 projects, 41 in another and 30 in another;
- 12 projects involved people meeting: workshops, camps and conferences were held;
- 9 projects saw the development of a data base, recording or material produced for broadcasting;
- 9 projects involved the development of CD, Tape or Video;
- 5 people received direct training outcomes;
- 5 Strategic Plans were produced for 5 different Centres;
- 1 project involved language classes for school children;
- Only 11 projects involved the funding of capital items;
- Only 5 projects involved ‘networking’ or ‘study tours’; and
- Only 4 projects required recurrent funding.

Note the performance monitoring for the 2001-02 financial year will be completed after June 30 2002.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(12) Output: Aboriginal and Torres Strait Islander Commission

Senator Crossin (L&C 289) asked, "Page 138 of the Portfolio Budget Statement – output 1.7 – states that 3,000 persons were assisted in Australia with eight families traced and a 60 percent client satisfaction rating. Explain this output and why only eight families were traced. Advise whether normal procedures would lead to only eight families being traced and why it obtained a 60 percent client satisfaction rating?"

Answer:

The figures in the Portfolio Budget Statements for Output 1.7 are based on estimates provided by Link Up service providers on what they thought the demand may be.

Actual performance data since accumulated show that demand was and will be significantly higher than estimated.

The actual performance for 2000-01 indicated that there were 12,405 contacts (note that one client may have many contacts recorded) and 124 family reunions.

The number of reunions is not necessarily a reflection of the number of persons assisted because some of those assisted may not have sought reunion as their final result or may not have been able to be reunited with family members because the person traced may have passed away or the tracing process may not have been fully completed.

The target of 60 per cent satisfaction rating is based on figures extracted from surveys conducted by Link Up service providers. It should be noted that these surveys are voluntary and not all clients complete the survey forms.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(13) Output: Aboriginal and Torres Strait Islander Commission

Senator Crossin (L&C 292) asked for a breakdown of the different programs within the area of substance abuse and family violence?

Answer:

Funding responsibility for programs to combat substance abuse lies with the Department of Health and Ageing, and therefore ATSIC does not provide grants for this purpose.

ATSIC does provide funding specifically for family violence prevention projects, although all of its programs are designed to address the underlying causes of problems such as family violence. ATSIC continues to advocate a holistic and strategic long-term response to the problem of family violence, as well as directing resources to immediate solutions.

Ongoing operational funding from ATSIC's "national" program budget is granted to thirteen family violence prevention services across Australia. The planned funding for each service in the 2002-03 financial year is listed below, along with that for two proposed research projects with national significance and a potential new service in Tasmania.

Each of these thirteen services has the capacity to provide legal assistance, community education, counselling and other appropriate support. The **primary aims** of the services are:

- to give the victims of family violence immediate protection from violence and abuse and assist them to remove themselves from the risk of violence;
- to reduce the incidence of violence and abuse in communities through community education;
- to increase the recognition of the problem of violence and abuse in communities; and
- to facilitate long-term solutions to violence and abuse in communities.

ATSIC's Regional Councils also provide funding for various local family violence prevention initiatives. A detailed breakdown of the $630,380 which Regional Councils are proposing to spend on such projects during 2002-03 is not yet available, but can be provided in July 2002.

State	Location of service	Grantee name	2002-03 funding
NSW	Kempsey	Dhurawa Training and Development Aboriginal Corporation	$ 319,181
	Moree	Kamilaroi Aboriginal Legal Service Inc	$ 331,879
	Walgett	Women's Legal Resources Ltd	$ 289,657
QLD	Cairns (service area includes Cape York)	North Queensland Women's Legal Service Inc	$ 289,657
	Mt Isa	West Queensland Aboriginal and Torres Strait Islanders Corporation for Legal Aid	$ 289,657
SA	Port Augusta	Warndu Watllhilli-Carri Ngura Aboriginal Family Violence Legal Service Inc	$ 281,898
WA	Fitzroy Crossing	Marniwarntikura Fitzroy Women's Resource Centre Aboriginal Corporation	$ 289,657
	Geraldton	Geraldton Yamatji Patrol Aboriginal Corporation	$ 289,657
	Kalgoorlie	Bega Garnbirringu Health Services Aboriginal Corporation	$ 289,657
NT	Alice Springs	Central Australian Aboriginal Legal Aid Service	$ 299,281
	Katherine	Katherine Regional Aboriginal Legal Aid Service Incorporated	$ 289,657
	Darwin	North Australian Aboriginal Legal Aid Service	$ 276,828
VIC	Melbourne	Service provider currently being established - incorporation expected July 2002	$ 289,657
TAS	To be determined	Service provider organisation to be established during 2002/03	$ 210,000
Other	All locations	Capacity building – sexual assault services	$ 120,000
	All locations	Research into potential perpetrator programs	$ 98,743
Various	Various	Local family violence	$ 630,380

		prevention initiatives funded through Regional Council allocations.	
Total			**$4,885,446**

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(14) Output: Aboriginal and Torres Strait Islander Commission

Senator Crossin (L&C 294) asked, "Does the Alcohol Education and Rehabilitation Foundation have indigenous representation?"

Answer:

Yes. Two of the ten directors of the Foundation are Indigenous.

Scott Wilson	(M)	Aboriginal Drug & Alcohol Council (SA)
Dr Ngiare Brown	(F)	World Vision Australia Indigenous Program.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(15) Output: Aboriginal and Torres Strait Islander Commission

Senator Crossin (L&C 294) asked, "Does ATSIC have any input into the alcohol and illicit substance abuse projects targeting Indigenous Australians or any arrangements with the Alcohol Education and Rehabilitation Foundation?"

Answer:

ATSIC still retains an advisory role in relation to policy and priorities in these programs and fully recognises their continuing importance.

There is a range of substance misuse rehabilitation programs seeking to assist those with particular problems. Funding for these is provided through the Office for Aboriginal and Torres Strait Islander Health or the National Drug Strategy, both located within the Department of Health and Aged Care.

The Alcohol Education and Rehabilitation Foundation is an independent foundation with objectives in addressing the abuse of alcohol and other substances. The Foundation has ten directors, two of who are Indigenous.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(16) Output: Aboriginal and Torres Strait Islander Commission

Senator Ludwig (L&C 295) asked for a list of the programs and the way they are funded or the amount of funding provided broken down by state and region.

Answer:

The attached table depicts ATSIC's program budget allocations for 2002-03 by Outputs across Regional Offices and States. These allocations are for grant payments only and do not include any administrative costs associated with grant delivery.

Of the total Program budget of $959.2 million, $625.5 million is allocated through Regional Councils and $333.7 million through National Program Centres. Please note that State and multi-regional grants which provide services to a number of regions in a State have been included under the Regional Office where the grant is administered.

ATSIC 2002-03 Budget Allocations ($) - Regional Councils and National Programs

Outputs	Broadcasting Servcices	Preservation & Protection of Indigeous Culture	Preservation of Indigenous Languages & Recording	Preservation & Protection of Indigenous Heritage & the Environment	Access to effective Family Tracing & reunion services (Link-Up)	Native Title	Advancement of Rights Land & Sea
OFFICE							
Sydney	261,760	287,500	0	128,000	338,000	0	0
Lismore	45,000	248,863	242,164	17,220	0	0	0
Tamworth	0	115,700	52,775	16,850	0	0	0
Queanbeyan	0	40,636	18,977	0	0	0	234,183
Bourke	276,000	0	448,311	208,000	0	0	0
Wagga Wagga	0	145,000	0	170,000	0	0	0
NSW	**582,760**	**837,699**	**762,227**	**540,070**	**338,000**	**0**	**234,183**
VIC - Melbourne	**429,350**	**794,822**	**435,440**	**50,800**	**276,741**	**0**	**180,000**
Brisbane	787,938	817,536	107,000	320,723	759,030	1,900,000	71,443
Rockhampton	394,720	702,603	246,005	85,298	0	1,350,000	12,285
Mt Isa	400,000	90,000	0	450,000	0	1,900,000	0
Townsville	520,000	772,424	190,000	532,111	0	1,342,155	106,231
Cairns	488,234	44,430	231,030	0	0	3,577,686	0
Roma	505,168	302,000	0	131,474	0	0	0
QLD	**3,096,060**	**2,728,993**	**774,035**	**1,519,606**	**759,030**	**10,069,841**	**189,959**
Adelaide	0	93,669	701,959	405,151	403,846	0	953,990
Northern Areas	1,010,710	705,550	0	88,500	0	0	0
Ceduna	0	294,508	0	0	0	0	0
SA	**1,010,710**	**1,093,727**	**701,959**	**493,651**	**403,846**	**0**	**953,990**
Perth	348,818	332,605	135,000	68,987	785,458	0	0
Kalgoorlie	500,021	229,981	198,749	12,175	0	3,464,000	0
Geraldton	0	50,000	223,164	0	0	1,400,000	0
Sth Hedland	130,000	216,000	257,690	0	0	1,900,000	0
Derby	438,257	225,599	134,500	45,464	0	1,900,000	7,544
Kununurra	467,443	333,318	426,470	23,700	0	0	0
Broome	573,620	200,032	30,000	37,657	0	0	0
WA	**2,458,159**	**1,587,535**	**1,405,573**	**187,983**	**785,458**	**8,664,000**	**7,544**
TAS - Hobart	**0**	**354,273**	**242,154**	**439,469**	**139,650**	**0**	**21,960**
Darwin	715,181	839,226	333,634	111,564	313,489	1,377,600	51,791
Nhulunbuy	127,000	326,000	0	108,000	0	0	0
Katherine	66,600	91,373	382,982	0	0	0	0
Tennant Creek	28,251	15,800	188,552	0	0	0	0
Alice Springs	3,651,074	781,771	199,643	0	363,655	1,537,042	0
NT	**4,588,106**	**2,054,170**	**1,104,811**	**219,564**	**677,144**	**2,914,642**	**51,791**
TOTAL ALL REGIONS	**12,165,145**	**9,451,219**	**5,426,199**	**3,451,143**	**3,379,869**	**21,648,483**	**1,639,427**
National Office	**1,023,618**	**880,166**	**333,113**	**637,462**	**575,131**	**30,593,878**	**1,018,665**
GRAND TOTAL	**13,188,763**	**10,331,385**	**5,759,312**	**4,088,605**	**3,955,000**	**52,242,361**	**2,658,092**

ATTACHMENT - Question No. 16

ATSIC 2002-03 Budget Allocations ($) - Regional Councils and National Programs

Outputs	Indigenous Rights	Indigenous Women	Public Information	Torres Strait Islanders on the Mainland	Community Housing & Infrastructure	Municipal Services	Home Loans
OFFICE							
Sydney	0	107,302	130,000	0	18,589,788	0	12,000
Lismore	0	140,000	75,000	0	370,000	0	12,000
Tamworth	0	35,276	36,000	0	2,694,496	0	12,000
Queanbeyan	0	0	50,000	0	4,023,220	0	0
Bourke	0	55,000	30,000	0	0	0	0
Wagga Wagga	0	100,000	56,500	0	1,255,000	0	12,000
NSW	**0**	**437,578**	**377,500**	**0**	**26,932,504**	**0**	**48,000**
VIC - Melbourne	**0**	**112,212**	**99,250**	**0**	**5,290,044**	**728,700**	**12,000**
Brisbane	0	345,428	88,000	0	3,509,040	0	12,000
Rockhampton	0	127,346	49,120	0	3,482,025	417,600	12,000
Mt Isa	0	374,000	5,000	0	5,261,607	440,000	0
Townsville	0	100,000	150,000	0	6,325,360	407,930	12,000
Cairns	0	605,028	65,000	0	21,293,250	1,812,115	0
Roma	0	187,079	70,000	0	3,312,266	856,760	0
QLD	**0**	**1,738,881**	**427,120**	**0**	**43,183,548**	**3,934,405**	**36,000**
Adelaide	0	118,081	6,000	0	8,932,532	1,164,955	12,000
Northern Areas	0	334,239	10,000	0	3,529,991	5,391,898	0
Ceduna	0	218,386	5,303	0	599,198	1,008,566	0
SA	**0**	**670,706**	**21,303**	**0**	**13,061,721**	**7,565,419**	**12,000**
Perth	0	45,000	98,000	0	17,768,557	267,000	12,000
Kalgoorlie	0	220,750	67,189	0	3,723,938	6,769,478	0
Geraldton	0	181,379	198,073	0	1,803,395	343,643	0
Sth Hedland	0	90,000	10,000	0	4,158,745	1,117,756	0
Derby	0	282,019	0	0	6,250,669	2,258,165	0
Kununurra	0	64,365	5,000	0	2,328,449	3,826,180	0
Broome	0	142,149	23,405	0	9,179,073	2,140,755	6,000
WA	**0**	**1,025,662**	**401,667**	**0**	**45,212,826**	**16,722,977**	**18,000**
TAS - Hobart	**0**	**122,575**	**0**	**0**	**2,014,185**	**227,689**	**6,000**
Darwin	0	130,000	46,125	0	58,752,365	2,832,707	12,000
Nhulunbuy	0	65,000	0	0	663,911	2,059,229	0
Katherine	0	340,400	10,000	0	839,300	2,462,637	0
Tennant Creek	0	113,550	0	0	340,701	704,598	0
Alice Springs	0	0	0	0	4,119,227	3,829,644	6,000
NT	**0**	**648,950**	**56,125**	**0**	**64,715,504**	**11,888,815**	**18,000**
TOTAL ALL REGIONS	**0**	**4,756,564**	**1,382,965**	**0**	**200,410,332**	**41,068,006**	**150,000**
National Office	**355,000**	**0**	**1,475,000**	**740,000**	**14,055,269**	**0**	**495,000**
GRAND TOTAL	**355,000**	**4,756,564**	**2,857,965**	**740,000**	**214,465,601**	**41,068,006**	**645,000**

