DEPARTMENT OF IMMIGRATION AND ETHNIC AFFAIRS

Attachment 6

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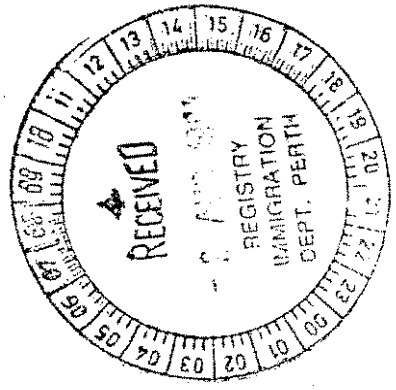

OFFICE: Executive Support & Review Branch

FILE NO: GuideMin.Int

First Assistant Secretaries
Branch Heads
State/Territory Directors

cc Secretary
Deputy Secretary A
Deputy Secretary B

GUIDELINES FOR PROCESSING REQUESTS FOR MINISTERIAL INTERVENTION IN MIGRATION ACT DECISIONS

The attached guidelines describe the usual processes to be applied in the handling of requests for the Minister to intervene in a migration decision.

It should be noted that the guidelines discuss aspects of the Minister's powers under sections 115 and 137 of the Migration Act, but do not, in any way, purport to define the operation of these powers, or circumscribe them in any way.

It follows that, while the handling of requests by Departmental officers will usually accord with the processes described in these guidelines, there will be variations depending on the nature of the case, and on the requirements of the Minister.

Dario Castello
Assistant Secretary
Executive Support & Review Branch
28 July 1994

GUIDELINES FOR PROCESSING REQUESTS FOR MINISTERIAL INTERVENTION

PURPOSE

These guidelines provide a framework for handling cases where a request has been made for ministerial intervention under sections 115 and/or 137 of the *Migration Act 1958* (the Act).

2. They deal with procedures applying to requests for ministerial consideration of visa and entry permit applications **other than** applications lodged in connection with applications for refugee status made on-shore.

SUMMARY

3. The guidelines establish the following procedures:

- all briefs relating to ministerial intervention should be directed to the Senior Adviser;
- the policy area responsible for the class of visa or entry permit should prepare any necessary brief or responses to ministerial correspondence; and
- Review Monitoring Section is the coordination point for receiving and referring ministerial correspondence and briefs, and for meeting tabling requirements.

BACKGROUND

4. The Act provides for the Minister, where he thinks that it is in the public interest, to set aside a decision of a Departmental review officer or a review tribunal and to substitute a decision which is beneficial to the applicant.

5. This power is conferred on the Minister by:

- section 115, which gives the Minister power to set aside and substitute a new decision for a decision of a Departmental review officer; and
- section 137, which gives the Minister the power to set aside and substitute a new decision for a decision of the Immigration Review Tribunal (IRT).

6. The Minister has two additional discretionary powers under ss166BE and 166HL, which provide for ministerial intervention after a decision by the Refugee Review Tribunal (RRT) and the Administrative Appeals Tribunal (on an RRT reviewable decision), respectively. The procedures applying to these sections of the Act are covered by separate instructions.

7. Under s115, the Minister may substitute for the Departmental decision, the decision sought by the applicant or a decision to which the applicant agrees. What is meant by the former is a decision to grant the class of visa or entry permit applied for.

What is meant by the latter is a decision to grant, with the agreement of the applicant, a class of visa or entry permit different from that applied for. Under s137 the Minister may substitute a decision which is more favourable to the applicant.

8. The Minister is only able to exercise his discretionary powers when he thinks that it would be in the public interest to do so. The powers may only be exercised by the Minister personally - he cannot delegate them.

9. Ss 115(11) and 137(7) indicate that the Minister cannot grant an entry permit, under his s115 and s137 powers, to a person who is the holder of a visa or temporary entry permit subject to the conditions set out in ss 23(4)(b) and 33(4)(b) of the Act, ie the condition that no further entry permits be granted to the person while he or she remains in Australia.

10. Decisions by the Minister to intervene are subject to the scrutiny of Parliament. The Act requires that details, including reasons for the decision, be tabled in both Houses of Parliament within a specified period after the decision was taken. Details on the tabling requirements are provided below (see paragraphs 42 to 46).

