Attachment B

CONTROLLING IMMIGRATION LITIGATION: THE COMMONWEALTH PERSPECTIVE

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Introduction

Controlling immigration litigation has been a pre-occupation for successive Commonwealth governments and Immigration Ministers. It is a topic which has received much attention over many years, and been the subject of numerous reform attempts, the most notable being the introduction of the privative clause, which, as you know was not successful in limiting judicial review. The reasons for this lack of success are complex. Some preliminary conclusions, however, may be drawn, including as to the motivation of litigants.

Despite the lack of success of legislative reforms in controlling immigration litigation, there has been a drastic reduction in the size of the Minister's case load. From a high of 4097 judicial review cases on hand on 31 July 2004, the case load has fallen to 700 cases on hand as at 30 June 2009.[1] This reduction can mostly be attributed to reform efforts outside of legislative change. The efforts are indicative of the future direction of reform using more innovative methods. For example, the Department is exploring the possibility of early engagement with potential litigants in an ADR inspired environment, and is among one of the first government agencies in the world to adopt business rules technology to improve legislative quality and decision support with the aim of thereby reducing the risk of "technical" litigation.

History of immigration reform

To begin, it is useful to outline some of the history of immigration reform.

It is a story of two parties, or should I say adversaries. It has almost become a traditional national dance of sorts, at least for those of us who have worked in the immigration sphere for long enough. Of course, I am speaking of the heightened tension between the Parliament and the courts, which in this sphere of administrative law that has been characterised by legislative reforms aimed at controlling litigation, met by assertive judicial responses.

1989 reforms

To understand this dance we begin with the 1989 reforms to migration decision-making.

The 1989 reforms replaced the previously broad and relatively unfettered Ministerial discretion to grant visas and entry permits with codified visa criteria located in regulations, which was the precursor to the modern *Migration Regulations 1994*. Prior to this amendment, the only constraints on the exercise of the Ministerial discretion were located in policy documents which did not have the force of law.

In terms of administrative review the 1989 amendments created the Migration Internal Review Office ("MIRO"), an internal review body and the Immigration Review Tribunal ("IRT"), a specialist and independent merits review tribunal. This was a significant development. Both the MIRO and the IRT stood in the shoes of the

[1] Please note that the statistics relating to the 2008-09 financial year are preliminary only. Please contact the Department before relying on statistics for this financial year.

decision-maker and considered the decision anew. Further, the IRT, unlike the AAT, was a non-adversarial tribunal with no right of departmental representation. Prior to this, merits review of immigration decisions was limited.

In terms of judicial review, prior to the coming into force of the *Migration Reform Act 1992* (Cth) ("the Migration Reform Act") in 1994, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("the ADJR Act") remained the primary avenue as it had since its introduction in the late 1970s with the Administrative Appeals Tribunal and the Commonwealth Ombudsman – together comprising Australia's mainstream administrative law package. Of course, review under section 75(v) of the Constitution in the High Court's original jurisdiction was also available, but lay relatively dormant.

The 1989 reforms were in part grounded in concerns about the courts' interpretation of broad discretions. The Report of the Committee to Advise on Australia's Immigration Policies, chaired by Professor Stephen Fitzgerald, noted in its 1988 report that one of the major criticisms of the immigration legislation was its indiscriminate conferral of uncontrolled discretionary decision making powers. Part of the guiding philosophy behind the reforms proposed by the Committee was to create a fair system of immigration control and review that was manageable in terms of administration within realistic resource allocation.[2] Accordingly, one of the purposes of the reforms was to give certainty for decision-makers in an environment where, arguably, court decisions were driving uncertainty.

1994 reforms

The 1989 amendments were followed in 1994 by the coming into force of the Migration Reform Act which continued the trend away from Ministerial discretion by introducing a universal visa system in the modern form which you are aware of. The Migration Reform Act also expanded the jurisdiction of the IRT to include most visa refusal decisions. It also created the Refugee Review Tribunal ("RRT") to hear and determine appeals against the refusal to grant refugee status.

The Migration Reform Act introduced a separate judicial review regime for immigration decisions in Part 8 of the *Migration Act 1958* (Cth) ("the Migration Act"). Access to the ADJR Act and section 39B of the *Judiciary Act 1903* (Cth) were barred.

The judicial review scheme also reduced the grounds of review. It prevented review on grounds of natural justice, failure to take account of relevant considerations and taking account of irrelevant considerations (hoped to be redundant on the ground that the criteria for grant of visas were specified in the regulations), making a decision so unreasonable that no reasonable person could have made it, and apprehended bias (replaced with actual bias).

[2] Committee to Advise on Australia's Immigration Policies, 'Immigration A commitment to Australia: The Report of the Committee to Advise on Australia's Immigration Policies', 16 May 1988, p 112.

One of the drivers for this was the increasing number of judicial review applications. In 1982-83 the Federal Court received 30 applications for judicial review of migration decisions. This increased to 192 in 1992, 404 in 1993-94, and 542 in 1995-96.[3]

The removal of review on the grounds of natural justice was also accompanied by the detailed legislative code of procedure which applied to departmental decision-making, and tribunal decision-making – in essence a codification of common law natural justice principles.[4] This was in part a response to the continued uncertainty for decision-makers regarding the content of procedural fairness as interpreted by the courts.

