

Regulation 4.31B and deterrence

Introduction

- 2.1 In its previous review in 1999, the Committee concluded that:
- the fee should be retained, but it should be subjected to a further sunset clause to allow for a thorough assessment to be made of its effectiveness.¹
- 2.2 Regulation 4.31B was:
- Introduced primarily to address the growing misuse of the PV process by people lawfully in the community.²
- 2.3 In its previous report, the Committee had concluded that:
- there is a significant amount of abuse from protection visa applicants.³
- 2.4 In this chapter, the Committee re-examines the question of misuse of the PV system, specifically:
- abuse of the Protection Visa (PV) system;
 - whether the fee is reducing abuse; and
 - whether the fee is deterring *bona fide* applicants.

1 Joint Standing Committee on Migration, *Review of Migration Regulation 4.31B*, Parliament of the Commonwealth of Australia, 1999 (JSCM, *Review of Migration Regulation 4.31B*), p. 37.

2 Department of Immigration and Multicultural Affairs (DIMA), Submissions, p. 81.

3 JSCM, *Review of Migration Regulation 4.31B*, p. 37.

Is there abuse?

2.5 The fee is based on the presumption that there is abuse of the PV which requires redress. If there is no abuse, there is no rationale for the regulation. In its 1999 report the Committee concluded that:

there is a significant amount of abuse from protection visa applicants.⁴

2.6 Amnesty International Australia (Amnesty) noted that asylum determination systems anywhere are subject to abuse.⁵ However there is a further question of whether any abuse detected is deliberate, or inadvertent. The Department of Immigration and Multicultural Affairs (DIMA), in common with a number of submissions, pointed out that unsuccessful applications to the Refugee Review Tribunal (RRT) are not all *mala fide*:

there are people from most countries in the world who may genuinely believe that they are refugees, or otherwise engage Australia's protection under its international obligations.⁶

2.7 Unsuccessful PV applicants include those who may harbour genuine fears for their safety if they return to their country of origin. The Young Lawyers' Law Reform Committee (YLLRC) pointed out that applicants:

cannot know before seeking a review whether or not the review will be successful.⁷

2.8 The Australian Section of the International Commission of Jurists (ICJ) argued that because the primary determination process was 'relatively meaningless'⁸ and that because the RRT was often the first opportunity for substantial examination of their claims,⁹ most applicants would:

apply for review by the RRT notwithstanding the possible imposition of the \$1,000 post decision fee.¹⁰

2.9 Unsuccessful applicants are those who have not been able to convince DIMA or the RRT that they fitted the Refugee Convention definition of refugees.¹¹ Both the National Council of Churches in Australia (NCCA) and the Kingsford Legal Centre (KLC) describe that definition as

4 JSCM, *Review of Migration Regulation 4.31B*, p. 37.

5 Amnesty, *Submissions*, p. 60.

6 DIMA, *Submissions*, p. 92.

7 YLLRC, *Submissions*, p. 69.

8 ICJ, *Exhibit 1*, p. 3.

9 ICJ, *Exhibit 1*, p. 2.

10 ICJ, *Exhibit 1*, p. 3.

11 *Submissions: RACS*, pp. 17-20; NCCA, p. 35; Amnesty, p. 60.

'narrow'.¹² Other applicants whose RRT appeals are rejected may have made honest, but ultimately unmeritorious, claims. Or as YLLRC noted, the RRT may have erred in its refusal.¹³

- 2.10 There is, however, evidence of abuse. Each year the RRT concludes that DIMA, in 90 per cent of its decisions, has correctly rejected a PV application. The low proportion (10 per cent) of DIMA decisions set aside by the RRT strongly suggests, and the Migration Institute of Australia (MIA) argues that, there are 'spurious applications' for refugee status.¹⁴
- 2.11 When the RRT is contemplating supporting DIMA's refusal of a claim for refugee status, it offers the applicant an opportunity to attend a hearing. The failure of one in three to take this opportunity¹⁵ to present their case in person is evidence that they know that the claim cannot be sustained.
- 2.12 These behaviours indicated to the Committee that there is deliberate abuse of the PV process.
- 2.13 The Committee thought it significant that most of those who applied for PVs and who had been rejected by the RRT were still in Australia, and that nearly one in three of those remained without a current visa. This suggested that one motivation for the initial application and subsequent appeal was a desire to prolong their stay in Australia.¹⁶
- 2.14 It also indicated to the Committee that there were likely to be other areas in the migration jurisdiction where more streamlined procedures might reduce the time taken to resolve cases and thus diminish the temptation to use the system to gain more time in Australia.

