IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY No. B68 of 2012

BETWEEN: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
Applicant
and

XIUJUAN LI
Respondent
and

MIGRATION REVIEW TRIBUNAL
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

I. Publication

1. These submissions are in a form suitable for publication on the Internet.

II. Statement of Issues

2. The issues are:

(a) Whether s. 357A(3) of the Migration Act ("the Act") imposes an obligation on the Migration Review Tribunal ("the MRT") to "*act in a way that is fair and just*".

(b) Whether the words '*fair and just*' in s. 357A has work to do in defining whether the MRT has carried out its statutory function of reviewing a decision under s. 348 of the Act.

(c) In conducting the review of this decision, was the MRT fair in the way it refused to adjourn the hearing in order to await what turned out to be a successful internal review by Trades Recognition Australia ("the TRA") of the TRA first instance decision not to grant the first respondent a positive skilled assessment, evidence that was the decisive for the determination of the review.

(d) Was the MRT fair in the way it conducted its hearing given that it had cogent submissions from the first respondent that the TRA skill assessment to be relied upon by the first respondent was defective and that an adjournment would allow the MRT to act on a skill assessment which was not defective.

(e) If it was not fair was the conduct of the MRT therefore in breach of the "*exhaustive statement of the requirements of the natural justice hearing rule*" set out in Division 5 of Part 5 of the Act.

(f) If there was such a breach was it a jurisdictional error.

(g) Once the MRT decided not to grant the adjournment, the review was doomed to fail. Having decided to make its decision in absence of the what turned out to be a positive TRA skill assessment, was the MRT unreasonable in the making of the MRT decision on review, it having failed to grant an adjournment to receive

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evidence of a proper TRA assessment. If the skill assessment finally made by the TRA was before the MRT, the review would have been successful;

(h) If it was unreasonable was it a jurisdictional error.

III. Judiciary Act s 78B

3. The first respondent certifies that she has considered whether any notice should be given to the Attorneys-General in compliance with s78B of the Judiciary Act 1903 (Cth) and has concluded that no such notice need be given.

IV Material Facts Contested

4. The TRA skill assessment dated 8 January 2007 accompanying the first respondent's visa application was not valid as the TRA at the material time had not been approved pursuant to Reg 2.26B(1A) of the Migration Regulations 1994 ("the regulations")[1].

5. Hence only the second skill assessment sought from the TRA by the first respondent could be a valid skill assessment for the purposes of paragraph 880.230 of Schedule 2 to regulations.

6. On the 12 April 2010, the TRA communicated its decision to the first respondent that the internal review of the negative second skill assessment was successful and that the first respondent had a skill assessment capable of satisfying the criterion in paragraph 880.230.

7. The MRT made its decision on 25 January 2010, knowing that a formal internal review was underway by the TRA of the negative TRA decision dated 15 December 2009 (ie a decision not to give the first respondent a positive skill assessment).

Part V Relevant Provisions

8. The first respondent accepts the appellant's statement of applicable provisions save that the Migration Amendment (Review Provisions) Act 2007 should be added.

Part VI Argument

9. Pared to its essentials, the appellant's argument[2] is that the words in the Act that '*the Tribunal must act in a way that is fair and just*' (s. 357A(3), do not mean that the Tribunal in fact '*must act in a way that is fair and just*'.

10. Thus if the appellant's argument be correct, the then Minister for Immigration and Citizenship, Mr Andrews was wrong when he told Parliament on 20 June 2007 when introducing the bill[3] to enact s. 357A(3):

[1] See *Singh v Minister for Immigration and Citizenship* [2012] FMCA 145 and the concession by the respondent in paragraph 39. On remittal to the MRT could take the second skill assessment as valid.

[2] See paragraph 43 - These provisions do not impose obligations on the Tribunal, except to the extent that they provide goals that the Tribunal *shall pursue,* in the exercise of procedural discretions or shed light on the construction of provisions that confer such powers or impose obligations.

*The bill will also insert new provisions into the act, **expressly requiring** the tribunals, when applying the requirements and procedures set out in relevant divisions of the act, to act in a way that is fair and just.*[4] [Emphasis added]

11. The practical consequence of the appellant's argument is that the requirement '*to act in a way that is fair and just*' is a voluntary requirement. A voluntary requirement is an oxymoron. The result will be some Tribunal members applying, at best, subjective standards or at worst paying lip service to fairness.

10 *12.* It is submitted in contrast that s. 357A(3) has work to do. S. 357A(3) makes the requirement to '*act in a way that is fair and just*' part of the *'exhaustive statement of the requirements of the natural justice hearing rule'.*

13. Simply put, the enactment of s. 357A(3) made the requirement to '*act in a way that is fair and just*' part of the '*natural justice hearing rule'.*

14. As such it does a number of things. Inter alia, it informs as to whether the '*natural justice hearing rule'* has been complied with. It may also inform as to whether a decision by the tribunal is unreasonable.

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15. Whether s. 357A(3) creates 'substantive rights' is an unnecessary characterisation, indeed an unnecessary complication to the task of interpreting the simple words, '*must act in a way that is fair and just'.*

16. If a Tribunal when conducting its review does not '*act in a way that is fair and just'* then quite simply it has not complied with the '*natural justice hearing rule'* and has made a jurisdictional error.

17. When the *Migration Legislation Amendment (Procedural Fairness) Act* 2002 came into
30 force it enacted s. 357A but it did not contain s. 357A(3). The Full Federal Court observed in *Minister for Immigration & Multicultural & Indigenous Affairs v NAMW* [2004] FCAFC 264 (23 September 2004) (2004) 140 FCR 572 that there was no obligation on the part of the Tribunal to afford an applicant a fair hearing - per Merkel and Hely JJ at 600 :

139. Our view gives effect to the intention of the legislature when s 424A was enacted. However, the consequence of the subsequent enactment of s 422B[5] *is likely to be that there is no longer an obligation on the part of the RRT to afford applicants before it a fair hearing, in so far as that requires the RRT to give those*

[3] The Migration Amendment (Review Provisions) Bill 2006 which became the Migration Amendment (Review Provisions) Act 2007

[4] See also the Explanatory Memorandum paragraph1, page 1 and Item 1.

[5] S. 422B is the equivalent to s. s. 357A, obviously at the time of judgment in *NAMW* there was no subsection (3) which later enacted requirement that '*the Tribunal must act in a way that is fair and just'*

applicants an opportunity to deal with relevant matters adverse to their interest the disclosure of which is not required by s 424A(1), but which the RRT proposes to take into account in affirming the delegate's decision to refuse to grant a protection visa. ***Plainly, that is a highly undesirable outcome.*** [Emphasis added]

18. Thus as Merkel and Hely JJ read the equivalent of s. 357A without subsection 3 as taking away an obligation to grant an applicant a fair hearing.

19. This is the very outcome being sought by the appellant in his submissions in this appeal.

20. The first respondent adopts the words of Heydon, Crennan and Bell JJ in *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR3 61 [2011] HCA 11 (4 May 2011), albeit in a different context (at 397):

It would not reflect well on the law if that submission were sound.

21. Certainly at least from the day of enactment of s. 357A(3), the Tribunal is required to afford applicants a fair hearing.

22. This solidifies concepts central to administrative law that decision must be reached fairly, examples of which are the observations of Gleeson CJ in *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2 (4 February 2003); (2003) 211 CLR 476 at 494

37..... Decision-makers, judicial or administrative, may be found to have acted unfairly even though their good faith is not in question. ***People whose fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness.*** *If Parliament intends to provide that decisions of the Tribunal, although reached by an unfair procedure, are valid and binding, and that the law does not require fairness on the part of the Tribunal in order for its decisions to be effective under the Act, then s 474 does not suffice to manifest such an intention.* [Emphasis added]

23. In enacting s. 357A(3) Parliament unequivocally manifests the intention to make fairness a requirement of a valid and binding decision by the MRT.

24. The appellant's interpretation falls into the type of error that McHugh J identified in *Kelly v The Queen* [2004] HCA 12; (2004) 218 CLR 216 at 253 [103]:

Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment.

25. Further, as McHugh J said in *Newcastle City Council v GIO General Limited* [1997] HCA 53; (1997) 191 CLR 85, at 113:

If the target of a legislative provision is clear, the court's duty is to ensure that it is hit rather than to record that it has been missed.

26. It is therefore submitted that Parliament has not missed the target in enacting s. 357A(3) that the MRT '*must act in a way that is fair and just*'.

Did the MRT act in a way that was fair and just?

27. Burnett FM correctly identified what the first respondent was seeking at the MRT was an adjournment. He said (at paragraph 18):

Plainly the applicant requested, in effect, an adjournment of the finalisation of the proceeding pending the outcome of the other review.

28. Procedural decisions can have substantive consequences as is the case here.

29. The chronology of events regarding the adjournment are as follows:

30 January 2009 first respondent applies to the MRT for a review of the visa refusal;

2 November 2009 The MRT of its own motion vacates the scheduled hearing date of 11 December 2009 and reschedules the hearing for 18 December 2009;

4 November 2009 First respondent submits an application for the second skill assessment;

18 December 2009 An incomplete hearing by the MRT takes place. The MRT is aware that a second skill assessment has been sought.

21 December 2009 The MRT in writing invites the first respondent to respond to certain information, the deadline for response being 18 January 2010;

18 January 2010 The first respondent informs the MRT that the second skilled assessment was negative but that an application for internal review to the TRA had been lodged and that there were very cogent grounds to consider that the internal review would be successful. The first respondent asks for an adjournment of the completion of the MRT review until the internal TRA review has been completed.