Uncertainty

To understand this uncertainty, I take you back to the 1980s.

The 1980s saw a rapid rise in Australian administrative law challenges instigated by the administrative law package of the late 70s. Among some of the seminal decisions of this time was the High Court's decision in *Kioa v West*,[5] the legacy of which has been described as a "legal obligation of inexact dimension".[6] The Court's decision established a new rule that in the ordinary case the validity of a deportation decision would turn on whether there had been a proper observance of natural justice. While this proposition is, in the context of such a momentous decision that affects the life of the individual, utterly defensible, the difficulty in *Kioa* lay in extracting from the case a rule that would identify other situations to which the obligation of natural justice would apply, and what is required to discharge that obligation.

In that case Mr Kioa faced deportation after his student visa had expired. Mr Kioa put his case against deportation briefly at an interview with an officer of the Department and in a written submission from the Legal Aid Commission of Victoria. The submission recorded that Mr Kioa had been active in the Tongan community providing pastoral support via the Uniting Church to other illegal Tongan immigrants and those facing deportation. In the brief prepared internally for the departmental decision-maker this was noted and it was added that "Mr Kioa's alleged concern for other Tongan illegal immigrants in Australia and his active involvement with other persons who are seeking to circumvent Australia's immigration laws must be a source of concern". By majority the High Court held that this internal remark gave rise to a breach of natural justice given its highly prejudicial nature.[7]

The difficulty with this finding was that natural justice became identified by the High Court as not just concerned with relations between the agency and the public (ie. was the person affected forewarned of a possible adverse decision and given an opportunity to respond) but also with how matters were discussed within the agency.

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[3] Mary Crock, 'Judicial Review and Part 8 of the Migration Act: Necessary reform or overkill?' (1996) 18 *Sydney Law Review* 267 at 288-289.
[4] Noting however that ss 359A and 424A of the Migration Act came into force on 1 June 1999: *Migration Legislation Amendment Act (No 1) 1998* (Cth).
[5] (1985) 159 CLR 550.
[6] John McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 *Federal Law Review* 335 (online Austlii ver) at 10.
[7] (1985) 159 CLR 550 at 568.

For example, the validity of the decision could turn on the nuanced way in which an internal submission was framed by an advisor, not the decision-maker. If an observation in an internal departmental briefing paper could be characterised as a "credible, relevant and adverse statement" (the formula of Justice Brennan that has gained support), then a second or subsequent hearing would be required.

Two examples of how *Kioa* was applied are the cases of *Taveli v Minister for Immigration, Local Government and Ethnic Affairs*[8] and *Conyngham v Minister for Immigration and Ethnic Affairs*[9]. In *Taveli* the Federal Court found that a comment in an internal briefing that a prohibited immigrant had "obtained Medical benefits" was a credible, relevant and adverse statement that attracted the obligation of natural justice. In *Conyngham* the Federal Court made the same finding about a prejudicial remark in an agency file that was *not* included in the briefing paper sent to the decision-maker. In the Court's view the "mere possibility" that "unconscious prejudice" could permeate the preparation of the briefing paper and flow through to the decision was a serious enough breach to invalidate the decision.[10]

The difficulty with how the natural justice obligation was articulated in *Kioa* was soon also illustrated in the High Court decision of *Haoucher v Minister for Immigration and Ethnic Affairs*[11]. In *Haoucher* the High Court held by majority that the Minister was obliged by natural justice to give Mr Haoucher a hearing before rejecting a recommendation of the Administrative Appeals Tribunal that he not be deported. The policy instruction which outlined the Minister's task stated that the Minister was to decide if there were "exceptional circumstances" and "strong evidence" to justify rejection of the AAT's recommendation. In essence the policy closely resembled the Minister's current public interest powers to intervene and substitute favourable decisions in certain circumstances. The result of *Haoucher* was an extra and exceptionally burdensome step in the decision-making process.

Further cases of this period that indicate the state of uncertainty that existed for decision-makers include the Full Federal Court decisions in *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs*[12] and *Heshmati v Minister for Immigration, Local Government and Ethnic Affairs*[13]. The applicants in these matters were Iranian refugee claimants. Both applicants wrote inflammatory letters to the Iranian embassy in Australia after their arrival in the country. In both cases the decision-makers disregarded the letters as a mere artifice designed to improve the applicants' chances of being recognised as refugees *sur place*. The Court held that the failure of the decision-makers to put to the applicants the doubts as to their credibility as raised by the letter amounted to a breach of natural justice.

While the fairness for and against the outcomes in these two cases can be debated and no doubt there would be force in requiring that an opportunity be given to an individual to be heard on evidence critical to their credibility, these cases do illustrate the uncertainty that was faced by decision-makers in drawing the natural justice line.