Conclusion

- 2.15 The Committee concluded that there is significant abuse of the PV and other migration processes.

Recommendation 1

- 2.16 The Committee recommends that DIMA systematically examine the full range of existing migration processing and review arrangements with a view to further streamlining them.**

12 Submissions: NCCA, p. 35; KLC, p. 123.

13 YLLRC, Submissions, p. 70.

14 MIA, Submissions, p. 43.

15 DIMA, Submissions, p. 99. RRT, Evidence, p. 26, indicates that between 1/7/00 and 28/2/01 only 20 of 380 appellants from the PRC appeared at the hearing.

16 DIMA, Submissions, pp. 103, 196. A sample of DIMA records indicated that 29 per cent did not have current visas.

Is the fee effective in reducing abuse?

2.17 In its previous report, the Committee concluded that:

there is evidence to suggest that regulation 4.31B may have been effective in reducing that abuse, although this is difficult to gauge given the short time that the fee has been in place.¹⁷

2.18 The current review was undertaken two years after that report, and some 45 months after the regulation came into effect. The Committee therefore reviewed the evidence relevant to the question of 'abusive' (or *mala fide*, or unmeritorious) claims by visa applicants.

2.19 There was a strong division of opinion concerning the effectiveness of the fee which was introduced:

primarily to address the growing misuse of the PV process by people lawfully in the community;¹⁸

and to reduce

abuse/misuse of the protection visa system by people lodging applications for visas or review knowing their claims to be unfounded, simply to gain benefit of extended stay in Australia during the processing period.¹⁹

2.20 A number of submissions argued that the fee was not having an effect on unmeritorious applications. The ICJ, for example, queried:

whether in fact the imposition of the post decision fee has had any direct impact on the number of applications appealed to the RRT.²⁰

2.21 KLC thought it was 'questionable' whether the fee met its aim,²¹ while the Refugee Advice and Casework Service concluded that 'the fee appears to have had no impact'.²² YLLRC and Amnesty went further submitting that, respectively:

there is no evidence that the fee has been effective in deterring abuse of the refugee application process;²³

and

17 JSCM, *Review of Migration Regulation 4.31B*, p. 37.

18 DIMA, Submissions, p. 81.

19 *DIMA 1999 Submissions*, p. 70.

20 ICJ, Exhibit, p.4.

21 KLC, Submissions, p. 122.

22 RACS, Submissions, p. 19.

23 YLLRC, Submissions, p. 67.

yet to see any evidence that would suggest that it has had any impact on those making vexatious claims... if anything, those seeking to “abuse” the asylum determination system...are often in the best position to afford \$1000.²⁴

2.22 The MIA maintained that ‘the regulation is failing to achieve its purposes’,²⁵ and identified a number of categories of applicant to illustrate why it argued this:

- legal temporary arrivals applying for a PV within 45 days would be able to work while their RRT appeal was pending, and so would find the fee no deterrent;
- legal temporary arrivals not applying for a PV within 45 days who wanted to work and did so illegally could continue to do so while their RRT appeal was pending, and would find the fee no deterrent;
- legal temporary arrivals wishing to remain for family/personal reasons and who were ineligible for another onshore visa except a PV would find the benefit to themselves or their family outweighed the deterrent effect of the fee;
- legal temporary arrivals fearing to return home (whether for a refugee convention reason or not) would not be deterred because for them ‘time is a precious commodity’²⁶; and
- persons detained when their visa has expired may be unable to return soon to Australia because of the visa breach and may therefore not be deterred by the fee.²⁷

2.23 More narrowly, NCCA claimed that the fee may not have the desired impact on ‘economic migrants... [who] have a greater capacity to pay the debt’.²⁸

2.24 A few submissions, such as those of Justice Migration and Visa Services (JMVS) argued that the fee was indeed reducing abuse of the PV system.²⁹ Mr Robert Downy, in a private submission, described the regulation as:

sound as a disincentive to those who have little or no cause to be considered for the very generous United Nations classification of refugee.³⁰