11. The Minister's powers under ss115 and 137 apply only to decisions that are merits reviewable. Applications made before 19 December 1989, on which the Immigration Review Panel made a decision, do not come within these provisions.

ISSUES

Public Interest

12. As indicated above, the Minister is able to exercise his discretionary power when he considers that to do so would be in the public interest. Successive Ministers have not defined the public interest explicitly, but their statements of reasons tabled in Parliament indicate that they have not restricted the exercise of their powers to cases which raise issues of public importance such as national security or economic issues. The compassionate circumstances attached to a case, particularly as they affect an Australian resident or citizen, have been a common reason for intervention.

13. The former Minister, Mr Hand, made a public statement in which he elaborated the sort of cases in which he would consider the exercise of his discretion (see **Attachment A**). This statement provided guidelines for Departmental officers in preparing submissions on cases presented for ministerial consideration. Minister Bolkus has reviewed the guidelines in operation to date, and has indicated that he may consider cases under ss115 and 137 when:

- the circumstances of the case are such that the regulations could not have anticipated them; and

- the consequences of not having recognised the circumstances in the regulations were clearly unintended; and

- the applicant presents strong compassionate circumstances of such order that failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or lawful permanent resident aggrieved by the decision; or

- the applicant would bring substantial economic or cultural benefit to Australia.

Legal Issues

14. The Minister has no duty to exercise his power under s115 or s137 in relation to an individual case, nor is he under a duty to consider whether to exercise that power: it is a non-compellable discretion.

15. However, if the Minister does begin to consider a case, he may have a duty to go on and decide it, which he will have to do according to the usual rules of administrative law.

16. It is important, therefore, that there is a clear distinction between cases which the Minister has examined for the purpose of deciding whether he might wish to consider the exercise of his powers, and cases where he has actually begun to consider the exercise of his public interest powers and makes a decision one way or the other. To avoid a presumption that the Minister has considered a case, when in fact he has not, the procedural guidelines require all briefs relating to requests for intervention to be directed to the Senior Adviser.

17. In all cases, the Senior Adviser will advise whether or not the Minister has, or has not, considered the request for intervention.

IDENTIFICATION

18. Cases for possible Ministerial intervention usually come to notice in one of four ways:

- through representations to the Minister from applicants or their representatives including Members of Parliament;

- identification by the IRT;

- through requests from the Minister's office; and

- identification by MIRO officers or other Departmental officers.

Representations to the Minister

19. Representations to the Minister can be either specific requests that the Minister intervene under s115 or s137 or non-specific requests for ministerial intervention or assistance. Requests may be in the form of ministerial correspondence or may be made to the Minister, in person.

20. Ministerial correspondence specifically requesting intervention by the Minister will be forwarded to the Review Monitoring Section, in the first instance, by the Ministerial Correspondence Unit (MCU).

21. Review Monitoring Section will record the correspondence and refer it to the responsible policy area for examination. Frequently, the correspondence will require a standard response (see **Attachment B** for proforma). Unless otherwise indicated by the Minister's office, a copy of the relevant review decision should be attached to the response to provide the Senior Adviser with case background. Policy areas should prepare a brief to the Senior Adviser in cases with more complex circumstances (see **Attachment C**). However, it is stressed that only in unusual circumstances is a detailed brief required.

22. Where the Minister has no power to intervene under s115 and/or s137 because there has been no decision by either MIRO or the IRT, the Review Monitoring Section will prepare a standard response (**Attachment B**), with additional information provided about the case background to the Senior Adviser, if necessary, including comment as appropriate from the policy area responsible for the class of visa/entry permit applied for.

23. Where the decision making process of a review body is being challenged, or where there is disagreement about the jurisdiction of a review body, ie where there is a clear review policy issue, the Review Monitoring Section will draft an answer to the correspondence.

24. It is the responsibility of the policy area which is answering the representation to locate and request case files, if necessary, although a copy of the review decision should be sufficient to answer representations in the majority of cases. In onshore cases involving illegal entrants, it is also the responsibility of policy areas to advise the relevant Compliance office of action taken to finalise the correspondence.