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[8] (1989) 86 ALR 435 (Wilcox J).
[9] (1986) 68 ALR 423 (Wilcox J).
[10] Ibid at 432.
[11] (1990) 169 CLR 648.
[12] (1991) 31 FCR 100; 102 ALR 339.
[13] (1991) 31 FCR 123; 102 ALR 367.

This was not a case where the evidence which led to the breach of natural justice was provided by a third party. Rather, the evidence here was provided by the actual applicant in circumstances where the applicant was legally represented and therefore had the opportunity to obtain advice on the evidence and put forward submissions accompanying the evidence.

Against this background, the introduction of a limited judicial review scheme in Part 8 of the Migration Act and the introduction of a code of procedure appeared a sensible means by which to give decision-makers more definitive guidance, and continue to ensure access to justice for genuine judicial review claimants while reducing unmeritorious applications.

However, history has shown that these aims were not successfully achieved as immigration litigation increased dramatically, with a large proportion of that litigation being successfully defended by the Minister. In 1993-94 a total of 520 immigration-related applications and appeals were filed in the federal courts and the AAT. This number increased steadily to 2005 applications and appeals in 2001-02. In the following two years there was an exponential rise, peaking at 5,395 applications in 2003-04. Over this period, however the Minister's success rate was on average 90%.

Reforms in the last 10 years

Returning to the history of immigration reforms, the next iteration of Part 8 of the Migration Act was enacted in 2001 by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth). The centrepiece of this amendment was the privative clause which was intended to expand the validity of decisions and to restrict the grounds of judicial review. This reform came out of the 1996 Howard Government's election platform to restrict judicial review in immigration cases to all but exceptional circumstances. A privative clause amendment was first introduced to Parliament in 1997 but did not proceed until 2001.

As you would be aware in 2003 the High Court in *Plaintiff S157 v Commonwealth*[14] upheld the constitutional validity of the privative clause, but construed it such that it did not operate to exclude the jurisdiction of the courts where a decision was affected by jurisdictional error.

A consequence of *Plaintiff S157* was that the time limits were no longer effective in circumstances where a decision was affected by jurisdictional error.

A further attempt in 2005 to limit the scope of judicial review by the re-introduction of time limits also failed. The *Migration Litigation Reform Act 2005* (Cth) ("the 2005 Act") was part of a package of administrative and legislative measures that implemented the recommendations of the Migration Litigation Review, headed by Ms Hilary Penfold QC, now Justice Penfold, which reported to the Government in January 2004. The 2005 Act introduced a definition of "purported" privative clause decision. By applying the time limits to purported privative clause decisions as well as privative clause decisions, the 2005 Act attempted to make the time limits in the Migration Act meaningful again.

[14] [2003] HCA 2; 211 CLR 476.

However, in 2007 the High Court in *Bodruddaza v Minister for Immigration and Multicultural Affairs*[15] held that the relevant provision was invalid.

The re-introduction of the time limits was also defeated in the Federal Court by the 2007 decision of *Minister for Immigration and Citizenship v SZKKC*[16]. The Court there held that "actual notification" of a tribunal decision for the purpose of engaging the section 477 time limits requires that the client be personally handed a copy of the decision within 14 days of the handing down of that decision. Of course, as a practical matter this is just not possible and therefore the time limits were rendered ineffective.[17]

In response to these decisions the Parliament in February this year passed the *Migration Legislation Amendment Act (No 1) 2009*, reinstating uniform time limits for the review of immigration decisions in all courts. Importantly, the courts now have a broad discretion to extend time where they consider an extension necessary in the interests of the administration of justice, thereby overcoming any constitutional objections. These time limits commenced on 15 March.

Why have attempts to control failed?

As I have mentioned, the attempt to control immigration litigation by legislative reforms has largely been unsuccessful. Why this is so is a complex question, with no easy answers. A few points however can be made.

Technical deficiencies

First, as many commentators, including Denis O'Brien, have argued, the code of procedure for decision-making may in large part have had the unintended effect of encouraging the courts to focus on technical deficiencies. As I have mentioned, the aim of the code was to replace the common law rules of procedural fairness in order to give decision-makers and tribunals certainty in processing visa applications and applications for review. While some certainty was achieved, a market for litigation over technical deficiencies grew.

For the Commonwealth, this market is characterised by "fire fighting" litigation. Where the point is strong and the Minister's prospects of success are less than reasonable, the department withdraws. However, often the points are not strong and the result of a court decision favourable to the applicant would result in undesirable policy consequences. An example of this was the recent Full Federal Court decision in *Sales v Minister for Immigration and Citizenship (No 2)*[18]. In this case the Court quashed a decision of a former Minister purporting to cancel Mr Sales' Transitional (Permanent) Visa under section 501(2) of the Migration Act on character grounds. The Court held that section 501 could not be used to cancel a Transitional (Permanent) Visa. This is because section 501 is a power to cancel a visa which has

[15] [2008] HCA 14.
[16] [2007] FCAFC 105.
[17] However, since then the Federal Magistrates Court has held that *SZKCC* was reversed by *SZKNX v MIAC* [2008] FCAFC 176: *SZMVQ v MIAC* [2009] FMCA 137 at [18].
[18] [2008] FCAFC 132.

been "granted", whereas Transitional (Permanent) Visas were held under an operation-of-law provision which converted entry permits into visas in 1994 as part of the implementation of the Migration Reform Act.

