Regulating Migration Litigation after *Plaintiff M61*

Report to the Minister for Immigration and Citizenship

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1. Background to the Inquiry

This inquiry was announced by the Minister for Immigration and Citizenship, the Hon Chris Bowen, on 7 January 2011. The inquiry is in response to the decision of the High Court on 11 November 2010 in *Plaintiff M61/2010E v Commonwealth* [2010] HCA 41. The Court held that legal errors had occurred in an assessment prepared for the Department of Immigration and Citizenship (DIAC). That assessment concluded that the plaintiffs in the case were not persons to whom Australia had protection obligations under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol to that Convention (Refugees Convention). Both the plaintiffs had the status under the *Migration Act 1958* of being an 'offshore entry person', being unlawful non-citizens who had arrived without a valid visa at an 'excised offshore place' (in this instance, Christmas Island).

Two implications flowed from the High Court ruling. One was that a large number of assessments of a similar kind would need to be reconsidered by DIAC. The other was that it would be open to other offshore entry persons who were assessed as not being owed protection obligations to commence proceedings for judicial review of the adverse assessments.

The Minister's statement on 7 January 2011 announced that a new refugee determination process was being implemented to assess refugee claims from offshore entry persons (also described in the Minister's statement as 'irregular maritime arrivals').[1] The new process that commenced on 1 March 2010 is described later in this report. In expectation of a higher court workload, the Minister also announced that two additional appointments would be made to the Federal Magistrates Court.

The Minister also announced that I had been asked to undertake this inquiry into options for enhancing the efficiency and minimising the duration of the judicial review process. Two particular concerns noted in the Minister's statement were that a person's detention could be prolonged while they were pursuing judicial review; and that the integrity of immigration processing should not be undermined by unmeritorious appeals that impede the departure from Australia of a person whose claim for asylum protection has been rejected.

The terms of reference for this inquiry were also announced by the Minister:

> **TERMS OF REFERENCE**
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> Having regard to:
>
> - The jurisdiction of the courts as found by the High Court on 11 November 2010 in relation to offshore entry people seeking refugee status determinations (OEP RSD)
> - The importance of the early resolution of claims relating to OEP RSD assessments, and

[1] Chris Bowen MP, Minister for Immigration and Citizenship, 'Government announces faster, fairer refugee determination process', media release, 7 January 2010.

- The need to ensure that OEP RSD litigation is dealt with expeditiously and efficiently by courts while maintaining fairness and robustness,

the review will inquire into and report to the government on options for enhancing the efficiency and minimising the duration of the judicial review process, including:

a) the introduction of legislation to direct the Court to seek to resolve OEP RSD matters as expeditiously as is reasonable;

b) the removal in OEP RSD matters, of the right of appeal from the Federal Magistrates Court to the Federal Court; and

c) the provision of guidance to appellants so as to contribute to the efficient operation of courts.

In performing the functions, the review may consult with relevant bodies and individuals as is considered appropriate.

I decided to conduct this inquiry primarily by consulting people and organisations with direct knowledge of the judicial process as regards review of refugee determinations. Due to the short time available to prepare a report I did not invite public submissions. In summary, the people I consulted were from Australian Government agencies, the Australian Parliament, federal courts and tribunals, legal practitioners, legal bodies and non-government organisations. I wish to acknowledge the helpful assistance I received from those I consulted, and excellent support in preparing this report from Ms Gabrielle Hurley, Office of the Commonwealth Ombudsman.

2. Executive Summary

This inquiry examined options for enhancing the efficiency and minimising the duration of judicial review proceedings commenced by offshore entry persons challenging negative refugee status determinations. Litigation of that kind may become more common, following the High Court's decision in *Plaintiff M61*.

The particular concerns of government are to resolve refugee status assessment disputes at the earliest opportunity; avoid prolonged immigration detention of persons who initiate judicial review proceedings; minimise the costs and legal doubts that accompany unresolved litigation; and discourage asylum applicants from commencing unmeritorious litigation that is designed more to prolong the refugee determination process rather than to resolve an issue of substance about an asylum claim.

My conclusions on the three specific terms of reference for this inquiry are as follows:

- I do not recommend that the Parliament enact a direction to the courts to resolve offshore entry person refugee status determination matters as expeditiously as is reasonable. My view is that a direction of that kind would be ineffective and unnecessary.
- I do not recommend removal of the right of appeal from the Federal Magistrates Court (FMC) to the Federal Court in offshore entry refugee status determination matters. My view is that the Federal Court plays a valuable role in judicial review of refugee status matters; that the Court has successfully made special arrangements to ensure that migration appeals are dispatched efficiently and speedily; and that removal of the Federal Court from the appeal process could have the unintended effect of increasing both the migration caseload of the High Court and the time taken by the Court to finalise applications before it.
- I recommend that the Department of Immigration and Citizenship (DIAC) implement two measures to provide guidance and assistance to offshore entry persons concerning the initiation of judicial review proceedings. The first measure is to prepare an information sheet on the judicial review process and rights. The second is to consider adopting a provisional scheme for reimbursing all or part of the legal costs of an offshore entry person in test case litigation that raises a significant legal issue about the Protection Obligations Determination (POD) process, or judicial review of actions taken under that process.

  Beyond that, my view is that it is premature for government to announce or implement a new scheme of legal assistance, advice or representation for offshore entry persons. I acknowledge too that this could run counter to government policy which is designed to facilitate civil dispute resolution at an early stage and by means other than litigation. However, I suggest that it may later be necessary for government to adopt new or expanded arrangements for providing legal assistance to offshore entry persons. This issue should be kept under constant review.

There are legal issues left unresolved by the decision in *Plaintiff M61* that could arise in legal proceedings commenced by offshore entry persons. They include issues to do with the jurisdiction of courts to undertake judicial review of POD decisions; the legal grounds on which a negative POD assessment can be set aside; the remedy that can be granted by a court if an error of law occurred; the stage in the assessment process at which proceedings can be commenced; and the parties against whom proceedings can be instituted.

It is possible that a substantial increase in immigration litigation will occur based on *Plaintiff M61*, although it is premature to make firm predictions and it is likely to be some months before there is any marked increase. A further complicating factor in any litigation could be that offshore entry persons initiating proceedings are unrepresented and reside in remote immigration detention facilities.

This uncertainty is best addressed by regular consultation (of a kind that already occurs) between DIAC, the Attorney-General's Department and the court officers responsible for court administration and liaison with government. Regular discussion may be needed on matters such as the number of applications for review or appeal that are filed, the location of those who have filed applications, the registries in which applications are filed, arrangements for documents to be filed and for communication between court registries and applicants in detention, exchange of documents between the parties and courts, arrangements for applicants to participate in proceedings, allocation of interpreters to cases, and other necessary arrangements if a court decides to hear a case by video or on a circuit basis in a facility at or near a detention centre. The pattern of recent years is that DIAC, the panel law firms that manage migration litigation on its behalf, the FMC, Federal Court and High Court have all been responsive to the need to develop special arrangements for handling migration litigation.

By contrast with the effectiveness of those administrative measures, there is a mixed picture as to the effectiveness of legislative measures over the past twenty years to regulate and constrain migration litigation. Some measures have achieved the legislative objective and been unproblematic. Some other special legislative measures did not achieve their objective and had unanticipated consequences. One explanation is that courts dealt adversely with legislative measures which they perceived as limiting their ability to deal fully with the legal issues in migration cases, or which hampered their discretion to control proceedings. There is the same risk — of unforeseen consequences — if the direct government response to *Plaintiff M61* is a new set of legislative measures that further isolates migration cases from the procedures that apply to other litigation. Consequently, the better course is for government to strive to develop a constructive working relationship with courts for the efficient resolution of offshore entry refugee status determination cases.

3. The legislative and legal framework for refugee status determination

Grant of a protection visa to an onshore claimant

Australia is a party to the Refugees Convention. It obliges the signatories to provide protection (or asylum) to a person in the country who meets the definition of a refugee in Article 1.A(2) of the Convention:

> [A]ny person who … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country …

The Convention further provides in Article 33(1) that:

> No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[2]

The principles of the Refugees Convention are partially implemented by the *Migration Act 1958*. The Act creates a class of visa known as a protection visa (s 36). The criterion for the grant of the visa is that the person is a non-citizen in the Australian migration zone and the Minister is satisfied that Australia has protection obligations to that person under the Refugees Convention (s 36(1)). The Act further provides that a visa must be granted to a non-citizen who lodges a valid application for a visa and satisfies the criteria for the grant of the visa (s 65).

A decision to refuse a person a protection visa is reviewable by the Refugee Review Tribunal (RRT) (s 411). The RRT can undertake merit review of the refusal decision and may substitute a new decision granting a protection visa if satisfied that the person meets the criteria for the visa (s 415). Both the Minister and the protection visa claimant can seek review of an RRT decision by the Federal Magistrates Court (FMC) (ss 477, 477A, 478). An appeal lies from a decision of the FMC to the Federal Court of Australia, and thereafter with special leave to the High Court.

[2] There are exceptions. Article 33(2) provides that the benefit of Article 33(1) may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Grant of a protection visa to an 'offshore entry person'

The above scheme for refugee determination does not apply to 'offshore entry persons', that is, to non-citizens who enter Australia through an 'excised offshore place'.[3] The Territory of Christmas Island, along with some other Australian territories, has been classified as an excised offshore place (s 5). An offshore entry person cannot make a valid visa application unless the Minister decides that it is in the public interest to allow the application (s 46A). This is described as 'lifting the bar'. The Minister can also grant a person a visa on public interest grounds without first receiving an application for the visa (s 195A). The Minister alone can exercise those powers and there is no duty on the Minister to consider doing so (ss 46A(3),(7), 195A(4),(5)).

An offshore entry person who does not hold a valid visa is to be taken into detention (s 189(3)). The person is to remain in detention until granted a visa or deported or removed from Australia (s 196). The person can also be taken from Australia to a declared country (s 198A). Between 2001 and 2008 the Republic of Nauru and Papua New Guinea were declared countries to which people were removed and their refugee claims considered. From 2008 the majority of asylum claims by offshore entry persons have been processed by the Australian Government at the immigration detention facility at Christmas Island.

The Refugee Status Determination process before 1 March 2011

The Refugee Status Determination (RSD) process considered by the High Court in *Plaintiff M61* was established following the Government decision in 2008 to undertake refugee processing at Christmas Island. The RSD process was spelt out in two procedural manuals that prescribed a two-stage process, involving a refugee status assessment (RSA) by a DIAC officer and independent merits review (IMR) by an independent contractor.[4] The process was established by an exercise of the executive power of the Commonwealth (Constitution s 61), rather than by legislation.

Under the RSD process, an entry interview was held with an offshore entry person arriving at an excised offshore place. If the person raised a claim or provided information that may engage Australia's protection obligations under the Refugees Convention, this could be

[3] The different arrangements for offshore entry persons were established by a package of six Acts enacted in 2001. The legislation followed the events surrounding the Australian Government action to prevent the MV Tampa, a Norwegian-registered commercial vessel, from transporting to Christmas Island 433 people who had been rescued from a sinking vessel between Indonesia and Australia. See *Border Protection (Validation and Enforcement Powers) Act 2001; Migration Amendment (Excision from Migration Zone) Act 2001; Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001; Migration Legislation Amendment Act (No 1) 2001; Migration Legislation Amendment Act (No 5) 2001; Migration Legislation Amendment Act (No 6) 2001.* The first of those Acts resolved any legal doubts raised by the Tampa incident by conferring explicit statutory powers upon government officials to take border control action of the kind taken in that case. Generally, see See *Minister for Immigration and Multicultural Affairs v Vadarlis* (2001) 110 FCR 491.

[4] The RSA framework is published in two manuals: the *RSA Procedures Manual* (March 2010), and the *Guidelines for the Independent Merits Review of Refugee Status Assessments* (April 2010).

treated as a refugee claim and the person invited to request an RSA.[5] Assistance to a claimant in requesting an RSA was available from a registered migration agent through the Immigration Advice and Application Assistance Scheme (IAAAS scheme), which was funded by the Australian Government.

The RSA was undertaken by a DIAC officer who assessed the claim and information provided by the claimant against Australia's obligations under the Refugees Convention. The officer could consider other relevant information. The officer would interview the RSA claimant, and may invite the person to comment on adverse information known to the DIAC officer. If the officer found that the claimant was owed protection and was not subject to exclusion under Articles 1F and 33(2) of the Refugees Convention,[6] Australia's protection obligations were engaged. If the person met other visa requirements relating to character, health and security, a submission would go to the Minister recommending that the s 46A bar be lifted to allow the person to submit a protection visa application.

If the DIAC officer found that a claimant did not meet the criteria for a protection visa, the person was advised in writing of the reasons for the decision. The claimant could request a review of the RSA under the IMR process. The review request was to be made within seven days, though an extension of time could be granted. The review was undertaken by a person employed by a private company that was contracted by DIAC to undertake this review task. Though privately employed, the members of the RSA Review Panel were appointed by the Minister.

The role of the IMR reviewer was to consider afresh all claims for protection as they related to the Refugees Convention. The reviewer would take into account all information that was available to the officer conducting the RSA, any additional information, documentation or submissions from the claimant, and any additional information that the reviewer considered to be relevant, such as revised country information. An interview was usually conducted. The claimant was to be given an opportunity to comment on any adverse information that was credible, relevant and significant to the review. The review should be completed within ninety days. The IMR reviewer provided a report to DIAC, setting out the review recommendations and reasons. A recommendation that Australia had protection obligations would be conveyed by the department to the Minister for consideration under s 46A. The Minister could invite the claimant to lodge a protection visa application.

A person who was not granted a visa at the conclusion of this process was to be placed on a removal pathway from Australia.

The Protections Obligations Determination framework after 1 March 2011

The Minister announced a new refugee determination process applying to offshore entry persons on 7 January 2011, to commence on 1 March 2011. The former process continues

[5] An applicant may include other family members in their RSA claim so that a separate RSA claim is not required from each member of a family unit.

[6] The obligation under the Convention to provide asylum does not extend to a person who has committed a war crime, a crime against humanity or a serious non-political crime, or who is regarded as a threat to national security in the country of asylum.

to operate after that date for any offshore entry person who had an RSA interview with a DIAC officer before 1 March 2011. In such cases, if the DIAC officer decides that Australia's protection obligations are not engaged the claimant may request an IMR.

The new process is called a Protection Obligations Determination (POD). The process applies to any offshore entry person who first enters Australia at an excised offshore place and who has not been interviewed under the RSD process by 1 March 2011. The POD process can thus apply to people who arrived prior to 1 March 2011.

The first step in the POD process is that a DIAC officer will interview an offshore entry person to ascertain if Australia's protection obligations under the Refugees Convention are enlivened. This stage is called a Protection Obligations Evaluation (POE). If the officer makes a positive finding (ie, that Australia's protection obligations are enlivened), and the person satisfies health, character and security requirements, a submission is made to the Minister recommending that the Minister lift the bar under s 46A to allow the person to apply for a protection visa.

