

Title Procedure for statutory protection visa decisions following BAL19

Body In late 2019, The Federal Court handed down the decision of BAL19. This decision has potential implications for s501 jurisdiction for Protection visa decisions.

The decision is currently being appealed in the Full Federal Court and the impact of the case is not yet known.

Current procedures should be followed until notified otherwise. Protection Obligations Decisions Makers should continue to assess PV applications in accordance with Direction 75 and refer decisions to s501 in accordance with current procedures.

Expires

Branch Both Branches

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Title	Updated Procedural Guidance on Assessing a 'Conviction' and a 'Serious Crime'
Body	Following a revision of existing procedural guidance on assessing requirements for the grant of a protection visa under section 36(1C) of the Act, s. 22(1)(a)(i) can now offer updated guidance to Protection Obligations Decision Makers (PODMs) on assessing a 'conviction' and a 'serious crime'. This guidance will be included in Part 13 'Exclusion, ineligibility, character and security' of the Protection Visa Processing Guidelines (PVPG) next time the PVPG is updated.

What constitute a serious crime?

The 'particularly serious crime' ground in [s36\(1C\)\(b\)](#) and [s36\(2C\)\(b\)\(ii\)](#) comprises four components:

- the applicant must have committed a crime, and
- they must have been 'convicted by final judgement' of committing that crime, and
- the crime must have been 'particularly serious', and
- the applicant must be a 'danger to the Australian community'.

The updated procedural advice below relates to:

- what constitutes a conviction by final judgment
- what constitutes a serious offence including assessing whether a crime meets the 'imprisonment for three or more years' requirement for the first limb of the definition of a particularly serious crime.

1. What constitutes a conviction by final judgement?

Conviction requires a finding by a court that the person is liable for the offence committed and final judgment may either be determined on the basis that the person has exhausted all judicial remedies to appeal a judgment or that no further appeals are forthcoming.

A court cannot proceed to sentence a person unless there has been a conviction. This applies even where the penalty that is imposed is 'no conviction recorded'. This position was outlined in the case of *Maxwell v R* [1996] HCA 46.

Each State and Territory in Australia has their own legislation dealing with sentencing for criminal matters. For most offences, the court does not proceed to sentence a person unless they have accepted or determined the guilt of a person. The fact that in sentencing an offender the court has determined no conviction is recorded does not mean the person has not been convicted; this includes children's offences even where the legislation (such as in NSW) states that the Children's Court cannot proceed to conviction after the determination of guilt.

No conviction recorded

For cases where the sentence imposed is one of the following:

- no conviction is recorded;
- without conviction; or

- a finding of guilt without proceeding to conviction;

the delegate should check if:

- the applicant plead guilty or was found guilty by determination of a court; and
- the court imposed a sentence – this will generally be evident where there is a finding of guilt, a sentence has been imposed, for example a fine, a good behaviour bond or a custodial sentence.

If both of these elements exist, the delegate can rely on the common law position that a person has been convicted, even where the court exercises the sentencing discretion to order that no conviction is recorded, or state 'without conviction'.

2. What constitutes a serious offence?

For an offence to be a 'serious Australian offence' or 'serious foreign offence' the offence must meet both requirements in subsection (a) and (b) of s 5(1). Subsection (b) requires that the offence be punishable by a fixed term of not less than three years or imprisonment for a maximum term of not less than 3 years or imprisonment for life.

Subsection (b) of the definition of 'serious Australian offence' and 'serious foreign offence' includes the term 'offence is punishable by'. Legal Division have advised this wording is intended to refer to the maximum penalty that may be imposed on a person if they are convicted of the crime.

This means that if an indictable offence is dealt with in a summary jurisdiction (refer to what is a summary offence below for further information) the decision maker should still refer to the maximum penalty that can be imposed for the offence, rather than the maximum penalty the court hearing the matter can impose. This is consistent with the current procedure for PODMs.

The same reasoning applies to crimes dealt with by the Children's Court.