25 January 2010 The MRT rejects the request for an adjournment by bringing down the decision affirming the visa refusal.

12 April 2010 The TRA determines the internal review in favour of the first respondent and makes a positive skill assessment such that the first respondent would meet the criterion found in paragraph 880.223.

30. The MRT is told the internal review by the TRA of the second skill assessment was applied for and cogent submissions had been made that the adverse skill assessment was wrong.

31. Given that the process from application to review had taken a year, there was no imperative for a decision to be made in January 2010.

32. In an ideal world everything would be done in time and decisions by intermediate bodies would always be correct.

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33. But that is not what happens in the practical world. The TRA had a formal system of internal review. There were cogent reasons established as to why that internal formal review by the TRA would be successful. In the practical world decisions made at first instance can be wrong but they can be corrected by the TRA itself.

34. Greenwood and Logan JJ aptly described the situation thus:

> *37. Here, there was, as the correspondence to the MRT by Ms Li's migration agent makes plain, every reason to conclude that the second skills assessment by Trades Recognition Australia (TRA), which was the "relevant assessing authority", was*
> 20 *infected by error, which error Ms Li was actively seeking to have that body address. Again having regard to the migration agent's letter, there was every reason to conclude that the only reason why the second skills assessment was adverse was a failure on the part of the TRA to follow its own procedures. As the MRT correctly recognised, there was nothing in the regulations which forbade the furnishing by an applicant of a second skills assessment. A favourable such assessment was critical to the applicant meeting the visa criteria.* ***For the MRT to refuse the adjournment was, effectively, to doom Ms Li's application for review to failure.*** [Emphasis added]

30 35. Many applications for adjournments relate to obtaining more evidence, that being one very important reason for applying for an adjournment.

36. In this case it was about correcting an error made by the TRA. Fairness dictates that the MRT adjourns to allow a correct decision by the TRA to be used in determining the review.

37. The MRT jumped the gun, making a decision when the jury was still out on the piece of evidence which would decide the review.

40 38. Thus the appellant wrongly submits (at paragraph 19) that *"It cannot be said that there was any such denial of opportunity in the present case."*

39. The denial is plain. The first respondent is doing things to obtain the evidence which will determine the matter in her favour. She is denied the opportunity to obtain that evidence.

40. What in fact happened was a partial hearing because of the wrongful denial of an adjournment.

41. Decisions in these types of cases have life changing effects. The Migration Act and Regulations contain windows of opportunity which if lost, usually do not re-open.

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42. Section 357A(3) refers to Division 5. Included in Division 5 is s. 363(1)(b) which states:

> *363 (1) For the purpose of the review of a decision, the Tribunal may:*
> *(a) ... ...*
> *(b) adjourn the review from time to time;*

43. Thus, in the words of the Minister to Parliament, the amendments are '*expressly requiring*' the MRT to '*act in a way that is fair and just*'.

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44. It follows that in exercising its power to adjourn a review the MRT '*must act in a way that is fair and just*'. The fact that s. 363(1)(b) may be characterised as a facultative provision does not mean that the power as facilitated should not be exercised '*in a way that is fair and just*'. The exercise of facultative provisions can often have substantive effects as is the case here and therefore must be exercised in a way that if '*fair and just*'.

45. In this case both the Federal Magistrate and the Full Federal Court found that the failure to grant an adjournment was not fair or just.

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46. In this context therefore the following extract from the reasons of Greenwood and Logan JJ represents a correct expression of the law:

> *26. On analysis, it can be seen that both Ortiz, insofar as it turned on the refusal of adjournment issue, and also Tran are but examples of applying Aala where the circumstances of a particular case disclosed jurisdictional error in the form of a failure to afford an opportunity to be heard constituted by an unreasonable refusal of an adjournment. Applicant S296 of 2003 v Minister for Immigration and Multicultural Affairs per Gyles J is another such example.*

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> *27. When a tribunal fails in this way to offer an opportunity to be heard, it fails to discharge its core statutory function of reviewing the decision of the Minister or his delegate.*
>
> *28. Necessarily, where the MRT behaves in this fashion it has also not met the requirement of providing a mechanism of review that is "fair" (s 353) or "acted in a way that is fair and just" (s 357A(3)). It may well be that these particular provisions add nothing to the general law ground of a denial of procedural fairness*

which can constitute jurisdictional error for the purposes of s 75(v) of The Constitution. On reflection, and with the benefit of expressly considering both SZMOK and SZGUR, we consider that this is the better way to view the prescriptions for "fairness" found in s 353 and s 357A(3). Even if these sections are only declaratory, they are not, in our respectful opinion, thereby to be consigned to the status of aspirational statements, as opposed to requirements. It is just that, as with the general law error ground, neither can have any particular content divorced from the circumstances of a particular case or the statutory context in which they appear.

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29. Consideration of the statutory context in which s 353 and s 357A(3) appear does not negate the proposition that an unreasonable refusal of an adjournment can constitute jurisdictional error on the part of the MRT. The MRT's "core function" is to review an MRT reviewable decision such as that made in respect of, the respondent, Ms Li: s 348. In so doing, it must invite her to appear: s 360. The appearance afforded by the MRT to an applicant by that invitation must be meaningful, not perfunctory, or it will be no appearance at all. The MRT is given power to adjourn proceedings from time to time: s 363(1)(b) of the Act. An unreasonable refusal of an adjournment of the proceeding will not just deny a

20 *meaningful appearance to an applicant. It will mean that the MRT has not discharged its core statutory function of reviewing the decision. This failure constitutes jurisdictional error for the purposes of s 75(v) of The Constitution.*

30. As we have already observed, necessarily, it will also mean that the MRT has not conducted its core function in a way which is "fair", which is a requirement of s 353 and, for that matter, of s 357A(3) of the Act. The statement in s 357A(1) of the Act that the division of the Act in which s 357A(3) appears is an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters dealt with in that division is not a palliative for a failure on

30 *the part of the MRT to discharge its "core function".*

47. As pointed out by Gibbs CJ in *FAI Insurances Ltd v Winneke* (1981-1982) 151 CLR 342 at349, in identifying whether the principles of natural justice have been met, one must not '*confuse form with substance*'.

48. It is confusing form with substance to assert that the first respondent had a proper hearing.

49. The MRT concluded in cursorily dismissing the first respondent's application for an

40 adjournment as follows:

35.....The Tribunal considers that the applicant has been provided with enough opportunity to present her case

50. This is clearly wrong as the she was denied the opportunity to present the one piece of evidence which would have determined the review in her favour.

51. In *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597 Gaudron and Gummow JJ observed, at 611:

> *a failure to accede to a reasonable request for an adjournment can constitute procedural unfairness.*

52. There are many cases where the failure to grant an adjournment for various purposes including to give a party the opportunity to present more evidence, constitute a denial of the principles of procedural fairness.

53. For example in *Sullian v Department of Transport* (1978) 1 ALD 383, Deane J (as he then was) found that a failure to adjourn to allow a medical witness to be called entitles the applicant to the intervention of the Federal Court. Deane J as part of a unanimous decision by the Full Federal Court concluded (at 403):

> *A refusal to grant an adjournment can constitute a failure to give a party to a proceedings the opportunity of adequately presenting his case.* (see also at 402)

54. In *Egan v Harradine (1975) 25 FLR 336* Sweeney and Evatt JJ at 371 endorsed what De Smith wrote in *Administrative Law, 3rd ed, pp 186-7* that *"the wrongful refusal of an adjournment to a party... requiring time to produce important evidence may also be tantamount to a denial of justice."*

55. An important case of principle is *R v Thames Magistrates' Court, ex p Polemis* [1974] 1 WLR 1371 where Lord Widgery CJ concluded that the party's inability to obtain evidence, among other things, meant it was '*unarguable*' that the party *"had a reasonable chance to prepare his defence"* (see 1375).

56. A useful final word on this issue is the words of Lord Denning delivering the judgment of Privy Council in *Kanda v Govt of Malaysia* [1962] AC 322 at 337 where he emphatically described the right to be heard as being set out in one word "Fairness".

57. Thus s, 357A(3) re-introduces general concepts of fairness as part of the *'exhaustive statement of the requirements of the natural justice hearing rule'*

58. The Federal Court decision does not stand for the proposition that an adjournment of an MRT hearing must occur when there is the possibility of further evidence becoming available.

59. Here, these factors operated to make the decision to adjourn a necessary one:

(a) The final TRA assessment simply was not available as the TRA decision was yet to be made;
(b) That a positive decision was expected by the TRA was not mere speculation or an expression of optimism;
(c) The MRT received cogent submissions outlining why the positive TRA assessment was expected;
(d) Corroborating the above, the positive decision did eventuate in reasonable time;

(e) There was no concern expressed by the MRT that there would be an inordinate delay in the TRA making its decision;
(f) The fact of the error by TRA was totally outside the control of the first respondent.

SZMOK

60. There are some contradictory strands in the decision of Full Federal Court in SZMOK *Minister for Immigration and Citizenship v SZMOK* [2009] FCAFC 83; (2009) 257 ALR 427.

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61. *SZMOK* does not stand for the proposition that that the powers in Division do not have to be exercised in a manner that is *'fair and just'*. There the Full Federal Court concluded:

> *[18] However, while the effect of s 422B(1) was to make Div 4 an exhaustive statement of the rule, there was nothing in Div 4 to indicate that any of the procedural powers contained in it were to be used fairly. Accordingly, it was possible that those powers could be used in ways that were not fair, without infringing the procedural requirements of Div 4. Section 422B(3) might therefore*
> 20 *be understood as restoring fairness and justice as a procedural concept.* ***In those circumstances, the requirement that the tribunal act in a way that is fair and just does not refer to substantive notions of justice or fairness but is more usefully to be compared with the content of the words "justice" and "fairness" in the expressions "natural justice" and "procedural fairness", respectively****: see SZLLY v Minister for Immigration and Citizenship (2009) 107 ALD 352; [2009] FCA185 at [22]–[24].* [Emphasis added]

62. *SZMOK*, in its factual context was essentially about a tribunal making an adverse finding of credit. Paragraph 18 of the Court's reasons in SZMOK in fact stand for the
30 proposition that compliance with obligations of *"natural justice" and "procedural fairness"* are not mere *'exhortations'*.