ATTACHMENT - Question No. 16

ATSIC 2002-03 Budget Allocations ($) - Regional Councils and National Programs

Outputs	Sport Opportunities for Indigenous People	Legal Aid	Law & Justice Advocacy	Family Violence Prevention	Prevention, Diversion & Rehabilitation	Business Development & Assistance	Employment & Training
OFFICE							
Sydney	343,283	3,341,874	848,887	46,608	591,629	2,000,000	0
Lismore	180,150	1,695,842	30,000	319,181	140,500	0	81,000
Tamworth	155,500	1,007,697	0	331,879	46,600	0	0
Queanbeyan	209,000	1,000,959	0	55,000	174,931	0	0
Bourke	176,100	1,690,984	0	289,657	57,010	0	0
Wagga Wagga	125,000	1,420,715	0	0	124,732	1,620,000	0
NSW	**1,189,033**	**10,158,071**	**878,887**	**1,042,325**	**1,135,402**	**3,620,000**	**81,000**
VIC - Melbourne	**656,123**	**2,182,646**	**156,734**	**0**	**223,202**	**1,650,000**	**0**
Brisbane	275,900	3,593,983	1,534,256	75,522	471,845	1,880,000	0
Rockhampton	270,192	1,260,040	123,912	0	67,031	0	0
Mt Isa	360,000	851,952	0	289,657	175,000	0	0
Townsville	100,000	1,553,132	0	60,000	140,000	0	0
Cairns	254,489	1,929,025	0	528,657	131,485	1,550,000	0
Roma	532,763	3,029,889	0	20,000	44,651	0	0
QLD	**1,793,344**	**12,218,021**	**1,658,168**	**973,836**	**1,030,012**	**3,430,000**	**0**
Adelaide	57,000	3,425,828	51,258	0	589,659	1,560,000	0
Northern Areas	532,202	0	0	281,898	0	0	10,000
Ceduna	199,988	0	0	0	0	0	0
SA	**789,190**	**3,425,828**	**51,258**	**281,898**	**589,659**	**1,560,000**	**10,000**
Perth	130,000	6,433,998	149,672	60,642	529,831	2,322,000	0
Kalgoorlie	460,736	0	27,485	291,657	101,289	0	10,000
Geraldton	145,805	0	0	289,657	166,816	0	0
Sth Hedland	92,000	0	0	0	0	0	0
Derby	200,000	50,000	0	289,657	40,858	0	133,000
Kununurra	106,520	0	0	0	0	0	104,000
Broome	88,020	0	0	9,300	15,599	2,005,000	37,000
WA	**1,223,082**	**6,483,998**	**177,157**	**940,913**	**854,393**	**4,327,000**	**284,000**
TAS - Hobart	**97,710**	**936,249**	**0**	**5,908**	**216,043**	**1,750,000**	**0**
Darwin	275,484	2,091,957	105,925	299,828	99,142	2,270,000	0
Nhulunbuy	100,000	428,905	0	0	0	0	0
Katherine	189,940	790,520	0	305,057	225,350	0	30,000
Tennant Creek	251,160	0	0	18,000	58,300	50,000	0
Alice Springs	705,846	1,972,748	0	299,281	715,448	1,300,000	67,000
NT	**1,522,430**	**5,284,130**	**105,925**	**922,166**	**1,098,240**	**3,620,000**	**97,000**
TOTAL ALL REGIONS	**7,270,912**	**40,688,943**	**3,028,129**	**4,167,046**	**5,146,951**	**19,957,000**	**472,000**
National Office	**2,359,000**	**2,670,230**	**1,123,134**	**718,400**	**0**	**11,514,000**	**518,000**
GRAND TOTAL	**9,629,912**	**43,359,173**	**4,151,263**	**4,885,446**	**5,146,951**	**31,471,000**	**990,000**

ATSIC 2002-03 Budget Allocations ($) - Regional Councils and National Programs

Outputs	CDEP Wages	CDEP Oncosts	Planning & Partnership Development	Business as Separate Legal Entities	Welfare Reform & Participation	Output Support Funds	GRAND TOTAL
OFFICE							
Sydney	4,865,400	1,517,760	204,000	0	0	0	33,613,791
Lismore	16,790,400	5,252,695	170,000	0	0	0	25,810,015
Tamworth	10,875,600	3,392,640	92,299	0	0	0	18,865,312
Queanbeyan	3,339,000	1,041,600	115,053	0	0	0	10,302,559
Bourke	12,173,040	3,797,376	194,473	0	0	0	19,395,951
Wagga Wagga	8,595,540	2,681,376	456,929	0	0	0	16,762,792
NSW	**56,638,980**	**17,683,447**	**1,232,754**	**0**	**0**	**0**	**124,750,420**
VIC - Melbourne	**9,454,140**	**3,007,788**	**174,350**	**0**	**0**	**0**	**25,914,342**
Brisbane	5,294,700	1,651,680	131,000	0	0	0	23,627,024
Rockhampton	5,008,500	1,562,400	151,190	0	0	0	15,322,267
Mt Isa	9,001,500	2,720,850	130,000	0	0	0	22,449,566
Townsville	10,076,250	3,076,935	181,000	0	0	0	25,645,528
Cairns	45,957,450	14,093,429	556,806	0	0	0	93,118,114
Roma	9,683,100	3,020,640	10,000	0	0	0	21,705,790
QLD	**85,021,500**	**26,125,934**	**1,159,996**	**0**	**0**	**0**	**201,868,289**
Adelaide	6,439,500	2,119,562	95,000	0	0	0	27,129,990
Northern Areas	13,810,500	4,257,940	20,000	0	0	0	29,983,428
Ceduna	7,125,300	2,179,050	5,250	0	0	0	11,635,549
SA	**27,375,300**	**8,556,552**	**120,250**	**0**	**0**	**0**	**68,748,967**
Perth	17,076,600	5,458,066	776,000	0	0	0	52,798,234
Kalgoorlie	17,532,390	5,327,811	94,000	0	0	0	39,031,649
Geraldton	9,502,650	2,914,364	67,000	0	0	0	17,285,946
Sth Hedland	7,476,540	2,286,015	107,000	0	0	0	17,841,746
Derby	19,114,950	5,881,205	0	0	0	0	37,251,887
Kununurra	14,137,650	4,359,233	100,000	0	0	0	26,282,328
Broome	16,891,050	5,105,595	0	0	0	0	36,484,255
WA	**101,731,830**	**31,332,289**	**1,144,000**	**0**	**0**	**0**	**226,976,046**
TAS - Hobart	**1,520,700**	**470,280**	**27,000**	**0**	**0**	**0**	**8,591,845**
Darwin	25,204,200	7,632,519	255,000	0	0	0	103,749,737
Nhulunbuy	18,320,700	6,124,972	273,852	0	0	0	28,597,569
Katherine	19,909,200	6,017,880	71,336	0	0	0	31,732,575
Tennant Creek	8,313,150	2,512,785	43,000	0	0	0	12,637,847
Alice Springs	16,785,150	5,112,734	67,000	0	0	0	41,513,263
NT	**88,532,400**	**27,400,890**	**710,188**	**0**	**0**	**0**	**218,230,991**
TOTAL ALL REGIONS	**370,274,850**	**114,577,180**	**4,568,538**	**0**	**0**	**0**	**875,080,900**
National Office	**247,750**	**509,805**	**1,540,146**	**1,641,000**	**3,875,766**	**5,244,241**	**84,143,774**
GRAND TOTAL	**370,522,600**	**115,086,985**	**6,108,684**	**1,641,000**	**3,875,766**	**5,244,241**	**959,224,674**

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(17) Output: Aboriginal and Torres Strait Islander Commission

Senator Scullion (L&C 295/296) asked:

In relation to the National Indigenous Development Alliance Limited (NIDA):

a) What form do the grants and loans take?
b) How much money has the company made?
c) What is the process for securing a loan?
d) What sort of security was obtained for those loans?
e) Can you provide a copy of the Deloitte report?

Answer:

(a). ATSIC has provided the following **Grants** to NIDA:-

1999-00	$360,215	Establishment and administrative costs to assist with progressing a proposed Joint venture with Elders Insurance Limited.
2000-01	$303,725	Operational Funding October 2000 to January 2001 to enable market research on the Indigenous economy.
2000-01	$47,749	Operational expenses for February – April 2001.
2000-01	$95,942	Operational expenses for May – June 2001.
2001-02	$275,400	Funding for Workers Compensation Feasibility Study
2001-02	$511,700	Funding for Business Plan for Indigenous Joint Pastoral Ventures
2001-02	$309,000	Working Capital for Insurance Services – this has been repaid in full
2001-02	$750,000	Capital injection to enable NIDA to continue operations pending agreement with Westpac over the financing of the purchase of Brookman Porter, the proposed purchase of Holdfast, and, if, possible, refinancing the previous purchases. The grant is to be converted into a loan if an agreement with Westpac does not eventuate.

ATSIC has provided one **Loan** to NIDA for working capital, and one Loan to its wholly owned subsidiary business, NIDA Intermediary Insurance Services (NIIS), to

purchase two insurance brokerages and to provide working capital for the brokerages.

(b). **NIDA/NIIS Profits.**

NIDA's operating surplus is reported in its financial statements lodged with the Australian Securities and Investments Commission. For the year 2001-02 the net surplus was reported as $97905.

(c). **Security - process.**

The BDP Policy states that:

> "ATSIC requires that borrowers provide adequate and appropriate security when a loan, grant or guarantee facility is provided.
>
> "Adequate security" means that items offered as security must, after depreciation, cover at least 85% of the total amount financed.
>
> "Appropriate security" means items of sufficient real value that they can be sold to recover loan funds in cases of default.
>
> The BDP Procedures set out the policy and add:

"In special circumstances a delegate may reduce the security requirement to 60%.

"The Commission accepts the following as appropriate security:

- freehold land;
- buildings;
- machinery;
- heavy vehicles;
- plant and equipment;
- fixtures and fittings;
- transferable rights and licences;
- tenancy leases in some cases;
- non-perishable major stock items in some cases;
- personal guarantees subject to the Commission being satisfied sponsors can support the guarantees and both the applicants and sponsors receiving independent legal counselling as to their obligations under the terms of personal guarantees; and

"The Commission will **not** accept the following as security:

- private benefits such as superannuation; and
- an applicant's home except in <u>exceptional</u> circumstances where no other appropriate security is available and the owner's equity in the property is greater than the loan. Where a home forms an integral part of a business proposal the Commission will consider the home as part of the business and therefore as part of security.

- goodwill where it forms part of a business purchase and has an independently assessed collateral value."

The BDP procedures also give detailed guidance on appropriate lending margins for the assessment of security and equity.

The procedures allow delegates approving security to vary the eligibility requirements on the basis of advice from a consultant and supporting recommendations from the next senior BDP officer below the delegate.

Security documents, such as a fixed and floating charge, are centrally stored within the ATSIC Legal Branch in Canberra. A copy of the security documents is commonly held on the loan files.