There is provision in each jurisdiction for various indictable offences to be dealt with summarily in the Local Court or Magistrates Court. This may be relevant for considering if a person is a danger to the Australian community. The fact that a Court may have exercised summary jurisdiction for an indictable offence may mean that the offending was on the lower scale of severity and is a relevant matter for decision makers to consider when assessing if a person 'is a danger to the Australian community'.

Summary offences and indictable offences

Summary offences are minor offences that are heard in Local or Districts Court's. The maximum penalty that can be imposed for any single summary offence is imprisonment up to a maximum of two years (note this may vary between States/Territories). Many summary offences carry a penalty of a fine only. Summary offences include offences contained in the Summary Offences Act, such as offensive conduct and indecent exposure, as well as traffic offences, drink driving and minor drug offences.

Offences committed in Australia can be categorised as either a summary offence or an indictable offence. Each state and territory has a different definition of what will constitute a

summary or indictable offence. The principle of each type of offence is still the same. For example:

- In the commonwealth - Summary offences are those involving a maximum penalty of twelve months or less or no penalty of imprisonment ([Crimes Act 1914](#) (Cth) s4H). Indictable offences involve a penalty of more than 12 months imprisonment ([Crimes Act 1914](#) (Cth) s4G). Indictable offences with penalties of imprisonment not exceeding 10 years may be dealt with summarily.
- In NSW - Summary offences are matters that are tried by a judge alone. In NSW, summary offences have a maximum penalty of two years imprisonment. For an offence to be a summary offence, the statute that creates the offence must clearly say that it can be dealt with summarily. An indictable offence is a serious offence where the maximum penalty imposed can exceed two years.

If you have any questions about this announcement please email

s. 22(1)(a)(ii) @homeaffairs.gov.au

s. 22(1)(a)(ii), Humanitarian Program Capability Branch,

Refugee, Humanitarian and Settlement Division.

Expires

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s. 22(1)(a)(ii)

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Sent: Friday, 5 June 2020 2:15 PM
To: s. 22(1)(a)(ii)

Cc:

Subject: CPD Information Session - BAL19 and s36 (1C) (b) concepts status updates- Responses to questions regarding the use of Ministerial Direction 79 - and s36(1C) (b) character test [DLM=~~Sensitive~~]

Sensitive

Dear all

Please find below some follow up on questions that were raised as part of the CPD session conducted by s. 22(1)(a)(ii) on s36(1C) and BAL19. s. 22(1)(a)(ii) and s. 22(1)(a)(i) have prepared the responses to these questions. This e-mail will be Trimmed and referenced in SharePoint.

Question – Why do I also need to conduct a s36(2C)(b) assessment if I have already conducted a s36(1C) assessment?

The exclusion criteria in the Migration Act, excludes an applicant from being granted a Protection Visa. It does not impact whether or not a person meets the criteria in section 36(2)(a) or section 36(2)(aa) – i.e. it does not exclude them from being a refugee or owed Complementary protection (CP).

The section 36(1C) criteria is an exclusion provision, excluding a person from being granted a protection visa.

The criteria in section 36(2C) relates to whether or not a person will engage the Complementary Protection criteria. If there are serious reasons for considering that a person meets one of these criteria they will be ineligible for the grant of a visa under the complementary protection criteria. They will also be found not to satisfy the CP criteria if this means they are found not to satisfy the CP criteria and are ineligible for Australia's protection under this criteria.

This means if a person is found to engage under CP – a finding under both section s36(1C) and 36(2C) is required, noting the assessment outcome of each. As they are mirror provisions, delegates do not need to make separate assessments, they will need to make a finding against s36(2C) but can use the same information, evidence and assessment that was used for section 36(1C).

Question - Given Direction 79 (Visa refusal and cancellation under s501) is to guide s501 delegates, can s65 delegates (specifically guided by s499 No. 75) be guided by it or reference it in their PV decisions, even when addressing s36(1C)(b)? Can s65 delegates still be guided by the Direction 79 given BAL19?