63. In *SZMOK* the court emphasised that the term *'just and fair'* did not import general notions of justice or fairness.

64. The reasons of Greenwood and Logan JJ do not disagree with that. Rather than there being a conflict, their reasons simply represent a progression of the views expressed in paragraph 18 in *SZMOK* especially when read with the passages in *SZLLY* as referred to by the Court in *SZMOK* with apparent approval. In *SZLLY v Minister for*
40 *Immigration and Citizenship,* (2009) 107ALD 352 Perram J stated (at paragraph 24, p 358), *'Section 422B(3) restores, as a procedural concept, justice and fairness.'*

SZGUR

65. It needs to be pointed out that the 2007 amendments did not apply to the tribunal in *SZGUR*[6] as the application for review in that case was filed on 15 March 2005, the

[6] *Minister for Immigration and Citizenship v SZGUR and Another (2011) 241 CLR 594*

amendment by virtue of Item 33 to s. 2 of the amending act only applied to applications lodged before the date of commencement (being 28 June 2007, the date of assent).

66. But in any event the gloss placed on the reasoning of French CJ and Kiefel J in *SZGUR* by the appellants (in paragraph 12 of the submissions) is unjustified. French CJ and Kiefel J stated (at 601 [19]):

> *The power conferred by s 427(1)(d) is to be exercised having regard to the requirement imposed on the Tribunal, in the discharge of its core function of reviewing Tribunal decisions, "to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick" and to act "according to substantial justice and the merits of the case".* [Footnotes omitted]

67. Significantly both the Minister in the second reading speech and French CJ and Kiefel J use the term '*requiring*' and '*requirement*', respectively in relation to the objective of conducting a review in a manner which is 'fair' and 'just'.

68. The appellant focuses on the word '*regard*'[7] as the basis for diluting the effect of the word '*requirement*'.

69. In any event though the issue of the adjournment is covered by Division 5 in Part 5 of the Act. In this context s. 353 adds a gloss as to how concepts of fairness ought to be applied. That the MRT is required to act in a way that is '*fair, just, economical, informal and quick*' informs as to how the MRT is to carry out its functions. The obligations are probably cumulative and generally the MRT ought to meet those requirements in context. Fairness may require delay but when the obligation of fairness has been met then the MRT should act in a way that is quick. S. 353 complements what the MRT is required to do under s. 357A(3).

70. It needs to be pointed out that the Migration Act has been amended almost annually in recent decades. It is a patchwork quilt put together my many different hands sometimes with contradictory objectives. To expect every piece of the quilt to harmoniously sit with each other piece is unrealistic.

71. In this context therefore the following extract from the reasons of Greenwood and Logan JJ represents a correct expression of the law:

> *31. On analysis, it can be seen that both Ortiz, insofar as it turned on the refusal of adjournment issue, and also Tran are but examples of applying Aala where the circumstances of a particular case disclosed jurisdictional error in the form of a failure to afford an opportunity to be heard constituted by an unreasonable refusal of an adjournment. Applicant S296 of 2003 v Minister for Immigration and Multicultural Affairs per Gyles J is another such example.*
>
> *32. When a tribunal fails in this way to offer an opportunity to be heard, it fails to discharge its core statutory function of reviewing the decision of the Minister or his delegate.*

[7] See paragraph 42 of the appellants submissions

33. Necessarily, where the MRT behaves in this fashion it has also not met the requirement of providing a mechanism of review that is "fair" (s 353) or "acted in a way that is fair and just" (s 357A(3)). It may well be that these particular provisions add nothing to the general law ground of a denial of procedural fairness which can constitute jurisdictional error for the purposes of s 75(v) of The Constitution. On reflection, and with the benefit of expressly considering both SZMOK and SZGUR, we consider that this is the better way to view the prescriptions for "fairness" found in s 353 and s 357A(3). ***Even if these sections are only declaratory, they are not, in our respectful opinion, thereby to be consigned to the status of aspirational statements, as opposed to requirements.*** *It is just that, as with the general law error ground, neither can have any particular content divorced from the circumstances of a particular case or the statutory context in which they appear.*

34. Consideration of the statutory context in which s 353 and s 357A(3) appear does not negate the proposition that an unreasonable refusal of an adjournment can constitute jurisdictional error on the part of the MRT. The MRT's "core function" is to review an MRT reviewable decision such as that made in respect of, the respondent, Ms Li: s 348. In so doing, it must invite her to appear: s 360. The appearance afforded by the MRT to an applicant by that invitation must be meaningful, not perfunctory, or it will be no appearance at all. The MRT is given power to adjourn proceedings from time to time: s 363(1)(b) of the Act. An unreasonable refusal of an adjournment of the proceeding will not just deny a meaningful appearance to an applicant. It will mean that the MRT has not discharged its core statutory function of reviewing the decision. This failure constitutes jurisdictional error for the purposes of s 75(v) of The Constitution.

35. As we have already observed, necessarily, it will also mean that the MRT has not conducted its core function in a way which is "fair", which is a requirement of s 353 and, for that matter, of s 357A(3) of the Act. The statement in s 357A(1) of the Act that the division of the Act in which s 357A(3) appears is an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters dealt with in that division is not a palliative for a failure on the part of the MRT to discharge its "core function".
[Footnotes omitted, emphasis added]

Eshetu

72. The decision in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 is analysed in the context of the Migration Act as it stood at that time. S. 476(2) stated (as set out at p 621):

(2) The following are not grounds upon which an application may be made under subsection (I):
(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
(b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.

73. With respect to the argument of the respondent in *Eshetu*, what was sought to be done in *Eshetu* was a backdoor re-introduction of the '*rules of natural justice*' via s. 420 the equivalent of s. 353. Gleeson CJ and McHugh JJ in a joint judgment aptly described the legal position

> *It is not an acceptable approach to statutory interpretation to negate the clear intention of the legislature by reliance on s 420 of the Migration Act. In any event, s 420, when understood in its legal and statutory context, is an inadequate foundation for an attempt to overcome the provisions of s 476(2).*

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74. All the references referred to by the appellant about *Eshetu* have to be seen in that context. *Eshetu* was an important case at the time but it is now only of historical significance and is certainly outstripped by s. 357A(3).

75. The appellant relies upon paragraph 49 of *Eshetu* at 628 which states:

> *The relationship, or lack of it, between ss 420 and 476 was correctly explained by Lindgren J at first instance in Sun Zhan Qui v Minister for Immigration and Ethnic Affairs. The history of legislative provisions similar to s 420 was examined in*
> 20 *Qantas Airways Ltd v Gubbins. They are intended to be facultative, not restrictive. Their purpose is to free tribunals, at least to some degree, from constraints otherwise applicable to courts of law, and regarded as inappropriate to tribunals. The extent to which they free tribunals from obligations applicable to the courts of law may give rise to dispute in particular cases, but that is another question.*
> (Footnotes omitted)

76. This does not stand for the proposition that principles of fairness do not apply to tribunals but merely that the onerous requirements of the principles of natural justice in a court of law would not apply to a tribunal. This is axiomatic.

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77. Lindgren J's reasons were quoted elsewhere in *Eshetu* at 643 in the judgment of Gummow J, in these terms:

> *But [s] 476(2)(a) provides expressly that breach of the rules of natural justice is not a ground of review. This suggests that the legislature did not intend the 'procedures' of [s] 476(1)(a) to embrace the standards which [s] 420(1) requires the [Tribunal] to pursue.*

78. It is submitted that it is impossible to separate the effect on s. 476(2) in the reasoning of
40 the court in *Eshetu.*

79. In the shifting sands of migration law the decision in *Eshetu* has lost its general application because of the state of the law at the time that decision was made.

Unreasonableness

80. As pointed out in *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323; 180 ALR 1; 75 ALJR 1105 (31 May 2001) by McHugh,

Gummow and Hayne JJ, the one error can be characterised in different ways. They stated at 351:

> *82. "Jurisdictional error" can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from Craig, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material.*[footnotes omitted]

81. In this context Greenwood and Logan JJ stated:

> *29. Consideration of the statutory context in which s 353 and s 357A(3) appear does not negate the proposition that an unreasonable refusal of an adjournment can constitute jurisdictional error on the part of the MRT. The MRT's "core function" is to review an MRT reviewable decision such as that made in respect of, the respondent, Ms Li: s 348. In so doing, it must invite her to appear: s 360. The appearance afforded by the MRT to an applicant by that invitation must be meaningful, not perfunctory, or it will be no appearance at all. The MRT is given power to adjourn proceedings from time to time: s 363(1)(b) of the Act.* ***An unreasonable refusal of an adjournment of the proceeding will not just deny a meaningful appearance to an applicant. It will mean that the MRT has not discharged its core statutory function of reviewing the decision.*** *This failure constitutes jurisdictional error for the purposes of s 75(v) of The Constitution.* [Emphasis added]

82. They added:

> *34. Whether or not this criterion is met does not entail the exercise of any discretionary power. The power, conferred by s 363(1)(b) of the Act, to adjourn the hearing of an application is discretionary.* ***If that discretion is exercised unreasonably such that the result is that a visa applicant is not afforded a meaningful appearance, the MRT will not, for the reasons given above, have conducted a review of a decision according to law.*** *Read as a whole rather than narrowly, the passage which we have quoted from the reasons of the learned federal magistrate stands for nothing more than this. So read, the passage is unremarkable. In the circumstances, an unreasonable refusal of an adjournment did indeed, as his Honour concluded, "go to the very jurisdiction".* [Emphasis added]

83. The first respondent needed one piece of evidence in order to be successful in her application before the MRT. That piece of evidence was not available at the time of hearing. That piece of evidence was the TRA skill assessment.