24 Amnesty, Submissions, pp. 58, 61.

25 MIA, Submissions, p. 43.

26 MIA, Submissions, p. 44.

27 MIA, Submissions, p.45.

28 NCCA, Submissions, pp. 35.

29 JMVS, Submissions, p. 38.

30 R. Downey, Submissions, p. 2.

2.25 DIMA indicated that abuse had been reduced, rather than eliminated,³¹ and argued that the fee:

as a discrete measure, is having an effect as a disincentive to *mala fide* applicants proceeding to the RRT.³²

2.26 However, YLLRC also pointed out that, if there was any deterrent effect, the fee:

does not distinguish between abusers of the system and a bona fide applicant who may fear that their application may not succeed.³³

2.27 In support of its claim that the fee was a disincentive to *mala fide* applicants DIMA provided statistical information. The data came from identifying refugee applications made in specific financial years by applicants not in detention, and following their subsequent appeal activities. This 'cohort' approach provides data which:

- enables comparison of the activities of applicants who sought PVs prior to the regulation coming into force with those applying later;

but

- is not comparable with RRT data which includes applicants in detention and covers applications dealt with in each financial year (independent of the year in which they were begun).³⁴

2.28 In assessing the data provided by DIMA, the Committee was aware that statistics offer no clear guide to the motivation of the applicants. The relevance of the fee to any observed changes in the data for 'abuse' was therefore open to interpretation.

2.29 The significance of changes revealed in the data was further clouded by other developments in the migration field which may have affected people's behaviour, and hence the data. Changes in the migration environment in the recent past include:

- limitation of rights to work and access to Medicare from July 1997 to those who made a PV application within 45 days of arrival;
 - forewarning of the imposition of the fee, which may have prompted a surge of applications to the RRT in 1996/97;
 - the adoption by the RRT from 1996/97 of a practice of giving priority to consideration of appeal from 'low set aside/high volume application
-

31 Eg DIMA, Submissions, pp. 90, 92, 95,

32 DIMA, Submission, p.110.

33 YLLRC, Submissions, p. 69.

34 DIMA, Submissions, p. 80, footnote 2.

countries' and those where applicants rarely attend for hearing.³⁵ This was to reduce backlogs and discourage abuse of the PV process³⁶ and may have affected the level of applications from low refugee-producing nationalities;

- the reduction in DIMA's average primary processing times from 268 days in 1995/96 to 151 in 1997/98 to fewer than 85 days thereafter,³⁷ potentially reducing the duration of an applicants stay in Australia;
- debate in 1997 over the period for which the sunset clause would apply,³⁸ which may have influenced possible *mala fide* applicants;
- the announcement in September 1996 by the Minister for Immigration and Multicultural Affairs, that interim appointments would be made to the RRT while its role was under Government consideration, may have led to uncertainty about the continuing access to the RRT;³⁹
- a change in the mix of protection visa applications which could have affected the proportions of acceptances and appeals;⁴⁰ and
- a significant increase in unauthorised arrivals by boat, which raised the profile of asylum issues in Australia.⁴¹

2.30 DIMA said that:

it is hard to disentangle which part of the package of measures that we have taken over the last eight or 10 years has uniquely contributed to deterring misuse of the asylum system... [but] the post-determination RRT fee...is an important part of the package.⁴²

Despite the scarcity of objective statistics on *mala fide* applications, the effect of the fee can be seen through study of specific groupings of applicants where the proportion of *mala fide*... can be expected to be higher.⁴³

35 RRT, *Annual Report 1998/99*, pp. 1-2; *Annual Report 1999/2000*, p. 9. www.rrt.gov.au/

36 RRT, *Annual Report 1998/99*, pp. 1-2. www.rrt.gov.au/

37 DIMA, *Submissions*, p. 89.

38 JSCM, *Review of Migration Regulation 4.31B*, pp. 4-6.

39 Minister for Immigration & Multicultural Affairs, Media Release, 60/96. *Refugee Review Tribunal Appointments*. This followed an announcement in May that the RRT would be reviewed: Minister for Immigration & Multicultural Affairs, Media Release, 19/96 *Review of Immigration Decision Making*. www.minister.immi.gov.au/media_releases Subsequently the Attorney-General announced the future incorporation of the RRT into a new Administrative Review Tribunal: Attorney-General News Release, 20/3/97, *Reform of Merits Tribunal*. www.law.gov.au/aghome/agnews

40 Eg: the three main nationalities applying for PVs in 1996/97 were Indonesia (1,770); Philippines (1,731); and Sri Lanka (1,278). In 1997/98: Indonesia (1,585); PRC (1,091); and Philippines (689). DIMA, *Submissions*, p.157.