Section 65 delegates are not bound by Direction No. 79, this was the case prior to the BAL19 decision. The BAL19 decision further highlights the importance of s65 delegates relying on the legal test in s36(1C)(b) and Direction No. 75.

Direction No. 79 can be a useful resource for s65 delegates to determine if a crime may be considered particularly serious or a person is a danger to the Australian community. Delegates can be guided by the direction to assist making a determination of whether or not a person has committed a particularly serious crime or is a danger to the community. Noting the thresholds between s501 and s36(1C) are different and in light of the BAL19 decision, which precludes the Minister using s 501(1) or its analogues as a basis to refuse to grant a protection visa delegates should ensure they are not indicating in their decision that they have strictly followed Direction 75 and considered a range of information and evidence to determine whether or not a crime is particularly serious or a person is a danger to the Australian community, this includes:

- Sentencing remarks
- The sentence that was imposed
- Mitigating factors

Kind regards

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

Humanitarian Program Capability Branch | Refugee, Humanitarian and Settlement Division
Immigration and Citizenship Services Group
Department of Home Affairs

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s. 22(1)(a)(ii)

Sensitive

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Continuing Professional Development (CPD) information sessions

BAL19 and s36 (1C)(b) concepts status updates – participant sheet

Learning Objectives

After completing this session you will be able to:

- have a basic understanding of the assessment process for s36 (1C)(b)/s36(2C)(b)
- be aware of the amended guidance on assessing if there is a conviction and if an applicant has been sentenced to three or more years punishment and apply this to the assessment of s36(1C)(b)/36(2C)(b)
- describe the practical implications of the BAL19 decision on the department
- understand how the PV program is managing BAL19 affected cases and when to escalate a case.

Procedure for assessing section 36(1C)(b)

The procedure for assessing section 36(1C)(b) can be broken down into 6 key steps

- Step 1 – Has a crime been committed?
- Step 2 – What jurisdiction did the conviction occur in?
- Step 3 – Is there a conviction?
- Step 4 – Is the offence punishable by 3 or more years?
- Step 5 – Did the offence involve violence against a person, serious damage to property or is a serious drug offence?
- Step 6 – Is the applicant a danger to the community?

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Step 1 - Has a crime been committed?

Determine if a crime been committed:

- Yes – You will need to assess the character requirements to determine if the Protection visa should be refused.
- No – You do not need to assess the character requirements.

Step 2 - What jurisdiction did the conviction occur in?

Need to determine if the offence occurred in Australia or offshore to identify which definition of 'serious crime' to apply.

If the offence occurred in Australia:

- Apply the definition of serious Australian offence.
- Determine which Australian jurisdiction the offence occurred in.

"serious Australian offence" means an offence against a law in force in Australia, where:

(a) the offence:

- (i) involves violence against a person; or
- (ii) is a serious drug offence; or
- (iii) involves serious damage to property; or
- (iv) is an offence against section 197A or 197B (offences relating to immigration detention); and

(b) the offence is punishable by:

- (i) imprisonment for life; or
- (ii) imprisonment for a fixed term of not less than 3 years; or
- (iii) imprisonment for a maximum term of not less than 3 years.

If the offence occurred offshore:

- Apply the definition of serious foreign offence.

"serious foreign offence" means an offence against a law in force in a foreign country, where:

(a) the offence:

- (i) involves violence against a person; or
- (ii) is a serious drug offence; or
- (iii) involves serious damage to property; and

(b) if it were assumed that the act or omission constituting the offence had taken place in the Australian Capital Territory, the act or omission would have constituted an offence (the Territory offence) against a law in force in that Territory, and the Territory offence would have been punishable by:

- (i) imprisonment for life; or
- (ii) imprisonment for a fixed term of not less than 3 years; or
- (iii) imprisonment for a maximum term of not less than 3 years.