84. But there was every reason to expect it would be available within a relatively short time and in fact it was available.

85. One can assess reasonableness from many angles. When an internal review was underway by the TRA, a short delay to await the outcome that review, hardly frustrates the work of the MRT. Already the MRT had taken a year to get from application to

decision. There is no policy objective militating against waiting a couple of months in order to receive evidence which is determinative of the review.

86. Fundamentally the MRT denied the first respondent the opportunity to present crucial evidence without giving any indication that it had weighed up what was at stake. Its cursory words, '*the applicant has been provided with enough opportunity to present her case*'[8] indicate a lack of appreciation of the evidence that was pending.

87. What the Federal Court concluded was a restatement of what is the long standing orthodox principle regarding administrative decision making exemplified by the observations of Gibbs J (as he then was) in *Buck v Bavone (1976) 135 CLR 110 at 118-119*:

> *"In all such cases* ***the authority must act in good faith; it cannot act merely arbitrarily or capriciously.*** *Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it.'* [Emphasis added]

88. Gummow J in *Eshetu* however addressed the issue of unreasonableness and considered that under s. 75(v) of the Constitution, the ground was available in an application for a prerogative write although not proved in that case (irrespective of the application of s. 420). Gummow J referred to the observations of Gibbs J in *Buck v Bavone* (set out in above) and continued at 654 (paragraph 138):

> *This passage is consistent with the proposition that, where the criterion of which the authority is required to be satisfied turns upon factual matters upon which reasonable minds could reasonably differ, it will be very difficult to show that no reasonable decision-maker could have arrived at the decision in question. It may be otherwise if the evidence which establishes or denies, or, with other matters, goes to establish or to deny, that the necessary criterion has been met was all one way.*

89. Greenwood and Logan JJ concluded that once there was an unreasonable refusal of an adjournment, then this '*was, effectively, to doom Ms Li's application for review to failure.*'

90. Therefore the decision to reject the review becomes unreasonable once the MRT decides that it will not adjourn to receive the final TRA assessment in the particular circumstances of this case.

91. Burnett FM noted that the reasons of the MRT showed a fatal flaw. He stated:

> *48.....*

[8] Paragraph 35 of the MRT decision

Ultimately what appears absent in the Tribunal's decision in this instance is a consideration of the relative merits of the competing interests.

92. His Honour was undertaking the exercise which Mason J (as he then was) envisaged could occur in particular circumstances of administrative decision making. In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 (31 July 1986) Mason J observed (at 40/41):

> *(d) The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned (Wednesbury Corporation, at p.228).*
>
> *It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power (Sean Investments Pty Ltd v. MacKellar, at p 375; Reg v Anderson; Ex parte Ipec-Air Pty Ltd [1965] HCA 27; (1965) 113 CLR 177, at p 205; Elliott v. Southwark London Borough Council (1976) 1 WLR 499, at p 507; (1976) 2 All ER 781, at p 788; Pickwell v. Camden London Borough Council (1983) QB 962, at p 990).* ***I say "generally" because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is "manifestly unreasonable".*** *This ground of review was considered by Lord Greene M.R. in Wednesbury Corporation, at pp.230, 233-234, in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it. This ground is now expressed in ss.5(2)(g) and 6(2)(g) of the ADJR Act in these terms. The test has been embraced in both Australia and England (Parramatta City Council v Pestell [1972] HCA 59; (1972) 128 C.L.R. 305, at p.327; Bread Manufacturers of NSW v Evans [1981] HCA 69; (1981) 56 ALJR 89, at p 96; [1981] HCA 69; [1981] HCA 69; 38 ALR 93, at p 106; Re Moore; Ex parte Co-operative Bulk Handling Ltd (1982) 56 ALJR 697; 41 ALR 221, at pp 221-222; Hall & Co Ltd v Shoreham-By-Sea Urban District Council (1964) 1 WLR 240, at pp.248, 255; (1964) 1 All E.R. 1, at pp.8, 13; R v Hillingdon London Borough Council; Ex p. Royco Homes Ltd (1974) QB 720, at pp 731-732; Newbury District Council v. Secretary of State for the Environment (1981) AC 578, at pp 599-600, 608). However, in its application, there has been considerable diversity in the readiness with which courts have found the test to be satisfied (compare, for example, Wednesbury Corporation, at p.230, and Parramatta City Council, at p.328, with the conclusions reached in South Oxfordshire District Council v. Secretary of State for the Environment (1981) 1 WLR 1092, at p 1099; (1981) 1 All ER 954, at p 960; Shoreham-By-Sea Urban District Council, and Minister of Housing and Local Government v. Hartnell (1965) AC 1134, at p 1173). But guidance may be found in the close analogy*

between judicial review of administrative action and appellate review of a judicial discretion. In the context of the latter, it has been held that an appellate court may review a discretionary judgment that has failed to give proper weight to a particular matter, but it will be slow to do so because a mere preference for a different result will not suffice (Lovell v Lovell [1950] HCA 52; (1950) 81 CLR 513, at p 519; Gronow v Gronow [1979] HCA 63; (1979) 144 CLR 513, at pp 519-520, 534, 537-538; Mallet v Mallet [1984] HCA 21; (1984) 58 ALJR 248, at pp 252, 255; [1984] HCA 21; 52 ALR 193, at pp.200-201, 206-207). So too in the context of administrative law, a court should proceed with caution when reviewing an administrative decision on the ground that it does not give proper weight to relevant factors, lest it exceed its supervisory role by reviewing the decision on its merits. [Emphasis added]

93. A decision not to wait for information foreshadowed was found to be unreasonable in *"A" v Pelekanakis* (1999) 91 FCR 70 [1999] FCA 236 (17 March 1999).

94. The matter before this court is not a *'duty to inquire'* case although the reasoning of the High Court in *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39 (23 September 2009) has some analogous value. There, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ observed:

> *25..... The duty imposed upon the Tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. It is not necessary to explore these questions of principle in this case. There are two reasons for that.*
>
> *26. The first reason is that there was nothing on the record to indicate that any further inquiry by the Tribunal, directed to the authenticity of the certificates, could have yielded a useful result. There was nothing before the Federal Magistrates Court or the Federal Court to indicate what information might be elicited if the Tribunal were to undertake the inquiry which was said to be critical to the validity of its decision.....*
>
> *The second reason is that the response made by SZIAI's solicitors to the Tribunal's letter of 14 January 2008 itself indicated the futility of further inquiry.*

95. In contrast in the matter before this court, crucial material would have been available had an adjournment been granted. In the above passage Their Honours were reflecting on the reasoning of Wilcox J in *Prasad v Minister for Immigration and Ethnic Affairs* 1985] FCA 47; (1985) 6 FCR 155 at 167-170 and Their Honours noted that Wilcox J was considering the conduct of the decision maker in the context of being unreasonable.

96. In assessing reasonableness regard ought to be had to the nature of the tribunal itself as aptly described in *Muin v Refugee Review Tribunal* [2002] HCA 30; (2002) 190 ALR

601; (2002) 76 ALJR 966 (8 August 2002) by Gleeson CJ as follows (in reference to the associated Refugee Review Tribunal) at paragraph 7 :

> *A review of such a decision is not an adversarial proceeding. There is no contradictor . No issue is joined.*

97. There is no specific interest to be taken of the opposing party in the conduct of the hearing because it is purely inquisitorial. In this context that the MRT denied itself the opportunity to receive crucial and decisive evidence without proper consideration of the matter and therefore the decision on review was unreasonable.

98. Of course it is not the first respondent's case that every application for an adjournment ought to be granted. The first respondent submits that the review decision was correctly characterised as unreasonable in the special circumstances of this case.

99. As well as breaching the requirement of procedural fairness the MRT's decision was unreasonable. There is no warrant limit the concept of unreasonableness in any event to an exercise of discretion.