This decision was undesirable from a policy perspective. It meant that decisions made by the Minister to cancel visas of this kind were invalid. These cases concerned persons who had been in Australia for long periods and therefore the decisions were not taken lightly and were often the result of very serious criminal records.

In this case, a legislative response was adopted. The gap in the coverage of section 501 was subsequently largely closed by legislative amendment.[19]

It is important to note that it is far from clear that repealing the code of procedure and returning to the common law rules of natural justice would actually have the effect of reducing unnecessary litigation such as that arising from technical deficiencies. This is because, while applications for judicial review that fall within this category of technical deficiencies are so far removed from the facts and therefore the "justice" or "merits" of the case, the applications do have the effect of delaying the resolution of the applicant's immigration status. This is the second point I would make here. That is, litigation in this jurisdiction as a means of delay is an end in itself. This is what makes immigration litigation unique. There is an inherent incentive for clients to litigate. The bridging visa granted to non-citizens with ongoing judicial review litigation achieves a version of the ultimate outcome sought – a visa to remain lawfully in Australia for an extended period of time. This "advantage" is not dependent on the code of procedure or legal rules whether legislative or common law.

Delay

Delay as a unique driver in immigration litigation has been recognised by members of the judiciary. Writing extra-judicially Justice Lindgren has acknowledged the concern that class actions in the late 1990s were being used to encourage large numbers of people to litigate to prolong their stay in Australia.[20] In an article in 2001 reviewing the increasing number of Federal Court applications for review of immigration decisions, Justice RD Nicholson noted that one feature of the applications for review of such decisions was that

> normal inhibitions against initiation and continuance of court process has little or no application. The sanction of costs is not meaningful as newly arrived persons rarely have resources.[21]

He went on to note that there was an

> inbuilt motivation of any unsuccessful applicant for [refugee] status to avoid or defer repatriation to the feared country of origin and so to seek review of the decision of the Tribunal and, if not successful, to further appeal. Each step holds the possibility that some political change may occur in the feared

[19] The *Migration Legislation Amendment Act (No 1) 2008* inserted section 501HA into the Migration Act. That section provides that the holder of a transitional visa is taken to have been "granted" a visa.
[20] Justice Lindgren, 'Commentary' (2001) 29 *Federal Law Review* 391.
[21] Justice RD Nicholson, 'Administrative Issues in Refugee Law' (2001) 28 *AIAL Forum* 40 at 41.

country which will remove the basis for that fear, whether well-founded or not.[22]

Delay as a primary litigation driver is also supported by the history of reform that has taken place in immigration decision-making. Over time the Commonwealth has improved and offered further opportunities for merits review. Over the past 30 years an elaborate administrative review structure has gradually developed. For example, in the refugee sphere, the review of departmental decisions began with the DORS Committee in 1978, progressed to the Refugee Status Review Committee in 1990 and then finally to a fully independent non-adversarial RRT in 1993. Former governments have stated that the purpose of improving the quality and quantity of such review opportunities and replacing the pre-1989 broad Ministerial discretion with codified decision-making criteria, was to make recourse to judicial review less attractive.[23] These initiatives did not curb judicial review.

A potential correlation between new court applications and court processing times may also support the view that delay is a primary litigation driver. Specifically, there appears to be an intriguing correlation between the reducing number of new court applications in recent years and reduced court processing times. For example, the average time to resolve a matter at first instance (whether before the Federal Magistrates Court or Federal Court) has reduced from 347 days in mid 2006 to 143 days in mid 2009, while over the same period the number of new applications went from 599 in the last quarter of 2005-06 to 313 in the last quarter of 2008-09.[24]

This may indicate that as court processing times decrease the incentive to litigate is lessened.

Another issue faced by the Department is repeat litigants. By this I mean persons who have previously made unsuccessful judicial review applications who seek to re-agitate review of the same decision before the courts. In most cases these non-citizens have pursued their applications through the entire court hierarchy including special leave to appeal to the High Court. This results in further delay.

Another noteworthy figure which supports delay as the primary litigation driver is the Minister's overwhelming success in matters defended. Since 1993-94 the Minister has been successful in, on average, 93% of cases. This means that, putting aside cases from which we withdrew, in only 7% of cases did the affected person get a favourable decision, which may have included a rehearing by the tribunal. (Of course, whether the person actually achieved a favourable visa outcome in the end is another matter.) When the success rate is viewed together with the upward trend in applications, 1,045 total new applications in 1997-98, 1,590 applications in 1999-2000, 2,605 applications in 2001-2002 and peaking in 2002-2003 with 5,397 new applications,[25] it

[22] Ibid.
[23] Philip Ruddock, 'Narrowing of Judicial Review in the Migration Context' (1997) 15 *AIAL Forum* 13 at 15.
[24] Please note that the statistics relating to the 2008-09 financial year are preliminary only. Please contact the Department before relying on statistics for this financial year.
[25] Department of Immigration and Citizenship, Quarterly Litigation Report: April to June 2008 and 2007/2008 Overview, Attachment B, p 1. NB: the peak figure of 5,397 applications in 2003-2004 includes the individual applications filed in the Federal Court as a result of the dismissal of the Muin/Lie class action applications, which were originally filed in the High Court in 2002-2003 and

is clear that delay is a real factor driving litigation, and to which there is no easy solution, let alone a legislative one.