The POE process is expected to take around seven weeks from the time of the POE interview to the completion of the evaluation. If the DIAC officer is not able to make a positive finding at the POE stage the case is referred — 'fast-tracked' — to the next stage for an Independent Protection Assessment (IPA). DIAC engages the IPA assessors from a private company under the same arrangement that formerly applied for engaging IMR reviewers. Many of those reviewers are now IPA assessors.

The independent assessor may but will not necessarily interview the claimant again, and may finalise a report based on the papers before the assessor. It is expected that the claimant (in consultation with an IAAAS agent) will be given the opportunity to comment on any potentially adverse material that the assessor may rely on in preparing a report.

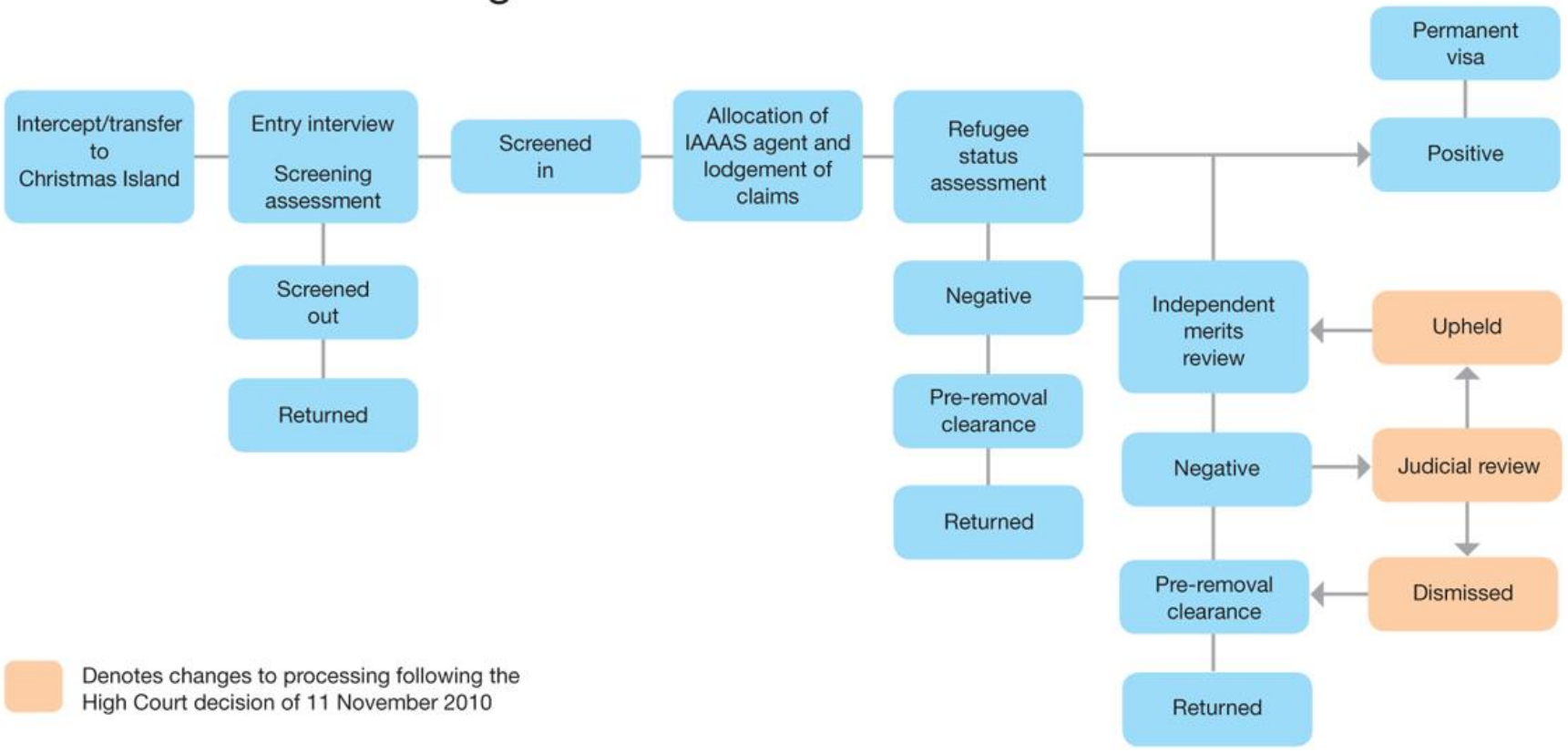
The assessor's report, including a recommendation as to a person's asylum claim, is to be finalised within ninety days and provided to DIAC. A positive recommendation will (if other character, health and security requirements are satisfied) proceed to a recommendation to the Minister that the bar be lifted under s 46A to allow an application for a protection visa to be made.

The following two flowcharts illustrate the RSD process that operated prior to 1 March 2011, and the POD process that operates from that date.

Australian Government

Department of Immigration and Citizenship

Refugee Status Determination Process

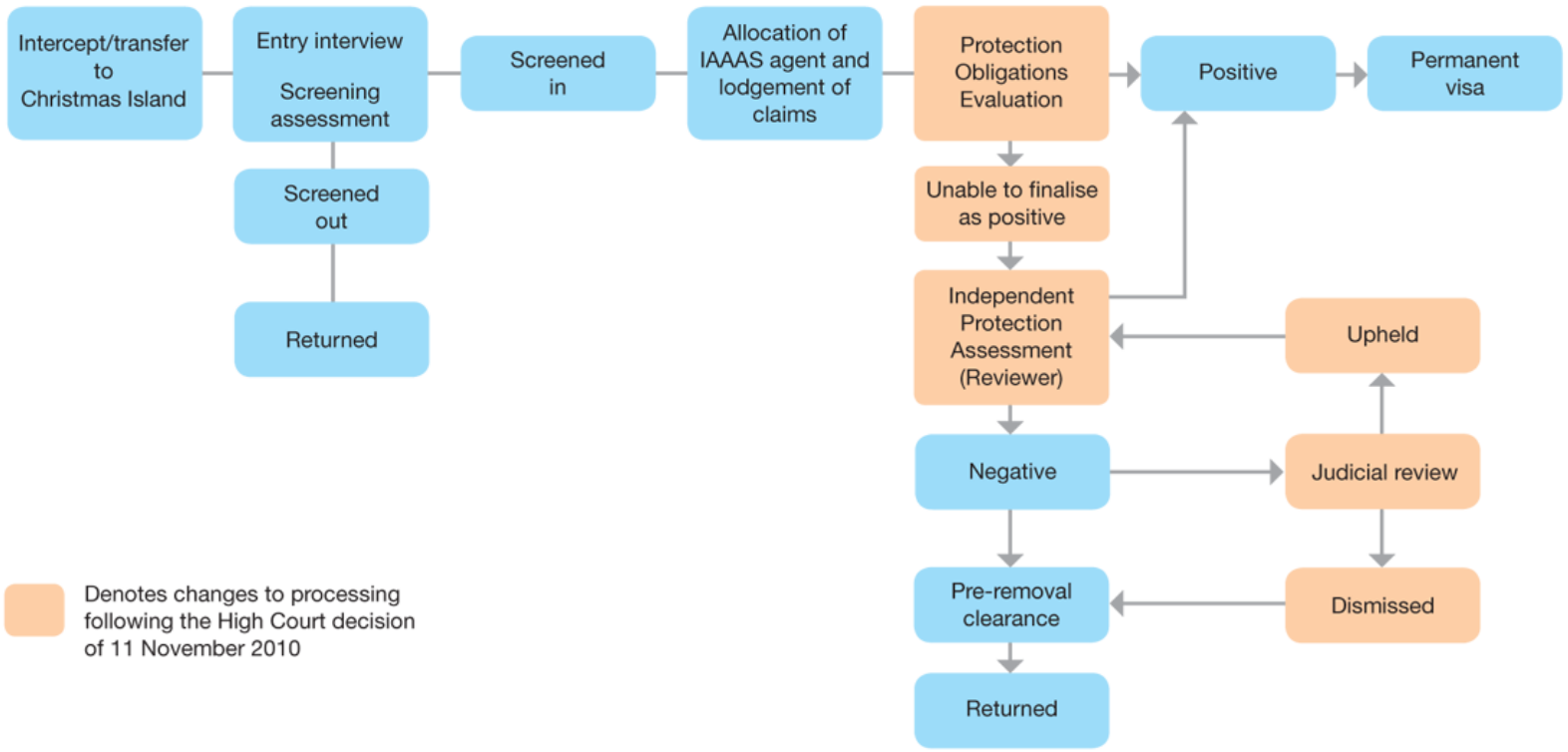


Health, security, character and identity checks - no visas granted until all checks completed and cleared.

Australian Government

Department of Immigration and Citizenship

New Protection Obligations Determination Process



Health, security, character and identity checks - no visas granted until all checks completed and cleared.

4. The High Court's Decision in *Plaintiff M61/201E v Commonwealth* and its Implications

The proceedings in this case were brought by two people, described in the proceedings as M61 and M69,[7] who had arrived at Christmas Island by boat and were detained in the Territory under s 189(3) of the Migration Act. Both applied for a protection visa and received a negative assessment at the RSA and IMR stages. Each commenced proceedings to challenge that outcome in the original jurisdiction of the High Court under Constitution ss 75(i), 75(iii) and 75(v).

The High Court held that the IMR reviews were flawed in two respects. First, the IMR manual followed by the IMR reviewers wrongly advised that it was a non-statutory process and that the reviewers were not bound to apply the Migration Act and Australian case law on refugee claims. The Court held that the RSA and IMR assessments were steps taken under and for the purposes of the Migration Act. The assessments were held under arrangements established by the Minister for the purpose of advising the Minister whether an applicant's claim engaged Australia's protection obligations such that the Minister should exercise the powers conferred by ss 46A or 195A. It was because an assessment was being undertaken that a claimant's detention under the Migration Act continued as lawful detention. It followed, the Court held, that the RSA and IMR inquiries had a statutory foundation and it was incumbent on the review officers to address the relevant legal questions under the Migration Act and to apply correct legal principles. The reviewers did not regard themselves as bound to apply the Migration Act and Australian case law, and therefore proceeded on an incorrect legal basis.

Secondly, the Court held that the assessment and review process must be conducted in accordance with the principles of natural justice. The obligation to afford natural justice applies when a statute confers power to prejudice a person's rights or interests. In this case, the inquiry into whether Australia had protection obligations towards a person prolonged their detention during that period of inquiry, and thus affected directly their right and interest to freedom from detention at the behest of the Australian executive. The obligation on the reviewers to be procedurally fair was breached in respect of both plaintiffs by the failure of the reviewers to put to the plaintiffs for consideration and comment country information known to the reviewers that was relied upon in rejecting the plaintiffs' claims for asylum protection. There was a further breach in respect of Plaintiff M61, in that the reviewer failed to address one of the claimed bases for his fear of persecution within the meaning of the Refugees Convention.

Three other issues were also considered or noted by the Court. First, the Court rejected a challenge to the constitutional validity of the power conferred upon the Minister by s 46A.

Secondly, the relief granted to each plaintiff was a declaration that the IMR reviewers had made an error of law in making adverse recommendations to the Minister. The implication

[7] The Migration Act 1958 s 91X provides that the name of an applicant for a protection visa must not be published by the High Court, Federal Court or Federal Magistrates Court.

of this declaration was that a new RSA should be undertaken in both cases, in which the law would be correctly applied and procedural fairness afforded. The Court declined to issue three other remedies sought by the applicants — an injunction, as there was no present threat to remove either plaintiff from Australia ahead of a fresh RSA being undertaken; mandamus, as the Minister was not bound to consider making a decision under ss 46A and 195A; and certiorari, as there was no practical utility in quashing the IMR recommendation if the Minister could not be compelled to make a decision under s 46A.

Thirdly, since a declaration provided adequate relief to the plaintiffs, the Court thought it 'appropriate to leave, for another day' (para [51]) whether the IMR reviewer, who was an independent contractor, was an 'officer of the Commonwealth' against whom an order could be made under Constitution s 75(v).

The broader implications of *Plaintiff M61* are discussed in the next section, but the following can be noted in summary:

- There is no constitutional flaw in present arrangements, by which a claim lodged by an offshore entry person for asylum is assessed and a recommendation may be made to the Minister to exercise the power conferred by s 46A(2) to allow the person to lodge an application for a protection visa or s 195A(2) to grant a visa to the person.
- The lawfulness of the actions taken by or on behalf of the Australian Government in considering an asylum claim from an offshore entry claimant can be challenged in proceedings commenced in the High Court under Constitution s 75.
- The requirements of natural justice apply to the consideration of an asylum claim by an offshore entry person, as those requirements have not been expressly excluded in the Migration Act. A court can make a declaration that an error of law occurred if an official fails to observe the requirements of natural justice in reaching a finding that an offshore entry person does not qualify for a protection visa.
- A court can also make a declaration that an official made an error of law of some other kind. The nature of the legal obligations that apply to a refugee status assessment have not been clarified, except that officials must proceed on the basis that the principles of the Migration Act and relevant case law relating to protection visa claims are binding and must be followed.
- The decision in *Plaintiff M61* applies to other asylum claims that were assessed under the scheme considered in that case. That is, other decisions that a person did not qualify for a protection visa should be reconsidered to identify if they were affected by the legal errors identified in *Plaintiff M61*. All negative assessments made under that scheme are, as a consequence, being reconsidered by DIAC.
- Many issues are left unresolved by *Plaintiff M61* concerning judicial review of asylum claims from offshore entry persons. These include: the court in which a negative assessment can be challenged; the legal grounds on which a negative assessment can be set aside; the remedy that can be granted by a court if an error of law occurred; the stage in the assessment process at which proceedings can be commenced; and whether an independent contractor involved in considering an

asylum claim can be classified as an 'officer of the Commonwealth' against whom proceedings can be instituted under Constitution s 75(v) or the parallel jurisdiction of the FMC.

5. Judicial review following *Plaintiff M61* — potential issues

There is uncertainty as to the litigation pattern that may develop following *Plaintiff M61*. This section looks at some issues that could arise and that provide a basis for forward planning to deal with proceedings commenced by offshore entry persons.

Size of the judicial review caseload

The factor most likely to influence the size of the litigation caseload will be the number of negative assessments in the POD process that an offshore entry person does not qualify for a protection visa. Those negative assessments can be challenged in proceedings commenced in the High Court and, as explained below, in the FMC.

It will not be automatic that a negative assessment is challenged: an offshore entry person may not wish to take the litigation path; advice or assistance on commencing proceedings may not be readily available; a person may accept advice that the prospects of a successful challenge are slim; or they may agree to a DIAC voluntary removal and resettlement offer. It is nevertheless foreseeable that many negative assessments will be challenged, bearing in mind the current high proportion of applications that are made for IMR review of negative RSA findings.

As at 9 February, there were over 6000 offshore entry persons whose cases were being assessed under the RSD (and now POD) process. This includes 158 cases in which a negative assessment was issued prior to the decision in *Plaintiff M61* but is to be reconsidered following that decision.