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Step 3 - Is there a conviction?

- To meet the definition of a 'serious foreign offence' and 'serious Australian offence' there must be a final conviction.
- This means the person must have gone through the entire criminal process and been found guilty of the offence.

Step 4 - Is the offence punishable by 3 or more years?

- In order for an offence to be a particularly serious offence it must be punishable by:
 - Imprisonment for life; or
 - Imprisonment for a fixed term of not less than 3 years; or
 - Imprisonment for a maximum term of not less than 3 years.
- This is an assessment of the maximum sentence a court can impose under the legislation not the offence the applicant was sentenced too.
- Where there are multiple offences only one offence needs to meet this criteria.
- The maximum penalty a court is able to impose (noting if an offence is dealt with summarily this will be 2 years) is not relevant to this assessment. What must be assessed is the maximum penalty prescribed by the legislation.

Step 5 - Did the offence involve violence against a person, serious damage to property or is a serious drug offence?

- This only needs to be assessed if the offence is found to be punishable by a term of 3 or more year's imprisonment.
- This requires the decision maker to assess the facts and circumstances relevant to the conviction and whether based on this the crime committed is serious.
- Where there are multiple offences only one offence needs to meet this criteria.

Questions that may assist when conducting an assessment of whether an offence involves violence against a person, involves serious damage to property or is a serious drug offence

- Did the crime involve actions against another person?
- Did the crime involve harm to another person?
- Did the crime involve violence?
- Did the applicant intend to cause violence (i.e. was there pre-mediation)?
- Did the crime involve drugs?
- Did the crime involve property that was damaged?
- Did the applicant intend to damage property (i.e. was there pre-mediation)?
- Did the crime involve actions committed while in detention?
- Did the court assess the crime as more serious?

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Step 6 - Is the applicant a danger to community?

Relevant considerations include:

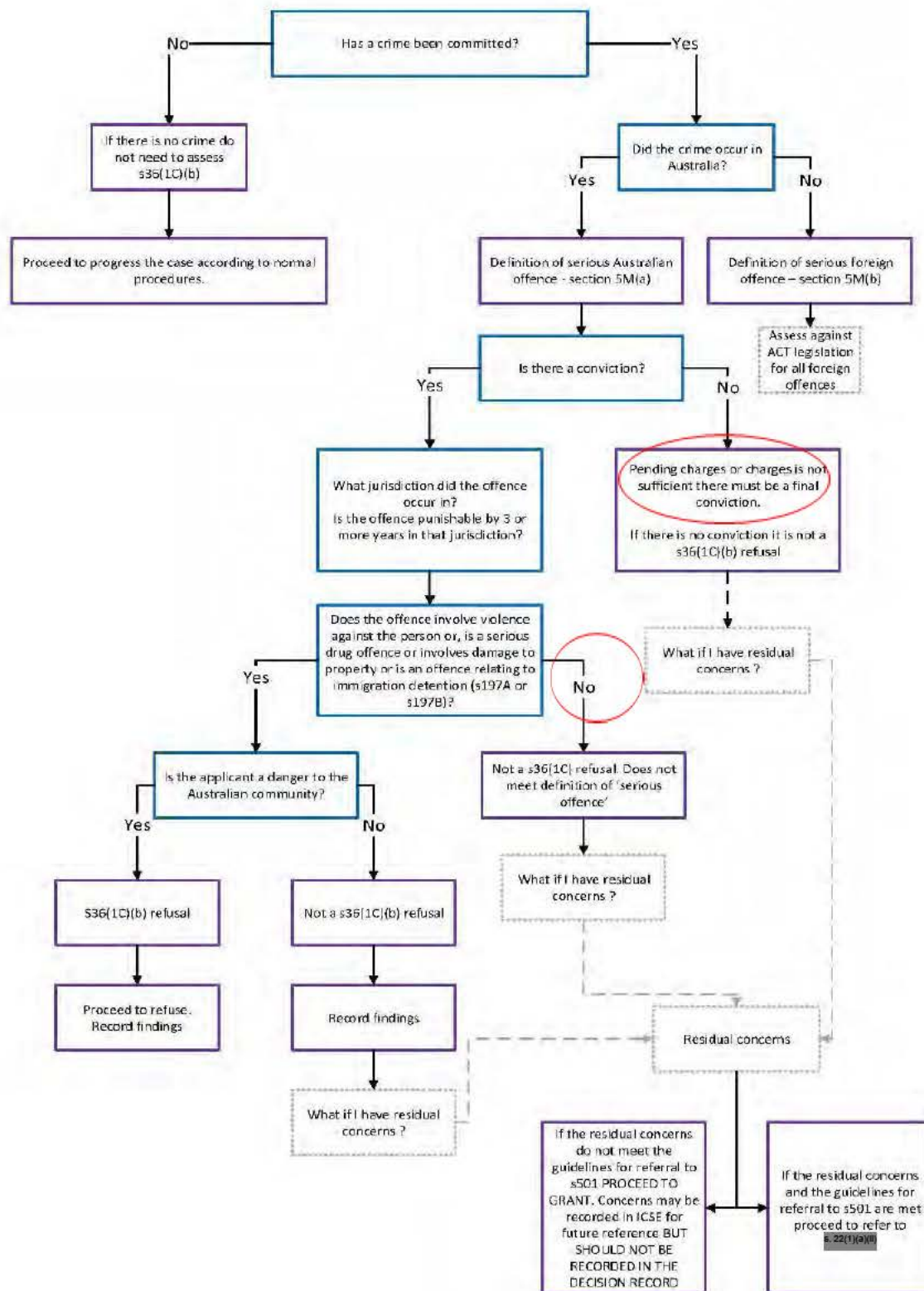
- the seriousness and nature of the crimes committed
- the length of the sentence imposed
- any mitigating or aggravating circumstances
- the criminal record in totality - including the extent and nature of any prior convictions and the period over which they took place
- the risk of re-offending and recidivism
- the likelihood of relapsing into crime
- any prospects of rehabilitation.