(d). **Security Taken.**

ATSIC has taken the following security:-

1. Fixed and Floating Charge over the assets of National Indigenous Development Alliance Limited; and

2. Fixed and Floating Charge over the assets of NIDA Insurance Intermediary Services Pty Ltd.

(e). **The Deloitte Touche Tohmatsu Report.**

The Deloitte Touche Tohmatsu Report contains strategic information public disclosure of which would be detrimental to the commercial interests of the two corporations. A private briefing on the economic environment in which Indigenous corporations operate can be provided to Committee members if required.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(18) Output: Aboriginal and Torres Strait Islander Commission

Senator Scullion (L&C 296) asked, "Are ATSIC Commissioners paid members of the boards of NIDA and NIDA subsidiaries?"

Answer:

No. The NIDA Board members are reimbursed for travel expenses.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(19) Output: Central Land Council

Senator Scullion asked, "How many staff are permanently located outside Darwin (for the NLC)/Alice Springs (for the Central Land Council (CLC)) and where are these staff located?"

Answer:

CLC has 18 employees permanently located outside Alice Springs as follows: Mutitjulu x 2; Kalkaringi x 1; Yuendumu x 1; Lajamanu x 1; Papunya x 1; Utopia x 1; Harts Range x 2; Tennant Creek x 9.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(19) Output: Northern Land Council

Senator Scullion asked, "How many staff are permanently located outside Darwin (for the NLC)/Alice Springs (for the Central Land Council (CLC)) and where are these staff located?"

Answer:

The number of staff permanently located outside Darwin is 28. The location of these staff, including current vacant positions, is as follows: Palmerston (Darwin/Daly/Wagait branch) – 4; Borroloola – 2; Jabiru – 6; Katherine – 7; Ngukurr – 1; Nhulunbuy – 4; Peppimenarti – 1; Tennant Creek – 1; Timber Creek – 2.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(20) Output: Central Land Council

Senator Scullion asked:

How many staff are currently employed in relation to the following:

a) ALRA land claims.
b) NTRB functions.
c) ELAs under the ALRA.

Answer:

The CLC operational structure is based around nine sections – Directorate; Legal Services; Anthropology; Mining; Land Management; Economic Development; Regional Services; Corporate Services and the Native Title Unit. With the exception of the Native Title Unit, staff elsewhere in the organisation work on any number of the many functions that the CLC performs.

a) Legal Section: 4 Lawyers undertake land claim work amongst other duties.
   Anthropology Section: currently 3 casual staff are working exclusively on land claims, with the Section Manager and Research Assistant undertaking land claim work amongst other duties.

b) 21 staff employed in the Native Title Unit are dedicated to working on NTRB functions.
   7 permanent staff in Anthropology Section and 7 permanent staff in Mining Section regularly contribute to NTRB functions amongst other duties.

c) 4 Legal Section lawyers undertake ELA work amongst other duties.
   8 Anthropology Section staff undertake work in relation to ELAs amongst other duties. These include traditional owner identification, site clearance, research and other advice as necessary.
   7 Mining Section staff undertake work in relation to ELAs amongst other duties. These include consultations with traditional owners, conducting meetings, negotiations with mining companies etc.

It is important to note that various other CLC staff also contribute to the performance of these functions, for example: Regional Services staff assist with the coordination of bush meetings irrespective of the nature of business at hand, this includes liaising with and transporting traditional owners, preparing the venue, catering, etc. Corporate Services staff also directly contribute through financial administration and the provision of support services in the performance of these functions.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(20) Output: Northern Land Council

Senator Scullion asked:

How many staff are currently employed in relation to the following:

a) ALRA land claims.
b) NTRB functions.
c) ELAs under the ALRA.

Answer:

The Northern Land Council's structure is based around six branches – legal, anthropology, resource management, regional development, secretarial and corporate services. Particular staff members do not usually work solely in relation to one category of Land Council business. The answer to question 21 provides a fair representation of the costs related to each of the activities described in this question, including staff time. There are 21 staff positions funded directly by Native Title grant funding, with more than 40 staff involved to some extent in Native Title projects and administration.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(21) Output: Central Land Council

Senator Scullion asked:

How much expenditure has been incurred since 1 July 2000 in relation to the following:

a) ALRA land claims.
b) NTRB functions.
c) ELAs under the ALRA.

Answer:

The CLC Native Title Unit, Legal, Anthropology and Mining Sections are primarily responsible for fulfilling these functions. With the exception of the Native Title Unit, the other sections do not distinguish in their budgets, the expenditure between work on NTRB and ALRA functions as many of these are carried out simultaneously (ie on the same field trips).

a) $185,878
b) $4,611,542 (operational and staff costs of CLC Native Title Unit – excludes cost of other CLC staff time)
c) $447,969 (recoverable – meeting expenses); $23,289 (non-recoverable)

With the exception of b); staff time and internal administration costs have not been apportioned to specific functions a) & c).

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(21) Output: Northern Land Council

Senator Scullion asked:

How much expenditure has been incurred since 1 July 2000 in relation to the following:

a) ALRA land claims.
b) NTRB functions.
c) ELAs under the ALRA.

Answer:

a) $5,704,705
b) $5,112,336 and
c) $3,003,806.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(22) Output: Central Land Council

Senator Scullion asked, “How many ELA negotiations under the ALRA have been concluded resulting in either agreement or veto since 1 July 2000?”

Answer:

The CLC has concluded 110 ELAs since 1 July 2000.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(22) Output: Northern Land Council

Senator Scullion asked, "How many ELA negotiations under the ALRA have been concluded resulting in either agreement or veto since 1 July 2000?"

Answer:

Fifty-nine negotiations have been concluded with 36 resulting in approvals and 23 have been place in moratorium. Twenty-three further consents to negotiate have been issued.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(23) Output: Central Land Council

Senator Scullion asked: "How much funding has been received from mineral resource companies for ALRA ELA negotiations since 1 July 2000?"

Answer:

The CLC does not receive funding from mineral resource companies. Mineral resource companies do however provide (on a cost recovery basis) for the expenses related to specific meetings. See question 21 c).

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(23) Output: Northern Land Council

Senator Scullion asked: "How much funding has been received from mineral resource companies for ALRA ELA negotiations since 1 July 2000?"

Answer:

The Northern Land Council (NLC) does not receive any funding from mineral resource companies. The NLC provides services to Aboriginal groups, the cost of which may be partially recovered at cost from mineral resource companies. Since 1 July 2000 $1,030,708 has been recovered on that basis in relation to ALRA ELA negotiations.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(24) Output: Central Land Council

Senator Scullion asked: "What are the names of all consultants engaged since 1 July 2000 and what was the purpose of their engagement?"

Answer:

AKA Consulting – Anthropological research & advice
John Cook – Anthropological research & advice
Susan Donaldson – Anthropological research & advice
Derek Elias – Anthropological research & advice
Craig Elliot – Anthropological research & advice
Anthony Gatti – Anthropological research & advice
Jenny Green – Anthropological research & advice
Anna Kenny – Anthropological research & advice
Alan Lance – Anthropological research & advice
Dr John Morton – Anthropological research & advice
David Nash – Anthropological research & advice
Mintupela P/L – Anthropological research & advice
Nicholas Peterson – Anthropological research & advice
Lee Sackett – Anthropological research & advice
Dr Mike Smith – Archaeological research & advice
Jeff Stead – Anthropological research & advice
Daniel Suggitt – Anthropological research & advice
Peter Sutton – Anthropological research & advice
Vaarzon – Morel – Anthropological research & advice
Carol Ruff – Artist/Designer
Jo Boniface – Design/Layout
Environmental & Earth Sciences P/L – Cyanide spill and tailings disposal
URS P/L – Groundwater study
Heritage Consulting – Archaeological survey
Peter Thorley – Archaeological research/heritage management
John Robertson – Economist
Jajirdi Consultants – Job selection panel participation
David Kloiber – Geological advice
Thomas James Gara – Historical research
Paul Amanda – Historical/Archaeological advice
Paul Josif – Land assessment/Social geographic planning
Sam Miles – Land assessment planning
Margaret Allars – Legal advice
Chris Athanasiou – Legal advice
Ian Barker – Legal advice & representation

John Basten – Legal advice & representation
Robert Blowes – Legal advice
Ross Howie – Legal advice & representation
Mark Irving – Legal advice & representation
Tom Keely – Legal advice & representation
Brett Midena – Legal advice
James Nugent – Legal advice
Melinda Richards – Legal advice & representation
Tim Robertson – Legal advice & representation
Brett Baker – Linguistic services
Suzanne Gibson – Researcher
Alison Cottrel – Social Impact assessment
Richie Howitt – Social Impact assessment
Jeff Hulcombe – Policy advice
Tracker Tilmouth – Policy advice
Alexis Wright – Policy advice
David Morrissey – Strategic planning
Warren Smith – Strategic planning
Employee Assistance Service – Remuneration and Classification Review
Professional Advantage – Accounting software support
Chris Carey – Accounting Services
Deloitte Tohmatsu – Accounting services
Greg Crough – Financial advice.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(24) Output: Northern Land Council

Senator Scullion asked: "What are the names of all consultants engaged since 1 July 2000 and what was the purpose of their engagement?"

Answer:

The consultants engaged during the 2000-01 financial year are listed below:

Glacken, Sturt – Legal Advice and Representation
Allen Allen & Hernsley – Legal Advice and Representation
Basten, John – Legal Advice and Representation
Howie, Ross – Legal Advice and Representation
Goodall, Carey – Legal Advice and Representation
Becket, Simeon – Legal Advice and Representation
D'rozari, June – Legal Advice and Representation
Frith, Angus – Legal Advice and Representation
Williams, Neil – Legal Advice and Representation
C.P. Moore Business Systems – Accounting Software Support
Priestleys – Legal Advice and Representation
Cleland McFarland – Legal Advice and Representation
Lynch, Mark – Legal Advice and Representation
Watkins, Naire – Accounting Support and Advice
Keely, Tom – Legal Advice and Representation
KPMG – Accounting and Taxation Advice and Support
Graham, Robert – Anthropological Services
Blaze Business Software P/L – Accounting software support
Parsons, D.A. – Legal Advice and Representation
Camilleri, Tony – Media support
Midena, Brett – Legal Advice and Representation
Athanasiou, Chris – Legal Advice and Representation
Jackson, Sue – Environment impact assessment
Garde, Murray – Translation services
Ernst & Young – Accounting Services
Blowes, Robert – Legal Advice and Representation
Dunhill Management Services – Recruitment support and services
Niblett, Michael – Anthropological services
Spark & Cannon – Transcript services
L.J. Hooker – Property management advice
McLaughlin, Dehne – Environmental management advice
Sailesh, Rai – Legal Advice and Representation
Dalrymple & Associates – Legal Advice and Representation

Jawoyn Association – Site clearance
Dalziel, Jamie – Legal Analysis
Gulin Gulin & Weemol Council – Site clearance
Taylor-Hunt, Dominic – Environmental management
Uren, Chris – Project management
Rosewood Project Management P/L – Economic Development advice
Carroll's Consultancy – Accountancy and Secretarial support services
DJWP Revel P/L – Economic Development advice
Manning, Ian Dr – Economic Development advice
Donald, Bruce – Legal and Economic Development advice
Maloney, Josephine – Participative planning support
Greening Australia – Environmental management advice
Demed Association Inc – Site clearance
Bawinanga Aboriginal Corp – Site clearance
Suggit, Daniel – Anthropological advice
Cook, John – Anthropological research
Pollard, Kellie – Anthropological support
Centre for Studies of Language – Interpreting
Dupont-Morris, Delphine – Anthropological research
Delaney, Chris – Anthropological research
Niblett, Michael – Anthropological research
Gilmour & Associates – Legal advice and project management services
Savvy Community Development Consultants – Sea country management advice
Maningrida Arts & Culture – Site clearance
Computer Support and Maintenance – Computer support
Lum, Ken – Anthropological research
Kwok, Natalie – Anthropological research
Rose & Lewis – Ethnological and historical research
Dodson, Bauman & Associates – Anthropological research
Dixon, Roderick – Economic development research
Pickering, Michael – Anthropological research
Walsh, Michael – Genealogical research
Wells, Samantha – Historical research
Munro, Jennifer – Anthropological research
Centre for Aboriginal Economic Policy Research – Economic development advice
McKown Ygoa & Associates – Anthropological research
Tallegalla Consultants – Commercial and Environmental management planning advice
Kim Barber – Anthropological research
Bowchung P/L – Anthropological research
Jessica Klingender – Legal Advice and Representation
Chips Macinolty – Land use negotiations
Dr McWilliam, Andrew – Anthropological research
MLCS Corporate – Legal Advice and Representation
Merlin, Francesca – Anthropological research
Munro, Jennifer – Anthropological research
Nolan, Anna – Anthropological research
Pye, Margo – Historical research
Fitzgerald, Tony – Economic development research and assessment
Herron Todd White – Land valuation

Altman, Jon – Anthropological advice
Bourke, Patricia – Ethnoarchaelogical research
Delaney, Chris – Negotiation facilitation
Environmental Consulting & Analytical Services P/L – Environmental management research
FPJ Robotham Consulting – Environmental management research
Diwurruwurru-jara Aboriginal Corporation – Anthropological research
Kumerage, Jitendra – Anthropological research
Lloyd, Jane – Land management research and advice.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(25) Output: Central Land Council

Senator Scullion asked, "What is the total expenditure on consultants since 1 July 2000?"