- Over 1500 cases had reached the stage of being assessed as cases in which Australia's protection obligations were engaged; it is likely, subject to health, character and security checks and Ministerial intercession, that most of those cases will result in the grant of a protection visa
- Nearly 1900 cases were still awaiting an RSA interview, or the interview had been held but an assessment had not yet been issued; the outcome in those cases is therefore unresolved
- Only 193 cases had reached the stage that the IMR had confirmed a negative assessment, or a person was awaiting removal from Australia.
- Over 2300 cases had reached the stage that a person had applied for IMR review of a negative RSA finding or would be eligible to do so (in the calendar year 2010 the IMR substituted a positive assessment in 76% of 680 cases it reviewed, and affirmed the negative RSA assessment in 24% of cases).

Three points can be drawn from that imprecise picture. The first is that, in time, a large number of offshore entry persons could receive negative POD assessments and challenge them in judicial review proceedings in the FMC. The second is that it is likely to be some months before many of those cases flow through to the judicial review stage. There could be a substantial increase in immigration litigation following *Plaintiff M61* but it will not be

immediate. Thirdly, the overall picture is fluid and can change as more people arrive in Australia without visas and are taken into detention as offshore entry persons.

Quality of primary decisions

A judicial review action looks at whether there was legal error in the decision being challenged. If so, the decision can be set aside and remitted for reconsideration. In the case of migration decisions, that can add considerably to the timeframe for making an effective decision that will resolve a person's immigration status and possibly conclude their detention.

The quality of decision making in the POD process must therefore be a paramount issue. A great deal turns on whether assessments are soundly based and legally robust. Judicial review proceedings can be resolved more speedily, especially at the appellate stage, if there are no apparent flaws in assessments. If actions are rarely successful in setting assessments aside, this can be a disincentive to the commencement of proceedings in other cases. The integrity of the refugee status assessment process will also be bolstered or tarnished according to the outcome of judicial review challenges.

There is a keen awareness of this point, generally in DIAC and specifically in the Independent Migration Authority (IMA) that plays a large role in the POD process. The IMA has a memorandum of understanding with the RRT to provide country information to reviewers. Training workshops have been conducted for reviewers on decision making, interviewing and use of country information. Steps have also been taken to ensure that the refugee status assessment process follows the principles of good decision making outlined in a *Best Practice Guide* series of five pamphlets published by the Administrative Review Council.

There are, nevertheless, challenges ahead. The POD process that commenced on 1 March 2011 differs from both the former RSD process and the process that applies to onshore claims. Under the new POD process, if a DIAC officer undertaking a protection obligations evaluation cannot reach a positive finding on a person's asylum claim the case is referred to the next stage for an independent protection assessment. The former RSD process was similar, except that a DIAC officer could first assess a refugee status claim positively or negatively; and a person receiving a negative assessment could then apply for an independent merits review.

As to onshore asylum claims, there is first a primary decision made by a DIAC officer which can then be reviewed by the RRT. The RRT, comprising over ninety full and part-time members, has nearly twenty years' experience in reviewing refugee status decisions. In 2009–10 the RRT set aside 24% of the 2157 primary decisions that it reviewed. In turn, 24% of RRT decisions were taken to judicial review, but only 10% of decisions were set aside.[8]

The IMA will comprise over 90 review officers, mainly appointed on a part-time basis. Most have former experience in tribunal review or at a senior level in administrative decision making within government. They bring considerable experience to the task, but face a large challenge in assessing a high volume of asylum claims made by people who come from

[8] Migration Review Tribunal–Refugee Review Tribunal, *Annual Report 2009-10* at 7.

diverse national and ethnic backgrounds, who may not be proficient in English and who may experience emotional trauma during the interview and assessment process. That process may itself be conducted under difficult circumstances in remote detention facilities. The obligation to afford natural justice in accordance with common law standards that have not been codified adds to this complexity.

These points underscore the need for ongoing evaluation of the consistency and quality of decision making in the POD process. That theme was taken up in a recent Commonwealth Ombudsman proposal accepted by DIAC, for a thorough review of the non-statutory refugee status assessment process.[9] It is also a theme in the Australian Government's Strategic Framework for Access to Justice in the Federal Civil Justice System. A 2009 report concluded that:

> Improving the quality of primary decision-making, the level of communication between agencies and applicants, and the mechanisms agencies develop to monitor and improve the performance of their statutory functions will improve access to justice outcomes and reduce costs associated with unnecessary or prolonged disputes.[10]

Another practical step that could be considered by DIAC is the publication after targeted consultation of procedural fairness guidelines for IMA reviewers. It is probable that many of the initial judicial review challenges will contend that a breach of natural justice occurred. Partly that will be argued because of the lack of definition regarding the natural justice requirements and standards applying to the POD process. The Migration Act addressed a similar concern applying to onshore visa decision making by spelling out a statutory hearing code to replace the common law rules of procedural fairness. It would assist IMA reviewers to have similar guidelines. The risk that a negative assessment based on the guidelines will be set aside in judicial review could be lessened if the guidelines were exposed to public comment, especially from legal professional and immigration advocacy bodies.

Legal issues in judicial review proceedings

Plaintiff M61 illustrated the range of legal issues that can arise in proceedings for judicial review of migration decision making. The case discussed or noted issues relating to jurisdiction, remedies, the grounds of review and the party nominated as the respondent. Similar issues could arise in proceedings instituted in the FMC by offshore entry persons, as the following brief discussion notes.

The High Court's jurisdiction to entertain the action in *Plaintiff M61* arose under Constitution s 75. The FMC's jurisdiction to review 'migration decisions' is conferred by s 476 of the Migration, which provides that the FMC has the same original jurisdiction in migration decisions as the High Court has under Constitution s 75(v). The term 'migration decision' is defined in s 5 of the Migration Act to mean a 'privative clause decision',

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9 Commonwealth Ombudsman, Christmas Island Immigration Detention Facilities, Report No 2/2011.

10 Attorney-General's Department, A Strategic Framework for Access to Justice in the Federal Civil Justice System (2009) at 132.

'purported privative clause decision' and 'non-privative clause decision'. Each of those terms is defined elsewhere in the Act.

FMC actions will proceed on the basis that a negative POD assessment is a 'privative clause decision'. That term is defined in s 474(2) to mean a decision of an administrative character that is made under the Migration Act or a regulation or instrument made under that Act. The POD assessment is not made directly under the Migration Act, but could be classified as such on the basis that it is a step 'taken under and for the purposes of' the Migration Act (*Plaintiff M61* at para [9](a)). The Act excludes a decision of the Minister not to consider or exercise the power conferred by s 195A from the term 'privative clause decision' (ss 476(2) and 474(7)(a)). However, a POD assessment can be linked to the term 'privative clause decision' by s 46A, which enables the Minister to lift the bar and allow a protection visa application to be considered.

A judicial review application must also be correctly framed to invoke the parallel jurisdiction of the High Court under Constitution s 75(v) and the FMC under the Migration Act s 476. The relief must be sought against 'an officer of the Commonwealth'. In *Plaintiff M61* relief was sought against a number of parties, one of whom was the Minister as an officer of the Commonwealth. Relief was also sought against the IMR reviewer who was an independent contractor. The High Court acknowledged but did not resolve the difficult question of whether an independent contractor is an officer of the Commonwealth (at para [51]; see also M Groves, 'Outsourcing and S 75(v) of the Constitution' (2011) 22 *Public Law Review* 3). The alternative in the High Court is to commence proceedings under either Constitution s 75(iii) against 'the Commonwealth' or a person 'on behalf of the Commonwealth', or Constitution s 75(i) as a matter 'arising under [a] treaty', namely the Refugees Convention. Those options are not available in the FMC which has only the jurisdiction conferred on the High Court by s 75(v).

The remedy the applicant seeks is also an issue. In *Plaintiff M61* the High Court granted a declaration, a remedy not mentioned in s 75(v), on the basis that the applicant had made a genuine claim for mandamus and injunction, two remedies that are mentioned in s 75(v). If there is a genuine claim that grounds the Court's jurisdiction it can grant other relief to resolve the matter in dispute: *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. The High Court further held that mandamus could not be granted against the Minister because the relevant Migration Act powers, ss 46A and 195A, were non-compellable discretions of the Minister. Consequently, the jurisdiction of the FMC to entertain an action brought by an offshore entry person challenging a negative POD assessment will depend on whether the applicant makes a genuine claim for an injunction, which would then enable the FMC to make a declaration. An injunction can be sought if the POD process has reached the stage that removal from Australia is a threat facing an offshore entry person.

Another aspect of jurisdiction is that the Migration Act imposes a 35 day time limit on commencing proceedings in the FMC, Federal Court and High Court, which can be extended by the Court in the interests of the administration of justice after receipt of a written application (ss 477, 477A, 486A). Those provisions are so worded that they probably apply to proceedings commenced by offshore entry persons, though their application is likely to raise novel questions (eg, what is the 'date of the migration decision' from which the 35

days is to be calculated, and what events can be considered in deciding 'the interests of the administration of justice').
Issues may also arise in applying the grounds of review to offshore entry decisions. As to the obligation to observe natural justice, the Court in *Plaintiff M61* held that 'procedural fairness required the reviewer to put before the plaintiff the substance of matters that the reviewer knew of and considered may bear upon whether to accept the plaintiff's claims' (at para [91]). The particular breach in that case was a failure to put adverse country information to the applicants for consideration and comment. The Court noted that that extends further than the procedural code in the Migration Act, which declares that the RRT in reviewing an onshore visa decision is not required to provide general country information to an applicant (s 424A(3)).

The other ground of review applied by the High Court in *Plaintiff M61* was error of law. The Court held that the RSA assessment and IMR review 'must address the relevant legal question or questions' (at para [77]), and do so on the basis that the Migration Act and relevant case law apply to the process. Future litigation will address the application to the non-statutory POD process of the detailed framework in the Migration Act, which is addressed to onshore visa decision making and judicial review of onshore decisions.

The concept of jurisdictional error is applied in migration review proceedings in the High Court under Constitution s 75(v) and in the FMC under the Migration Act s 476. The High Court in *Plaintiff M61* did not use the language of jurisdictional error, but instead spoke of error of law, probably because of the different legal framework for onshore and offshore refugee status assessment and that a declaration rather than mandamus or prohibition was the remedy granted by the Court. This is another area of selection or uncertainty that may arise in proceedings commenced by offshore entry persons.

Legal assistance, advice and representation for offshore entry persons

A high proportion of migration litigation is currently pursued by unsuccessful visa applicants who are not legally represented. Legal advice and assistance may be available through one or other of the schemes described in Section 10, but they cannot provide comprehensive assistance in all cases. The result quite often is that the application for judicial review is poorly prepared and presented.

This is likely to be a more acute problem facing an offshore entry person who receives a negative POD assessment and wishes to explore the option of judicial review, relying on *Plaintiff M61* as a precedent. Among the problems the person may face (if legally unaided) are a lack of understanding of the Australian legal system and the procedure for judicial review; a lack of competence to initiate and conduct legal proceedings; difficulty, from a remote detention facility, of lodging court documents and communicating with the court registry; and coping with special arrangements to participate in a court hearing either in person or through a video link.

It is unlikely that the existing legal advice and assistance schemes will be able satisfactorily to address those problems. This will disadvantage offshore entry persons, but it could also create complications for courts and, indirectly, for DIAC. If the result is that it takes longer to finalise judicial review applications brought by offshore entry persons, this will undermine

the government's objective of enhancing the efficiency and minimising the duration of judicial review proceedings.

Those projections are conjectural, as the size and nature of the litigation caseload following *Plaintiff M61* is still unclear. It is premature for government to announce or implement a new scheme tailored to provide legal assistance, advice or representation to offshore entry persons. Understandably, too, government may feel that introducing a new scheme at this stage could be counterproductive by encouraging people to litigate. This would be at odds with the access to justice reform program that is designed to facilitate civil dispute resolution at an early stage and by means other than litigation. Similarly, government migration policy is to discourage litigation and to promote other options such as voluntary resettlement following unsuccessful visa claims. Relevant too is the policy embedded in the Migration Act ss 486E-486K of discouraging unmeritorious litigation. Those sections provide that a person (including a lawyer) must not encourage another person to commence migration litigation that has no reasonable prospect of success, that a court can make a costs order against a person who breaches that obligation and that a lawyer filing a document that commences migration litigation must certify that it has a reasonable prospect of success.

There is, nevertheless, a realistic chance of increased litigation following *Plaintiff M61,* and an equal prospect that the litigation will be complicated where applicants are in detention and not legally represented. Many of the potential problems discussed in this report would be lessened or overcome if an offshore entry applicant detained in a remote detention facility was legally represented in judicial review proceedings. In particular, the legal representative would take over responsibility for preparing and lodging court documents and for appearing before the court. The presence in court of the offshore entry applicant would not be necessary in all but exceptional cases.

It could also be less costly for government to take this path. As noted in Section 9, the FMC and Federal Court both prefer that parties appear before the court, rather than by video or the matter being decided on the papers. The cost of arranging for legal representation for a detained applicant could be less than the cost of bringing that person to the court or the court going on circuit to a hearing room at or near the detention facility.

Another cost consideration is that legal aid can be cost efficient in legal dispute resolution. This was the finding of a benefit-cost analysis of legal aid in a report published in 2009, *Economic Value of Legal Aid*.[11] The report focussed on legal aid in family law matters, but the findings have broader relevance. The report found that there is a net positive efficiency benefit for the justice system in ways such as early resolution of legal issues, streamlining of matters appropriately through the justice system through legal advice and information, diversion of cases away from the courts and to other dispute resolution mechanisms, and increased efficiency of court processes.

[11] The report was prepared by PriceWaterhouseCoopers at the request of Legal Aid Queensland. The full title of the report is *Economic Value of Legal Aid: Analysis in relation to Commonwealth funded matters with a focus on family law* (2009).

Government has, in other ways, accepted that it can be fairer, sensible and cost-efficient to fund legal advice and representation for people involved in migration review processes. As explained in Section 10, this is done through the IAAAS scheme, through the DIAC-funded Legal Advice Scheme in NSW and WA, and through government financial support of legal aid and community legal centres. It will be advisable, in the climate of uncertainty following *Plaintiff M61*, that government keeps an open mind about the options for providing legal advice and assistance to offshore entry persons. The options could range through providing basic advice to an offshore entry applicant on preparing an application for judicial review; assisting in the drafting and lodgement of an application; and providing legal representation before a court. Depending on the option chosen, it could implemented by supplementing or expanding the IAAAS scheme; providing direct funding to an immigration legal advice and referral centre or a public interest advocacy centre; or providing targeted funding for migration assistance through the established legal aid scheme.