25. If the correspondence contains a general plea for assistance, making no reference to the Minister's powers under ss115 and 137, and there is no indication from the Minister's office that they require more detailed consideration of the case, the MCU should refer the correspondence to the processing office which holds the case file. That office should answer the correspondence according to the proforma in **Attachment B**. If the Minister's office should later indicate that a brief focusing on the question of intervention is required, then the original correspondence, any prepared responses and the files should be forwarded to Review Monitoring Section to coordinate.

26. In some cases the Minister's office will advise that the Minister may wish to consider the exercise of his powers under either s115 or s137 before receipt of a brief. In these cases, Review Monitoring Section will refer the request to the responsible policy area. Policy areas will need to request the file and determine outstanding processing requirements on which the Minister should be briefed. Once the outstanding processing has been completed, a decision record for the Minister's signature and a tabling statement should be prepared. A proforma for the decision record is at **Attachment D**.

Cases Identified by the IRT

27. It has been the practice of the IRT to indicate in decision records where they consider that the exceptional circumstances of a case are such that it may warrant consideration by the Minister of an exercise of his powers under s137. Such cases should be brought to the attention of the Minister's Office. The Review Monitoring Section will therefore refer the IRT decision to the relevant policy area for preparation of a brief to the Senior Adviser. It is stressed that such briefs should be concise, and not repeat the detail of information provided in supporting documentation.

Cases Identified by MIRO/Departmental Officers

28. Review Officers, or other Departmental staff involved in the processing of applications, may, on occasion, identify a case where the circumstances of the application appear to fall within the guidelines for the exercise of ministerial discretion.

29. Where MIRO is unable, because of the operation of the Regulations, to vary a decision in a case which appears to meet the policy criteria elaborated in paragraph 13, MIRO should bring the case forward for possible ministerial consideration immediately after internal review (ie, under s115). Such cases should be referred to the Review Monitoring Section, which in turn will liaise with the Senior Adviser and relevant policy area(s).

30. This approach provides the opportunity for the client to receive a better outcome, and more quickly. (In these circumstance, where an application is made to the IRT, it could be expected that the IRT too, would reach the view that ministerial consideration is warranted and suggest his consideration of the case under s137.)

31. The referral of an application from MIRO for possible ministerial consideration should be a purely internal matter, without indicating to the applicant that his or her case might be brought to the Minister's attention. Similarly, Departmental officers should refrain from commenting on the appropriateness of policy or legislation as applied to a particular case, in order to prevent raising undue expectations and to avoid any implied commitment that the Minister might consider the case. The applicant should not be dissuaded from applying to the IRT, and if the Minister does not consider the case, or does not intervene, IRT review rights would not be affected.

PREPARATION OF BRIEFS

32. Briefs should be prepared when:

- the Minister's office requests one; or
- the responsible policy area considers that the circumstances of the case are such that the Senior Adviser may wish to bring them to the Minister's attention; or
- the IRT has identified a case as warranting ministerial consideration.

In all cases, briefs should be directed to the Senior Adviser.

33. Briefs should be prepared by the policy area responsible for the visa class or entry permit applied for. However, where necessary, there will be input from other relevant policy areas to ensure that briefs reflect the full implications for policy of overturning the decision. For example, where the Preferential Family, Residence Policy or Skills Sections are preparing a brief in a case rejected on health grounds, they should consult with the Health and Character Section in preparing the brief.

34. Briefs should follow the proforma in **Attachments C**. They should be succinct and address the circumstances of the case and the key policy and/or legislative implications.

35. It is essential that policy areas advise the Review Monitoring Section of all cases which have been presented to the Minister's office, other than routine ministerial correspondence for which no brief has been prepared. The Review Monitoring Section should be routinely and regularly advised of:

- all briefs presented to the Senior Adviser;
- all requests from the Minister's office for a brief, or advice that the Minister wishes to consider the case; and
- the outcome in all cases presented to the Senior Adviser where the IRT has recommended consideration by the Minister.

36. The Review Monitoring Section will record all such cases on a schedule which will be used for monitoring and reporting purposes.

37. The wording of ss115 and 137 suggests that the Minister has not made a decision which requires tabling unless it is a decision to grant a visa or entry permit. The majority of requests for ministerial intervention will be made after the applicant has failed to meet primary eligibility criteria, for example remaining relative, balance of family test etc. In most cases applicants will not have undergone health and character processing. There may also be additional criteria which have not been decided, for example custody of children, Assurance of Support, English Education charge etc.