Answer:

The CLC's total expenditure on consultants since 1 July 2000 has been $1,476,014.

Note:
a) The cost of many anthropological/archaeological consultants was recovered from proponents;
b) Costs associated with some legal consultants also appear as litigation expenditure at question 26.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(25) Output: Northern Land Council

Senator Scullion asked, “What is the total expenditure on consultants since 1 July 2000?”

Answer:

Total expenditure on consultants since 1 July 2000 has been $2,668,178.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(26) Output: Central Land Council

Senator Scullion asked, "What is the total expenditure on litigation since 1 July 2000?"

Answer:

It is important to note much of the work in relation to all litigation concerning CLC is done internally by employed lawyers. These figures relate to expert advice from barristers and the cost of counsel appearing for and on behalf of the CLC, it does not include staff time and internal administration costs.

Total direct litigation costs incurred by the CLC since 1 July 2000 were:

Native Title litigation:	$ 567,356
Other:	$ 342,324**
Total	$ 909,680

**To put this figure into perspective, the CLC is aware that between 1996 and March 2001, the Northern Territory Government paid a figure estimated in excess of $1m (not including trial costs) to Noonan's Lawyers of Darwin for the conduct of the Alcoota court case against claimants in the land claim, and the CLC. The litigation costs incurred by the CLC were largely as a result of defending that case on behalf of the claimants and the CLC.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(26) Output: Northern Land Council

Senator Scullion asked, "What is the total expenditure on litigation since 1 July 2000?"

Answer:

Total direct expenditure on litigation since 1 July 2000 has been $166,781, with staff time and internal management and administration costs not apportioned to individual projects.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(27) Output: Central Land Council

Senator Scullion asked, "What is the total expenditure on sitting fees and travel costs paid to Council members since 1 July 2000?"

Answer:

CLC's total expenditure on sitting fees and travel costs paid to Council members since 1 July 2000 is $137,027.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(27) Output: Northern Land Council

Senator Scullion asked, “What is the total expenditure on sitting fees and travel costs paid to Council members since 1 July 2000?”

Answer:

Total expenditure on sitting fees and travel costs paid to Council members since 1 July 2000 had been $706,656.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(28) Output: Central Land Council

Senator Scullion asked, “How many applications for permits to access Aboriginal land have not been processed?”

Answer:

Nil.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(28) Output: Northern Land Council

Senator Scullion asked, "How many applications for permits to access Aboriginal land have not been processed?"

Answer:

More than 25,000 permits have been processed since 1 July 2000. All applications received are generally processed within 10 days of receipt. There are currently 24 applications being processed. None of these applications is older than 6 weeks.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(29) Output: Central Land Council

Senator Scullion asked, “How many permit applications that have not been processed were received more than six weeks ago?”

Answer:

Nil.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(29) Output: Northern Land Council

Senator Scullion asked, “How many permit applications that have not been processed were received more than six weeks ago?”

Answer:

Nil.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(30) Output: Central Land Council

Senator Scullion asked, “How many permit applications that have not been processed were received more than six months ago?”

Answer:

Nil.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(30) Output: Northern Land Council

Senator Scullion asked, “How many permit applications that have not been processed were received more than six months ago?”

Answer:

Nil.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(31) Output: Northern Land Council

Senator Scullion asked, "What is the total number of staff currently employed by the Northern Land Council (NLC) and the current total annual salary budget?"

Answer:

As at 21 June 2002 the Northern Land Council has total staff of 119. The approved salary budget for 2001-02 is $4,726,155.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(32) Output: Northern Land Council

Senator Scullion asked, “Is it true, as suggested in the Notes to the NLC’s audited financial statements, that the NLC owns 75 per cent of the shares of the Northern Aboriginal Investment Corporation Pty Ltd (NAIC)?”

Answer:

Yes.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(33) Output: Northern Land Council

Senator Scullion asked:

a) Who are the current directors of the NAIC?
b) Are any of these individuals also staff or Council members of the NAIC?

Answer:

a) Galarrwuy Yunupingu, Max Finlay, George Campbell, Dhuwarrwarr Marika, Kevin Rogers, John Daly, Bunung Galaminda, Mary Yarmirr.

b) No. The aforementioned directors of NAIC are Full Council members of the Northern Land Council.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(34) Output: Northern Land Council

Senator Scullion asked:

a) Does the NLC have a role in the appointment of directors of the NAIC?
b) If so, what is that role?

Answer:

a) Yes.

b) The NLC's role is that of a shareholder. The role of shareholders ordinarily may include determining the directors of the company in which shares are held.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(35) Output: Northern Land Council

Senator Scullion asked:

a) Has the NLC ever requested a mineral resource company to pay funds to the NAIC?

b) If so, what was the amount and for what purpose?

Answer:

a) No.

b) N/A.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(36) Output: Northern Land Council

Senator Scullion asked:

a) What is the value of the NAIC's current assets and liabilities?
b) What do those assets comprise?

Answer:

a) Assets $137, liabilities $0.

b) Cash.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(37) Output: Northern Land Council

Senator Scullion asked, "What was the total revenue of the NAIC in the last financial year and from what sources?"

Answer:

$219 from the Northern Australian Aboriginal Charitable Trust.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(38) Output: Northern Land Council

Senator Scullion asked, “Will the NLC make available to the Committee a set of the last audited accounts of the NAIC?”

Answer:

On the assumption this question constitutes a request for these statements, a copy of the last audited accounts is attached.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(39) Output: Refugee Review Tribunal

Senator Ludwig (L&C 372) asked for legal bulletins and commentary indicating the cases, facts and the decision arising out of them, in particular those that relate to Miah ex parte A, in the High Court; and Aala in the High Court; Justice Gyles in the Federal Court relating to NAAX; and the peripheral one attached to NAAX, which is NAAV.

Answer:

The following have been provided to all members of the RRT (copies attached):

- 20 November 2000, a case note referring to the implications for the Tribunal of *Re Refugee Review Tribunal; Ex parte Mansour AALA,* and a link to the full judgment
- 20 November 2000, a summary of the judgment in *Re Refugee Review Tribunal; Ex parte Mansour AALA*
- 4 December 2000, Legal Research Bulletin No.52 entitled: *The Implications of Re RRT; Ex parte Aala*
- 18 May 2001, a case note referring to the implications for the Tribunal of *Re MIMA & Anor; Ex MD Ataul Haque MIAH,* and a link to the full judgment
- 18 May 2001, a summary of the judgment in *Re MIMA & Anor; Ex MD Ataul Haque MIAH*
- 7 June 2001, Legal Research Bulletin No.57 entitled: *Recent High Court Decisions on Procedural Fairness*
- 5 October 2001, Legal Research Bulletin No.65 entitled: *New Legislation: Judicial Review of Migration Decisions under the Migration Act 1958*
- 20 March 2002, a case note referring to the implications for the Tribunal of *NAAX v MIMA*
- 20 March 2002, a summary of the judgments in NAAX v MIMA and NAAV v MIMA, with a hypertext link to the full judgment of Gyles, J.

Re Refugee Review Tribunal & Anor; Ex parte Mansour AALA

[2000] HCA 57

High Court of Australia, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne, Callinan JJ, S185 of 1999, 16 November 2000

This was an application in the original jurisdiction of the Court to make absolute orders nisi for writs of mandamus, prohibition and certiorari.

The prosecutor, an Iranian national, had claimed a fear of persecution on the basis of an imputed political opinion. The prosecutor told the Tribunal (the first tribunal) that he and a business associate, T, had illegally sold real estate for the Shah. The first Tribunal was not satisfied there was a real chance that T had told the Iranian authorities about the prosecutor's illegal dealings.

The decision of the first tribunal was set aside by the Full Federal Court. Before the Court, the prosecutor had submitted statements in which he claimed that he and T had made an agreement that if T was investigated after the prosecutor's departure form Iran, he should disclose incriminating information about the prosecutor to help himself.

At the hearing before the second Tribunal, the tribunal stated: *"I've got [your] Department of Immigration file and your old Refugee Tribunal file and your new Refugee Tribunal file plus all of the Federal Court papers."* The second tribunal subsequently found the prosecutor was not a person to whom Australia had protection obligations. It found that assisting in the sale of the Shah's properties was not of itself sufficient to be regarded as a political risk to the authorities. The Tribunal noted that "*there is no evidence...apart from the [prosecutor's] own claims, to suggest that … any person caught facilitating sales of properties for the Shah…for profit are imputed with a political opinion".* It found the prosecutor concocted his evidence of a pact with T, noting that *"prior to the second Tribunal hearing, the [prosecutor] had never raised the claim that he and [T] had an agreement".* It went on to conclude that even if T did inform the authorities of the prosecutor's illegal dealings, the Tribunal was not satisfied that he had a well founded fear for a Convention reason.

The issues before the Court were:

- whether the tribunal breached the rules of natural justice by failing to take into account the statements made to Full Court about the agreement with T, and misleading the prosecutor into believing that those statements would be considered;
- whether, if it did breach the rules, relief should be denied because the breach would have made no difference to the decision of the Tribunal;
- whether a breach of the rules of natural justice by the Tribunal attracts the writs of mandamus and prohibition;
- whether there is a general discretion to refuse relief in the form of prohibition;
- whether the writ of certiorari is available.

Held: ***per Gleeson CJ, Gaudron, Gummow, Kirby, Hayne, Callinan JJ* (McHugh J dissenting)*, granting the relief**

per curium:

(i) There was a breach of the rules of natural justice. As a result of the conduct of the Tribunal, the prosecutor was deprived of a fair opportunity of presenting his case and of correcting an erroneous and unfavourable factual assumption relevant to his credibility.

per Gleeson CJ, Gaudron, Gummow, Kirby, Callinan JJ

(ii) It could not be concluded that the breach made no difference to the outcome of the proceedings.

(iii) The denial of procedural fairness by an officer of the Commonwealth may result in a decision made in excess of jurisdiction in respect of which prohibition will go under s.75(v) of the Constitution.

(iv) The remedy of prohibition under s 75(v) does not lie as of right, but is discretionary.

per Gaudron & Gummow, Kirby, Hayne JJ

(v) The 5 month delay between the end of the Federal Court proceedings and the application to the High Court was not such as to merit the disqualification of the prosecutor from relief to which he would otherwise be entitled.

per Gleeson CJ, Callinan J

(vi) The fact that the misleading conduct resulted from an innocent misstatement does not alter the position.

per Gaudron & Gummow

(vii) There is no universal proposition that before the Tribunal ever makes a finding adverse to an applicant, it is necessary for it to put to the applicant the concerns which are inclining the Tribunal towards such an adverse finding. The procedure is inquisitorial and not adversarial.

per Kirby J:

(viii) The text of the Constitution must be construed in a way appropriate to a constitutional character for the government of a nation and as its words are understood by succeeding generations of Australians for whose governance it provides.

(ix) Section 75(v) is not to be narrowly construed or the relief grudgingly provided.

per Hayne J:

(x) The legislature cannot confine, or extinguish, the circumstances in which relief will go so as to strip s.75(v) of its content.

Callinan J:

(xi) *(dissenting)* Certiorari should not be granted as the legislature in s.476(2) of the Migration Act has excluded review of a relevant decision of the Tribunal on the ground of a beach of the rules of natural justice.

McHugh J:

(xii) Mere failure to take into account the Federal Court papers, would not have amounted to a breach of the fair hearing rule

(xiii) Breach of the rules of natural justice does not automatically invalidate a decision adverse to the party affected by the breach.