Evidence and information available to assist finding answers to these questions:

- Australian criminal history checks
- Police statements of fact
- Pre-sentence reports from a court
- Court transcripts of hearings related to the offence
- Corrective services reports on progress in custody, particularly relating to the offender's participation in rehabilitation programs, incidents or disciplinary issues while in prison
- Psychologist or psychiatric reports
- Parole reports
- Interpol notices
- International criminal history checks
- Allegations received
- 'Character' references from employment, friends and relatives, and community groups.

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Overview of procedure for assessing section s36(1C)(b)



Logistics of the CPD DBB16 information session

s. 22(1)(a)(ii)





Australian Government

Department of Home Affairs

Continuing Professional Development (CPD) Information Session

Protection Assessment Support Section

BAL19 and s36 (1C) (b) concepts status updates

Presenter:


s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

15 May 2020


s. 22(1)(a)(ii)



Rules of Engagement

- Ask questions and seek clarification on what you don't know during the webinar.

s. 22(1)(a)(ii)



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Learning objectives

After completing this session you will be able to:

- have a basic understanding of the assessment process for s36 (1C)(b)/s36(2C)(b)
- be aware of the amended guidance on assessing if there is a conviction and if an applicant has been sentenced to three or more years punishment and apply this to the assessment of s36(1C)(b)/36(2C)(b)
- describe the practical implications of the BAL19 decision on the department
- understand how the PV program is managing BAL19 affected cases and when to escalate a case.

s36 (1C) (b) assessment procedure

The procedure for assessing s36(1C)(b) can be broken down into steps. Each step involves a question that needs to be asked and assessed against evidence and information in relation to the applicant.