38. It is important, in such cases, that advice to the Senior Adviser indicates that certain criteria have not yet been decided so that, should the Minister consider the case, he is fully informed.

39. If the policy area is advised by the Senior Adviser that the Minister wishes to consider a case, the case should be referred to the primary office for further processing. Once the applicant satisfies outstanding criteria, the case will need to be referred to the Senior Adviser for the Minister to make a decision on whether or not to grant and a tabling statement should be prepared for the Minister's signature by the policy area (see paragraphs 42 to 46 below).

40. Where the applicant fails one or more outstanding criterion, a further brief will

to consider whether to grant, although in the end he may decide not to grant. The further brief will need to summarise the public interest arguments for and against grant, in light of all criteria the applicant has failed to satisfy. Such briefs should be channelled through Review Monitoring Section, which will arrange for clearance by Legal Opinions Section, if necessary, before being sent to the Minister's office.

41. It is the responsibility of the policy area which prepared the brief to monitor processing of the outstanding criteria by the primary office and to keep the Review Monitoring Section informed of progress in the case.

TABLING STATEMENTS

42. The Act specifies that, when the Minister sets aside a review decision or the recommendation of a review body under s115 or s137 the Minister must table, in both Houses of Parliament, a statement that:

- sets out the decision set aside;
- sets out the decision substituted by the Minister; and
- sets out the reasons for the Minister's decision, referring in particular to the Minister's reasons for thinking that his actions are in the public interest.

43. A proforma for a tabling statement is attached (**Attachment E**). Applicants and sponsors should not be identified by name in the tabling statements, which should give only a brief summary of the circumstances of the case and the reason for the decision. Tabling statements should refer to the relevant guidelines enunciated in paragraph 13.

44. The Act also specifies time limits for tabling statements. Statements must be tabled in Parliament within 15 sitting days in the six monthly period, beginning either 1 January or 1 July, following the period in which the decision was made.

45. Legal advice indicates that once a decision has been tabled, the Minister has exhausted his power under ss115 and 137 and has no power to look at the case further.

46. Once the applicant has been granted a visa or entry permit, the original of the tabling statement must be sent to the Review Monitoring Section to ensure compliance with tabling requirements. To this end, the Review Monitoring Section will also contact policy areas in writing, in January and July of each year, to remind them of the need to forward tabling statements and to prompt them to contact processing offices in cases where no advice of the finalisation of processing has been received.

RECORD KEEPING

47. Review Monitoring Section is responsible for keeping records of the briefs prepared in relation to ss115 and 137 and for recording the types of cases in which the Minister has and has not chosen to intervene. In addition, Review Monitoring Section will hold a copy of each request, submission, tabling statement and decision record as source material.

48. Review Monitoring Section will monitor and report regularly on any interventions, and will initiate discussions with policy areas and the Minister's office when it appears that a series of particular decisions to intervene may indicate that a preferred approach may be to amend current procedures or regulations.

ATTACHMENT A

In a statement to Parliament on 9 May 1990, concerning a review of migration legislation, the then Minister, Mr Hand, said the following in relation to his powers of intervention under sections 115 and 137:

> "I might also emphasise that I have no intention of intervening under my review powers unless there is serious reason. That is, I shall not be setting aside decisions reached in accord with the criteria established by the regulations unless I am convinced that there is a gap in policy, that the refusal is an unintended consequence of the regulations or that an individual case requires special consideration."

On 16 October 1990, the Minister Hand, tabled in Parliament the Government's response to the first report of the Joint Standing Committee on Migration Regulations dealing with illegal entrants. The response included guidelines on the types of cases that would be of particular concern to the Minister in the context of extending certain concessions to illegal entrants. The Minister, in subsequent correspondence, dated 21 December 1990, with the Principal Member of the Immigration Review Tribunal, indicated that similar considerations could apply to cases referred to him for consideration of the exercise of his power under section 137. These considerations, which have been adopted as guidelines by the Department in preparing submissions for the Minister's consideration, were:

- the circumstances of the case are such that the regulations could not have anticipated them; and

- the consequences of not having recognised the circumstances in the regulations were clearly not intended; and

- the applicant presents strong compassionate circumstances of such an order that failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or lawful permanent resident aggrieved by the decision.