(xiv) *(dissenting);* In the present case, the denial of natural justice did not affect the outcome. The Tribunal found that illegal property dealings for profit were not sufficient to be regarded as a political risk to the authorities. It would not have made the slightest difference to the Tribunal's findings if it had been aware of the statements to the Federal Court. It did not restore the destruction of his credit that resulted from his inconsistent and irreconcilable accounts.

(xv) Even if the Tribunal would not have made an adverse credibility finding, the countervailing evidence was so strong that the Tribunal still would have found the prosecutor did not have a well founded fear for reason of imputed political opinion.

*** Callinan J declined to grant certiorari**

From: Sobet Haddad
Sent: Wednesday, 20 March 2002 6:09 PM
To: Cratchley, Bob; Kanachowski, Andrew; Kimberley, John; Matic, Kathy; McKerrow, Peter; McShane, Ian; Melbourne - Legal Research; Melbourne - Members; Pih, Raymond; Pinto, Susan; Rajagopalan, Sundar; Summers, Pamela; Sydney - Legal Research; Sydney - Members; Toohey, Jill
Subject: FC Judgment summary - NAAX


Shortcut to NAAX.doc (3 KB)

Attached is a copy of a summary of the judgment in the following matter:

NAAX v MIMA [Gyles J]

The application was dismissed

IMPLICATIONS FOR THE TRIBUNAL

This is a significant judgment concerning a privative clause decision of the Tribunal. Central to the case was the issue of the Tribunal's failure to give the applicant country information that it relied upon in its decision.

Gyles J held that the privative clause (s.474) was constitutionally valid, and that it operates so as to exclude an implied duty on the Tribunal to afford the procedural fairness beyond the requirements contained in the Division 4 of Part 7 of *Migration Act* (ss423-429A). His Honour acknowledged that the matter was not free from further debate and proceeded to consider whether there was a breach of procedural fairness. His Honour found that there was not, construing the High Court's judgment in *Miah* narrowly. Gyles J also observed that other aspects of natural justice - namely bias - would fall within one of the limited bases on which a privative clause decision could be set aside.

This judgment represents a reigning in of judicial review in manner unlike the very few substantive judgments on s.474 that have been thus far been made (*Walton, Wang*) which suggested the potential for a read down privative clause.

A Summary of the judgment is attached. An electronic copy of the SUMMARY and TEXT of the judgment can also be found on the RRT INTRANET.Click on the address below to access:

http://rrtproxy/rrtweb/legal/legal_caselaw.htm

-----Original Message-----
From: Sobet Haddad
Sent: 20 November 2000 2:03 PM
To: Cratchley, Bob; Kanachowski, Andrew; Kennedy, Eliot; Kimberley, John; Matic, Kathy; Melbourne - Legal Research; Members - Melbourne; Members - Sydney; Pih, Raymond; Rajagopalan, Sundar; Sydney Legal Research; Toohey, Jill
Subject: HC Judgment summary - AALA

aala_hc.doc (34 KB)

Attached is a summary of the judgment in the following matter:

Re Refugee Review Tribunal; Ex parte Mansour AALA [Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne, Callinan JJ]

Relief granted - the Tribunal decision was quashed and remitted for reconsideration (6-1).

IMPLICATIONS FOR THE TRIBUNAL

This was an application in the High Court's original jurisdiction. The entire Court held that the Tribunal's conduct in misleading the prosecutor amounted to a breach of the rules of natural justice. Justce McHugh delivered a dissenting judgment, holding that whilst there was a breach it was not sufficient to affect the outcome of the Tribunal's decision. Much of the decision is concerned with an analysis of the available writs under s.75(v) of the Constitution, and whether a breach of natural justice atrracts mandamus/prohibition and whether certiorari, which is not mentioned in s.75(v), is nevertheless avaliable.

The decision does not have a direct impact on the Tribunal, insofar as it is well recognised that the Tribunal has an obliagtion to act according to the rules of procedural fairness. It does confirm that the High Court may provide relief in an area where the Federal Court is restricted. This judgment may of course act as further impetus for applications to the High Court.

A Bulletin giving an analysis of the Judgment will be available shortly.

A Summary of the judgment is attached. In Sydney, a copy of the SUMMARY can also be found at:

SYDNEY: r:\research\legalres\judgment\summary\aala_hc.doc
MELBOURNE: r:\legal\judgment\summary\aala_hc.doc

Copies of the judgment will be placed in the Sydney and Melbourne libraries. An
electronic copy of the TEXT of the JUDGMENT is available at.

SYDNEY: r:\research\legalres\judgment\text\aala_hc.doc
MELBOURNE: r:\legal\judgment\full\aala_hc.doc

From: Sobet Haddad
Sent: Friday, 18 May 2001 4:20 PM
To: Cratchley, Bob; Kanachowski, Andrew; Kimberley, John; Matic, Kathy; McKerrow, Peter; McShane, Ian; Melbourne - Legal Research; Melbourne - Members; Pih, Raymond; Pinto, Susan; Rajagopalan, Sundar; Summers, Pamela; Sydney - Legal Research; Sydney - Members; Toohey, Jill
Subject: HC Judgment summary - MIAH


miah_hc.doc (45 KB)

Attached is a summary of the judgment in the following matter:

Re MIMA & Anor ; Ex MD Ataul Haque MIAH [Gleeson CJ, McHugh, Gummow, Kirby, Hayne, JJ]

The appliciation was successful (3-2).

IMPLICATIONS FOR THE TRIBUNAL

This was an application in the High Court's original jurisdiction concerning a primary decision to refuse a protection visa (the applicant failed to apply to the RRT within the prescribed period). Like *Re MIMA; ex p Epeabaka*, this case is largely about whether the strict code of procedures (in this case, precedures for primary decision makers) effectively excludes the common law rules of procedural fairness. In short, the majority held that it was not parliament's intention to exclude those rules. The judgment has some quite signifcant implications at the departmental level, but despite the similarity in some of the procedures under scrutiny and those of the RRT (eg s.424, 424A), the judgment is much less practical significance for the Tribunal. This is becasue, given the general obligation under s.420 and Principal Member's Directions, the Tribunal's practices are not inconsistent with the majority's view.

A Summary of the judgment is attached. In Sydney, a copy of the SUMMARY can also be found at:

SYDNEY: r:\research\legalres\judgment\summary\miah_hc.doc
MELBOURNE: r:\legal\judgment\summary\miah_hc.doc

Copies of the judgment will be placed in the Sydney and Melbourne libraries. An
electronic copy of the TEXT of the JUDGMENT is available at.

SYDNEY: r:\research\legalres\judgment\text\miah_hc.doc
MELBOURNE: r:\legal\judgment\full\miah_hc.doc

refugee review tribunal

LEGAL RESEARCH BULLETIN

Issue No. 52 *4 December 2000*

The Implications of *Re RRT; Ex parte Aala*

SYNOPSIS AND IMPLICATIONS FOR THE TRIBUNAL

The High Court's judgment in *Re Refugee Review Tribunal; Ex parte Aala*[1] *(Aala)* involved an application in the original jurisdiction of the Court by an Iranian national (the prosecutor) who was seeking orders for writs of mandamus, prohibition and certiorari[2] on the basis that the Refugee Review Tribunal's (the Tribunal) decision was beyond jurisdiction as it was made in breach of the rules of natural justice.

There were two aspects to the case, the first being the application of principles of natural justice to the particular facts of the case to determine whether there was a breach and the second being the remedies available under s.75(v) of the Constitution and what was appropriate to the circumstances of the case. All members of the Court agreed that there was a breach of the rules

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1 [2000] HCA 57 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne & Callinan JJ, 16 November 2000).

2 *Mandamus*: an order of the court compelling a public official to exercise a power in accordance with law, in this case requiring the Tribunal to consider the matter according to the law;
prohibition: an order forbidding a specified act or omission, a form of constitutional injunction, in this case, forbidding the Minister from taking any action in reliance upon the Tribunal's decision;
certiorari: remedy to quash a decision or order of a tribunal or inferior court on the basis of non-jurisdictional error on the face of the record, or jurisdictional error or denial of procedural fairness.
Traditionally described as 'prerogative writs' several members of the High Court took the opportunity to explain why this was no longer appropriate and indicated the term 'constitutional writ' was preferable: *ibid*., per Gaudron and Gummow JJ at [21] and per Kirby J at [138].

of natural justice in that the prosecutor was deprived of a fair opportunity of presenting his case and correcting an erroneous and unfavourable factual assumption relevant to his credibility due to an unintentionally misleading statement by the Tribunal. On the second aspect of the case the majority of the High Court concluded that remedies sought were available for such a breach and the prosecutor should be granted the relief sought (writs of mandamus, prohibition and certiorari) on the basis that it could not be said that the breach of the rules of natural justice made no difference to the outcome.[3]

The implications of this decision for the Tribunal are minimal. The principles of natural justice and the requirement of procedural fairness applied to the Tribunal were not controversial. The focus was upon the content of the fair hearing rule in this particular case and whether the Tribunal gave the applicant adequate opportunity to answer the case against him. The difference between the majority and minority decisions turned upon a differing view of how those principles applied to the particular facts of the case and the Tribunal's reasoning on those facts. It was acknowledged that the requirement for procedural fairness may fluctuate during the course of particular administrative decision-making and that there was no universal proposition that before the Tribunal ever makes a finding adverse to an applicant, it is necessary for the Tribunal to put to the applicant the concerns which are inclining the Tribunal to an adverse finding.[4]

The majority of the discussion in the various judgments was directed to the appropriate remedies for breach of natural justice and whether those remedies applied as of right or were available at the discretion of the Court. A majority of the Court concluded that a decision in breach of rules of natural justice was a decision in excess of jurisdiction and that the writs of prohibition, mandamus and certiorari were available[5] and that they were discretionary.

FACTS AND BACKGROUND TO THE CASE

The prosecutor was an Iranian national who claimed a fear of persecution on the basis of imputed political opinion due to his work for the Savak (deposed Shah's secret police), his support for the Mujahadeen who opposed the Iranian government and his involvement with another associate, Ali, in illegal sales of real estate owned by the Shah and his supporters. Most attention in the case focused on the last of these activities. The first Tribunal found there was no real chance that the business associate had revealed the prosecutor's dealings to the authorities and went on to find the prosecutor was not a person to whom Australia had protection obligations.

The prosecutor applied for judicial review and in the course of this matter submitted statements containing new claims regarding an agreement with Ali to the Federal Court. The first Tribunal's decision was set aside and remitted to the Tribunal by the Full Federal Court on the basis that the Tribunal had made an error of law in coming to its conclusion.[6] At hearing before the second Tribunal the Member stated:

> "I've got [your] Department of Immigration file and your old Refugee Tribunal file and your new Refugee Tribunal file plus all of the Federal Court papers."[7]

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3 McHugh J dissenting that any relief should be granted, his Honour concluding that the breach of natural justice made no difference to the outcome; Callinan J dissenting on the granting of certiorari but agreeing with the granting of mandamus and prohibition.

4 [2000] HCA 57, per Gaudron and Gummow JJ at [62] and [76].

5 Callinan J dissenting in relation to availability of certiorari. McHugh J did not consider the issue.

6 *X v MIMA* (unreported, Full Federal Court, Davies, Hill & Lehane JJ, 18 December 1997).

7 [2000] HCA 57 at [67].

Ultimately the second Tribunal found the prosecutor was not a person to whom Australia had protection obligations. In coming to this conclusion it found the prosecutor had concocted his evidence of a pact with Ali, noting that "prior to the second Tribunal hearing, the [prosecutor] had never raised the claim that he and Ali had an agreement that Ali would try to save himself by passing on information about the [prosecutor] if it became necessary".[8] The Tribunal went on to conclude that even if Ali did inform the authorities of the prosecutor's illegal dealings, the Tribunal was not satisfied he had a well-founded fear for a Convention reason, referring to country information and noting that "there is no evidence … apart from the [prosecutor's] own claims, to suggest that … any person, caught facilitating sales of properties for the Shah … for profit are imputed with a political opinion in Iran".[9]

The prosecutor applied to the Federal Court for judicial review of the second Tribunal's decision. The second Tribunal's decision was upheld by Branson J at first instance and then by the Full Federal Court on the basis that the Federal Court had no jurisdiction to set aside the Tribunal decision on the ground that it denied the prosecutor natural justice.[10] Five months after the appeal was dismissed by the Full Federal Court, the prosecutor applied to the High Court in its original jurisdiction for, *inter alia*, writs of prohibition and certiorari directed to the Minister and the Tribunal and mandamus directed to the Tribunal to consider the application according to law.[11]

ANALYSIS OF THE ISSUES

In the High Court, the following issues were raised:

- whether the Tribunal breached the rules of natural justice by failing to take into account the statements made to the Federal Court about the agreement with Ali and misleading the prosecutor into believing that those statements would be considered;
- whether, if it did breach the rules, relief should be denied because the breach would have made no difference to the decision of the Tribunal;
- whether a breach of the rules of natural justice by the Tribunal attracts the writs of prohibition and mandamus;
- whether there is a general discretion to refuse relief in the form of prohibition; and
- whether the writ of certiorari is available.