Those are longer term options that may not ultimately be necessary. There is a stronger case, in the shorter term, for DIAC adopting a scheme similar to the Test Case Litigation Program established by the Australian Taxation Office (ATO). Under that scheme the ATO may reimburse all or part of the legal costs incurred by a taxpayer in legal proceedings that may clarify a significant issue of tax law. The cases selected for funding are those which raise taxation law issues that are uncertain or contentious and have a broader significance beyond the individual case. The premise of the scheme is that it is in the public interest to have the law clarified through litigation that can be commenced only by a taxpayer. Cases are assessed for funding by a test case litigation panel that is chaired by the Chief Tax Counsel and includes accounting and legal professionals and senior tax officers. The final decision on funding rests with the ATO.

As noted earlier in this section, *Plaintiff M61* could generate a range of difficult and novel issues concerning refugee determination processes as well as judicial review principles. There is a chance that those issues will go on appeal to the Federal Court or High Court; and a risk that the proceedings will be lengthy or inconclusive unless competently raised and presented. It may, once again, be premature for DIAC to formally establish a scheme akin to the ATO Test Case Litigation Program, but the ATO model nevertheless provides a good starting point for a provisional scheme that could be reviewed and adjusted in the light of legal developments following *Plaintiff M61*.

DIAC could, for example, establish a panel to receive and advise on applications for legal assistance in cases that met three criteria:

- the case raises a significant legal issue about the POD process, or judicial review of actions taken under that process
- the applicant for review will not be able to conduct proceedings adequately without legal assistance (for example, because the person is in detention in a remote location), and
- it is in the public interest for the person's action to proceed and for the legal issue to be clarified.

The panel could be constituted by a DIAC officer (as Chair of the panel), a representative of the Attorney-General's Department and two or more representatives of legal aid agencies and non-government organisations such as law councils and immigration legal advice centres. The decision on funding would rest with the Department or the Minister.

6. Legislative changes to the framework for Judicial Review of Migration Decisions — 1989 to 2009

The terms of reference for this inquiry ask whether legislative changes are desirable to the scheme for judicial review of migration decisions following the High Court's decision in *Plaintiff M61*. The Migration Act has undergone frequent amendment since 1989, both to the rules on migration entry and to the arrangements for court and tribunal review of migration decisions.

This section summarises the main legislative changes since 1989 affecting court and tribunal review. Many of those changes were a response to court decisions that, in the view of government, were at odds with the intended effect of earlier legislative changes. Some decisions are noted in this summary and discussed more fully in the next section of the report.

Migration Legislation Amendment Act 1989

The *Migration Act 1958* regulates the entry into and stay in Australia of people who are not Australian citizens. The modern form of the Act dates from 1989, when a rule-based system for migration decision making was introduced to replace the broad discretions which the Act then conferred on the Minister to control migration entry into Australia.

In addition to introducing new and detailed rules on visas and entry permits in place of the Minister's broad discretionary powers, the Act also established the Migration Internal Review Office (MIRO) and an independent external merits review tribunal, the Immigration Review Tribunal (IRT). (On 1 June 1999 the Migration Review Tribunal (MRT) took over the functions of the MIRO and the IRT.)

Migration Reform Act 1992

Prior to this Act judicial review of migration decisions was possible in the Federal Court of Australia under the ADJR Act and the *Judiciary Act 1903* s 39B. Together, both Acts conferred jurisdiction on the Federal Court to undertake judicial review of all Commonwealth decision making. The parallel scope of the Federal Court's Judiciary Act s 39B jurisdiction and the High Court's Constitution s 75(v) jurisdiction, meant that the High Court could remit to the Federal Court any matter commenced in the High Court's original jurisdiction (Judiciary Act s 44(2A)).

The Migration Reform Act 1992 introduced a new judicial review scheme applying to migration decisions. The Act was a response to government concern about the steady increase in applications for judicial review of migration decisions, and the grounds relied upon by the Federal Court in setting aside some migration decisions. The 1992 Act introduced four important changes.

Firstly, it established the RRT to undertake merit review of protection visa refusal decisions. Secondly, the Act prevented a person from applying directly for judicial review of a primary decision that was reviewable by the MRT or the RRT. Instead, the person must first apply for tribunal review, and if aggrieved by the outcome, seek judicial review by the Federal Court of the MRT or RRT decision.

Thirdly, the rules for judicial review of MRT and RRT decisions were spelt out in Part 8 of the Migration Act, to replace the ADJR Act. Section 476 in Part 8 excluded some of the grounds of review that were otherwise available under the ADJR Act, notably breach of the hearing rule of natural justice, apprehended bias on the part of the decision maker, *Wednesbury*[12] unreasonableness, failure to take a relevant consideration into account and taking an irrelevant consideration into account. An application to the Federal Court for judicial review of an MRT or RRT decision was to be commenced within 28 days of the tribunal decision. The Federal Court could not extend that period.

Fourthly, a detailed procedural code was inserted into the Migration Act specifying how a primary decision was to be made. The code specified how information was to be collected and provided to a visa applicant and set out an applicant's right to present their case. This code was to replace the common law obligation of the decision maker to accord natural justice to the applicant.

Migration Legislation Amendment Act (No 1) 1998

This Act applied a similar procedural code to the MRT and RRT, in place of the common law obligation of the tribunals to accord natural justice to an applicant.

Migration Legislation Amendment (Judicial Review) Act 2001

This Act introduced a new judicial review scheme to replace the scheme introduced in 1992. As explained later, the 1992 Act had not achieved the intended purpose of channelling and constraining judicial review. A growing trend was that litigation would be commenced in the High Court under Constitution s 75(v), the proceedings would focus on grounds of review that were not available in the Federal Court, and proceedings were commenced outside the time limit that applied in the Federal Court.

The new Parts 8 and 8A in the Migration Act introduced two main changes. The first aligned the migration review jurisdiction of the Federal Court and the High Court, by providing that the Federal Court had the same original jurisdiction in relation to migration decisions as the High Court has under Constitution s 75(v). The purpose of this alignment was to remove any advantage that a person may achieve by commencing proceedings in the High Court and thus circumventing restrictions applying to Federal Court proceedings. The similarity of the jurisdiction of both courts also meant that the High Court could remit a matter commenced in the High Court to the Federal Court under the Judiciary Act s 44(2A).

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[12] This is the shorthand description for a ground of review in the ADJR Act s 5(2)(g): 'an exercise of power that is so unreasonable that no reasonable person could have so exercised the power'. The ground captures a legal principle enunciated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

The second change was the introduction of a privative clause that applied to most decisions under the Migration Act, including visa decisions. Section 474 of the Migration Act declared that a privative clause decision 'is final and conclusive'; cannot be 'challenged, appealed against, reviewed, quashed or called in question in any court'; and cannot be subject to the grant of a constitutional writ 'in any court on any account'. Notwithstanding that uncompromising language, the Parliament expected that judicial review would still be possible as other sections of the Migration Act provided that judicial review proceedings could be commenced in the Federal Court within 28 days of the deemed notification of an RRT decision to a person (ss 476, 477).

The intention behind this new approach to curbing judicial review was that the courts would construe the privative clause by applying an earlier line of authority in the High Court usually traced to *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598. There it was held that a decision protected by a privative clause would not be declared invalid if the decision maker acted in good faith and made a decision that was reasonably related to the legislation conferring power.

Migration Legislation Amendment Act (No 1) 2001

This Act introduced three new limitations on judicial review of migration decisions. Firstly, the Act barred class (representative) actions in visa related matters in the Federal Court and the High Court (s 486B). This addressed a concern that visa applicants who could individually challenge a visa refusal decision were joining a class action raising the same issue, which could prolong the resolution of legal claims. Secondly, the Act imposed a time limit of 35 days on commencing proceedings in the High Court under s 75(v); the time ran from actual notification of a decision (s 486A). Thirdly, the Act confined the right to commence proceedings challenging a visa, deportation or removal decision to the person directly affected and not, for example, their relative or friend (s 486C).

Migration Amendment Legislation (Procedural Fairness) Act 2002

This Act was in response to the decision of the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57. The Court held that the statutory hearing code inserted into the Migration Act in 1992 to replace the common law rules of procedural fairness had not, in fact, done so as the legislative intention was not expressed with sufficient clarity to achieve that purpose. The 2002 Act spelt that intention out more clearly, by declaring that the provisions of the Migration Act are 'taken to be an exhaustive statement of the requirements of the natural justice hearing rule' (ss 51A, 97A, 118A, 127A, 357A, 422B).

Migration Litigation Reform Act 2005

This Act made a number of changes to the judicial review scheme in the Migration Act. The unifying purpose of the changes was to streamline the arrangements for judicial review and to preclude delay in proceedings being finalised.

Firstly, the 2005 Act provided that, with limited exceptions, any proceedings under Part 8 of the Migration Act seeking review of a decision of the MRT or RRT must be commenced in the Federal Magistrates Court rather than the Federal Court. Both courts had had

concurrent jurisdiction since 2001 under Part 8, but jurisdiction was now given exclusively to the FMC (s 476A). An appeal would lie from an FMC decision to the Federal Court and would ordinarily be heard by a single judge rather than a Full Bench (*Federal Court of Australia Act 1976* s 25(1AA)). Any case commenced in the High Court under the Constitution s 75(v) could be remitted by that Court only to the FMC and not to the Federal Court (s 476B).

Secondly, all three courts were given power to give summary judgment if it appears to the court that a party has no reasonable prospects of prosecuting or defending a proceeding (*Federal Magistrates Act 1999* s 17A, Federal Court Act s 31A, Judiciary Act s 25A).

Thirdly, the Act responded to the decision of the High Court in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, with a new set of provisions limiting the time for commencing legal proceedings in any of the courts. The practical effect of *Plaintiff S157* was that an RRT decision affected by jurisdictional error was invalid and of no legal effect and, as such, could not provide a legal commencement date from which the time limitation provision would run. The 2005 amendments extended the coverage of the privative clause to include a 'purported privative clause decision' (ss 5(1), 5E) and introduced a uniform and more tightly drawn 28 day time limitation period that could be extended by a further 56 days in the interests of the administration of justice (ss 477, 477A, 486A).

Other changes in the 2005 Act to migration litigation proceedings included: a party who commences proceedings must disclose if he or she has earlier commenced other proceedings of the same kind (s 486D); a lawyer commencing proceedings is required to file a certificate stating that the proceedings have a reasonable prospect of success (s 486I); and all three courts can make a personal costs order against a person (including a lawyer) who encourages litigation that has no reasonable prospect of success (s 486F).

Migration Amendment (Review Provisions) Act 2007

This Act was a response to the decision of the High Court in *SAAP v Minister for Immigration and Multicultural Affairs* (2005) 228 CLR 294, which construed the code of procedure in the Migration Act as requiring the RRT to provide the appeal applicant with written notice of any adverse item of information communicated by another person to the tribunal during the hearing of the applicant's appeal.

The 2007 Act provided that the information could be provided to the applicant orally during the proceedings; and that there is no obligation to put to an applicant adverse information that was information already provided by the applicant to DIAC as part of the process leading to the decision under review (s 424AA).

Migration Legislation Amendment Act (No 1) 2009

This Act made amendments relating to merits and judicial review of migration decisions. It is the most recent Act to amend the Migration Act provisions that impose time limits on the commencement of proceedings. These amendments responded to the decision of the High Court in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 and the decision of the Full Federal Court in *Minister for Immigration and Citizenship v SZKKC* [2007] FCAFC 105.

In *Bodruddaza* the High Court held that the maximum time limit of 84 days that applied to proceedings commenced under s 75(v) was inconsistent with the right of an applicant to seek constitutional relief under that provision. In *SZKKC* the Full Federal Court held that the time period for seeking judicial review of a tribunal decision will begin to run only if the applicant is personally served with the written statement of reasons of the tribunal by a person authorised by the registrar of the tribunal.

Under the 2009 Act, proceedings in any of the three courts must be commenced within 35 days after the actual date of the decision being reviewed, not from the date an applicant was notified of the decision as was previously the case. The court may extend that period in the interests of the administration of justice (ss 477, 477A, 486A). There is no right of appeal from a decision of the FMC or Federal Court refusing to grant an extension of time (476A).

The Act also made amendments to clarify that, when the MRT or RRT seeks information from a review applicant or third party, this may be done either orally or by written notice. These amendments addressed problems faced by tribunals following the Full Federal Court decision in *SZKTI v Minister for Immigration and Citizenship* [2008] FCAFC 83, which found that tribunals could not exercise the general power conferred by the Migration Act to obtain information without complying with the specified procedures set out in other sections. In practice, that meant that the tribunals could not seek information orally from an applicant. The Act reinstated this avenue of information collection for the tribunals. The High Court subsequently overturned the decision in *SZKTI* ([2009] HCA 30).

Increased court fees

The fees for commencing and conducting proceedings in the FMC, Federal Court and High Court increased from 1 November 2010: see *Federal Magistrates Regulations 2000*, *Federal Court of Australia Regulations 2004* and *High Court of Australia (Fees) Regulations 2004*. The fee increase applied generally and did not differentiate between migration and other cases. The Australian Government's explanation for the increases was that they were part of a suite of access to justice measures to direct people away from litigation towards early intervention alternative dispute resolution services. The fees are to be increased every two years. It is possible that they will cause a decrease in migration litigation.

A range of different fees apply to steps in the litigation process such as commencing an action, filing a document and setting a matter down for hearing. The following list of fees for commencing litigation is a partial but illustrative list:

- Federal Magistrates Court: the fee to commence an action in the Court is $426 for an individual, which can be reduced to $100 on financial hardship grounds or for designated groups that include people in detention and people in receipt of legal aid
- Federal Court: the fee to file a notice of appeal from the FMC is $3007 for an individual, which can be reduced to $100 on the same grounds as in the FMC
- High Court: the fee for a special leave application is $2074 for an individual, which is reducible by two thirds to $691 on financial hardship grounds, or to $100 for people in detention and people in receipt of legal aid.

7. The Judicial Response to Legislative Restriction of Judicial Review

The previous section summarised the major legislative changes over the last two decades to the scheme for court and tribunal review of migration decision making. A major reason for the frequency of legislative change was that particular changes did not always achieve the government's intended objectives of constraining litigation by limiting the number and duration of migration litigation proceedings and confining the legal issues arising in proceedings. The reason, on occasions, was that the legislation was construed or applied by courts in a way that was not anticipated. This section looks at some of those High Court and Federal Court decisions.

Restricting the grounds for judicial review

The Migration Reform Act 1992 created a special scheme for judicial review of most migration decisions in Part 8, to replace the ADJR Act. The grounds of review in Part 8 were narrower than those available under the ADJR Act. The constitutional validity of this restricted scheme for judicial review was upheld by the High Court by a 4:3 majority in *Abebe v Commonwealth* (1999) 197 CLR 510. However, the scheme was not effective in constraining judicial review, primarily for three reasons.