Other efforts

Despite the failure of legislative reforms to control immigration litigation, other management efforts have been successful in reducing the Minister's case load. From a high of 4097 judicial review cases on hand on 31 July 2004, the case load has fallen to 700 cases on hand as at 30 June 2009.[26]

At the outset, in understanding the Department's strategy to manage the case load, it is important to understand that it is not the Department's business to litigate. Early withdrawal where there are no reasonable prospects of success is a key goal of the management of the case load. Our panel firms are required under contract to provide preliminary advice on prospects within 21 days of receiving a claim. Of the 2125 judicial review applications filed last financial year the Department withdrew in 213.[27] Of course, the court only has jurisdiction to allow the Department to withdraw from matters initiated by applicants where a jurisdictional error has been identified.

Conversely the Department does not hesitate to seek early dismissal of an application where it considers the applicant has no prospects of success.

Our objective is to provide real access to justice to those cases that have genuine prospects, while minimising claims that are unmeritorious or amount to an abuse of process.

It is important that these comments be understood in light of the Attorney-General's Legal Services Directions and the model litigant obligations imposed on the Department. The Department is bound by these directions and we take our obligations very seriously.

We have systems in place to record and track any complaints alleging breach of these obligations. In addition, our panel firms and Legal Officers are required to certify at the end of a matter that there was no indication, no matter how minor, of an allegation of a breach. Any allegations are immediately escalated and reported to the Office of Legal Services Coordination ("OLSC") in the Attorney-General's Department. The Department's commitment is reflected in the fact that no breaches have occurred since proceedings in 2005, and that breach related to an oversight which OLSC found had caused no detriment.

Other management efforts include the centralisation of all litigation within the Litigation and Opinions Branch in National Office. The Branch is structured along client lines to ensure the relevant client areas within the Department are provided with high quality advice and reporting. This improves consistency across matters and

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remitted to the Federal Court. The original High Court and remitted Federal Court applications have not been included in these figures.

[26] Please note that the statistics relating to the 2008-09 financial year are preliminary only. Please contact the Department before relying on statistics for this financial year.

[27] Ibid.

where possible like matters are batched. This may include allocating a particular issue to one panel firm or one counsel.

The other clear advantage of centralisation is in the management of our Legal Services Panel and greater use of this resource. The allocation of work to the panel is proactively managed to ensure high quality legal services that represents value for money. Panel performance is closely monitored both on a day-to-day basis by our legal officers and via four monthly formal reviews.

The Department's key management efforts in recent years have focused on working with some key stakeholders, in particular the Attorney-General's Department ("AGD") and the courts. Regular meetings with the courts and AGD have created a strategic and coordinated approach to litigation caseload management. A combination of additional funding for the courts and administrative measures adopted by the courts has greatly assisted the management of immigration matters.

A long standing practice in immigration matters is that the Department prepares court books in all first instance matters. These books contain all the departmental documents that an applicant requires for the litigation process such as their visa application and the delegate and tribunal's decision. This practice has proven to be effective by limiting reliance on the potentially time consuming and costly process of discovery or requests under the *Freedom of Information Act 1982* (Cth). Of course, the applicant in all cases has the opportunity to put on evidence that is not in the court book.

In 2006 the Government agreed to funding for an additional 13 Magistrates to assist with migration litigation. Additionally, the courts have set disposition time goals for finalising matters, and have carefully monitored the progress of matters against those goals to ensure that matters are resolved within an appropriate timeframe. Keeping tabs on outstanding judgments and monitoring the flow of cases through tribunals and courts allows the courts to predict the future case load and make appropriate plans. The courts have periodically held mass-callovers to address any emerging backlog of litigation matters, and have established processes that enable certain decisions to be made on the papers.

Further, there has been some streamlining in relation to the way that matters filed in the original jurisdiction of the High Court are remitted to lower courts.

Monitoring the professionals providing advice to applicants has also made a contribution to lessening the backlog.

These efforts are reflected in the reduction in Federal Magistrates Court processing times which, as I have mentioned, has reduced from an average of 347 days in mid 2006 to 143 days in mid 2009.[28]

[28] Please note that the statistics relating to the 2008-09 financial year are preliminary only. Please contact the Department before relying on statistics for this financial year.

Good decision-making

A related effort is the continued focus on good decision-making. The Department's commitment to producing quality decisions is evidenced by the development of Best Practice Guides on good decision-making a joint publication between the Department and the Administrative Review Council. These guides were published in 2007 and are made widely available to staff. The guides deal with a range of issues relevant to good decision-making, such as lawfulness, natural justice, evidence, facts and findings, reasons and accountability.