Whether the Tribunal breached the rules of natural justice

All members of the High Court found the Tribunal had breached the fair hearing rule.[12] Of main concern was the effect of the Tribunal inadvertently misleading the applicant as to the evidence which it would take into account. The prosecutor gave evidence to the High Court that, but for being misled, he would have elaborated on the material relating to the agreement with Ali at the hearing. On this basis the Court concluded that, in being misled, the applicant did not have the

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8 *ibid*., at [68].
9 *ibid*., at [116].
10 *ibid*., at [196]-[197].
11 *ibid*., at [198]-[199].
12 The way in which the breach was described varied slightly from judgment to judgment; eg Callinan J discussed it in terms of 'legitimate expectation' at [208]-[209], Gaudron and Gummow JJ focused on the centrality of credibility to the prosecutor's case and being 'left in the dark' as to the risk of an adverse finding resulting in being deprived of any opportunity to adduce additional material, at [76]-[78]; McHugh J focused on the fact that, having been misled, the applicant was denied the opportunity to put his whole case to the Tribunal, at [103].

opportunity to put his whole case or provide additional material, which amounted to a breach of procedural fairness.

Whether the breach of rules of natural justice made any difference to the outcome

Having concluded that a breach of natural justice occurred, the question arose as to whether that was sufficient to give rise to a remedy, or whether there was a further question of whether the breach had any impact on the decision-making process. Generally the Court agreed it was necessary to consider whether the breach made any difference to the outcome to determine whether the relief sought was appropriate[13], with the majority holding that it could not be concluded that the breach made no difference to the outcome of the proceedings. There were slight differences in the way this question was approached, with the main difference between the majority and McHugh J's dissent being in the application to the facts of the case.

Justice McHugh took a pragmatic view of the Tribunal's reasoning and examined closely the material before the Tribunal. His Honour considered that even if the prosecutor had been given the opportunity to put further evidence as to when he made the claim regarding the agreement with Ali, this would not have overcome the inherent inconsistencies within his evidence which also formed the basis for the Tribunal's finding as to his credibility. McHugh J also found that the finding as to the prosecutor's credit did not affect the Tribunal's decision that there was no well-founded fear of persecution even if the authorities were aware of his real estate activities on the basis that the country information which went against the applicant's claims was "too strong".[14]

Other members of the High Court were more reserved and mindful of the difficulty in determining whether information from the applicant would or would not have altered a credibility finding[15] and considered that the finding as to the well-foundedness of the fear, even if the Iranian authorities were aware of the prosecutor's activities, was still affected by the second Tribunal's findings as to credibility and thus tainted by the breach of procedural fairness.

Whether breach of rules of natural justice attracts the writs of mandamus and prohibition

It was generally accepted by the High Court that breach of the rules of natural justice by a Commonwealth officer resulted in the officer acting in excess of jurisdiction, an error which has traditionally attracted the remedy of prohibition.[16] It was also accepted that mandamus also applied in the event of an excess of jurisdiction resulting from a denial of procedural fairness.[17]

In discussing the nature of the error involved in denial of procedural fairness and whether prohibition was available, the Court interpreted s75(v) of the Commonwealth of Australia Constitution Act 1900 (the Constitution). The difference in approach to interpretation between members of the Court which was evident in the High Court's approach to the Refugees

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13 Reference was made to High Court decision of *Stead v Stage Government Insurance Commission* (1986) 161 CLR 141 at 145, "not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial" at [4], [58], [104], [131] & [211].

14 [2000] HCA 57, at [115]-[117].

15 See for example Gleeson CJ, at [4] "Decisions as to credibility are often based upon matters of impression, and an unfavourable view taken upon an otherwise minor issue may be decisive." See also Kirby J at [131] and Gaudron and Gummow JJ at [76]-[80], "the second Tribunal's estimate of the cogency of the prosecutor's claim permeated its reasoning."

16 *ibid*., for example, at [17] and [142]. McHugh J did not go into this discussion given his findings that the breach of procedural fairness would not have affected the outcome.

17 *ibid*., at [142]. The High Court maintained the distinction between jurisdictional error (a decision made outside the limits of the functions and powers conferred on the decision-maker, or which he or she lacks power to do) and error within jurisdiction (incorrectly deciding something which the decision maker is authorised to decide) see Hayne J at [163].

Convention in *MIMA v Ibrahim*[18] was apparent again in the difference between Gaudron and Gummow JJ and Kirby J's approach to construction of the Constitution, although it was of little practical impact in the present case.[19]

Whether there is a general discretion to refuse relief in the form of prohibition

It was generally accepted by the High Court that the remedy of prohibition was available at the discretion of the Court.[20] Some examples of circumstances in which the discretion might be exercised to refuse relief included unwarrantable delay in making an application for relief, or bad faith on the part of the applicant, either towards the court or in the transaction giving rise to the action, or if the person's conduct has been 'disgraceful' and he or she has suffered no injustice.[21] However, Gummow and Gaudron JJ indicated that it would be rare for the remedy to be denied in circumstances involving a denial of natural justice, on the basis that there is a background 'animating principle' which was described by Gaudron J as follows:

> Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.[22]

In this regard Gaudron and Gummow JJ took a stricter approach to the discretion in relation to prohibition than other members of the Court. While recognising as relevant the delay in the prosecutor bringing the application to the High Court and as Callinan J noted, the fact the prosecutor has had a number of separate hearings, nevertheless this was found not to be sufficient for the Court to exercise the discretion to refuse prohibition in the circumstances.[23]

Whether the writ of certiorari is available

Generally the Court held that certiorari was available in the circumstances of the case, in order to give effect to the remedies of prohibition, and particularly mandamus.[24] There has been some question as to whether the High Court had power to grant certiorari, given that s75(v) of the Constitution only refers to prohibition and mandamus without including certiorari. The Court concluded that it was available stating that it was ancillary or incidental to the effective exercise of the jurisdiction conferred by s75(v)[25], or alternatively the Court's power extends to all forms of 'prerogative' relief as reflected in Pt 4 of the Judiciary Act 1903 (Cth).[26]

Callinan J indicated he would not grant certiorari "because the legislature in s 476(2) of the *Migration Act* has excluded review of a relevant decision of the Tribunal on the ground of a breach of the rules of natural justice, and, it would … be inappropriate to grant a remedy on the basis of such a ground so excluded … ."[27] The reasoning behind Callinan J's conclusion is not

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18 [2000] HCA 55 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne & Callinan JJ, 26 October 2000).

19 [2000] HCA 57, at [136] Kirby J states that once adopted, the Constitution's test was "set free from the constraints of nineteenth century appreciation. … the text has to be construed in a way appropriate to a constitutional charter for the government of a nation and as its words are understood by succeeding generations of Australians for whose governance it provides."

20 *ibid*., at [17], [149] and [172]. McHugh J did not consider the issue.

21 *ibid*., at [56]-[57].

22 *ibid*., at [55], citing *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157 [56].

23 *ibid*., Callinan J at [217].

24 McHugh J did not consider the issue and Callinan J dissented on the availability of certiorari.

25 [2000] HCA 57, per Gaudron & Gummow JJ at [14], per Kirby J at [151]-[152].

26 *ibid*., per Hayne J at [156].

27 *ibid*., at [218].

clear and Kirby J rejected the possibility that Parliament could, by such a provision, limit or deny the exercise by the High Court of its jurisdiction under s75(v) of the Constitution and, in any event, he was of the view that s476(2) of the Migration Act did not purport to have the effect that Callinan J ascribed to it.[28]

CONCLUSION

The principle aspects of this case, as they concern the Tribunal, are largely restricted to the facts of the case. The High Court concluded that there had been a denial of natural justice in terms of a denial of a fair hearing as a result of the second Tribunal's inadvertent misleading of the applicant as to the information before the Tribunal. The majority of the Court could not conclude that the denial of natural justice made no difference to the outcome given that it involved an issue of credibility. The Court agreed that all the constitutional writs were available and were discretionary, although some members of the Court indicated that they would be loath to refuse relief in circumstances involving denial of natural justice by an administrative decision-maker. The relevant orders of the Court were that the Minister was prohibited from taking action on the second Tribunal's decision, the second Tribunal's decision was to be quashed and the Tribunal was to reconsider the application in accordance with the law.

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[28] *ibid*., at [151].

refugee review tribunal

LEGAL RESEARCH BULLETIN

Issue No. 57 *7 June 2001*

RECENT HIGH COURT DECISIONS ON PROCEDURAL FAIRNESS

Re MIMA; Ex parte Miah [2001] HCA 22
Re MIMA; Ex parte Epeabaka [2001] HCA 23
Re RRT and Anor; Ex parte H [2001] HCA 28

SYNOPSIS

The High Court recently decided three applications made in the High Court's original jurisdiction which concerned procedural fairness requirements under the *Migration Act* 1958 (the Act). One case concerned the procedural fairness obligation to provide an opportunity to respond to adverse information and the other two involved claims of apprehended bias against the decision-maker.

The decision in *Re MIMA; Ex parte Miah*[1] (*Miah*) considered procedural fairness obligations under the Act in relation to a decision refusing to grant a protection visa made by the delegate of the Minister for Immigration and Multicultural Affairs (hereafter 'the delegate' and 'the Minister'). The High Court held by majority that procedural fairness obligations had not been excluded by the relevant provisions of Subdivision AB of the Act and the delegate had not complied with the relevant procedural fairness obligation that was determined to exist in the circumstances of the case.[2]

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1 [2001] HCA 22 (Gleeson CJ, Gaudron, McHugh, Kirby and Hayne JJ, 3 May 2001).

2 *Ibid*., per Kirby J at [178], per McHugh J at [147], per Gaudron J at [95] (although this is obiter); Gleeson CJ and Hayne J dissenting.

The case of *Re MIMA; Ex parte Epeabaka*[3] (*Epeabaka*) also concerned the issue of whether the rules of procedural fairness had been excluded or limited by the Act, this time in relation to the Refugee Review Tribunal (the Tribunal) and Part 7 of the Act. The High Court found that the rules of procedural fairness had not been excluded, at least in so far as it related to bias, either actual or apprehended, but apprehended bias was not made out in the circumstances of the case.[4]

The third case of *Re RRT & Anor; Ex parte H & Anor*[5] (*H*) also concerned a claim of apprehended bias. The High Court confirmed that administrative decisions are reviewable in the High Court for failure to observe the rules of natural justice and that such a failure would extend to claims of apprehended bias by the Tribunal. It went on to conclude that apprehended bias had in fact been made out on the facts of this case, in particular on the basis of the Tribunal's interventionist conduct at the hearing.[6]

The cases are important for the guidance they give as to the scope of procedural fairness obligations on the Tribunal and also on the Department of Immigration & Multicultural Affairs (the Department) beyond the statutory requirements of Subdivision AB and Part 7 of the Act. The main implication for the Tribunal is the clear indication that there is a remedy available in the High Court's original jurisdiction for the breach of the traditional rules of natural justice, the hearing rule and the bias rule. The case of *H* also gives some warnings on the effects of overstepping the mark in terms of the Tribunal's inquisitorial role and how it may affect the appearance of impartiality.

THE SCOPE OF THE RULES OF PROCEDURAL FAIRNESS

The Traditional Rules of Natural Justice

There are two traditional rules of natural justice, the hearing rule and the bias rule.[7] The hearing rule requires the decision-maker to hear a person before making a decision which affects the person's interests. The bias rule requires that a decision-maker be disqualified where circumstances create a reasonable apprehension that the decision-maker would not bring an impartial mind to bear upon the decision to be made.

There have been two views given as to the derivation of obligation to act in accordance with the rules of natural justice. The first view is that there is a common law duty to act fairly in the sense of according procedural fairness in the making of administrative decisions and this duty is subject only to the clear manifestation of a contrary statutory intention.[8] The second view is that the rules of natural justice exist as a statutory implication to be drawn from the legislation conferring the decision-making authority.[9]

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3 [2001] HCA 23 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ, 3 May 2001).