Firstly, the Federal Court and the High Court applied the restricted grounds in s 476 more broadly than Parliament anticipated. For example, in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 the High Court held that ADJR grounds not included in s 476 (ignoring relevant material and relying on irrelevant material) could be raised under other s 476 grounds (lack of jurisdiction to make a decision, and making a decision not authorised by legislation). Another illustration is that review under s 476 was confined to the concept of actual bias and did not include the broader common law concept of apprehended bias which was part of the ADJR ground of review. However, after 1992 actual bias was frequently relied upon as a ground of challenge to RRT decisions, and the challenge was upheld on occasions by the Federal Court (eg, *Sun Zhan Qui v Minister for Immigration & Ethnic Affairs* [1997] FCA 1488).

Secondly, the code of procedure in Part 7 of the Migration Act, designed to replace indeterminate common law natural justice standards, itself became a major focus in judicial review of RRT decisions. Some RRT decisions set aside by the Federal Court and the High Court for breaching the code might not, at common law, have been treated as a breach of natural justice. An example of a Full Federal Court decision is *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* [2003] FCAFC 126. The Court held that an applicant had not been 'invited' to attend an RRT hearing as required by the Act, as he was not in a fit state to represent himself. An example of a High Court decision is *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162. The Court held that the RRT, in conducting a hearing by videolink, had made a jurisdictional error by summarising orally the adverse evidence given minutes earlier by another witness (a

daughter), rather than providing that evidence in writing as required by s 424A of the Migration Act. *SAAP* led to over 500 consent determinations being set aside by the RRT.

Thirdly, the jurisdiction of the High Court under Constitution s 75(v) to grant a constitutional writ against an officer of the Commonwealth was broader than the jurisdiction of the Federal Court under the Migration Act. This meant that a person who was unable to commence proceedings or seek relief under the Migration Act could instead commence proceedings directly in the High Court. An illustration is *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, in which the High Court held that the RRT had denied natural justice to Mr Aala in deciding that he did not qualify for a protection visa. Mr Aala had earlier been unsuccessful in challenging the Tribunal's decision in the Federal Court. The ground on which he succeeded in the High Court — breach of natural justice — was not a ground available to him in the Federal Court proceedings. Furthermore, his proceedings in the High Court were commenced five months after the decision of the Full Federal Court, which was well outside the time limit for appealing to the High Court against the Federal Court decision.

The practical effect of the High Court's decision in *Aala* was a substantial increase in the number of applications filed in the High Court under s 75(v) of the Constitution. The High Court could remit a matter to the Federal Court, but not that part of a matter which was based on a ground that could not be applied by the Federal Court. Sections 476(1) and 476A(2) of the Migration Act have since harmonised the jurisdiction of the FMC, Federal Court and High Court so that there is less advantage for an applicant in filing proceedings in the High Court under Constitution s 75(v).

Curbing judicial review by a privative clause

In 2001 the restricted scheme for judicial review that was introduced in 1992 was replaced by a privative clause in s 474 of the Migration Act. As explained earlier, the thinking at the time was that a court would only set aside a decision protected by a privative clause on the narrow ground that the decision was reached in bad faith, bore no apparent relationship to the legislation conferring power, or breached some inviolable limitation on the scope of power.

The High Court subsequently took a different approach to the effect of the privative clause. In *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 the Court held that the privative clause would not prevent the grant of relief if a decision was flawed by jurisdictional error. The Court further stated that a breach of the rules of natural justice would constitute a jurisdictional error. Later cases have confirmed that the concept of jurisdictional error extends to a broad range of errors, including statutory misconstruction, asking the wrong question, ignoring relevant material, or relying on irrelevant material. The Solicitor-General Mr Stephen Gageler SC has pointed to a trend of 'a fairly wide and ever expanding range of legislative conditions breach of which will give rise to jurisdictional error in the absence of a tolerably clear manifestation of legislative intention to the contrary'.[13]

[13] S Gageler, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92 at 93.

In short, the privative clause does not appear to have had a marked impact in narrowing the grounds for judicial review or constraining the function of the courts in controlling legal error in migration decision making.

Exclusion of natural justice

The first attempt by Parliament to exclude natural justice in the Migration Reform Act 1992 was found wanting in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57. The Act inserted a new code of procedure in subdivision AB into the Migration Act, with the following features: a decision could be made 'without giving the applicant an opportunity to make oral or written submissions'; a decision maker was required only to give an applicant information specifically relating to that person; a decision maker was not required to take any action other than as stipulated in the Act; a failure to comply with those requirements did not mean that the decision was invalid but only that it could be set aside on review by the RRT; and the Explanatory Memorandum to the amending legislation stated that the purpose of the new statutory code was 'to replace the current common law rules of natural justice'.

In *Miah* the High Court held by majority that the obligation to observe natural justice had not been displaced as the obligation was not expressly excluded by words of plain intendment. The Court further held that a breach of natural justice had occurred in that case as the decision maker had not invited the protection visa applicant to comment on information concerning political changes in the applicant's country of citizenship.

Parliament has since amended the Migration Act by inserting at various points a declaration that the provisions of the Act are 'taken to be an exhaustive statement of the requirements of the natural justice hearing rule' (eg, ss 51A, 97A, 118A, 127A, 357A, 422B). This has been accepted by the courts as an effective ouster of the common law rules of natural justice (eg, *Minister for Immigration and Multicultural Affairs v Lay Lat* (2006) 231 ALR 412).

Imposing time limits on judicial review

A series of legislative changes to the Migration Act has sought to control administrative review and litigation by placing strict limits on the right to commence review proceedings. These limitations have not operated as intended.

Firstly, courts have ruled on occasions that an event that triggers the commencement of a time limit has not occurred (eg, *Chan Ta Srey v Minister for Immigration and Multicultural Affairs* [2003] FCA 1292). The reason may be that a letter notifying a person that a visa was refused or cancelled was sent to an incorrect address or the wrong person, or there was a drafting error in the notice of refusal or cancellation. In some cases courts have also construed the statutory notification rules strictly or narrowly.

Secondly, in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 the High Court held invalid a section of the Migration Act which provided that an application under Constitution s 75(v) for a constitutional writ must be commenced with 84 days of a person being notified of a visa refusal decision. The Court held that limitation to be invalid as the rigid time limit was inconsistent with the place of s 75(v) in the constitutional

structure. In particular, the time limit did not take account of events beyond a person's control that could prevent them from complying with the time limit, such as (in that case) failure by the person's migration agent to take necessary action.

As noted above, the Migration Act has since been amended to stipulate a time limit that can be extended by a court in the interests of the administration of justice (ss 477, 477A, 486A). Every case is different, but generally the courts have shown reluctance to extend time unless a good reason is shown for doing so. In fact, it may be that the current approach of a short time limit that can be extended is more effective than the former approach of a rigid time limit that could not.

Limitation of review options for offshore entry persons

Special and restricted refugee status assessment rules were implemented in 2001 for offshore entry persons. Unlike a non-citizen who arrives in Australia as a visa holder, an offshore entry person has no automatic right to apply for a protection visa or to challenge a negative assessment in the RRT.

An implicit objective in this differential scheme was to limit the review options available to offshore entry persons. This was reflected in the RSA and IMR manuals prepared by DIAC,[14] which advised that the processes were non-statutory and that the provisions of the Migration Act and Regulations and relevant case law did not apply to an RSA. The Commonwealth submission to the High Court in *Plaintiff M61* argued that it was in the nature of this special scheme that an offshore entry person did not have any right or interest that was directly affected by a negative assessment or a decision not to make a recommendation to the Minister.

As explained earlier, the Court's decision in *Plaintiff M61* is at odds with those assumptions. The Court held that the Migration Act and case law do apply, that an applicant in detention has a right or interest at stake in the process, and that the IMR reviewers must observe the principles of natural justice. An offshore entry person who is aggrieved by a negative assessment may commence judicial review proceedings to challenge the result.

[14] See note 4 above.

8. Management of Migration Litigation by the Department of Immigration and Citizenship

This section summarises the steps taken by DIAC to manage migration litigation in conjunction with the law firms that are members of the Legal Services Panel. The bulk of that litigation comprises judicial review proceedings brought by onshore visa applicants seeking review of adverse decisions of the Refugee Review Tribunal. The litigation also includes proceedings in the Administrative Appeals Tribunal (eg, visa cancellation; or refusal of citizenship); appeals against AAT decisions; applications in the original jurisdiction of the High Court; and civil compensation actions brought mostly in State Supreme Courts.

Mention is made of some issues that may arise for DIAC and the law firms in handling litigation initiated by offshore entry persons following *Plaintiff M61*.

Management of the litigation caseload

DIAC's arrangements to manage migration litigation are largely a response to four factors. One is the high number of cases being handled at any time. In September 2010 the active caseload was 836 matters, but it has been as high as 4500 in 2004.

Secondly, while applicants doubtless hope that the litigation will be successful and result in a visa being granted, that is an unlikely outcome given that applicants are successful in only 4% of defended cases in the FMC. Applicants nevertheless appeal from the FMC to the Federal Court in over 50% of cases. It is reasonable to surmise from those figures that a major reason why people initiate litigation is to prevent or delay their removal from Australia. Consequently, DIAC's objective is to ensure that litigation is resolved as speedily as possible.

Thirdly, the cost of the litigation to government can grow while it is unresolved or moves through multiple review and appeal stages. In 2009-10 DIAC's total legal services expenditure was $30.4M (*Annual Report 2009-10* at Part 6, Appendix 2).

Fourthly, a small number of applicants are in detention at the time that litigation is underway. Any delay in resolving the litigation can complicate the detention options and arrangements and prolong a person's detention.

Following are the main features of DIAC's arrangements for managing the litigation caseload:

- *External provision of legal services:* DIAC established a Legal Services Panel in 2000 to provide litigation services to the Department. The panel was established by tender process. The panel members are currently the Australian Government Solicitor and four private law firms. The allocation of work to panel members is closely managed to ensure 'value for money' based on cost and quality of work.

- *Centralisation of litigation:* Litigation is managed by the Litigation and Opinions Branch in the National Office of the Department. The benefits of centralisation are that expertise is accumulated in one area, the legal service providers are efficiently managed, cases can be allocated strategically (eg, similar matters can be allocated to the one panel firm), trends in litigation and case law developments can be monitored, and submissions can be refined for presentation in court.
- *Early assessment of cases:* Panel firms are required to provide a preliminary advice within 21 days of receiving a case file. If a legal error is identified in the decision under review DIAC will usually withdraw from the proceedings by consenting to have the decision reconsidered. In 2009–10 this occurred in approximately 8% of cases.
- *Active management and conduct of cases:* Steps are taken to identify repeat litigants who are seeking review of the same decision; to identify cases suitable for an application for summary dismissal; and to identify like cases that can be batched and allocated to the same panel firm or counsel. Cases that raise the same issue of law will usually be conducted simultaneously to avoid delay or a bank-up of matters; there are exceptions, for example, where the same issue of jurisdiction arises in more than one case.
- *Preparation of court books:* DIAC prepares the court book in all first instance matters (eg, in the FMC), and in appeals where the applicant is unrepresented. The court book contains all the departmental and tribunal documents required for the court proceedings. The aim is to have matters ready for hearing at an early date, usually by the first directions hearing.
- *Electronic management of files:* Cases are managed electronically to enable prompt communication with panel firms.
- *Selection of appeal cases:* An appeal is filed in a case only if there is a good prospect of success and there is a cogent legal or policy reason to appeal. A decision to appeal is based on legal advice and consultation with policy areas.
- *Liaison with MRT and RRT:* Procedures are in place to: enable files to be obtained quickly from the tribunals when litigation is commenced; provide the tribunals with DIAC's analysis of recent cases that may affect the procedures or law applied by the tribunal; and exchange information about trends in decision making and litigation.
- *Liaison with courts:* The courts notify DIAC of all applications for review, even though the applicant is also required to serve notice of the proceedings. DIAC and the Australian Attorney-General's Department meet as appropriate with the Registrars of the courts to discuss practical and procedural issues presented by migration litigation (such as video conferencing).
- *Liaison with law firms:* To ensure consistency and lower costs in case presentation, DIAC provides standing instructions and a regular fortnightly bulletin to the panel law firms on the conduct of litigation.
- *Liaison within department:* The Litigation and Opinions Branch notifies DIAC compliance areas within 24 hours of finalisation of matters so that compliance action such as removal can be considered. A weekly update of finalised litigation matters is

also provided to other relevant areas in the Department, as well as bulletins and guidance for decision makers based on the analysis of recent decisions.

Managing litigation following *Plaintiff M61*

DIAC's arrangements for efficiently handling migration litigation will be as suited to proceedings brought by offshore entry persons as they are to proceedings instituted by onshore visa claimants. However, the objectives will differ in part. There will not be the same strong focus on resolving litigation speedily so as to lessen its attraction as a strategy for preventing or delaying an applicant's removal from Australia.

Two other objectives are likely to guide the Department's actions. The first will be to shorten an applicant's detention by concluding the litigation and thereby clarifying the options facing the applicant and the Department. An offshore entry person in detention may be equally anxious (and more so than an onshore claimant who is not in detention) to resolve the litigation quickly. The second objective will be for the Department to identify and facilitate early and authoritative resolution of significant legal issues that arise for the first time in proceedings brought by offshore entry persons. That objective may require that a case be taken on appeal (by either party) to the Federal Court or High Court.

To meet those objectives DIAC will need to continue its close liaison with law firms and courts and — in place of the tribunals — the officers supervising the POD process. In addition, four refinements of present arrangements (raised by those consulted for this inquiry) should be considered by DIAC.

The first is for DIAC, the Attorney-General's Department and the Court registries to agree that it would be advantageous, more so than occurs at present, for DIAC to communicate directly with the Court registries on issues relating specifically to managing offshore entry litigation. This would be a departure from normal consultation arrangements and would be justified by the uncertain developments in this area. It would be particularly helpful for court registries to have a flexible channel of communication with DIAC in the early stages of framing standard directions and making hearing arrangements.

The second, discussed in Section 5 of this report, is for DIAC to consider establishing a litigation test case funding scheme. This would reimburse an applicant for all or part of the legal costs incurred in a proceeding, especially any legal costs incurred at an appellate stage. The purpose in taking this step would be to ensure that experienced legal counsel were handling cases that could authoritatively resolve important legal issues relating to the POD process.

The third is to ensure that the record keeping and document integrity procedures followed in the POD process take account of the special issues and challenges that offshore entry litigation could present. For example, the obligation on an interviewer to accord natural justice to a person seeking asylum may require that that person be invited to comment on adverse country information that is at odds with their asylum claim. A clear record will be needed of all information put to the claimant and, as to country information, a record of the

source of that information and the date it was accessed or was current. Tape recording all interviews would assist in providing a high integrity documentary record. I am aware that these matters are being closely considered within the Department.

A point of contrast between the onshore and offshore visa claim cases is that the former are ordinarily heard by the RRT before litigation commences in the FMC. The practice of the RRT is to provide a full summary of its decision and record to the FMC, which can replace other document discovery processes. Comparable procedures of equal integrity will be required in relation to POD assessments.