Senator Bolkus has reaffirmed these guidelines but has added that, in addition to considering cases with strong compassionate circumstances, he may consider cases where:

- the applicant would bring a substantial economic or cultural benefit to Australia.

ATTACHMENT B

STANDARD REPLIES TO CORRESPONDENCE WHERE MINISTERIAL INTERVENTION IS NOT CONTEMPLATED

SAMPLE REPLY BY SENIOR ADVISER
(where application has been reviewed)

Thank you for your letter of _____ to Senator the Hon Nick Bolkus, Minister for Immigration and Ethnic Affairs, on behalf of _____. I am responding on behalf of the Minister.

You have requested that the Minister intervene in _____'s application for a _____ which was recently reviewed by the _____ .

The Minister's power to intervene under migration legislation is limited and was neither intended nor does it operate as an additional tier of merits review.

The merits of _____ 's application have been fully considered by the Minister's delegate at the primary decision making stage, and by the Migration Internal Review Office and(/or) the Immigration Review Tribunal. Both these review bodies bring to notice those cases where the Act and Regulations have apparently failed to deal adequately with the merits of any individual case.

In addition, when requests such as yours are received, the case is scrutinised to identify, and bring to notice, the presence of any unintended consequences, or deficiencies in the process of merits review.

In respect of _____'s application, it is clear that the merits review process has operated as intended, and has dealt adequately with the individual circumstances of the case. Therefore it would not be appropriate for the Minister to consider intervening.

Thank you for raising this matter.

[optional final paragraph where application has been reviewed by MIRO but not the IRT:

_____ now has the option of applying for review to the Immigration Review Tribunal (IRT). The IRT has strict time limits on the lodgement of review applications and he/she should act quickly if he/she wishes to seek further review.]

SAMPLE REPLY BY SENIOR ADVISER
(where application has not been reviewed)

Thank you for your letter of _____ to Senator the Hon Nick Bolkus, Minister for Immigration and Ethnic Affairs, about the application for _____ of____ . I am responding on behalf of the Minister.

You have requested that the Minister intervene in _____'s application for a _____ which was rejected by _____ on _____ .

The Minister's power to intervene under migration legislation is limited to those cases which have been reviewed by bodies such as the Migration Internal Review Office (MIRO) and the Immigration Review Tribunal (IRT). As the application has not been reviewed by either MIRO or the IRT, the Minister has no power to consider the case.

[optional final paragraph where review has not been sought but time limit has not expired:

It would appear, however, that the decision is reviewable by MIRO [the IRT], and that the time limits for review have not yet expired. MIRO [the IRT] has strict time limits on the lodgement of review applications and _____ should act quickly if he/she wishes to exercise his/her right of review.]

SAMPLE REPLY BY MINISTER
(where application has been reviewed)

Thank you for your letter of _____on behalf of _____.

You have requested that I intervene in _____'s application for a _____ which was recently reviewed by the _____ .

My power to intervene under migration legislation is limited and was neither intended nor does it operate as an additional tier of merits review.

The merits of _____ 's application have been fully considered by my delegate at the primary decision making stage, and by the Migration Internal Review Office and(/or) the Immigration Review Tribunal. Both these review bodies bring to notice those cases where the Act and Regulations have apparently failed to deal adequately with the merits of any individual case. In addition, when requests such as yours are received, the case is scrutinised to identify, and bring to notice, the presence of any unintended consequences, or deficiencies in the process of merits review.

In respect of _____'s application, it is clear that the merits review process has operated as intended, and has dealt adequately with the individual circumstances of the case. Therefore it would not be appropriate for me to consider intervening.

[optional penultimate paragraph where application has been reviewed by MIRO but not the IRT:

_____ now has the option of applying for review to the Immigration Review Tribunal (IRT). The IRT has strict time limits on the lodgement of review applications and he/she should act quickly if he/she wishes to seek further review.]

Thank you for raising this matter with me.

SAMPLE REPLY BY MINISTER
(where application has not been reviewed)

Thank you for your letter of _____ on behalf of _____ .

You have requested that I intervene in _____'s application for a _____ which was rejected by _____ on _____ .

My power to intervene under migration legislation is limited to those cases which have been reviewed by bodies such as the Migration Internal Review Office (MIRO) and the Immigration Review Tribunal (IRT). As the application has not been reviewed by either MIRO or the IRT, I have no power to consider the case.