4 *Ibid*., per Gleeson CJ, McHugh, Gummow & Hayne JJ at [28], per Kirby J at [57].

5 [2001] HCA 28 (Gleeson CJ, Gaudron & Gummow JJ, 24 May 2001).

6 *Ibid*., at [5] and [32].

7 For a useful overview of the development and scope of procedural fairness, refer to M. Aronson & B. Dyer, *Judicial Review of Administrative Action*, 2nd ed., LBC Information Services, 2000, Chapters 8-10.

8 *Re MIMA; ex parte Miah*, [2001] HCA 22, per Gaudron J at [89], referring to *Kioa v West* (1985) 159 CLR 550 at 584.

9 *Id*, referring to *Kioa v West* (1985) 159 CLR 550 at 614-615

While these approaches are conceptually different, they are very similar in effect. As Gaudron J identified in *Miah*, whatever approach is adopted, ultimately the question is the same. On its proper construction, has the Migration Act relevantly and validly limited or extinguished the obligation to accord procedural fairness?[10]

The Construction of the Legislation

The members of the High Court in *Miah* approached the construction of the legislation in similar ways. However, even though they took account of similar factors in assessing the statutory intent, they came to differing conclusions. The majority[11] concluded that there was no clear statutory intention that the legislature intended Subdivision AB to exhaustively define the content of fair procedure in relation to dealing with visa applications and that it had not excluded the rules of procedural fairness. The dissenting judges,[12] considering the same factors, concluded that Subdivision AB did define the procedural requirements exhaustively and effectively limited the content of procedural fairness to the procedures as set out in the Subdivision.

The factors considered were those submitted by the Minister as indicating the relevant statutory intention for Subdivision AB to 'cover the field' with regard to procedural fairness. They included:

- the description of Subdivision AB as a "Code of procedure for dealing fairly, efficiently and quickly with visa applications" (the 'code' argument);[13]
- the existence of s.57[14], the mandatory requirement for the Minister to give certain "relevant information" to the applicant, explain its relevance and invite comments as indicative of the intention to limit the requirements of natural justice to this;
- that s.69 of the Act relieved the Minister from any obligation to do more than comply with the procedure in Subdivision AB (the s.69 argument);[15] and
- the existence of the right to a full *de novo* review by the Tribunal as indicating an intention to limit the requirements of natural justice at the primary decision level (the right of appeal argument).[16]

Although the arguments and the High Court's conclusions were related specifically to Subdivision AB, we can extrapolate from these viewpoints and comments in other decisions such as *Epeabaka* and *Re RRT; ex parte Aala*[17] (*Aala*) as to the Court's likely view on a similar argument in relation to Part 7 of the Act. In *Aala*, which also involved a claimed failure to accord procedural fairness in terms of a breach of the hearing rule, Gaudron and Gummow JJ stated:

> Nor does any question arise here of attempted abrogation by statue of any requirement of procedural fairness. Rather, s. 476(2)(a), in limiting the grounds which may be taken in the Federal Court, assumes

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10 *Ibid*., at [57].

11 Gaudron, McHugh & Kirby JJ.

12 Gleeson CJ and Hayne J.

13 *Re MIMA; ex parte Miah* [2001] HCA 22, per Gleeson CJ & Hayne J at [34]-[49] (dissenting), per Gaudron J at [91]-[95], per McHugh J at [131]-[143], per Kirby J at [171]-[183].

14 Section 57 is the equivalent at primary level of s.424A for the Tribunal.

15 [2001] HCA 22, per Gleeson CJ & Hayne J at [48]-[49] (dissenting), per Gaudron J at [100]-[104] (McHugh J agreeing), per Kirby J at [203]-[209].

16 *Ibid*., per Gleeson CJ & Hayne J at [49] (dissenting), per McHugh J [145]-[156], per Kirby J at [184]-[185].

17 (2000) 176 ALR 219.

> the existence of the requirement in respect of decisions under the Act which include those of the Tribunal.[18]

In addition, Part 7 of the Act contains s.420(1) which states that the Tribunal is to "pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick." In light of the way in which the majority in *Miah* construed the legislation by reference to the inclusion in the Subdivision heading of a code for dealing "fairly, efficiently and quickly" as indicative of the intention that the rules of procedural fairness are not excluded,[19] it is very likely the High Court would take the same approach to Part 7 and the procedural fairness obligations on Tribunal decision-makers.

Although the High Court in *Epeabaka* was concerned mainly with the bias rule, their approach was similar. For example, the existence of s.476(1)(f) allowing for judicial review by the Federal Court for actual bias negated the claim that the provisions of Part 7 of the Act were sufficiently comprehensive as to exclude, by necessary intendment, any other requirements of procedural fairness, and because there were no clear words in relation to apprehended bias, it was concluded that the obligation in respect of the bias rule (actual and apprehended) had not been excluded.[20]

The Content of the Procedural Fairness Obligation

Having concluded that Subdivision AB did not relevantly exclude or limit the procedural fairness obligations of the Minister in *Miah*, the High Court majority went on to consider whether the delegate had failed to afford Mr Miah procedural fairness. In determining whether there had been a breach of procedural fairness, the Court had regard to the content of the procedural fairness obligation in the circumstances of the case.

In *Miah*, the prosecutor claimed in his protection visa application that his father had been killed by an Islamic fundamentalist group in Bangladesh and he had also been threatened by the same group. He claimed that the Bangladeshi party in government at the time (the BNP) had some form of alliance with the fundamentalist group and would not protect him. The primary delegate refused to grant the visa on the basis of information regarding a change in government in Bangladesh which occurred after the prosecutor had lodged his protection visa application. The information was not of the kind required to be put to the applicant in accordance with s.57 (the s.424A equivalent at primary level) and the delegate did not seek comment from the prosecutor on the information under s.56 which says that the Minister, in considering an application, may get any information that he or she considers relevant (primary level equivalent to s.424).

In identifying the content of the procedural fairness obligation, McHugh J referred to the seminal decision on procedural fairness, *Kioa v West*.[21] Drawing from that judgment he identified the main principle of the hearing rule as follows:

> … a person whose interests are likely to be affected by an exercise of power must be given an

[18] (2000) 176 ALR 219 at 231.

[19] [2001] HCA 22, see for example Gaudron J at [95].

[20] [2001] HCA 23, per Gleeson CJ, McHugh, Gummow & Hayne JJ at [28].

[21] (1985) 159 CLR 550.

> opportunity to deal with relevant matters adverse to his or her interests that the repository of the power proposes to take into account in deciding upon its exercise. This does not mean that all material which comes before the decision-maker must be disclosed but, "in the ordinary case … an opportunity should be given to deal with adverse information that is credibile, relevant and significant to the decision to be made."[22]

His Honour set out examples of material that would not require comment as including:

- non-adverse country information;
- favourable or corroborative information in the public domain; and
- information based on the circumstances already described in the application.[23]

Examples of cases where the exercise of the decision-maker's power does require the applicant be given an opportunity to comment included:

- where the delegate proposes to use new material of which the applicant may be unaware and which is or could be decisive against the applicant's claim of refugee status;
- where the material concerns circumstances that have changed since the date of application and is being used after considerable delay; and/or
- where the material is equivocal or contains information that the applicant could not reasonably have expected to be used in the way the decision-maker uses it.[24]

Kirby J also referred to the above principle from *Kioa v West*. His Honour referred to the possible circumstances where withholding information could be justified, none of which existed in the circumstances in *Miah*:

- the information is confidential; or
- there is a need for secrecy or particular speed in making the decision.[25]

His Honour also noted five "special considerations" which indicated the delegate was obliged to supply the information to the prosecutor for comment, some of which match the points raised by McHugh J:

- the long delay between the application and primary decision
- the fact the information was not confidential or secret
- the fact the information was judged as crucial, even determinative, for the outcome of the application
- the consideration that the delegate's decision would have been better informed with the prosecutor's comments on the information
- the fact the delegate would have been aware the decision was important for the prosecutor and was intended by the Act ordinarily to be the final decision.[26]

While the discussion in *Miah* was specifically in relation to the delegate's obligations under Subdivision AB, the principles and examples identified are equally applicable to the Tribunal. In particular the concept that the applicant should not be "taken by surprise" and the obligations which arise in relation to information which is or may be "determinative" of the outcome of the application are the same for according procedural fairness at the Tribunal level.

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22 [2001] HCA 22 at [140], quoting *Kioa v West* (1985) 159 CLR 550 at 629.

23 *Ibid*., at [141].

24 *Id*.

25 *Ibid*., at[192].

26 *Ibid*., at [193].

APPREHENDED BIAS

The High Court considered the issue of apprehended bias[27] in the two cases of *Epeabaka* and *H*.

In *Epeabaka*, no apprehended bias was made out with the Court concluding that on the facts of the case the comments made by the Member on his internet home page as to "desperate applicants who tell lies" would not lead to a reasonable apprehension that the Member might not have brought an impartial mind to bear upon the assessment of the present applicant's credibility.[28]

However, in *H* the High Court concluded that the manner in which the Tribunal conducted the hearing was such that a "fair-minded lay observer … might well apprehend bias by the Tribunal against the male prosecutor."[29]

The case of *H* indicates some of the factors which will be considered in determining whether apprehended bias is made out in the context of inquisitorial proceedings. The case involved a claimed fear of persecution by a husband and wife arising from their ethnicity and imputed political opinion. The Tribunal accepted the prosecutors may have suffered some harm because the wife was part Tamil, but was not satisfied it was of such seriousness as to amount to persecution. It found their claims to have assisted the LTTE and to have been imputed with a pro-LTTE opinion to be fanciful. The allegation of bias was said to stem from the Tribunal Member's conduct of the hearing, in particular that the Tribunal Member continually interrupted their evidence and constantly challenged the truthfulness of the prosecutor husband's account.

The Court suggested the appropriate formulation for the test for apprehended bias in the case of administrative proceedings held in private was the view of a "hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias."[30] The Court acknowledged that, where credibility is in issue, a Member will have to test the applicant's evidence, "often vigorously", and will need to ensure the applicant is confronted with matters adverse to his or her credit in order to accord procedural fairness. However, it highlighted its particular concern in relation to the conduct of hearings with legally unrepresented applicants, stating:

> Where, however, parties are not legally represented in inquisitorial proceedings, care must be taken to ensure that vigorous testing of the evidence and frank exposure of its weaknesses do not result in the person whose evidence is in question being overborne or intimidated. If that should happen, a fair-minded lay observer… might readily infer that there is no evidence that the witness can give which can change the decision-maker's view.[31]

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27 Apprehended bias is not a ground of review under Part 8 of the *Migration Act* 1958, which only allows review on the basis of actual bias: s.476(1)(f). Actual bias is made out when it is shown that the decision-maker has prejudged the case. Apprehended bias (or ostensible bias) is made out on the basis that the relevant conduct or aspect of the case would cause a reasonable person to apprehend that the decision-maker did not bring an impartial mind to bear upon the decision.

28 [2001] HCA 23, per Gleeson CJ, McHugh, Gummow & Hayne JJ at [34], per Kirby J at [89]-[96].

29 [2001] HCA 28, per curiam at [32].

30 *Ibid*., at [28].

31 *Ibid*., at [31].

This case does not remove the Tribunal's power to control or direct the hearing, or the manner in which evidence is presented. Nor does it restrict the procedural fairness requirement that the Tribunal advise the applicant that it has difficulties accepting aspects of his or her evidence. However, the Court is warning that the Tribunal should be careful not to overstep the mark from vigorous testing of the applicant's evidence to intimidatory behaviour which may inhibit the applicant's opportunity to fully present their case. In *H*'s case the Court concluded that a fair-minded lay observer would infer from the the constant interruptions of the prosecutor husband's evidence and the constant challenges to the prosecutor husband's truthfulness and to the plausibility of his account of events that there was nothing he could say or do to change the Tribunal's preconceived view that he had fabricated his account, that is, the fair-minded observer would apprehend bias by the Tribunal against the prosecutor husband.

CONCLUSION

These High Court cases have given further indication that remedies for breach of the rules of procedural fairness are available in the High Court's original jurisdiction. It is clear from *Epeabaka* and *H* that Part 7 of the Act does not operate to exclude the Tribunal's obligation to comply with the bias rule of procedural fairness. The case of *Miah*, in addition to the Court's previous decision in *Aala*, gives a fair indication that the High Court would also conclude that Part 7 of the Act does not operate to limit or exclude the obligation of Tribunal Members to accord procedural fairness to applicants in terms of the hearing rule either.

