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10 April, 2002

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Mr Noel Gregory
Acting Secretary
Australian Senate Legal and Constitutional
References Committee
Legislation Committee
Parliament House
CANBERRA ACT 2600

BY EMAIL TO: legcon.sen@aph.gov.au

Dear Mr Gregory,

Amended 'Annexure "A" to Submission on Migration Legislation Amendment Bill (No. 1) 2002 and Supplementary submission on the Migration Legislation Amendment (Procedural Fairness) Bill 2002

Mary Crock has advised our Nicole Hogg that during the hearings on the above bills, the Senate Committee pointed out an error in Annexure "A" to our submission forwarded on 4 April 2002, namely our statement in paragraph 1 that proposed s. 48(3) would apply to prevent a person on a bridging visa who had not had an application rejected by DIMIA from lodging a second application off-shore.

As the Committee correctly pointed out, this proposed section would apply only to persons who have had an application refused. We have amended Annexure "A" accordingly and ask that you accept the amended Annexure (attached) as a replacement of the original version sent to you on 4 April 2002.

In addition, we attach a supplementary submission on the Procedural Fairness Bill (Annexure "C"), prepared by Mr Erskine Rodan of our Migration Committee, which the Senate Committee might wish to take into account in its deliberations. These points provide further examples of instances where the existing code of procedures in the Migration Act falls short of the rules of natural justice, as noted in our original submission, Annexure "B" (further copy attached).

Yours faithfully,

DAVID FARAM
PRESIDENT
LAW INSTITUTE OF VICTORIA

Enc

ANNEXURE "C"

Supplementary submission on the Migration Legislation Amendment (Procedural Fairness) Bill 2002 Prepared by Erskine Rodan on behalf of the Migration Committee of the Law Institute of Victoria

Subdivision AB – New Section 51A

The effect of the Bill in respect to Subdivision AB is to more rigidly set out the notification procedures by the Minister. Those procedures breach natural justice principles in providing that the applicant is taken to have been notified of a decision or a document, regardless of the applicant's circumstances. For example, no consideration is taken of the fact that the applicant may be temporarily absent from his or her address, that the registered article card may be placed in the wrong letter box, or various other situations that may arise accidentally, that affect a persons' opportunity to respond to the Minister in time or appeal a decision to one of the Tribunals.

Cancellation Provisions - New Sections 97A, 118A and 127A

The proposed new Sections 97A, 118A and 127A refer to cancellation provisions. These Sections came under the scrutiny of the Federal Court in the matter of Walton v. Philip Ruddock, the Minister for Immigration & Multicultural Affairs (2001) SCA 1839. Indeed, his Honour Justice Merkel referred to the Migration Legislation Amendment (Procedural Fairness) Bill 2001 on page 10 of his decision and stated as follows:

> *"The Migration Legislation Amendment (Procedural Fairness) Bill 2001 was intended to amend the Migration Act 1958 (Cth) by providing that the common law requirements of the natural justice hearing rule do not apply to visa decisions made by the Act. Had the Bill been passed the Act would plainly provide clear legislative intention to exclude the rules of natural justice that the majority in Miah found was absent. The Bill, however has not been passed with the consequence that, subject to Section 474, the decision in Miah is likely to govern decisions made under the Act in relation to the grant, refusal to grant, or cancellation of visas.*
>
> *Whether s 474 can operate to prevent judicial review of decisions made in breach of the rules of natural justice is not altogether clear. The breach, being an excess of jurisdiction, is reviewable under s75(v) of the Constitution. While there may be a question as to whether the rules are derived from or implied by statute or arise under the common law (see for example Miah at 246, 251, 258, 266 and 286), in so far as the rules have not been abrogated or excluded by statute it has been said that it is not open to the federal legislature to prevent review under s 75(v) of a decision made in breach of the rules: see Miah at 261 per Gaudron J, McHugh J, and 290 per Kirby J. See also Re Refugee Review Tribunal; Ex parte HB (2001) HCA 34 at [10].*
>
> *As s 474 and Pt 8 of the Act are altogether silent on compliance or non-compliance with the rules of natural justice there may be obstacles in the path of an argument that the section provides a clear legislative intention to abrogate or exclude the rules of natural justice of s 501(5). See also Miah at 262 per Gaudron J and 289-290 per Kirby J in respect of s 69(1) of the Act. Thus, absent a change in the substantive law in that regard, plainly, there are grounds for contending that s 474 does not prevent the review of decisions in respect of visas on that ground."*

Proposed Section 422B

Proposed Section 422B refers to the conduct of review by the Refugee Review Tribunal. In particular, that Section would affect Section 438, which relates to the Tribunal's discretion to disclose certain information.

In this regard, we draw your attention to the decision in re: Refugee Review Tribunal; Ex parte AALA [2000] HCA 57, in which the matter was remitted back to the Refugee Review Tribunal due to a breach of procedural fairness:

> *"On the remitter the Tribunal stated that it had read and taken into account relevant materials from previous hearings which in fact the Tribunal did not have and had not read. Those materials contained claims which the Tribunal said in its reasons were not raised prior to the hearing before it. The Tribunal found that the prosecutor had concocted the evidence and it was purely self serving, and placed no weight on it. The prosecutor applied to the High Court under Section 75(v) of the Constitution for prerogative relief. It was held by the Full Court of the High Court that there was a denial of procedural fairness. The statement by the Tribunal that it had read and taken into account the relevant materials mislead the prosecutor and as a consequence the prosecutor was denied the opportunity to answer adverse inferences based in part on a misunderstanding of his previous conduct. The prosecutor was denied the opportunity to put his whole case to the Tribunal and in that respect was denied a fair hearing."*

Conclusion

The closing of any opportunity to obtain natural justice and procedural fairness, as proposed by this Bill, reduces the opportunity for the applicant and/or his sponsor or nominator to seek a just and fair result after the proper adjudication of their case. The Bill is misnamed and should be called the Migration Legislation Amendment (Removal of Procedural Fairness) Bill 2002.

Mr Erskine Rodan
Migration Committee
Law Institute of Victoria
9 April 2002