[optional penultimate paragraph where review has not been sought but time limit has not expired:

It would appear, however, that the decision is reviewable by MIRO [the IRT], and that the time limits for review have not yet expired. MIRO [the IRT] has strict time limits on the lodgement of review applications and _____ should act quickly if he/she wishes to exercise his/her right of review.]

Thank you for bringing this matter to my attention.

ATTACHMENT C

PROFORMA FOR A BRIEF TO THE SENIOR ADVISER

(suggested standard test in italics)

PURPOSE

To brief you on the issues involved in the exercise of ministerial discretion under ss115/137 of the Migration Act 1958 in the case of .....

BACKGROUND

Applicant details

(Provide details of applicant including name, date of birth, nationality and country of residence, current visa/entry permit status, immediate family and relatives in Australia).

Primary decision

(Provide details of the visa/entry permit application, date applied, date rejected, details of sponsorship, grounds for rejection {if details of the regulations and/or policy issues are included in the review decision record do not repeat in body of brief)

Review Decision

(Provide details of when review application(s) were lodged and outcome. Attach review decision record if available).

Case Identification

(Provide details of how the case came to be identified, ie through representations or through the IRT indicating that this is a case in which the Minister should consider intervention).

ISSUES

Case circumstances

(Do not repeat details of the case contained in the review decision record. If the decision record is not available, or additional claims have been made, summarise the arguments and claims presented by the applicant, their representative or the IRT for ministerial intervention)

'olicy/Legislative Implications

(The briefing note should indicate whether the regulations have operated as intended in this case and whether the outcome was the intention of policy - where this is the case, and the regulations are contained in an attachment, a brief statement to this effect is sufficient. Where there appear to be exceptional circumstances which warrant further consideration, or policy concerns about the outcome in this case, refer to these in summary. Where these issues are discussed in an IRT decision or in the representation refer to the attachment.).

RECOMMENDATION

(where the recommendation is that the Minister not consider):

There do not appear to be exceptional circumstances which justify consideration by the Minister under s115/137.

(where there has been correspondence):

I recommend that the you/the Minister sign the attached correspondence advising the applicant of this.

(where the recommendation is that the Minister consider):

There appear to be exceptional circumstances (or the outcome in this case appears to be an unintended consequence of the regulations) which the Minister may wish to consider.

(Policy Branch Head
signature)

Policy Area contact officer

SENIOR ADVISER'S ACTION

RECOMMENDATION:
AGREED/NOT AGREED
LETTER:
SIGNED/NOT SIGNED

ATTACHMENT D

DECISION RECORD

MR/MS .....

In accordance with the provisions of section 115/137 of the Migration Act 1958, I have today set aside the decision of a review officer/Immigration Review Tribunal to refuse Mr/Ms ..... a visa/entry permit in the .....Class and have substituted a decision to grant a Class .... visa/entry permit providing Mr/Ms satisfies public interest/Assurance of Support etc criteria.

NICK BOLKUS
Minister for Immigration and Ethnic Affairs

Date:

ATTACHMENT E

PRO FORMA FOR A TABLING STATEMENT

(suggested standard text in italics)

SECTION 115/137 OF THE MIGRATION ACT 1958 - STATEMENT TO PARLIAMENT

1. *Exercising my powers under section 115/137 of the Migration Act 1958, I have set aside a decision of the review officer/Immigration Review Tribunal (IRT) not to grant a* (visa/entry permit details, eg a Class 103 Parent (Balance of Family) visa) *to the applicant and have substituted a decision to grant that visa/entry permit.*

2. *The application in question was lodged on ..... and was refused by a Departmental officer on.... The refusal decision was affirmed by a review officer on .....* (when appropriate) *and by the Immigration Review Tribunal on .....*

3. (Provide a short paragraph summary of the circumstances in the case, including reasons for rejection, exceptional and/or compassionate circumstances).

4. Provide at least two sentences on the factors which persuaded the Minister to intervene eg *I took the view that the compassionate circumstances in this case, combined with ...., justify its approval in the public interest as a reflection of Australia as a compassionate and humane society.*

5. *Accordingly, it is appropriate in this case that I exercise my powers under section 115/137.*

Nick Bolkus
Minister for Immigration and Ethnic Affairs