41 DIMA, Fact Sheet 81 *Unauthorised Arrivals by Sea and Air*. 1997/98 = 157; 1998/99 = 920; 1999/00 = 4,174.

42 DIMA, *Evidence*, p. 7.

43 DIMA, *Submission*, p. 92.

- 2.31 The relevant group of applicants was that from 'low refugee producing' nationalities. These were defined as nationalities from which, over the five financial years 1995/96 to 1999/2000, ten or more applicants had applied for PV and the grant rate was below 2 per cent.⁴⁴ That is, 98 per cent of those applications were assessed by the RRT as being without merit, and DIMA expected *mala fide* applicants to be concentrated in that group.⁴⁵
- 2.32 DIMA argued that the deterrent effect of the fee would show up in the proportion of unsuccessful primary applicants who proceed to the RRT, specifically:

the RRT take-up rate for 'low refugee producing' nationality from 1997/98 onwards.⁴⁶

Table 1: RRT Take-up rates - 'low refugee producing' nationalities not in detention by year of Primary Application.

	1995/96	1996/97	1997/98	1998/9	1999/00
	%	%	%	%	%
Low refugee producing nationalities	75.25	82.52	83.19	85.55	90.25
All other nationalities	84.48	86.09	87.42	89.90	88.96

Source DIMA, *Submissions*, p. 94.

- 2.33 DIMA noted that the 1999/00 data did not reflect the true rate because not all primary applications have been decided and applicants refused in 1999/00 may have not yet applied to the RRT. However:

the 'low refugee producing' rate... should remain around the same level.⁴⁷

- 2.34 DIMA concluded that:

the fee has had an effect on the numbers of *mala fide* applicants to the RRT... 'low refugee producing' ... take-up rates were increasing by almost 10% per annum before the fee... Immediately after the introduction... dropped to less than 1% per annum.⁴⁸

44 DIMA, *Submissions*, p. 93, footnote 17.

45 DIMA, *Submissions*, p. 93.

46 DIMA, *Submission*, pp. 93-94.

47 DIMA, *Submissions*, p. 94.

48 Take up rates: 1995/96 = 75.25 percent; 1996/97 = 82.52 percent. 1997/98 = 83.19 per cent; DIMA, *Submissions*, pp. 94-95.

2.35 Looking at the trend after 1997/98, DIMA contended that the:

gentle increase in the rate of take-up of the review opportunities... is probably to be expected seven years or so after the RRT has been in place with people in the community networks becoming more and more aware of what it means and more comfortable in going to a review.⁴⁹

2.36 DIMA also argued that:

while the share of RRT applications made by people from low refugee producing countries has slowly risen since 1998-99, it has still not returned to its pre-fee level...the review take-up rate by low refugee producing countries has remained below and roughly parallel to, the take-up rate for all nationalities;⁵⁰

a drop would indicate a substantial effect, a reduction in the rate of increase is also arguably sufficient to show that the fee is deterring some applicants.⁵¹

Conclusion

2.37 The Committee considered that a decline in the take-up rate from 'low refugee producing counties' indicated that there was a deterrent effect for *mala fide* applicants.

Is the fee deterring *bona fide*⁵² applicants?

2.38 In its previous review, in 1999, the Committee concluded that:

there is no evidence to date that regulation 4.31B has deterred genuine refugees from applying for review.⁵³

2.39 This issue was raised again during the current review in a number of submissions.⁵⁴ Neither YLLRC nor KLC were convinced that the fee was reducing *mala fide* applications, yet were concerned that, *if* the fee had any deterrent effect, it could prevent *bona fide* applicants from pursuing appeals to the RRT.⁵⁵

49 DIMA, Evidence, pp. 50-51.

50 DIMA, Evidence, pp. 46-47.

51 DIMA, Submissions, p. 159.

52 *Bona fide* is used in this report to indicate that the applicants have a genuine belief that they are refugees, whether or not they are eventually assessed to meet the refugee criteria.