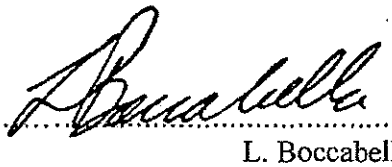
VII – Not applicable

VIII – Estimate of time required to present argument

Two hours

Attached is the Second Reading speech by the Minister for Immigration and Citizenship Mr Andrews to the House of Representatives dated 20 June 2007, Explanatory Memorandum to *Migration Amendment (Review Provisions) Bill 2006* as presented to the Senate and the *Migration Amendment (Review Provisions) Bill 2007*

Dated: 21 January 2013



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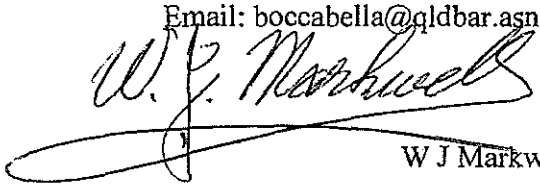

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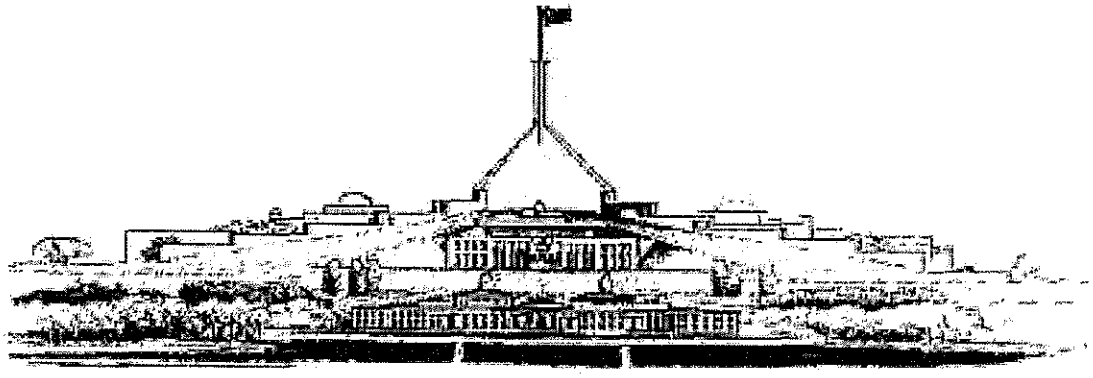
COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



HOUSE OF REPRESENTATIVES

Main Committee

MIGRATION AMENDMENT (REVIEW PROVISIONS) BILL 2006

Second Reading

SPEECH

Wednesday, 20 June 2007

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

SPEECH

Date	Wednesday, 20 June 2007	**Source**	House
Page	175	**Proof**	No
Questioner		**Responder**	
Speaker	Andrews, Kevin, MP	**Question No.**	

Mr ANDREWS (Menzies—Minister for Immigration and Citizenship) (10.08 am)—I present the explanatory memorandum to this bill and I move:

That this bill be now read a second time.

The Migration Amendment (Review Provisions) Bill 2006 amends the Migration Act 1958 to allow the Migration Review Tribunal and Refugee Review Tribunal flexibility in how they give procedural fairness to review applicants.

The Migration Act currently states that the tribunals must give the applicant particulars of adverse information 'in the way the tribunals consider appropriate in the circumstances' and invite the applicant to comment on those particulars. What I mean by the expression 'adverse information', is information that would be the reason, or a part of the reason, for the member affirming the decision under review.

The current provisions also state that the particulars and invitation to comment must be given by one of the methods set out in the act. These methods involve the tribunal sending a document to the applicant.

The full Federal Court and the High Court have strictly interpreted the latter provisions to mean that the tribunals can only discharge their procedural fairness obligations by providing applicants with particulars of adverse information and the invitation to comment on it in writing.

The cumulative effect of the court decisions is creating serious operational difficulties for the tribunals, including delays in finalising decisions.

The proposed amendments seek to resolve these difficulties. Specifically, they provide that where an applicant is at a hearing before one of the tribunals, the tribunal member will have a discretion to either (1) tell the applicant about any adverse information before it at the hearing, and invite him or her to respond, or (2) write to the applicant about the adverse information, and invite him or her to respond.

Whether they opt for the written or the oral method of providing procedural fairness, the proposed amendments will require the tribunals to do their best to ensure that the applicant understands why the adverse information being put to them is relevant to the review. They must ensure that the applicant understands the consequences of the tribunal relying on that information to affirm the decision that is under review.

If a tribunal chooses to tell the applicant at hearing about any adverse information, the member must also tell the applicant that he or she may ask for more time to respond to that information. If the applicant then asks for more time, and the tribunal considers that this request is reasonable, the tribunal must adjourn the review.

As has long been the case, interpreters will be available to applicants who need them for review proceedings so people who have difficulty with English will in no way be disadvantaged.

The tribunal's choice as to whether they provide procedural fairness to an applicant orally or in writing will depend on what is appropriate in a particular case and with the tribunal bearing in mind the guiding principle, which is stated in the act, that it endeavour to provide a review that is fair, just, economical, informal and quick.

The bill will also provide that the tribunals are not obliged to provide an applicant with information already given by the applicant to the department, as part of the process leading to the decision under review.

The current requirement to give an applicant particulars of adverse information is subject to an exception in relation to information that has been given by the applicant for the purposes of 'the application'.

However, the courts have strictly interpreted this exception to apply only to information provided to the tribunals, and not to information provided by the applicant to my department during the process leading to the decision under review.

The bill will insert a new exception for information given by the applicant to my department during the process leading to the decision that is under review. This exception will not extend to information that the applicant orally gave to my department, such as information provided during an interview with a departmental officer for a visa application. Such information is typically not recorded verbatim, and the tribunals will still be required to give the particulars of that information to the applicant for comment.

Since the full Federal Court and the High Court decisions I referred to earlier, the tribunals have operated under a very technical application of the law. The tribunals advise that this is seriously hampering their efficient operation and is causing unnecessary delays in finalising cases.

For example, take information such as passport details and details of a person's movements—information that is frequently before the tribunals. If a tribunal was to rely on such information to affirm a decision, it must put particulars of it to the applicant in writing for comment before making the decision, even if the tribunal had orally put that to the applicant at the hearing, and the applicant had an opportunity to comment on it at the hearing and so had, in substance and effect, been given procedural fairness.

The bill will also insert new provisions into the act, expressly requiring the tribunals, when applying the requirements and procedures set out in relevant divisions of the act, to act in a way that is fair and just.

These amendments will uphold the fundamental right of all review applicants to receive procedural fairness during review proceedings, while at the same time giving the tribunals flexibility in how they meet their procedural fairness obligations.

These amendments will allow the tribunals to conduct reviews more efficiently, with less unnecessary process and paperwork. This will help the Refugee Review Tribunal to comply with its statutory 90-day time limit for finalising decisions. It will also lead, in many cases, to the faster completion of cases, which will benefit review applicants who no doubt experience stress and uncertainty in waiting to hear of a decision.

I commend the bill to the House.

2004 – 2005 – 2006

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

MIGRATION AMENDMENT (REVIEW PROVISIONS) BILL 2006

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Immigration and Multicultural Affairs,
Senator the Hon Amanda Vanstone)

MIGRATION AMENDMENT (REVIEW PROVISIONS) BILL 2006

OUTLINE

1. The Migration Amendment (Review Provisions) Bill 2006 ("the Bill") amends the *Migration Act 1958* ("the Act") to:

a) allow the Migration Review Tribunal ("the MRT") and the Refugee Review Tribunal ("the RRT") to give procedural fairness to review applicants, during a hearing, by allowing the Tribunals to orally give clear particulars of any information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review and invite the applicant to comment on or respond to the information;

b) provide that the obligation to give an applicant information and invite comment on or a response to the information does not extend to information already provided by the applicant to the Department of Immigration and Multicultural Affairs ("the Department"), as part of the process leading to the decision under review, other than information that the applicant has given orally to the Department;

c) provide that if the Tribunals give, orally or in writing, clear particulars of the information that the Tribunals consider would be the reason or part of the reason for affirming the decision under review, then the Tribunals must ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review and the consequences of the information being relied on in affirming the decision;

d) provide that if an applicant is given information at the hearing, the Tribunals must advise that he or she may seek additional time to comment on or respond to the information; and

e) provide that if an applicant seeks more time to comment on the information and the Tribunals consider that the applicant reasonably needs additional time, the Tribunals must adjourn the review and provide the applicant with that opportunity.

1. The bill also includes new provisions that ensure that in carrying out the procedures and requirements regarding the natural justice hearing rule set out in the Act (which continue to be an exhaustive statement of the natural justice hearing rule), the Tribunals must do so in a way which is fair and just. This complements subsections 353(1) and 420(1) of the Act, which provides that in carrying out their functions under the Act, the Tribunals must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

2. Under existing subsections 359A(1) and 424A(1) of the Act, the MRT and RRT have an obligation to provide review applicants with procedural fairness. The Tribunals must:

- give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review;
- ensure, as far as reasonably practicable, that the applicant understands why the information is relevant to the review; and
- invite the applicant to comment on the information.

1. There are certain exceptions to these requirements, provided in subsections 359A(4) and 424A(3) of the Act. One of these exceptions is that the Tribunal is not required to give to the applicant information that has already been given by the applicant for the purposes of the application.

2. The full Federal Court decision of *MIMA v Al Shamry [2001] FCA 919* ("*Al Shamry*") in July 2001 made it clear that adverse information provided by an applicant to the Department as part of their visa application or in response to a possible visa cancellation decision was not covered by the exemption provisions in subsections359A(4) and 424A(3). Accordingly, the Tribunals are required to put that information to the applicant and invite them to comment.

3. Following *Al Shamry*, the Tribunals complied with this decision by orally providing any such adverse information to the applicant for comment during the hearing.

4. In February 2006, the full Federal Court handed down its decision in *SZEEU v MIMIA* [2006] FCAFC 2. The Court found that *Al Shamry* was not plainly wrong and that it should be followed.

5. In May 2005, in *SAAP v MIMIA* [2005] HCA 23, the High Court made it clear that the requirement in sections 359A and 424A to provide the information in writing was not procedural and had to be strictly complied with by the Tribunals.

6. The cumulative effect of these decisions is that the Tribunals have needed to adopt a very literal approach to providing applicants with procedural fairness, and this is having considerable practical ramifications on their operations. For example:

- delays are being caused by matters that have already been covered exhaustively at the Tribunal hearings, having to be put to the applicants again in writing following the hearing; and
- information such as passport details, family composition and statutory declarations provided by the applicant during the process leading to the decision under review, if the Tribunals are to rely on the information, must be put to the applicant in writing for comment.

1. Subsequent judicial comment on the effect of this very literal interpretation has been that it has led to a highly technical application of the law in circumstances where little or no practical injustice can be found in the way the Tribunals have dealt with a matter (for example, Justice Allsop in *SZEWL v MIMIA [2006] FCA 968*).