In conjunction with these guides the Department delivers Good Decision-Making training to staff across Australia on a regular basis. The Department has also recently launched eGDM, which is an introductory, on-line course for all staff on good decision-making.

These initiatives remind us that continuous improvements in decision-making can go hand in hand with reforms to control the volume of litigation.

Legal advice scheme

Another effort in recent years that has, surprisingly, not proved successful in controlling immigration litigation is the Legal Advice Scheme.

In July 2000 the then Minister established a pilot legal advice scheme following concerns expressed by some Federal Court judges on the large number of photocopied, generic and otherwise inappropriate applications for review from unrepresented clients in immigration matters. It was hoped that providing independent legal advice to unrepresented applicants, who were seeking review of RRT decisions, would provide applicants with meritorious cases a coherent application to the court, and those whose cases were unmeritorious would be encouraged to withdraw. This would have resulted in significant savings for the Government, both in terms of litigation costs and court resources.[29]

The pilot Legal Advice Scheme commenced on 17 July 2000 in New South Wales. In October 2003 the Scheme was extended to Western Australia, although the number of cases in that state remains negligible.

Under the Scheme, unrepresented applicants who choose to participate are provided with independent legal advice on their application to the Federal Magistrates Court. The advice is provided by a lawyer from a panel consisting, in NSW, of approximately 30 legal practitioners, of whom roughly half are barristers appointed by the NSW Bar Association, and half solicitors appointed by the Law Society of NSW.

Unrepresented applicants who file applications for review of their RRT decision in the NSW and WA District Registries are invited in writing to participate in the Scheme.

[29] See the comments of Wilcox J in *Mbuaby Paulo Muaby v Minister for Immigration and Multicultural Affairs* [1998] FCA 1093.

The NSW District Registry of the Federal Magistrates Court/Federal Court is responsible for the Scheme's day-to-day operation in NSW. In WA, the Scheme is administered by the Law Society of Western Australia. The Department does not have responsibility for the day-to-day operation and administration of the Scheme because this would put the Department in a conflicted position.

The Scheme is fully financed by the Commonwealth. The panel lawyer renders an invoice and forwards this to the Bar Association or Law Society. Upon receipt of the invoice payment is made by the Bar Association or Law Society from funds periodically provided by the Department which are held in a trust account.

Since its inception in 2000 the Scheme has cost around $4.12 million.

In terms of the original goals of the Scheme, the statistics indicate that it has not been successful in lowering case resolution time as compared to self-represented clients. Scheme members' cases have consistently had a longer resolution time than the self-represented litigant caseload, with the slight exception of the Scheme's first year of operation. The average difference over the life of the Scheme is a 41-day difference in favour of the non-Scheme caseload (see Figure 1).

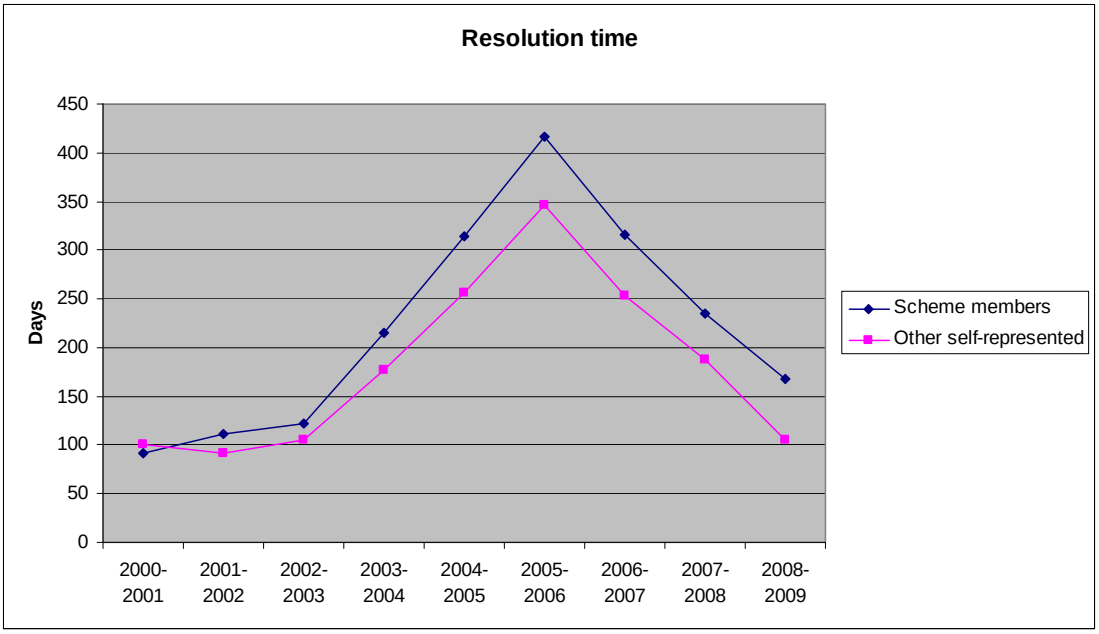

Figure 1

The Scheme has also had no discernable impact on applicant withdrawal rates. While it is not possible to extract the withdrawal rate for only those cases which would fall into the subjective category of "unmeritorious", it can be assumed that the percentage of cases which could be called unmeritorious would be approximately the same between the Scheme-assisted clients and the broader self-represented caseload. There is no consistent pattern of withdrawals between these two groups – the Scheme's impact on withdrawal rates has been negligible (0.1% difference, on average) (see Figure 2).