Miah gives some helpful indicators of when procedural fairness will require that information is put to the applicant and when it will not. The strongest point that comes out of the majority judgments is that, where material is before the decision-maker that is going to be determinative of the issue before them, procedural fairness will usually require that the applicant be given the opportunity to comment on the material and not be taken by surprise.

Finally, the case of *H* gives a reminder to Tribunal Members in relation conducting hearings with unrepresented applicants that questioning on credibility can go beyond simply testing the evidence, to the point where a reasonable observer would have a reasonable apprehension that the Member did not bring an impartial mind to the assessment of the case and thereby amounts to a breach of the bias rule and a denial of procedural fairness.

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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.

Re MIMA & Anor; ex parte MD Ataul Haque MIAH

[2001] HCA 22

High Court of Australia, Gleeson CJ, Gaudron, McHugh, Kirby, Hayne JJ, S199/1999, 3 May 2001

This was an application, pursuant to s.75(v) of the Constitution for writs of prohibition, certiorari and mandamus. The application was commenced after the prosecutor's solicitor's failed to lodge an application for merits review with the RRT within the prescribed period, and unsuccessfully. sought the respondent's permission pursuant to s.48B of the Migration Act, to lodge a second protection visa application.

The prosecutor, a Bangladeshi national, applied for a protection visa in April 1996. He claimed that his father had been killed by the Jamiat-I-Islami and he had been attacked and threatened by the same group because of his progressive views. In response to the question on the application *'Do you think the authorities …can and will protect you if you go back?"* the applicant outlined his concerns that the government of the day, the BNP, had been supportive of fundamentalists.

The delegate of the respondent rejected the application in May 1997. He accepted the prosecutor "may have experienced harassment from the Muslim fundamentalists" and that the BNP may have had some form of alliance with them. However he noted that since the application had been lodged, the BNP had lost power. The prosecutor was not invited to comment on the impact of the change in government. On the basis of independent country information the delegate concluded that "*there is no indication that [the current government] is totally powerless to stop those violations of other people's rights. The current government can still be said to be capable of offering persons like the [prosecutor] effective protection against the religious fundamentalists."*

Before the High Court the prosecutor contended that the respondent had breached the rules of procedural fairness by not offering the prosecutor the opportunity to respond to the country information relating to the change in government in Bangladesh. It was also contended that the delegate constructively failed to exercise his jurisdiction by applying an incorrect test in determining whether the prosecutor was a refugee.

Held: ***per Gaudron, McHugh, Kirby JJ (Gleeson CJ and Hayne J dissenting),*** **granting an order absolute for a writ of prohibition, certiorari and mandamus:**

per Gaudron, McHugh and Kirby JJ:

(i) The obligation on the Minister or his or her delegate to accord procedural fairness to an applicant is not excluded by provisions of Part 2, Div 3, subdiv AB of the Act , or the fact that there is a right to merits review.

(ii) In the particular circumstances of the case, the rules of procedural fairness required that the delegate inform the prosecutor that he was intending to rely on the information concerning a change in government, and give the prosecutor the opportunity to comment. The delegate failed to do so.

(iii) Section 69(1) did not validate the decision. The purpose of s.69 is to ensure that an applicant's rights are to be ascertained by reference to the Minister's decision unless and until set aside. Section 69 of the Act does not preclude the Court from exercising its jurisdiction under s.75(v) of the Act. Nor does it purport to excuse non-compliance with the Act or rules of natural justice.

(iv) Given the valid explanation for the delay in bringing proceedings before the present Court, it was not appropriate to exercise the Court's discretion to refuse relief.

per Gleeson CJ and Hayne J (dissenting):

(vi) The provisions of Part 2, Div 3, subdiv AB of the Act, read in the context of the legislative scheme, evince an intention on the part of the legislature to prescribe comprehensively the extent to which, and the circumstances in which the Minister or delegate is to give an applicant an opportunity to comment on additional information.

per Gleeson CJ, Hayne, Kirby JJ (Gaudron J dissenting):

(v) The delegate did not apply the wrong test. In concluding that the government was capable of offering “effective protection”, the delegate was concerned with considerations of willingness and availability.

per Gaudron J (dissenting):

(vii) The delegate constructively failed to exercise jurisdiction by failing to appreciate that the Convention definition of ”refugee” looks both to the individual and to the circumstances prevailing in his or her country. If the prosecutor, as an individual, had been targeted by Jamat-I-Islam, the composite question whether he had a well-founded fear of persecution for a Convention reason and was unable or, owing to that fear, unwilling to avail himself of the protection of Bangladesh was not answered by considering whether the new government was "capable of offering persons like the [prosecutor] effective protection against the religious fundamentalists."

NAAX v MIMA

NAAV v MIMA

[2002] FCA 263

Federal Court of Australia, Gyles J, N1467, N1468 of 2001, 15 March 2002

N98/23078, N98/23251 Full Text of Judgment

The applicants, Burmese nationals, sought judicial review of Tribunal decisions that they were not persons to whom Australia had protection obligations. They had claimed a fear of persecution arising from their political opinion.

The applicants contended

- that the use by the Tribunal of undisclosed country information in a manner which was adverse to the applicants was a breach of procedural fairness
- that the Tribunal misled the applicant into thinking no country information would be relied upon
- that the Tribunal erred in relying on his own undisclosed military experience in assessing the claims
- that the Tribunal relied upon a map without disclosing that fact to the Tribunal in the hearing.

The Tribunal decision was a privative clause decision.

Held: applications dismissed

(i) Section 474 ['privative clause'] operates according to its terms, which are inconsistent with the existence of implied duty to afford procedural fairness by supplying information beyond the requirements of Div 4 of Pt 7 of the Act [ss.423-429A].

(ii) It is not legitimate to construe the Act on the basis that s.474 did not exist to conclude that a duty to afford natural justice existed and then ask whether s.474 takes away the corresponding right.

(iii) The *Hickman exceptions* are authoritative and exhaustive and do not include breach of an implied duty to accord procedural fairness of the type alleged on the present case.

(iv) At least some, and perhaps all, examples of bias would negate the bona fides of a decision and so fall within the first *Hickman* exception [*the decision is lawful unless the decision maker did not act in good faith*].

(v) A determination to grant or refuse a protection visa is only a determination as to whether a new right should be granted. It is not a determination as to existing rights - a characteristic of the exercise of judicial power.

(vi) The privative clause is not contrary to the Constitution.

(vii) In any event, there was no breach of the rules of procedural fairness.

(viii) An applicant for a visa should expect that his or her claim will be critically examined by the Minister and, if applicable, the Tribunal, in the light of relevant country information which is known to or available to the decision-maker. If there is a new circumstance or event which the Tribunal proposes to consider, *MIMA; ex p Miah* may require that the applicant be advised accordingly depending upon circumstances. None of the country information relied upon by the member in the present cases could conceivably fall into the *Miah* principle or any realistic extension of it.

(ix) The Tribunal Member did not mislead the applicants into believing that no country information would be used.

(x) There is no difficulty in a member using his or her knowledge and experience to assess the credibility of what is put before them. It is not realistic to expect compartmentalisation of knowledge and not feasible to disclose all such knowledge or experience.

(xi) It must be expected that a Tribunal will resort to maps and the like in assessing what he or she is told.

(xii) The hearing provided by s.425 is not an opportunity for confrontation, it is an opportunity for persuasion.

(xiii) The judgment as to the issues upon which external country information will be relevant is entirely a matter for the Tribunal member. There is no obligation to consider any or any particular country information. Disclosure of particular country information to an applicant is, in essence, to reveal the process of reasoning of the Tribunal.

Migration Institute of Australia Limited (ABN 83 003 409 390)

Migration Agents Registration Authority

16 July 2002

Ms Carol Evans
Senate Legal and Constitutional Committee
Parliament House
Canberra ACT 2600

Dear Ms Evans,

Response to Question on Notice

I refer to Question on Notice number 40 asked of the Authority by Senator Sherry at the time of the appearance of the Authority before the Senate Legal and Constitutional Committee on 30 May 2002.

Question :

Does the Financial Services Reform Act cover this area of the disclosure of fees and charges, the standardisation of the disclosure of fees and charges.

Answer :

The Authority has been advised that Financial Services Reform Act 2001 does not apply in respect of the activities of "immigration assistance" referred to in section 276 of the *Migration Act 1958* , and that therefore the Financial Services Reform Act 2001 does not apply to the migration agents acting as such.

Yours faithfully

David Mawson

Executive Officer

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(41) Output: Internal Product

Senator McKiernan (L&C 298) asked, " How many individuals who were at the senior level with the Department of Immigration have retired and are now re-engaged as part-time public servants, not consultants?"

Answer:

At the end of May 2002 there were 4 former senior public servants (Executive Level 2 and above) re-engaged by the Department as part-time public servants, not consultants, after their retirement.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(42) Output: Internal Product

Senator McKiernan (L&C 299) asked in relation to former senior employees of the Department being currently engaged on a consultancy basis, do they appear in the Annual Report as an individual or a company?

Answer:

Annual reporting requirements for consultancies requires a summary statement detailing the number of consultancy services contracted during the financial year, with more detailed information above the reportable threshold of $10,000. Any consultancy involving a former DIMIA employee would be included in the figures, but the details that will appear in the Annual Report could be either the individual or the company name depending on who the entity is in the contract.

QUESTION TAKEN ON NOTICE

BUDGET ESTIMATES HEARING: 29 and 30 May 2002

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(43) Output: Internal Product

Senator Faulkner (L&C 328) asked if Mr Ruddock's Itinerary could be provided to the Committee for his visit to Indonesia in June 2001.

Answer:

A copy of the Minister's itinerary is attached.

DAILY PROGRAM

TUESDAY 12 JUNE 2001 **DARWIN - JAKARTA**

Local Time			*Canberra Time*
1740	Depart Darwin	QF61 Business Class *(Duration 4 hrs 25 mins)*	*1810*
2035	Arrive Singapore		*2235*
	(To be met by Ms Michelle Grau, PMO, DIMA)		
2140	Depart Singapore	GA859 Business Class *(Duration 1 hr 40 mins)*	*2340*
2220	Arrive Jakarta		*0120*
	(To be met by Mr Ric Smith AO, Ambassador and Mr Jose Alvarez PSM, Regional Director, DIMA)		
2240	Depart Airport for Grand Hyatt Hotel		*0140*

ACCOMMODATION

Grand Hyatt Jakarta
Jalan M.H. Thamrin
Jakarta 10230 Indonesia

Telephone: (62 21) 390 1234
Facsimile: (62 21) 334 321
Adviser's Facsimile: (62 21) 390 3869 wait then dial 6 then 2305

DAILY PROGRAM

WEDNESDAY 13 JUNE 2001 **JAKARTA – BANGKOK**

Local Time		*Canberra Time*
0600	Jog	*0900*
0800	Briefing by Ambassador Smith and Inter-Agency People Smuggling Group	*1100*
0930	Meet with: HE Dr Marsilam Simandjuntak, Minister for Justice and Human Rights	*1230*
1130	Meet with: HE Dr Alwi Abdurrahman Shihab, Minister for Foreign Affairs	*1430*
1230	Lunch Hosted by Ambassador at Residence. Invited guests to include: *Lunch Hosted by: Mr. Ric Smith, Ambassador* Guests include: The Hon. Philip Ruddock MP, Minister for Immigration and Multicultural Affairs; Ms. Paris Kostakos, Chief Adviser; Mr. Bill Farmer, Secretary, Department of Immigration and Multicultural Affairs (DIMA); Mr. John Okely, Assistant Secretary, International Cooperation Branch, DIMA; Mr. Hari Purwanto, Counsellor for Human Rights Affairs, DEPLU; Mr Raymond Hall, Regional Representative, UNHCR; Mr Richard Danziger, Head of Liaison, IOM; and Mr Jose Alvarez, Regional Director DIMA	*1530*
1430-1445	Meet with: Prof Yusril Ihza Mahendra, Former Minister of Justice and Human Rights	*1730-1745*
1515	Meet with: Mr Jakob Tobing, Member of Parliament (PDI P)	*1815*

1600	Check out and Depart for Airport		*1900*
1830	Depart Jakarta	SQ161 First Class *(Duration 1 hr 30 mins)*	*2130*
2100	Arrive Singapore		*2300*
	(To be met by Ms Michelle Grau, PMO, DIMA)		
2240	Depart Singapore	SQ880 Business Class *(Duration 2 hrs 15 mins)*	*0040*