2. It has also led to delays in finalising reviews and operational difficulties in the conduct of reviews impairing the ability of the Tribunals to conduct reviews that are fair, just, economical, informal and quick.

3. These amendments are designed to ensure that applicants are still provided with procedural fairness while providing flexibility to the Tribunals in how they meet their obligations. If the Tribunals do not orally, at the hearing, give applicants clear particulars of the relevant adverse information and invite them to comment or respond, the Tribunals will be required to do so in writing. The provisions ensure that an applicant will not be taken by surprise in this process and will have a reasonable time to comment or respond (including a requirement for the Tribunal to adjourn the review if the Tribunal considers the applicant reasonably needs additional time), and that they will be treated fairly and justly.

FINANCIAL IMPACT STATEMENT

There are no new costs. The amendments are likely to result in potential savings for the Tribunals as unnecessary processes will be avoided.

MIGRATION AMENDMENT (REVIEW PROVISIONS) BILL 2006

NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short title

1. The short title by which this Act may be cited is the *Migration Amendment (Review Provisions) Act 2006.*

Clause 2 Commencement

2. Clause 2 provides that the Act will commence on the day after it receives the Royal Assent.

Clause 3 Schedule(s)

3. This clause provides that each Act specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned. In addition, any other item in a Schedule to this Act has effect according to its terms.

SCHEDULE 1 – Review Processes of the Migration Review Tribunal and the Refugee Review Tribunal

Migration Act 1958

Item 1 **At the end of section 357A**

1. This item inserts new subsection 357A(3) at the end of section 357A.

2. New subsection 357A(3) provides that in applying Division 5 of Part 5 of the Act, the Migration Review Tribunal ("the MRT") must act in a way that is fair and just.

3. Division 5 relates to the MRT's conduct of its reviews. Subsection 357A(1) provides that Division 5 is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with. New subsection 357A(3) ensures that in carrying out the procedures and requirements set out in Division 5, which continue to be an exhaustive statement of the natural justice hearing rule, the MRT must do so in a way which is fair and just. This complements subsection 353(1) of the Act, which provides that in carrying out its functions under the Act, the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

Item 2 **After section 359**

4. Currently, section 359A provides that the Migration Review Tribunal ("the MRT") must give applicants for review particulars of any information that the MRT considers would be the reason, or a part of the reason, for affirming the decision under review. This must be done either by a prescribed method for an applicant in detention or by one of the methods specified in section 379A. As a consequence of the High Court decision in *SAAP*, section 359A requires that the MRT must always provide the particulars of the information and the invitation to comment to the applicant in writing even if the information has already been covered at hearing.

5. New section 359AA provides a new discretion for the MRT to orally give particulars of information and invite the applicant to comment on or respond at the time that the applicant is appearing before the MRT in response to an invitation issued under section 360. This will complement the MRT's existing obligation under section 359A, in that, if the MRT does not orally give information and seek comments or a response from an applicant under section 359AA, it must do so in writing, under section 359A. The corollary is that if the MRT does give clear particulars of the information and seek comments or a response from an applicant under section 359AA, it is not required to give the particulars under section 359A.

6. Where a review applicant is appearing before the MRT pursuant to an invitation issued under section 360, new paragraph 359AA(a) provides the MRT with a discretion to give to the review applicant orally, clear particulars of the information that the MRT considers would be the reason, or part of the reason, for affirming the decision under review.

7. Section 360 provides that, unless the MRT considers that it will find in the applicant's favour or the applicant consents to not appear before the MRT, the MRT must invite the

applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision under review. Section 366 provides that the MRT may allow the applicant to appear or to give oral evidence before it by telephone, closed-circuit television or any other means of communication. The MRT is required to appoint an interpreter if the applicant is not sufficiently proficient in English.

8. New paragraph 359AA(b) provides that if the MRT exercises its discretion to orally provide clear particulars of the information that it considers would be the reason, or part of the reason, for affirming the decision under review, then the MRT is obliged to ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision. The MRT is also obliged to orally invite the applicant to comment on or respond to the information and to advise the applicant that he or she may seek additional time to comment or respond. If the applicant seeks additional time to comment or respond, the MRT must adjourn the review, if it considers that the applicant reasonably needs additional time to comment or respond.

9. In inviting the applicant to comment on or respond to information while the applicant is appearing before it, the MRT must clearly set out the particulars of information is and why it is relevant. The applicant can seek clarification and make additional comments. It will enable the MRT to give clear particulars of information orally at a hearing without also being required, as is presently the case, to give the same particulars in writing to the applicant after the hearing. The amendment will facilitate the more efficient conduct of reviews by improving their quality, timeliness and will reduce the cost of reviews.

10. The amendments will also ensure that applicants are not taken by surprise and are given time, if necessary, to provide their comments or response.

Item 3 **Subsection 359A(1)**

11. This item omits the words "subsection (2)" to substitute "subsections (2) and (3)" in subsection 359A(1).

12. This item provides that subsection 359A(1) is subject to the provisions in subsection 359A(2) and new subsection 359A(3) (inserted by item 7 below). Previously, subsection 359A(1) was only subject to subsection 359A(2).

13. This item also includes a note which provides that the current heading to section 359A (which reads "Applicant must be given certain information") is omitted and substituted with the heading "Information and invitation given in writing by Tribunal".

14. The note to item 3 altering the heading to section 359A reinforces the distinction that the procedures and requirements contained in section 359A only apply to particulars of the information and invitations to comment that the MRT gives to the applicant in writing.

Item 4 **Paragraph 359A(1)(a)**

15. Subsection 359A(1) currently provides that the MRT is required to give to the applicant particulars of the information that it considers would be the reason, or part of the reason, for affirming the decision under review and ensure, as far as reasonably practicable, that the applicant understands why the particulars are relevant to the review and invite the applicant to comment on the information.

16. This item inserts the word 'clear' before 'particulars' in paragraph 359A(1)(a). It is a consequential amendment to mirror the wording in new paragraph 359AA(a).

Item 5 **Paragraph 359A(1)(b)**

17. This item repeals paragraph 359A(1)(b) and replaces it with new paragraph 359A(1)(b) that mirrors new subparagraph 359AA(b)(i). That is, if the MRT provides particulars of information to the applicant pursuant to subsection 359A(1), the MRT is obliged to ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision.

Item 6 **Paragraph 359A(1)(c)**

18. This item adds the words "or respond to" after "comment on" in paragraph 359A(1)(c).

19. Paragraph 359A(1)(c) provides that the MRT must, when providing information to an applicant in writing, invite the applicant to comment on the information. The amendment will provide that the MRT's invitation must be not only to comment on, but also to respond to, the information. This is consistent with new subparagraph 359AA(1)(b)(ii), inserted by item 2.

Item 7 **After subsection 359A(2)**

20. This item inserts new subsection 359A(3).

21. New subsection 359A(3) complements new section 359AA which provides a discretion for the MRT to give procedural fairness orally to the applicant at the time that the applicant is appearing before the MRT.

22. Subsection 359A(1) (as amended by items 3, 4, 5 and 6) provides that the MRT is required to give to the applicant clear particulars of the information that the MRT considers would be the reason, or part of the reason, for affirming the decision under review; ensure, as far as reasonably practicable, that the applicant understands why it is relevant to the review and the consequences of it being relied on; and invite the applicant to comment on or respond to the information. Subsection 359A(2) sets out how the information and invitation are to be given.

23. New subsection 359A(3) provides that the MRT is not obliged, under section 359A, to give particulars of the information to an applicant, nor invite the applicant to comment on or respond to the information if, at the time the applicant appeared before it, the MRT exercised its discretion under new section 359AA (inserted by item 2) to orally give clear particulars of the information and orally invited the applicant to comment on or respond to the information.

24. If the MRT has exercised its discretion under new section 359AA to provide clear particulars of the information to the applicant orally, it may still choose to provide the particulars, or part of the particulars, and the invitation to comment on or respond to the information, to the applicant in writing, under section 359A.

Item 8 **Paragraph 359A(4)(b)**

25. This item inserts the words "for review" after the word "application" in paragraph 359A(4)(b) so that that paragraph now reads "that the applicant gave for the purpose of the application for review".

26. This item clarifies that the MRT is not bound to give to the applicant information that the applicant themself already gave for the purposes of their application for review by the MRT.

27. This item reinforces the distinction between information covered under paragraph 359A(4)(b) and information that is covered by new paragraph 359(4)(ba) inserted by item 9 of this bill.

Item 9 **After paragraph 359A(4)(b)**

28. This item inserts new paragraph 359A(4)(ba) into subsection 359A(4).

29. Subsection 359A(1) (as amended by items 3, 4, 5 and 6) provides that the MRT is required to give to the applicant clear particulars of the information that the MRT considers would be the reason, or part of the reason, for affirming the decision under review; ensure, as far as reasonably practicable, that the applicant understands why the particulars are relevant to the review and the consequences of it being relied on; and invite the applicant to comment on or respond to the information. Subsection 359A(2) sets out how the information and invitation are to be given.

30. Subsection 359A(4) provides that certain classes of information are excepted from the requirement in subsection 359A(1).

31. New paragraph 359A(4)(ba) provides for a new class of information that is excepted from the requirements of subsection 359A(1). The MRT will not be required to give to the applicant information that the applicant has given during the process that led to the decision that is under review, unless it was information provided orally by the applicant to the Department.

32. This includes, for example, written information provided to the Department by the applicant as part of their visa application (where it is the decision to refuse that application which is under review by the MRT), or in response to a notice of intended visa cancellation (where the subsequent visa cancellation is under review).