The fourth suggestion made to me for refining litigation management arrangements is to introduce more flexible arrangements for electronic exchange of documents between DIAC and the panel law firms. The prevailing practice, in line with DIAC's centralisation of litigation management, is that information relevant to a case that is held in a regional centre is sent by hard copy to DIAC's national office before it is conveyed electronically to the panel law firm. It was suggested to me that document scanning in regional offices and direct electronic communication of that information to panel law firms would enable court books to be prepared earlier in some cases. An alternative is for the information to be uplifted at the time of creation to an electronic data base that can be accessed by the panel law firms. These changes may be important where documents are held at a remote detention facility.

9. Management of Migration Litigation by the Federal Magistrates Court, Federal Court and High Court

Outline of the Courts' jurisdiction

This section summarises the special measures put in place by the Federal Magistrates Court, Federal Court and High Court to manage migration litigation arising from onshore migration decisions. The litigation occurs under a special judicial review framework in Part 8 of the Migration Act. A feature of that scheme is that most migration decisions are first reviewed on the merits by the RRT or MRT prior to judicial review in the FMC.

Judicial review of migration decisions occurs principally in the FMC. Section 476 of the Migration Act confers on the FMC the same jurisdiction in relation to migration decisions as the High Court has under the Constitution s 75(v). There are some limitations on the FMC's jurisdiction, for example, it cannot review primary migration decisions that are reviewable by a tribunal, nor deportation or visa cancellation decisions of the AAT or Minister.

The primary role of the Federal Court in migration matters is to hear appeals from the FMC. Unless the Court directs otherwise, appeals are heard by a single judge rather than a Full Court (Federal Court Act s 25(1AA)). Until 2005 the Federal Court had a larger role, being the court in which most migration judicial review actions were heard. This occurred initially under the ADJR Act, and after 1992 under Part 8 of the Migration Act. The Court's original jurisdiction in migration review is now limited to a small category of cases listed in s 476A (cases transferred from the FMC, and judicial review of some decisions of the AAT and the Minister).

The High Court has a dual role in migration matters. In its appellate jurisdiction under Constitution s 73 the High Court can grant special leave to hear an appeal from a decision of a Judge of the Federal Court exercising the appellate jurisdiction of that court (Federal Court Act s 33(4)); and in its original jurisdiction under Constitution s 75 the High Court can determine a matter commenced in that court in which relief is sought against the Commonwealth (s 75(iii)) or an officer of the Commonwealth (s 75(v)). A migration matter commenced in its original jurisdiction can be remitted by the High Court to the FMC if the FMC has jurisdiction in relation to the matter (Migration Act s 476B). Only a very limited class of matters can be remitted by the High Court to the Federal Court (s 476B(3)).

The statistics on the courts' migration caseload are given later in this section.

Federal Magistrates Court

- There are 61 Federal Magistrates. Review of migration decisions is principally undertaken by 16 Federal Magistrates in the general division of the FMC in Sydney and Melbourne. Other Federal Magistrates (eg, from the family law jurisdiction) can be allocated to migration cases if a need arises (although this option may not be available if foreshadowed legislation is enacted to appoint Federal Magistrates who handle family law matters to a new division of the Family Court of Australia).

- The registry services of the FMC for migration matters are provided by the Federal Court registry in each State.
- Applications for review of migration decisions either filed in the FMC or remitted by the High Court are randomly allocated to the dockets of Federal Magistrates. Under the docket system, a matter remains with that Magistrate during all hearings until finalisation of the matter.
- The practice of the FMC is to notify an application to DIAC, although the applicant for review is required by the Rules of the court to serve a sealed copy of the application on the Minister as respondent (in practice, it is filed with the Department).
- The first court date is a directions hearing, that is usually held within four weeks of an application being filed. Most Magistrates conduct their own directions hearing; the Registrar does so for some other Magistrates. The style and detail of the directions differ among Magistrates, but are largely similar in nature. The date for the substantive hearing into a matter is usually set at the directions hearing.
- The preparation of the court book is undertaken by the solicitors for the Minister and Department. The court book contains the relevant records from DIAC and the RRT.
- The hearing of a migration matter will usually take less than half a day. Directions hearings usually take 45 minutes or less.
- The performance target of the FMC in migration matters is that a decision finalising a matter should be given within six weeks of the hearing, and within 200 days of the application for review being filed.
- The applicant is unrepresented in roughly 80% of migration cases in the FMC. In a small number of cases the applicant is in detention. If an applicant in detention is unrepresented, DIAC will arrange for the person to be brought to the Court or to attend by video link. If represented, the presence of the applicant in court is not required.
- While most migration matters are heard in Sydney or Melbourne, the established practice of the Court in other areas of work is to go on circuit to a large number of regional Australian cities and towns.
- A panel of Federal Magistrates with expertise in migration matters provides direction and continuing education within the Court in this area. Thought has been given to enlarging the role of the panel so that it is apprised of all migration matters filed in the FMC and can play an advisory role in the allocation of those cases to individual Magistrates.
- A special procedure introduced in 2005 is the procedure for a show cause hearing under rule 44.12 of the Federal Magistrates Court Rules 2001. This rule provides that the FMC may dismiss an application at the interlocutory stage if the Court is not satisfied that the application raises an arguable case for the relief claimed. An appeal to the Federal Court against the dismissal of a matter under rule 44.12 requires the leave of a Federal Court Judge (eg, see *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397).

> This dismissal procedure is used less commonly in migration matters than was expected; it is said that some Magistrates are disinclined ever to use the procedure. Two reasons are given. One is that it is difficult without hearing a case for the FMC to properly decide if there was jurisdictional error in the decision of the RRT, especially if the court book has not yet been prepared. It is fairer that the applicant — particularly an unrepresented applicant who is disputing a protection visa decision — is granted the opportunity of a substantive hearing. The second reason is that an unmeritorious claim can be dispatched as efficiently by listing it for an early hearing at which a final order can be made on the substantive merits of the claim. This may at times be the quicker path, as it avoids the risk that an applicant will appeal successfully to the Federal Court against an order of dismissal under Rule 44.12 and have the matter set down for a substantive hearing in the FMC (eg, *MZXGP v Minister for Immigration and Multicultural Affairs* [2006] FCA 1075).

Issues facing the FMC in dealing with judicial review applications by offshore entry persons

Following *Plaintiff M61* a range of atypical or unexpected issues may confront the FMC in dealing with judicial review applications lodged by offshore entry persons. In addition to novel legal issues that will require a decision, the FMC will encounter practical and logistical problems that arise from an applicant's place of detention, whether the applicant is legally represented, whether an interpreter is needed, the stage of the refugee status determination process at which proceedings are commenced and the adequacy of the application and documents filed in the matter. In the course of my consultations, two issues stood out.

The first was the special arrangements that may be needed for the FMC to hear cases brought by offshore entry persons who are held in detention at one of more than twenty detention facilities on the Australian mainland and at Christmas Island. As discussed earlier, the courts will be greatly assisted if an applicant is legally represented. That is unlikely to occur in all cases, and even an applicant who is represented may be required at times to give evidence in the case, for example, if there is a disputed factual issue concerning the conduct of a refugee status determination interview and whether natural justice was observed.

It is likely that the FMC will have more flexibility than other courts in arranging hearing venues that enable applicants to be present in court. The FMC has an established pattern of conducting circuit hearings around Australia; and a Federal Magistrate is located in Darwin, where detention facilities are to be expanded. The appointment of two extra Federal Magistrates to deal with the expected increase in litigation also offers a fresh opportunity to put new or special arrangements in place.

Another option is for the presiding Magistrate and the applicant in detention to be joined by video link. Video hearings are used occasionally by courts and tribunals, both generally and in migration cases; the technology is available and there is considerable experience in using it. However, many people consulted during this inquiry were firm that it was not the preferred option for conducting the substantive hearing of a case brought by an offshore entry person. The technology is not always reliable, particularly in establishing a reliable and uninterrupted link to a remote detention facility. It is likely that both ends of the video link

will be in different time zones, which can make it complex and time consuming to arrange a hearing. The presiding Magistrate cannot always be satisfied that an unrepresented applicant who is joined by video fully understands the proceedings, is participating confidently and is not inhibited by the setting (including the presence at the applicant's end of detention centre staff). The challenge of providing a fair hearing can be greater if the applicant requires an interpreter who is also participating by video. Those issues will be less of a concern for a video hearing at an interlocutory stage of proceedings.

The FMC will be better placed to develop appropriate arrangements for hearing offshore entry applications if it has up-to-date information about the number of negative POD assessments that could give rise to FMC proceedings, the place of detention of the potential applicants and special security arrangements and interpreter services that may be required. As that indicates, there should be a continuing dialogue as events unfold between DIAC, the Attorney-General's Department and the Court officers responsible for Court administration and liaison with government.

A second issue discussed during this inquiry was the comparative advantages and disadvantages of the FMC docket system compared to the more centralised system in the Federal Court. Many positive comments were made about Federal Court arrangements: cases proceed in an orderly and predictable manner; practitioners find it routine to comply with the standard directions issued by the Court registry; novel legal issues, as well as options for streamlining judicial proceedings, can be identified in advance of a hearing during the allocation of cases to Judges; the Court registry keeps an eye on how cases are being handled and the stage they have reached; the review workload can be shared equally among Judges; and the overall process is efficient, economical and well-adapted to high volume review of migration cases.

By contrast, criticisms made of the docket system of the FMC are that individual Federal Magistrates have different expectations and directions, or respond differently to non-compliance by applicants with FMC directions; it is less likely that cases raising similar issues or requiring special treatment will be identified and grouped at an early stage of proceedings; and there can be marked variation in the timeframe in which individual cases are handled.

A comparison of that kind between the FMC and Federal Court processes is not straightforward. In migration matters the Federal Court has an appellate role and deals with issues of law arising from the earlier hearings of the FMC. The FMC, by contrast, is a busy trial court in which matters commence; the legal and factual claims before the Court can be unclear and wide-ranging; and the Magistrate has an opportunity at the directions hearing to clarify issues in dispute and to stress upon the applicant the nature of the proceeding and their obligation to be prepared for and attend at the hearing date.

The point of present relevance is that it will probably be advantageous, at least in the early phase of litigation following *Plaintiff M61*, for the FMC to consider greater standardisation in the directions that apply to the hearing of cases. The migration panel of Federal Magistrates could develop a model set of directions that would ordinarily be issued by the

Registry. This may avoid the need for a directions hearing where the applicant is in detention.

There may also be a need for stronger registry involvement at an early stage in identifying the issues arising in an application from an offshore entry person and whether that application should be grouped with others when allocated to a Federal Magistrate. This early analysis could be supervised by a Federal Magistrate discharging a role akin to that of the local migration liaison Judge in the Federal Court. Central management of cases is also advantageous when offshore entry applicants are moved from one detention facility to another during the course of proceedings.

Federal Court of Australia

The Federal Court has made special arrangements to ensure that migration appeals are dispatched efficiently and speedily. Matters proceed before the Court in the following manner:

- All appeals are heard by the Court during four appeal sittings that are scheduled each year in February, May, August and November. A month is allocated to each sitting. All 45 Judges of the Court are, in principle, available to participate in the appeal sittings and to give priority to that work during the month. Most migration appeals are listed for hearing in Sydney.
- Most migration appeals are presently filed in the Sydney and Melbourne registries of the Court. The likely explanation is that many of those lodging appeals reside in those States (in some instances in the Villawood or Maribyrnong detention centres); and some of the law firms and migration legal centres that advise or represent appellants are also located in those States.
- Nearly all migration appeals to the Court are listed for hearing by a single Judge. A Full Court of three Judges will be constituted only if there is a significant or complex legal issue arising in a case, or a need to address contrasting rulings by single Judges in previous cases.
- Migration appeals filed in the Court are, prior to hearing, managed by: a listing clerk who works in the Melbourne registry; a local migration liaison Judge in the Sydney or Melbourne registry, who will see a majority of the cases; and a legal case management unit in the Court that may prepare a summary of a case for the migration liaison Judge and the Judge listed to hear the case.
- Within a week of a migration appeal being filed, it is usual for the Court to notify the appellant of the sitting period in which the appeal will be held, which is commonly the next scheduled sitting period. A set of directions is sent to the appellant based on the standard directions of the Court and modified if required for the particular case. There is no directions hearing or call-over list in migration appeals, nor any further contact between the appellant and the Court prior to the listed hearing date. Closer to the sitting period the parties are told the particular date and the Judge listed to hear the case.
- Cases are allocated to Judges up to 1 or 2 months in advance of the hearing. Matters of a like nature will sometimes be bundled and allocated to the same Judge. This

may be done, for example, if there is a similar legal issue arising in more than one case; if family members are parties in separate but related cases; or an interpreter skilled in a particular language is required for a number of cases. The migration liaison Judge may play a role in identifying special issues ahead of the listing and allocation of a case.

- If the appellant is unrepresented, the appeal books are prepared by the legal representatives of the Department. Otherwise, this is done by the legal representative of the appellant.
- It is usual for two cases to be listed for hearing by a Judge on the same day, one in the morning session and one in the afternoon session. The hearing will often take no more than two hours. On occasions more than two matters will be listed for hearing by a Judge on a particular day.
- The timeline established internally by the Court is that migration matters should be completed within 90 days, from a matter being filed to the decision and order of the Court (that is, before the next sitting period). The Court advises that it is meeting that timeline in 95% of cases. In approximately 76% of appeals the decision is given by the Judge within two weeks of the hearing. In some matters the Judge delivers an *ex tempore* judgment on the day of hearing.
- The Court usually insists that a migration appeal be heard on the listed date. Matters that require an adjournment are sometimes listed for hearing later in the four week sitting period.
- In approximately 80% of cases the appellant in migration matters is unrepresented and appears in person. The practice of many Judges is to play a more active role in the hearing if the appellant is unrepresented, to ensure that the appellant understands the nature of the proceedings and receives a proper hearing. The Court administration arm may also take extra steps to ensure that the Judge can be adequately prepared for the hearing to ensure that all relevant legal issues are addressed.
- Interlocutory and similar matters are usually listed to be heard separately from the substantive appeal hearing in a case. This applies, for example, to an application by a party for an extension of time to commence appeal proceedings, or an application that a matter be dismissed or that summary judgment be given. Up to eight interlocutory matters may be listed for hearing on the same day. No appeal book is required in these cases and they can be dealt with quickly.
- The Court is prepared to take special steps to ensure that an appeal is dealt with at the earliest opportunity when, for example, the appellant is in detention or children are involved in the appeal. Cases are listed for hearing outside the appeal period if required.
- A self-represented applicant who is in detention on the hearing date (usually at Villawood) is ordinarily brought to the Court by security officers. This is not necessary if the applicant is legally represented, as the legal representative can appear in the proceedings without the applicant being present. Arrangements have sometimes been made for a person in detention to participate in a hearing by video-conference.

- The practice of the Court, as those points indicate, is that applicants in migration appeals are given the opportunity to appear before the Court either personally or by a legal representative. If an applicant does not appear the case can in effect be decided on the papers. However, that is not the standard practice of the Court.