- Step 1 – Has a crime been committed?
- Step 2 – What jurisdiction did the conviction occur in? – this is the only step where you are not knocked out
- Step 3 – Is there a conviction?
- Step 4 – Is the offence punishable by 3 or more years?
- Step 5 – Did the offence involve violence against a person, serious damage to property or is a serious drug offence?
- Step 6 – Is the applicant a danger to the community?

STEP 1

Has a crime been committed?

- Determine if a crime been committed.
- Yes – You will need to assess the character requirements to determine if the Protection visa should be refused.
- No – You do not need to assess the character requirements.

STEP 2

What jurisdiction did the conviction occur in?

- Need to determine if the offence occurred in Australia or offshore to identify which definition of 'serious crime' to apply.
- If the offence occurred in Australia apply the definition of serious Australian offence and determine which Australian jurisdiction the offence occurred in.

STEP 3

Is there a conviction?

- To meet the definition of a 'serious foreign offence' and 'serious Australian offence' there must be a final conviction.
- Conviction requires a finding by a court that the person is liable for the offence committed and final judgment may either be determined on the basis that the person has exhausted all judicial remedies to appeal a judgment or that no further appeals are forthcoming.
- A court cannot proceed to sentence a person unless there has been a conviction - this position was outlined in the case of *Maxwell v R* [1996] HCA 46.

STEP 4

Is the offence punishable by 3 or more years?

- In order for an offence to be a particularly serious offence it must be punishable by:
 - imprisonment for life; or
 - imprisonment for a fixed term of not less than 3 years; or
 - imprisonment for a maximum term of not less than 3 years.
- This is an assessment of the maximum sentence a court can impose under the legislation not the offence the applicant was sentenced too
- Where there are multiple offences only one offence needs to meet this criteria.

STEP 5

Did the offence involve violence against a person, serious damage to property or is a serious drug offence?

- This only needs to be assessed if the offence is found to be punishable by a term of 3 or more year's imprisonment.
- This requires the decision maker to assess the facts and circumstances relevant to the conviction and whether based on this the crime committed is serious,
- Where there are multiple offences only one offence needs to meet this criteria.

STEP 6

Is the applicant a danger to community?

Relevant considerations include:

- the seriousness and nature of the crimes committed
- the length of the sentence imposed
- any mitigating or aggravating circumstances
- the criminal record in totality - including the extent and nature of any prior convictions and the period over which they took place
- the risk of re-offending and recidivism
- the likelihood of relapsing into crime
- any prospects of rehabilitation.

Summary of BAL19 decision

- The Court held that the application of the character test is inconsistent with s 36(1C). In light of s 36(1C), it would make no sense for the Minister to be free to apply a less stringent criterion under s 501, involving his very broad discretion, to refuse to grant a PV.
- The Court also found that reg 785.226, which prescribes the character test in PIC 4001 as a criterion for the grant of a PV, is likewise broader than s 36(1C); is inconsistent with it; and is therefore invalid. The Court noted that the applicant would still have to satisfy reg 785.227, ie that the grant of the visa is in the national interest.

What is the immediate practical implication of the BAL19 decision?

- Refusal (or cancellation) of a Protection visa under PIC4001 and the 501 character provisions is unlawful.
- The ability to refuse a visa under s 36(1C)/s36(2C)(b), s5H(2)(a), is still available for character and security issues for PV applicants.

s. 42(1)



What is the longer term plan?

- The Department has filed an appeal in a related matter KDSP challenging the correctness of the BAL19 judgment; the appeal will be heard later in May 2020.

s. 42(1)



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How are we managing BAL19 affected cases?


Cases that have already been refused or cancelled:

s. 42(1)




How are we managing BAL19 affected cases?

s. 47E(d)




How are we managing BAL19 affected cases?

s. 47E(d)




What does this mean for decision makers?

s. 47E(d)



What does this mean for decision makers?

s. 47E(d)



What does this mean for decision makers?

s. 47E(d)



Conclusion

- Any questions/points requiring clarification?

Contacts

- For queries related to the content of this session, please e-mail:

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s. 22(1)(a)(ii)