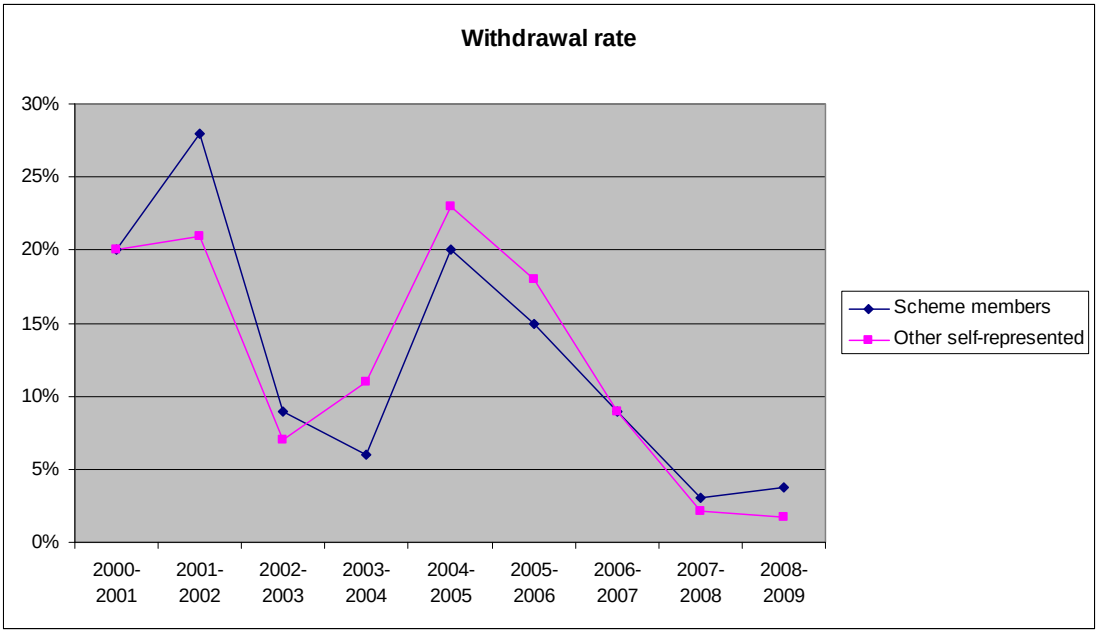

Figure 2

Minister's appeals

Another aspect of the Department's management of the litigation case load is the careful consideration given to decisions to appeal.

The decision to appeal is taken very seriously. Appeals are only filed following consideration of legal advice and extensive consultation with policy areas. Not only must there be good prospects of success but there must also be cogent policy or legal reasons to pursue an appeal, for example if the decision holds significant precedential value. This is reflected in the fact that less than 2% of our case load constitutes Minister's appeals.

A current example is the appeal in *SZIAI*[30] which was heard by the High Court on 28 July 2009. This case raises the question of whether a failure by the RRT to undertake inquiries can ever amount to jurisdictional error. The RRT decision was quashed by the Federal Court on the basis that the RRT should have taken additional steps to resolve the authenticity of documents provided by the applicant. The principle applied by the Federal Court has the potential to impose a significant workload on the RRT. Additionally, the scope of judicial review in relation to failure to inquire is an important issue across a range of Commonwealth decision-making. The Minister's position is that failure to take some action in the course of coming to an administrative decision will not infringe any limit on the decision-maker's power in the absence of some statutory provision requiring that step to be taken. In this case, there is no provision in the Migration Act which requires the RRT to undertake inquiries.

[30] Appeal from *SZIAI v Minister for Immigration and Citizenship* [2008] FCA 1372.

Another current example of a Minister's appeal is the case of *SZIZO*[31], which was heard by the High Court on 23 April 2009. *SZIZO* concerns an invitation to an RRT hearing which was addressed to the wrong family member. A different family member had been nominated to receive the invitation. Nevertheless, the invitation was received and all family members attended the RRT hearing. The Federal Court quashed the RRT decision. The Minister argued before the High Court that minor breaches of mandatory statutory procedures should not necessarily be regarded as a jurisdictional error. In the alternative, the Minister argued that the Court should refuse to grant relief, in reliance on the Court's inherent discretion, as the error did not affect the outcome of the decision-making process.

Judgment in both *SZIAI* and *SZIZO* is reserved.

New reform directions

Putting aside these efforts, which might be described as more traditional approaches to controlling litigation, the Department is also working on other more innovative approaches.