Issues facing the Federal Court in dealing with judicial review applications by offshore entry persons

The Federal Court is well placed to handle any increase in migration appeals that may occur following *Plaintiff M61*. There has been a steady decrease in the Court's migration appeal caseload in recent years. For example, only 73 cases were listed for hearing in the November 2010 appeal period, compared to as many as 330 in an appeal period in 2007.

There is unlikely to be any substantial increase in appeals until later in 2011, at the earliest. This will not occur unless there is in future a sizeable number of negative POD assessments, that in turn result in applications for judicial review in the FMC, followed by appeals to the Federal Court. The procedures of the Federal Court are well-adapted to identifying if special arrangements are required for handling appeals (for example, assigning similar cases to the same Judge) or if a special issue in an appeal could suitably be heard by an appeal bench of three Judges.

The Federal Court will also be in the favourable position that it can draw from the experience of the FMC in developing special arrangements for receiving and handling appeals from offshore entry persons who are unrepresented and located in remote detention facilities. For example, it is likely that the FMC will already have decided whether a special arrangement is required in a particular case to receive or deliver documents to a person in detention or arrange an interpreter for them (the Federal Court registry may in fact have played a role in handling those special arrangements for the FMC).

The most problematic issue the Federal Court is likely to face is in hearing an appeal brought by an offshore entry person who is unrepresented and detained in a remote facility. It is not uncommon for the Federal Court to develop special hearing arrangements — for example, taking evidence in remote locations in native title cases. However, most migration appeals are currently heard in Sydney or Melbourne, and this is an important factor in the efficiency of the appeal process. Although a high proportion of migration appellants are unrepresented, most hold a bridging visa and are expected to make arrangements to attend the Court. It is unusual that the Court has to make special hearing arrangements. Even appellants who are in detention are usually detained at Villawood and their attendance at the Court precinct can be arranged.

It would be possible to arrange for a Federal Court Judge to go on circuit to a place at or nearby a remote detention facility. However, this is likely to delay the hearing of the appeal, and also potentially impair the Court's efficiency in dealing with other migration appeals. It could also be costly and practically challenging because of the number of other persons (for example, Court officers, legal practitioners and interpreters) who would be required to attend with the Court. Depending upon the location, special difficulties can arise in arranging flights and accommodation.

Another option is for a video hearing, linking the presiding Judge and the person in detention. As discussed above (in relation to the FMC), this is a viable option but not the option preferred by many participants in the process.

Those problems will not arise if an appellant is legally represented. The legal representative can file and receive all documents for the client, and can appear at the scheduled time at a hearing held in Sydney or another city. It is possible that some offshore entry persons will be legally represented, either of their own motion or as a result of pro bono assistance provided by the legal profession. If not, consideration should be given by the Commonwealth to providing legal assistance, at least in cases identified as important test cases. This proposal is discussed further at Section 5.

High Court of Australia

As noted earlier, migration matters come to the High Court in both its original jurisdiction under Constitution s 75 and its appellate jurisdiction under Constitution s 73. With a fixed number of seven Justices, the Court has less flexibility than the FMC or Federal Court to devote greater resources to an increased migration caseload. The main tools available to the Court to deal with an increased caseload are to refuse special leave to appeal or to remit matters commenced in its original jurisdiction to another court.

There has, however, been a marked decrease in original jurisdiction applications in recent years: 2105 applications were filed in 2002–03, 2006 in 2003–04, and 30 in 2009–10. The reasons are that the Migration Act s 476 confers on the FMC the same jurisdiction in relation to migration decisions as the High Court has under Constitution s 75(v); and the High Court can remit to the FMC any migration matter commenced in the original jurisdiction that falls within the jurisdiction of the FMC (Migration Act s 476B).

There are mixed reasons why some migration matters are still commenced in the High Court's original jurisdiction. Sometimes, as in *Plaintiff M61*, it is because of the novelty of the issues and a doubt as to whether another court has jurisdiction. In some other cases the reason is that an applicant has decided to continue litigating in the High Court's original jurisdiction, after being unsuccessful in the FMC, being refused special leave to appeal to the High Court from a decision of the Federal Court, or being refused an extension of time to commence proceedings in the FMC or to appeal to the Federal Court. This occurs less frequently now: all legal issues can as a general rule be raised before the FMC; the FMC and the Federal Court can both extend the period for commencing proceedings in the interests of the administration of justice (Migration Act ss 477, 477A); and there is a substantial filing fee to commence a case of $2074 (for an individual), which can be reduced by two thirds on financial hardship grounds. Moreover, in respect of actions commenced under Constitution s 75 the High Court may refuse relief on discretionary grounds (*R v McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 415; *Re Heerey; Ex parte Heinrich* (2001) 185 ALR 106 at 109), or on the basis that the issue in dispute was decided in earlier judicial proceedings between the same parties and should not be re-litigated in accordance with the doctrines of issue estoppel and *res judicata* (*Kuligowski v Metrobus* (2004) 220 CLR 368).

Appeals against migration decisions of the Federal Court (single Judges as well as the Full Bench) require the High Court's special leave to appeal (Federal Court Act s 33(3),(4)). The special leave procedure is governed by Part 41 of the *High Court Rules 2004*. The standard procedure is that a special leave application must be filed within 28 days after judgment was delivered by the Federal Court, although this can be extended; the applicant must serve notice of the proceedings on the respondent within 7 days; file a summary of argument within 28 days of filing the application; within 21 days thereafter the respondent must file a summary of argument; within a further 21 days the applicant must file nine copies of an application book; and the Court can then decide to set the special leave application down for oral argument or have it decided by two Justices 'on the papers' in chambers.

A modified procedure applies where an unrepresented applicant is seeking leave to appeal (rule 41.10) (93% of migration special leave applications in 2009-10 were filed by self-represented litigants[15]).The applicant's summary of argument must be filed within 28 days of filing the application for special leave. If it is not filed within that time the application is taken to be abandoned unless the Court directs otherwise. The summary of argument is not served on the respondent, and instead is referred to a panel of two High Court Justices who decide on the papers whether to grant or refuse special leave, require the respondent to serve an argument in reply, or set the special leave application down for oral argument. The Registrar may at any time give directions concerning a special leave application (r 41.14.1).

The majority of special leave applications in migration cases (195 in 2009–10) are resolved by the High Court on the papers without oral argument. The practice is that a batch of applications is referred each month to a panel of two Justices, together with a memorandum on each case prepared within the Court. The Justices usually make a decision on the applications within 4-6 weeks. They may confer before deciding or require that an application be set down for oral hearing. In the large majority of cases a decision is made to deny special leave without DIAC being notified in advance or required to file a summary of argument.

Litigation statistics and trends

The following statistics on the migration caseload are taken from the annual reports of the courts and from figures provided by DIAC. The high number of litigation variables and different classification methods means that the figures from different sources are not always identical, but the following is a reliable picture of migration litigation patterns.

Number of migration matters filed in the FMC, Federal Court and High Court

The following figures are taken from the annual reports of the three Courts for 2009-10. Three time periods have been chosen to indicate the decline in migration applications.

Federal Magistrates Court — applications filed in migration cases

2005–06	2429
2008–09	1288
2009–10	880 (68% were refugee related)

[15] High Court of Australia, *Annual Report 2009-10* at 14.

Federal Court – appeals and FMC referrals in migration cases

2005–06	1053
2008–09	530
2009–10	392 (79% were refugee related)

High Court — special leave applications in migration cases

2005–06	386
2008–09	252
2009–10	195 (92% were refugee related)

High Court — migration appeal cases heard by the Court

2005–06	5
2008–09	10
2009–10	3

High Court — migration matters commenced under Constitution s 75

2002–03	2105 (many were part of the *Muin & Lie v RRT* [2002] HCA 30 class action)
2003–04	206
2005–06	34
2008–09	24
2009–10	30 (80% were refugee related)

Appeal rate

In refugee related matters in 2009–10:

- unsuccessful applicants before the FMC appealed to the Federal Court in 51% of cases
- unsuccessful appellants to the Federal Court applied to the High Court for special leave to appeal in 57% of cases.

DIAC's active litigation caseload

DIAC's active migration litigation caseload at 20 September 2010 was 836 matters — compared to 639 on 30 June; and approximately 4500 in 2004. That active caseload of 836 matters comprised:

- 656 administrative law matters, eg, applications to the FMC for judicial review of MTR/RRT visa refusal decisions; appeals from the FMC to the Federal Court; special leave and other applications to the High Court; and AAT applications for merit review of visa cancellation and passport decisions. Roughly half (341) of the matters were refugee cases
- 180 civil and other litigation matters, eg, proceedings in State Supreme Courts for damages arising from detention.

- The distribution of the 656 active administrative law matters was:

AAT	167
FMC	298
Federal Court appeals	109 (15 were DIAC-initiated appeals)
High Court special leave	58
High Court original jurisdiction	33
High Court substantive appeal	1

Litigation outcomes

The outcome in 406 administrative law matters resolved in the July-September quarter 2010 in the AAT, FMC, Federal Court and High Court was:

DIAC win	69%
DIAC loss	6% (6% in FMC; 5% in FC; 0% in HC special leave)
Applicant withdrawal	17%
DIAC withdrawal	8% (nearly half were citizenship matters)

DIAC's success rate in refugee related matters is higher — for example, in 2009–10 DIAC won 96% of the 1072 matters that went to a hearing.

Time to resolve

The following DIAC figures show the average number of days taken to resolve judicial review proceedings in refugee related matters in 2009–10. The figures in brackets are the comparable figures for 2005–06

FMC	145	(358)
Federal Court	110	(129)
High Court original jurisdiction	161	(261)
High Court special leave	142	(185)

Federal Court figures on 92 migration appeals and related applications filed on or after 1 July 2010 and resolved prior to 11 February 2011 are:

- The average resolution time was 98 days, or a median of 91 days
- 39% of matters were disposed of by ex tempore judgment on the day of hearing, and 37% within 14 days of the hearing (a combined total of 76%).

10. Legal assistance available in migration matters

A prominent issue in this inquiry is the possible need for special legal assistance to be available to offshore entry persons who commence legal proceedings for judicial review of negative POD assessments. This section briefly summarises the current legal assistance schemes that are available in migration matters.

Immigration Advice and Application Assistance Scheme funded by DIAC

The Immigration Advice and Application Assistance Scheme (IAAAS) is established by DIAC to provide professional migration advice and application assistance to eligible migration clients. Advice is available free of charge to both onshore and offshore visa applicants. The advice is provided by registered migration agents and officers of legal aid commissions who participate in the IAAAS. There are 24 IAAAS providers around Australia, who are listed on the DIAC website. In 2009–2010 advice was provided under the scheme to 3425 irregular maritime arrivals at a cost of $8.79 million.

The IAAAS service has been available to offshore entry persons since July 2008, and will continue to be available under the new POD process that commenced on 1 March 2011. IAAAS providers visit immigration detention centres to provide face-to-face advice. After an initial interview with a DIAC case manager but before a refugee status assessment (RSA) interview is held, the case manager may refer an offshore entry person an IAAAS adviser. The adviser will assist a person during the RSA stage, by assisting in preparing and lodging a statement of claim for protection, translating key documents, attending the interview and explaining the decision. IAAAS advice is also available when a person is referred to the next stage for an Independent Protection Assessment (IPA), and if the s 46A bar is lifted in preparing a protection visa application. The IAAAS service is not available at later stages to assist a person commencing judicial review proceedings or requesting Ministerial intervention.

I have not examined the operation of the IAAAS as part of this inquiry. However, it seems from the comments made to me and from DIAC's strong commitment to the scheme that it plays a valuable role in ensuring that offshore entry persons are properly advised before undertaking an RSA interview. This is important in providing procedural fairness for those interviewed and to ensure that Australia's refugee protection obligations are correctly engaged. A shortcoming in the scheme raised with me on a couple of occasions was that IAAAS advisers on Christmas Island do not always have adequate time to prepare for and conduct an advice session prior to a person's RSA interview. A recent Commonwealth Ombudsman report on the Christmas Island detention facilities discussed the improvements that had occurred in the refugee status assessment process, but the challenges arising from the increased number of people to be processed.[16]

DIAC is aware that the IAAAS is a key element of the POD process following the High Court's decision in *Plaintiff M61*. The RSA and IPA stages each build on the preceding steps. A

[16] Commonwealth Ombudsman, Christmas Island Immigration Detention Facilities, Report No 2/2011.

weakness at the IAAAS stage can impair the correctness and legal integrity of an RSA or IPA assessment. This could, in turn, result in a negative assessment being set aside by a court and remitted for reconsideration. Throughout that process the offshore entry person is likely to remain in detention.

It is therefore important that the IAAAS is properly resourced and supported by DIAC. There should be continuing and rigorous evaluation of how it is operating. As part of that evaluation, comments should be sought from IAAAS advisers, DIAC staff, and IPA assessors. Court decisions in proceedings initiated by offshore entry persons should also be monitored for developments that may shed light on the role played by IAAAS advice in a particular case.

NSW and WA immigration Legal Advice Scheme funded by DIAC

A Legal Advice Scheme funded by DIAC was established in NSW in 2000 to provide advice to unrepresented visa applicants who commence proceedings for judicial review of RRT decisions. The scheme was extended to WA in 2003. The purpose of the scheme is to enable the unrepresented person to seek free professional legal advice concerning the judicial review process, preparation of a case and their prospects of success.

The scheme was established following a view expressed by some Federal Court Judges that the documents filed in a high number of unsuccessful Federal Court applications were poorly-prepared from a common template that was not understood by the applicants (eg, *Mbuaby Paulo Muaby v Minister for Immigration & Multicultural Affairs* [1998] FCA 1093). It was thought that independent legal advice would reduce the number of cases filed and improve the preparation and focus of the cases that did proceed to hearing.

Advice under the scheme is provided by legal practitioners who are appointed to a panel that is administered in NSW by the NSW Bar Association and in WA by the Law Society of WA. Thirty legal practitioners were listed on the NSW panel in 2009 (half barristers and half solicitors). The professional associations control appointments to the panels; in NSW there is a system of internal accreditation conducted by two senior counsel, who appoint practitioners on the basis of their knowledge and experience in migration law and administrative law.

The scheme operates independently of DIAC, which funds the scheme to a total of $4.245M between 2000 and 2008–09. The annual expenditure has dropped from a peak of nearly $900,000 in 2004–05 to $450,000 in 2008–09. Legal practitioners who provide advice are paid a maximum professional fee of $737, plus a maximum amount of $192.50 to cover disbursements (for example, travel to Villawood (NSW) or the Perth IDC (WA) to interview an applicant).

An unrepresented applicant is informed of the scheme by the court registry upon filing an application for judicial review of an RRT decision. The scheme may also be explained to the applicant at the first directions hearing. If interested, the applicant is referred to the legal practitioner next on the list maintained by the court registry. The relevant court documents and tape of the RRT hearing are forwarded to the legal practitioner, who is expected to meet with the applicant within two weeks, with an interpreter if necessary. The assistance

provided is limited to a written advice on the matter, and assistance in redrafting the court documents if the advice is to pursue the action. The Bar Association and the court registry are notified when this is done. Assistance is not available under the scheme for appeals to the Federal Court or High Court.