53 JSCM, *Review of Migration Regulation 4.31B*, p. 37

54 Eg ACMRO, Submissions p. 64, and others cited below.

55 Submissions: YLLRC, p. 69; KLC, p. 123;

2.40 NCCA, which considered that the fee was not a deterrent to ‘abuse’, nevertheless claimed that because:

asylum seekers are rarely in a position to judiciously weigh up the merits of their own cases...the \$1,000 fee only places them under more pressure to abandon their application.⁵⁶

2.41 Similarly, ICJ, while ambivalent about the effectiveness of the fee in reducing abuse, considered that the fee was likely to cause concern and anxiety,⁵⁷ while Amnesty argued that the fee was:

detering asylum seekers from appealing.⁵⁸

2.42 However, the Network for International Protection of Refugees (Net I PR), while describing the fee as ‘an unnecessary and unfair burden’, concluded that the fee:

is not discouraging asylum seekers from appealing to the tribunal.⁵⁹

2.43 Mr Gareth Kimberley, in a private submission, ICJ and RACS concluded that the fee appeared to have no impact on *bona fide* asylum seekers.⁶⁰

2.44 DIMA argued that:

the effect of the fee can be seen through study of specific groupings of applicants where the proportion of... *bona fide* applications can be expected to be higher.⁶¹

2.45 The relevant group of applicants was that from ‘high refugee producing’ nationalities. These were defined as nationalities from which, over the five financial years 1995/96 to 1999/2000, ten or more applicants had applied for PV and the grant rate was 50 per cent or above.⁶² That is, at least half of those applicants were assessed by the RRT as meriting Australia’s protection, and DIMA expected *bona fide* applicants to be concentrated in that group.⁶³

2.46 If the fee was deterring *bona fide* applicants, DIMA argued that the effect:

should be seen most readily in that group from 1997/98 financial year.⁶⁴

56 NCCA, Submissions, p. 36.

57 ICJ, Exhibit 1, p. 4.

58 Amnesty, Submissions, p. 60.

59 Net I PR, Submissions, p. 128.

60 G Kimberley, Submissions, p. 30; RACS, Submissions, p. 19; Evidence, p. 43; RACS, Evidence, p. 38.

61 DIMA, Submission, p. 92.

62 DIMA, Submissions, p. 93, footnote 16.

63 DIMA, Submissions, p. 97.

64 DIMA, Submission, p. 97.

Table 2: RRT Take-up rates - 'high refugee producing' nationalities not in detention by year of Primary Application.

	1995/96	1996/97	1997/98	1998/9	1999/00
	%	%	%	%	%
High refugee producing nationalities	84.98	87.53	93.27	92.95	90.05
All other nationalities	80.40	84.41	85.34	87.85	89.58

Source DIMA, *Submissions*, p. 97

2.47 DIMA noted that the 1999/00 data did not reflect the true rate because not all primary applications have been decided and applicants refused in 1999/00 may have not yet applied to the RRT. However:

it is expected that the gap between the 'high refugee producing' group and the remaining nationalities will widen as the outstanding applications are finalised.⁶⁵

2.48 DIMA concluded that:

the RRT take-up rate for people of "high refugee producing" nationality has not been affected negatively by the introduction of the fee; and

that people with a genuine fear of persecution, be it subjective or objective are not deterred from making a refugee application by the existence of a post decision fee.⁶⁶

2.49 The Committee noted that the take-up rate appeared to have increased after the imposition of the fee, which indicated that it was not a disincentive. The Committee also noted, however, that the take-up rate may be declining slightly, but that this would not be clear until the data for 1999/00 was complete.

2.50 In addition, the Committee noted that no submission had provided an example of the fee discouraging an applicant from proceeding with an appeal. Nor could witnesses from ICJ and RACS, when directly questioned, provide evidence that the fee had discouraged *bona fide* applicants from seeking review.⁶⁷

Conclusion

2.51 The Committee concluded that the available statistical information indicated that *bona fide* applicants were not being discouraged from

65 DIMA, *Submissions*, p. 98.

66 DIMA, *Submissions*, p. 98

67 Evidence: ICJ, p. 38; RACS, p. 43.

applying for review. This conclusion was reinforced by the fact that those closely involved with the appeals process could not provide any examples where a bona fide applicant had not pursued review because of the fee.

Summary

- 2.52 Overall, the Committee concluded that there was abuse of the PV process and that the fee played a role in reducing it, but it did not discourage *bona fide* applicants for RRT review.