33. For example, an applicant might have provided a copy of their passport to the Department in support of a visa application but not to the MRT in support of their review application. Because the MRT receives the applicant's file from the Department, the MRT will have the copy of the passport. If there is information in that passport that would be a part of the reason for the MRT to affirm the decision under review, the MRT is not required to

inform the applicant of the particulars of the information in the passport, because the applicant had already provided that passport.

34. The exception provided by new paragraph 359A(4)(ba) does not extend to information that the applicant has provided orally to the Department. This would include information provided by the applicant as part of interviews with the Department for the purposes of applying for a visa or in response to a possible visa cancellation decision or information provided to the Department as part of some other process (for example, an interview with a Departmental officer at an airport about the applicant's entry into Australia). Such information is typically not recorded verbatim.

Item 10 **Paragraph 359B(1)(b)**

35. This item adds the words "or respond to" after "comment on" in paragraph 359B(1)(b). This is a technical amendment, consequential to the amendment made by item 6 to paragraph 359A(1)(c).

36. The note to this item provides that the heading to section 359B, which reads "Invitation to give additional information or comments", is omitted and replaced by the heading "Requirements for written invitation etc".

Item 11 **Subsection 359B(1)**

37. This item adds the words "or the response," after "or the comments" in subsection 359B(1). This is a technical amendment, consequential to the amendment made by item 10 to paragraph 359B(1)(b).

Item 12 **Subsection 359B(2)**

38. This item adds the words "or a response" after "or comments" (first occurring) in subsection 359B(2). This is a technical amendment, consequential to the amendment made by item 6 to paragraph 359A(1)(c).

Item 13 **Subsection 359B(2)**

39. This item omits the words "or comments" (second occurring) in subsection 359B(2), and substitutes the words "or the comments or the response". This is a technical amendment, consequential to the amendment made by item 12 to subsection 359B(2).

Item 14 **Subsection 359B(3)**

40. This item adds the words "or a response" after "or comments" in subsection 359(3). This is a technical amendment, consequential to the amendment made by item 6 to paragraph 359A(1)(c).

Item 15 **Paragraph 359C(2)(a)**

41. This item adds the words "or respond to" after "comment on" in paragraph 359C(2)(a). This is a technical amendment, consequential to the amendment made by item 6 to paragraph 359A(1)(c).

42. The note to this item provides that the heading to section 359C, which reads "Failure to give additional information or comments", is changed to "Failure to give additional information or comments or response in response to written invitation".

Item 16 **Paragraph 359C(2)(b)**

43. This item adds the words "or the response" after "the comments" in paragraph 359C(2)(b). This is a technical amendment, consequential to the amendment made by item 15 to paragraph 359C(2)(a).

Item 17 **At the end of section 422B**

44. This item inserts new subsection 422B(3) at the end of section 422.

45. New subsection 422B(3) provides that in applying Division 4 of Part 7 of the Act, the Refugee Review Tribunal ("the RRT") must act in a way that is fair and just.

46. Division 4 relates to the RRT's conduct of its reviews. Subsection 422B(1) provides that Division 4 is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with. New subsection 422B(3) ensures that in carrying out the procedures and requirements set out in Division 4, which continue to be an exhaustive statement of the natural justice hearing rule, the RRT must do so in a way which is fair and just. This complements subsection 420(1) of the Act, which provides that in carrying out its functions under the Act, the RRT must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

Item 18 **After section 424**

47. Currently, section 424A provides that the Refugee Review Tribunal ("the RRT") must give applicants for review particulars of any information that the RRT considers would be the reason, or a part of the reason, for affirming the decision under review. This must be done either by a prescribed method for an applicant in detention or by one of the methods specified in section 379A. As a consequence of the High Court decision in *SAAP*, section 424A requires that the RRT must always provide the particulars of the information and the invitation to comment to the applicant in writing even if the information has already been covered at hearing.

48. New section 424AA provides a new discretion for the RRT to orally give information and invite an applicant to comment on or respond to the information at the time that the applicant is appearing before the RRT in response to an invitation issued under section 425. This will complement the RRT's existing obligation under section 424A, in that, if the RRT does not orally give information and seek comments or a response from an applicant under section 424AA, it must do so in writing, under section 424A. The corollary is that if the RRT does give clear particulars of the information and seek comments or a response from an applicant under section 424AA, it is not required to give the particulars under section 424A.

49. Where a review applicant is appearing before the RRT pursuant to an invitation issued under section 425, new paragraph 424AA(a) provides the RRT with a discretion to give to

the review applicant orally, clear particulars of the information that the RRT considers would be the reason, or part of the reason, for affirming the decision under review.

50. Section 425 provides that, unless the RRT considers that it will find in the applicant's favour or the applicant consents to not appear before the RRT, the RRT must invite the applicant to appear before the RRT to give evidence and present arguments relating to the issues arising in relation to the decision under review. Section 429A provides that the RRT may allow the applicant to appear or to give oral evidence before it by telephone, closed-circuit television or any other means of communication. The RRT is required to appoint an interpreter if the applicant is not sufficiently proficient in English.

51. New paragraph 424AA(b) provides that if the RRT exercises its discretion to orally provide clear particulars of the information that it considers would be the reason, or part of the reason, for affirming the decision under review, then the RRT is obliged to ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision. The RRT is also obliged to orally invite the applicant to comment on or respond to the information and to advise the applicant that he or she may seek additional time to comment or respond. If the applicant seeks additional time to comment or respond, the RRT must adjourn the review, if it considers that the applicant reasonably needs additional time to comment or respond.

52. In inviting the applicant to comment on or respond to information while the applicant is appearing before it, the RRT must clearly set out what the information is and why it is relevant. The applicant can seek clarification and make additional comments. It will enable the RRT to give clear particulars of information orally at a hearing without also being required, as is presently the case, to give the same particulars in writing to the applicant after the hearing. The amendment will facilitate the more efficient conduct of reviews by improving their quality, timeliness and will reduce the cost of reviews.

The amendments will also ensure that applicants are not taken by surprise and are given time, if necessary, to provide their comments or response.

Item 19 **Subsection 424A(1)**

53. This item omits the words "subsection (3)" to substitute "subsections (2A) and (3)" in subsection 424A(1).

54. This item provides that subsection 424A(1) is subject to the provisions in subsection 424A(3) and new subsection 424A(2A) (inserted by item 23 below). Previously, subsection 424A(1) was only subject to subsection 424A(2).

55. This item also includes a note which provides that the current heading to section 424A (which reads "Applicant must be given certain information") is omitted and substituted with the heading "Information and invitation given in writing by Tribunal".

56. The note to item 19 altering the heading to section 424A reinforces the distinction that the procedures and requirements contained in section 424A only apply to particulars of the information and invitations to comment that the RRT gives to the applicant in writing.

Item 20 **Paragraph 424A(1)(a)**

57. Subsection 424A(1) currently provides that the RRT is required to give to the applicant particulars of the information that the RRT considers would be the reason, or part of the reason, for affirming the decision under review and ensure, as far as reasonably practicable, that the applicant understands why the particulars are relevant to the review and invite the applicant to comment on the information.

58. This item inserts the word 'clear' before 'particulars' in paragraph 424A(1)(a). It is a consequential amendment to mirror the wording in new paragraph 424AA(a).

Item 21 **Paragraph 424A(1)(b)**

59. This item repeals paragraph 424A(1)(b) and replaces it with new paragraph 424A(1)(b) that mirrors new subparagraph 424AA(b)(i). That is, if the RRT provides particulars of information to the applicant pursuant to subsection 424A(1), the RRT is obliged to ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision.

Item 22 **Paragraph 424A(1)(c)**

60. This item adds the words "or respond to" after "comment on" in paragraph 424A(1)(c).

61. Paragraph 424A(1)(c) provides that the RRT must, when providing particulars of information to an applicant in writing, invite the applicant to comment on the information. The amendment will provide that the RRT's invitation must be not only to comment on, but also to respond to, the information. This is consistent with new subparagraph 424AA(b)(ii), inserted by item 18.

Item 23 **After subsection 424A(2)**

62. This item inserts new subsection 424A(2A).

63. New subsection 424A(2A) complements new section 424AA which provides a discretion for the RRT to give procedural fairness orally to the applicant at the time that the applicant is appearing before it.

64. Subsection 424A(1) (as amended by items 19, 20, 21 and 22) provides that the RRT is required to give to the applicant clear particulars of the information that the RRT considers would be the reason, or part of the reason, for affirming the decision under review; ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review and the consequences of it being relied upon; and invite the applicant to comment on or respond to the information. Subsection 424A(2) sets out how the information and invitation are to be given..

65. New subsection 424A(2A) provides that the RRT is not obliged, under section 424A, to give particulars of the information to an applicant, nor invite the applicant to comment on or respond to the information if, at the time the applicant appeared before it, the RRT exercised its discretion under new section 424AA (inserted by item 18) to orally give clear particulars

of the information and orally invited the applicant to comment on or respond to the information.

66. If the RRT has exercised its discretion under new section 424AA to provide clear particulars of the information to the applicant orally, the RRT may still choose to provide the particulars, or part of the particulars, and the invitation to comment on or respond to them, to the applicant in writing, under section 424A.

Item 24 Paragraph 424A(3)(b)

67. This item inserts the words "for review" after the word "application" in paragraph 424A(3)(b) so that that paragraph now reads "that the applicant gave for the purpose of the application for review".

68. This item clarifies that the RRT is not bound to give to the applicant information that the applicant themself already gave for the purposes of their application for review by the RRT.

69. This item reinforces the distinction between information covered under paragraph 424A(3)(b) and information that is covered by new paragraph 424(3)(ba) inserted by item 25 of this bill.