Alternative dispute resolution

First, the failure of the Legal Advice Scheme to minimise unnecessary or unmeritorious litigation answers some questions, and raises others. Logically, it could be expected that an ordinary litigant would withdraw their application if advised by able representation that there was no prospects of success. In the case of the matters under the Legal Advice Scheme it is clear that this has not occurred. The reason for this might be explained by the delay incentive inherent in this jurisdiction. It could also be expected that legal representation would reduce court processing times. However, processing times in cases where the applicant was legally represented through the Scheme in fact increased.

One conclusion that might be drawn is that in the vast majority of cases the litigants do not accept the legal advice given, and the court's decision, and therefore do not reach the realisation that they could decide to go home. Litigation does not resolve this hurdle.

While further work needs to be done to explore the underlying motivations of litigants in this jurisdiction, it is possible that mediation may achieve what legal advice has not. Early intervention, especially with unrepresented litigants who make up a very substantial part of our case load, with third party mediation to explain the decision, the likely prospects of success and possible alternative avenues, may be a way to reduce unmeritorious litigation and to get better outcomes for litigants.

The success of the Department's Community Care Pilot, which, following the 2009-10 Budget has transitioned to a complete program – the Community Status Resolution Service, may indicate the merit in this approach. This program provides active and early support for compliance clients in the community, particularly those holding a bridging visa E, until such time as they achieve a final immigration outcome. In the

[31] Appeal from *SZIZO v Minister for Immigration and Citizenship* [2008] FCAFC 122.

case of the pilot, assistance was given to 746 clients since its inception in May 2006. Of these, 53% received immigration information and counselling services. A total of 291 (or 39%) were assisted in the resolution of their immigration status.

Business rules technology

The other approach which I would like to highlight is the use of business rules technology to improve legislative and decision-making quality to thereby reduce the risk of litigation.

As I have discussed, one source of unnecessary litigation is the focus on technical deficiencies. In some cases the sheer complexity of the *Migration Regulations 1994* means that minor differences in drafting between provisions that were intended to be identical, can be a source of uncertainty and thus litigation.

To combat this, and achieve greater consistency across our legislation, the Department has developed and is currently populating a Business Rules Repository. A business rule is a directive that is intended to govern, guide or influence departmental business activity or define departmental business knowledge. Business rules may be used in computer assisted decision making, such as that provided in the portals being developed in the Department to assist in visa processing.

The Visa Wizard and Citizenship Wizard, two products developed by the Department and available on the Department's website, use executable business rules to quickly and accurately provide visa and citizenship information to potential applicants. Executable business rules will also be used in the Department's Generic Visa Portal, which will provide computer assisted decision-making for visa decisions.

There are three key ways in which the Business Rules Repository will help improve the quality of legislation.

First, the Repository will contain an approved set of terms and their definitions, to ensure that consistent language is used for the same idea across the Department. By harmonising our language, we can prevent duplication of ideas within our policy and legislation and adopt a consistent set of expressions for common ideas.

Secondly, the Repository will contain a set of business rules defining the legally approved requirements for a particular business outcome (for example, the granting of a particular subclass of visa). Where a part of a process is common to several decision processes (for example, the same requirements within several different visa subclasses), these are identified as a set of common rules to show the commonality.

Thirdly, the Repository will provide a mechanism to show the links between the approved terms, business rules and legislation. This will enable policy and legal staff to undertake impact analysis on proposed changes to identify whether a proposed change will have unintended consequences or would diverge from an already established process without good reason.

Underlying the Repository is an approval process to ensure that the Repository is a "single source of truth" for business rules and approved terms. All business rules and

terms are cleared by lawyers and business policy owners before being submitted to a high-level committee for enterprise wide approval.

As part of the analysis process to populate the Repository, a number of inconsistencies have already been identified in the language of the legislation. The business rules have adopted standard language for describing a few common concepts that are frequently expressed in different ways in legislation. For example, the business rules express a person's age consistently as "less than 18 years of age" (or other equivalents) and its opposite as "not less than 18 years of age", whereas these are expressed in numerous different ways in immigration legislation. With the inconsistencies identified and a standard expression agreed on, it is our expectation that legislative changes will adopt this approved language.

The Department is among one of the first government agencies anywhere in the world to use business rules technology. This is truly an innovative approach focusing very much on the front end of the legal process. The Visa Wizard and Citizenship Wizard, two products of the business rules technology, have been recognised recently through the award of first prize in the Awards for Excellence in eGovernment for 2009 at the CeBIT International Business Technology Conference in Sydney. It is our hope that the Business Rules Repository will be a key tool in the proactive management of immigration litigation.

Conclusion

To conclude, it is worth reminding ourselves of the nature of litigation. That is, litigation is full of uncertainty for all parties. Regardless of what steps are taken by governments, whether legislative or otherwise, controlling the volume of immigration litigation will be a continuing battle. If the last 20 years of immigration litigation is anything to go by, external factors such as controversial and unexpected legal rulings and the behaviour of clients motivated by the unique bridging visa incentive, will continue to drive litigation in this area.