Item 25 After paragraph 424A(3)(b)

70. This item inserts new paragraph 424A(3)(ba) into subsection 424A(3).

71. Subsection 424A(1) (as amended by items 19, 20, 21 and 22) provides that the RRT is required to give to the applicant clear particulars of the information that the RRT considers would be the reason, or part of the reason, for affirming the decision under review; ensure, as far as reasonably practicable, that the applicant understands why the particulars are relevant to the review and the consequences of it being relied upon; and invite the applicant to comment on or respond to the information. Subsection 424A(2) sets out how the information and invitation are to be given.

72. Subsection 424A(3) provides that certain classes of information are excepted from the requirement in subsection 424A(1).

73. New paragraph 424A(3)(ba) provides for a new class of information that is excepted from the requirements of subsection 424A(1). The RRT will not be required to give to the applicant information that the applicant has given during the process that led to the decision that is under review, unless it was information provided orally by the applicant to the Department.

74. This includes, for example, written information provided to the Department by the applicant as part of their visa application (where it is the decision to refuse that application which is under review by the RRT), or in response to a notice of intended visa cancellation (where the subsequent visa cancellation is under review).

75. For example, an applicant might have provided a copy of their passport to the Department in support of a visa application but not to the RRT in support of their review application. Because the RRT receives the applicant's file from the Department, the RRT will

have the copy of the passport. If there is information in that passport that would be a part of the reason for the RRT to affirm the decision under review, the RRT is not required to inform the applicant of the particulars of the information in the passport, because the applicant had already provided that passport.

76. The exception provided by new paragraph 424A(3)(ba) does not extend to information that the applicant has provided orally to the Department. This would include information provided by the applicant as part of interviews with the Department for the purposes of applying for a visa or in response to a possible visa cancellation decision or information provided to the Department as part of some other process (for example, an interview with a Departmental officer at an airport about the applicant's entry into Australia). Such information is typically not recorded verbatim.

Item 26 **Paragraph 424B(1)(b)**

77. This item adds the words "or respond to" after "comment on" in paragraph 424B(1)(b). This is a technical amendment, consequential to the amendment made by item 22 to paragraph 424A(1)(c).

78. The note to this item provides that the heading to section 424B, which reads "Invitation to give additional information or comments", is omitted and replaced by the heading "Requirements for written invitation etc".

Item 27 **Subsection 424B(1)**

79. This item adds the words "or the response," after "or the comments" in subsection 424B(1). This is a technical amendment, consequential to the amendment made by item 26 to paragraph 424B(1)(b).

Item 28 **Subsection 424B(2)**

80. This item adds the words "or a response" after "or comments" (first occurring) in subsection 424B(2). This is a technical amendment, consequential to the amendment made by item 22 to paragraph 424A(1)(c).

Item 29 **Subsection 424B(2)**

81. This item omits the words "or comments" (second occurring) in subsection 424B(2), and substitutes the words "or the comments or the response". This is a technical amendment, consequential to the amendment made by item 28 to subsection 424B(2).

Item 30 **Subsection 424B(3)**

82. This item adds the words "or a response" after "or comments" in subsection 424B(3). This is a technical amendment, consequential to the amendment made by item 22 to paragraph 424A(1)(c).

Item 31 **Paragraph 424C(2)(a)**

83. This item adds the words "or respond to" after "comment on" in paragraph 424C(2)(a). This is a technical amendment, consequential to the amendment made by item 22 to paragraph 424A(1)(c).

84. The note to this item provides that the heading to section 424C, which reads "Failure to give additional information or comments", is changed to "Failure to give additional information or comments or response in response to written invitation".

Item 32 **Paragraph 424C(2)(b)**

85. This item adds the words "or the response" after "the comments" in paragraph 424C(2)(b). This is a technical amendment, consequential to the amendment made by item 31 to paragraph 424C(2)(a).

Item 33 **Application**

86. This item provides for the application of the amendments in Schedule 1.

87. Paragraph 33(a) provides that the amendments made by this Act apply to an application for review of an MRT-reviewable decision made under section 347 of the Act which is made after item 33 commences.

88. Paragraph 33(b) provides that the amendments made by this Act apply to an application for review of an RRT-reviewable decision made under section 412 of the Act which is made after item 33 commences.

89. Clause 2 provides that this Act (which includes item 33) commences on the day after the Act receives the Royal Assent.

Migration Amendment (Review Provisions) Act 2007

No. 100, 2007

An Act to amend the *Migration Act 1958*, and for related purposes

Contents

Migration Amendment (Review Provisions) Act 2007

No. 100, 2007

An Act to amend the *Migration Act 1958*, and for related purposes

[*Assented to 28 June 2007*]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Migration Amendment (Review Provisions) Act 2007*.

2 Commencement

This Act commences on the day after it receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Review processes of the Migration Review Tribunal and the Refugee Review Tribunal

Migration Act 1958

1 At the end of section 357A

Add:

(3) In applying this Division, the Tribunal must act in a way that is fair and just.

2 After section 359

Insert:

359AA Information and invitation given orally by Tribunal while applicant appearing

If an applicant is appearing before the Tribunal because of an invitation under section 360:

(a) the Tribunal may orally give to the applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) if the Tribunal does so—the Tribunal must:

(i) ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and

(ii) orally invite the applicant to comment on or respond to the information; and

(iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and

(iv) if the applicant seeks additional time to comment on or respond to the information—adjourn the review, if the Tribunal considers that the applicant reasonably needs

additional time to comment on or respond to the information.

3 Subsection 359A(1)

Omit "subsection (2)", substitute "subsections (2) and (3)".

Note: The heading to section 359A is replaced by the heading "**Information and invitation given in writing by Tribunal**".

4 Paragraph 359A(1)(a)

After "circumstances,", insert "clear".

5 Paragraph 359A(1)(b)

Repeal the paragraph, substitute:

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and

6 Paragraph 359A(1)(c)

After "comment on", insert "or respond to".

7 After subsection 359A(2)

Insert:

(3) The Tribunal is not obliged under this section to give particulars of information to an applicant, nor invite the applicant to comment on or respond to the information, if the Tribunal gives clear particulars of the information to the applicant, and invites the applicant to comment on or respond to the information, under section 359AA.

8 Paragraph 359A(4)(b)

After "application", insert "for review".

9 After paragraph 359A(4)(b)

Insert:

(ba) that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department; or

10 Paragraph 359B(1)(b)

After "comment on", insert "or respond to".

Note: The heading to section 359B is replaced by the heading "**Requirements for written invitation etc.**".

11 Subsection 359B(1)

Omit "or the comments", substitute ", or the comments or the response,".

12 Subsection 359B(2)

Omit "or comments" (first occurring), substitute ", or comments or a response,".

13 Subsection 359B(2)

Omit "or comments" (second occurring), substitute ", or the comments or the response,".

14 Subsection 359B(3)

Omit "or comments", substitute ", or comments or a response,".

15 Paragraph 359C(2)(a)

After "comment on", insert "or respond to".

Note: The heading to section 359C is altered by omitting "**or comments**" and substituting ", **comments or response in response to written invitation**".

16 Paragraph 359C(2)(b)

After "the comments", insert "or the response".

17 At the end of section 422B

Add:

(3) In applying this Division, the Tribunal must act in a way that is fair and just.

18 After section 424

Insert:

424AA Information and invitation given orally by Tribunal while applicant appearing

If an applicant is appearing before the Tribunal because of an invitation under section 425:

(a) the Tribunal may orally give to the applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) if the Tribunal does so—the Tribunal must:

(i) ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and

(ii) orally invite the applicant to comment on or respond to the information; and

(iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and

(iv) if the applicant seeks additional time to comment on or respond to the information—adjourn the review, if the Tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information.

19 Subsection 424A(1)

Omit "subsection (3)", substitute "subsections (2A) and (3)".

Note: The heading to section 424A is replaced by the heading "**Information and invitation given in writing by Tribunal**".

20 Paragraph 424A(1)(a)

After "circumstances,", insert "clear".

21 Paragraph 424A(1)(b)

Repeal the paragraph, substitute:

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and

22 Paragraph 424A(1)(c)

After "comment on", insert "or respond to".

23 After subsection 424A(2)

Insert:

(2A) The Tribunal is not obliged under this section to give particulars of information to an applicant, nor invite the applicant to comment on or respond to the information, if the Tribunal gives clear particulars of the information to the applicant, and invites the applicant to comment on or respond to the information, under section 424AA.

24 Paragraph 424A(3)(b)

After "application", insert "for review".

25 After paragraph 424A(3)(b)

Insert:

(ba) that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department; or

26 Paragraph 424B(1)(b)

After "comment on", insert "or respond to".

Note: The heading to section 424B is replaced by the heading "**Requirements for written invitation etc.**".

27 Subsection 424B(1)

Omit "or the comments", substitute ", or the comments or the response,".

28 Subsection 424B(2)

Omit "or comments" (first occurring), substitute ", or comments or a response,".

29 Subsection 424B(2)

Omit "or comments" (second occurring), substitute ", or the comments or the response,".

30 Subsection 424B(3)

Omit "or comments", substitute ", or comments or a response,".

31 Paragraph 424C(2)(a)

After "comment on", insert "or respond to".

Note: The heading to section 424C is altered by omitting "**or comments**" and substituting ", **comments or response in response to written invitation**".

32 Paragraph 424C(2)(b)

After "the comments", insert "or the response".

33 Application

The amendments made by this Schedule apply to an application made, after this item commences:

(a) under section 347 of the *Migration Act 1958* for review of an MRT-reviewable decision; or

(b) under section 412 of the *Migration Act 1958* for review of an RRT-reviewable decision.

[*Minister's second reading speech made in—*
Senate on 7 December 2006
House of Representatives on 20 June 2007]

(175/06)