The scheme relies upon a generous commitment from legal practitioners and professional associations and substantiates their support for refugee advisory work. The scheme appears to work well in three respects. First, it ensures that applicants can be properly advised about their cases. Over 6000 applicants have received advice under the scheme, and in recent years between 60-70% of eligible applicants have used the scheme each year. Secondly, in those cases where the applicant's documents are redrafted the court is better placed to discharge its review function. Thirdly, the scheme relieves the pressure that the Bar in particular would otherwise face to provide pro bono assistance in migration law cases.

On the other hand, the scheme has limitations and it is not without occasional problems. Difficulties and criticisms that have been noted include: arranging a meeting time and place for the legal practitioner and the applicant; ineffective communication between both parties arising from differences in language, culture and familiarity with the Australian legal system; reluctance by applicants to accept advice that an action has limited prospects of success; claims by applicants that they were disadvantaged by the advice received, could not meet with an adviser or did not receive written advice; and some criticism of the inconsistent quality of legal advice provided to applicants.

The confidential relationship between the legal practitioner and the applicant makes it hard to evaluate whether the scheme has met its original objectives. The statistics (confirmed by anecdotal commentary) suggest that it has not. The average case resolution time for applicants who used the scheme, compared to self-represented applicants who did not use the scheme, has been higher by at least fifty days over the five year 2004-2009 (a 41 day difference over the life of the scheme). The probable reason is that matters were listed later for hearing to enable advice to be provided.

Nor has there been a marked decline in litigation that can be attributed to scheme advice. Over the life of the scheme, the rate of withdrawal by those who received advice under the scheme is similar to the rate of withdrawal for other self-represented applicants (a 0.1% difference, on average).

Refinement or expansion of this Legal Advice Scheme does not appear to be warranted as a response to *Plaintiff M61*. The scheme will continue for so long as it receives support from the professional associations and DIAC, and plaintiffs avail themselves of the free legal advice offered. However, there are inherent limitations in a scheme of this kind, and to the extent that there is a need for additional legal advice and support for offshore entry persons it is better to explore other options.

Commonwealth Public Interest and Test Cases Scheme

The Commonwealth Public Interest and Test Cases Scheme is a non-statutory financial support scheme administered by the Attorney General's Department. The scheme provides funding for legal and related costs in two types of cases. The first are 'public interest' cases

that involve an unresolved and important question of law arising under a law of the Commonwealth. The second are 'test cases' that might resolve an important question of Commonwealth law that could affect a large number of socially or economically disadvantaged persons.

Funding is available under the scheme for legal proceedings in all Australian courts and tribunals. Decisions are made by delegates of the Attorney-General.

The funding criteria and application process for the scheme are spelt out in the 'Guidelines for the Provision of Assistance by the Commonwealth for Legal and Related Expenses under the Commonwealth Public Interest and Test Cases Scheme'. The criteria include the public interest and test case criteria noted above; the financial means of the applicant; the prospects of success and whether there is a reasonable case to argue; the availability of legal aid as an alternative avenue of funding; the funds available under the scheme in the particular year; and the number and merits of other applications for assistance in that year.

Community Legal Centres

There are approximately 200 community legal centres (CLCs) in Australia that provide legal assistance and advice to members of the community. Funding is provided to most CLCs by the Commonwealth and State governments. There are specialist migration CLCs, such as the Immigration Advice and Rights Centre in Sydney, the Refugee Advice and Casework Service (Australia) in Sydney, the Refugee and Immigration Legal Service in Brisbane, the Refugee and Immigration Law Centre in Melbourne and the Asylum Seeker Resource Centre in Melbourne. The work undertaken by CLCs varies from one to another. Some primarily provide advice and case work assistance, while others provide or arrange legal representation in court and tribunal proceedings. A full list of CLCs is provided on the website of the National Association of Community Legal Centres (www.naclc.org.au)

The Public Interest Law Clearing House network

Public Interest Law Clearing Houses (PILCH) have been established in NSW, Queensland and Victoria. Bodies with a similar role in other States are the WA Law Access Pro Bono Referral Scheme, and Justice Net SA.

The clearing houses are independent, not-for-profit organisations that are established and financially supported by legal profession members and government grants. Members include law firms, university law departments, law societies and individual barristers. A core role of the clearing houses is to facilitate pro bono legal assistance for members of the public. This is done by inviting requests for legal assistance and advice from the public and referring appropriate cases to lawyers, barristers and professional advisers who are willing to act on a pro bono basis. For example, 600 barristers and 31 law firms are registered with Victorian PILCH. Migration law cases are among those referred through the clearing houses.

Legal profession schemes

The legal professional associations in some States have established pro bono referral schemes that provide legal advice and representation to people in legal and financial need who are without proper representation. Three examples are the Victorian Bar Pro Bono

Scheme (VBPBS), the Law Institute of Victoria Legal Assistance Scheme and the NSW Law Society pro bono scheme. As an illustration of the importance of these schemes, 38% of the Victorian Bar is registered to provide assistance under the VBPBS and over 10% of legal referrals in recent years have been migration matters.

Commonwealth Legal Aid Commission funding

The National Partnership Agreement on Legal Assistance Services entered into between the Commonwealth, States and Territories in July 2010 sets the framework for financial funding to State and Territory legal aid commissions. The primary objective of the Agreement is to provide legal aid services for disadvantaged Australians.

The Commonwealth legal aid service priorities are outlined in Schedule A of the Agreement. The list of civil law priorities includes migration matters where assistance is otherwise not available from services funded by DIAC. Schedule A also lists the special circumstances that may be considered when assessing a grant of aid. These include the applicant having a language or literacy problem; or an intellectual, psychiatric or physical disability; or the person being in a remote locality where it is difficult to obtain legal assistance; or where the person would otherwise be at risk of social exclusion. The Commonwealth can amend the legal aid priorities in negotiation with the relevant States and Territories (clause 28e).

The broad principles set out in the National Agreement are supplemented by more detailed State and Territory rules that prescribe the means and merit tests for providing assistance. For example, a merit test applied by Legal Aid NSW in relation to migration assistance requires consideration of 'the reasonable prospects of success' of a case, 'the application of the prudent self-funding litigant' test and satisfaction of 'the appropriateness of spending limited public legal aid funds' on the case.

11. Migration review in other countries

This section outlines the procedures applying in four other countries for tribunal and court review of refugee asylum claims. The common theme is that special arrangements are made in each country that differ from the arrangements applying to other administrative law or civil litigation.

The countries examined are Canada, New Zealand, United Kingdom and United States. All four countries, like Australia, are signatories to the Refugees Convention.

Canada

Refugee claims made onshore are considered at first instance by the Immigration and Refugee Board (IRB). If the IRB rejects a person's claim for protection, the applicant can seek leave to appeal the decision to the Federal Court. An application for review must be made within 15 days of the IRB decision being issued, and must be made by a lawyer on the applicant's behalf.

Review in the Federal Court involves two stages. At the first stage the Court considers on the papers whether to grant leave to hear the substantive claim. The applicant must satisfy the Court that an error was made in the IRB decision, or that the decision was not fair or reasonable. If the Court refuses leave, the applicant is automatically placed under a removal order to leave Canada within 30 days.

If leave is granted, the matter proceeds to the second stage and is set down for a substantive hearing by the Court. Any removal order is suspended until finalisation of the hearing. If the Court decides that there was no error in the IRB decision, the applicant is automatically placed under a removal order to leave Canada within 30 days.

A person who is subject to a removal order can apply for a pre-removal risk assessment (PRRA). An officer reviews the documents relating to the applicant's case and any other evidence provided. In the case of refugee claimants, only new or different evidence that was not presented at the IRB hearing will be considered. The officer will also consider the risk to life or of cruel and unusual treatment or punishment. Some applicants are not eligible for a PRRA, including those subject to extradition; those who came from a safe third country; and those recognised as a refugee in a country to which they can return. If the PRRA officer rejects the applicant's claim, the applicant can apply for a review of the decision in the Federal Court by following the same process outlined above.

An appeal from a decision of the Federal Court to the Federal Court of Appeal can be made only if a judge of the Federal Court certifies that a serious question of general importance is involved and states that question for the Court.

Leave is required to appeal from the Federal Court of Appeal to the Supreme Court of Canada. Leave is granted only if, in the opinion of a panel of three Supreme Court Judges,

the case involves a question of public importance or raises an important issue of law (or mixed law and fact) that warrants consideration by the Court.

Another avenue is that a person can apply for permanent residence in Canada on humanitarian or compassionate grounds. This is regarded as an exceptional option that can take many years to process and does not prevent or delay a person's removal in the meantime.

New Zealand

The primary decision on a refugee recognition claim is made by a refugee and protection officer in Immigration New Zealand, which is part of the Department of Labour. A decision not to recognise a person as a refugee can be appealed to the Immigration and Protection Tribunal, which commenced in November 2010. The Tribunal is chaired by a District Court Judge, and comprises 16 other members. The Tribunal falls within the portfolio of the Ministry of Justice.

A person in detention is required to lodge an appeal within 5 days of being notified of a decision; otherwise, appeals must be lodged within 10 days of the date of deemed notification.

The Tribunal can undertake merit review of the primary decision, and uphold or reverse that decision. The Tribunal may hear a matter orally or on the papers, and may also hold a pre-hearing.

The High Court may grant leave to appeal from a decision of the Tribunal. The application for leave must be filed within 28 days of a person being notified of the Tribunal decision. The scope of review by the High Court is for error of law. An alternative avenue open to a person is to seek judicial review by the High Court of the Tribunal's decision.

United Kingdom

Claims for asylum are considered in the first instance by the United Kingdom Border Agency (UKBA), which is part of the Home Office. A decision on a claim can be fast-tracked, including on the ground that the case officer considers that a claim, if believed and taken at its highest, would not give rise to an obligation to provide protection under the Refugees Convention.

Applicants are usually detained during the processing of claims, which can include interviews, responding to requests for information, and review of decisions. Commonly this occurs in a short period, and can be as brief as a few days.

A person whose asylum claim is refused can appeal the UKBA decision to a new independent two-tier tribunal that was established in February 2010 as part of the Unified Tribunals framework created by the *Tribunals, Courts and Enforcement Act 2007.* This replaces the former Asylum and Immigration Tribunal, and also removes the High Court (the UK's third highest court) from the asylum appeals system.

The First-tier Tribunal (Immigration and Asylum Chamber) is a merit review body that is constituted by an Immigration Judge, who may be accompanied by non-legal members. The grounds of appeal are that the UKBA's decision was not in accordance with the immigration rules, was not in accordance with the law, or that a discretionary judgement permitted under the immigration rules should have been decided differently. There is also a right to appeal on the grounds of race discrimination, breach of human rights contrary to the European Convention on Human Rights or that removal would be a breach of the UK's obligations under the Refugees Convention. A person does not have a right to remain in the UK during the appeal if they can be removed to another European Union country or the Secretary of State certifies that the person's human rights or asylum claim is clearly unfounded and that they can be removed to a safe third country. In that situation, any appeal must be pursued from outside the UK.

Appeals from decisions of the First-tier Tribunal go to the Upper Tribunal (Immigration and Asylum Chamber). Leave to appeal must be granted by either the First-tier Tribunal or the Upper Tribunal. The Upper Tribunal is a superior court of record. Appeals are heard by one or more Senior or Designated Immigration Judges who are sometimes accompanied by non-legal members of the Tribunal.

The Immigration judges and non-legal members in both tiers are appointed by the Lord Chancellor and form an independent judicial body.

A Decision of the Upper Tribunal may be appealed on a point of law to the UK Court of Appeal, unless it comes within an 'excluded' category under the *Tribunals, Courts and Enforcement Act 2007* or an order of the Lord Chancellor. Leave to appeal to the Court of Appeal must be granted either by that Court or the Upper Tribunal, on the ground that the appeal would raise an important point of principle or practice, or there is some other compelling reason to hear the appeal. There is also a right under the general law to seek judicial review of any decision made in relation to migration decision making.

United States of America

The primary decision on an asylum claim is made within the United States Citizenship and Immigration Service (USCIS), by a two stage process. The decision is firstly made by an asylum officer, then reviewed for consistency with the law by a supervisory asylum officer. A person who is found ineligible and has temporary resident status in the US can apply to have the case reviewed on the merits by a specialist asylum division within USCIS. Other cases of ineligibility are referred to an immigration judge to review the asylum claim anew.

Appeals from decisions of USCIS or immigration judges lie to the Board of Immigration Appeals (BIA). The BIA can examine whether there was legal error in the decision, or a factual error but only if 'clearly erroneous' as to findings of an immigration judge. The BIA decides most appeals on the papers, but can hear oral argument. Simple appeals are considered by a single board member, while more complex matters are considered by a panel of three members. A single Board member has 90 days either to decide the case or refer it to a three-member panel. A three-member panel must render a decision within 180 days of referral. In limited circumstances the time limits can be extended.

A decision of the BIA can be appealed to the Federal Court, and from there to the Supreme Court of the United States if the case raises an important question about the Constitution or federal law. Appeals must be filed within 90 days of the decision of the lower court.

13 Response to the Terms of Reference and Recommendations

The Terms of Reference for this review broadly require me to report on options for enhancing the efficiency and minimising the duration of judicial review proceedings commenced by offshore entry persons challenging negative refugee status determinations. The Terms of Reference also identify three specific matters for comment.

I start with some general remarks about the approach that should in my view be adopted by government to further its stated objective of enhancing the efficiency and minimising the duration of judicial review proceedings. I then comment on the three specific matters in the Terms of Reference, followed by comments on other options that may require consideration.

General assessment

The underlying assumption for this inquiry is that it is important to enhance the efficiency and minimise the duration of judicial review proceedings brought by offshore entry persons. I have not found any reason to question that assumption, and all to whom I have spoken during this inquiry concur in that view.

It is inherently desirable that legal proceedings disputing a refugee status determination should be resolved as speedily and efficiently as the justice of a case admit. The applicant for review is necessarily in a situation of uncertainty about the final resolution of their asylum claim. This can have a damaging emotional impact on the applicant. Uncertainty as to the outcome can impede other decisions to be made about their future in Australia and more generally. It is probable also that an offshore entry applicant will be in detention during the proceedings; the deprivation of liberty should be shortened as soon as possible. There are also added costs for government, and possibly for applicants, as proceedings become extended and unresolved.

Two themes permeate this report. The first is that DIAC, the panel law firms, the FMC, Federal Court and High Court have all been responsive to the need to develop special arrangements for handling migration litigation. Effective measures have been implemented in recent years by courts and by government at an executive level to expedite and streamline the resolution of migration cases. These measures have contributed to reducing the average time for resolving migration cases, which has probably contributed to reducing the total number of review applications and appeals filed each year.

The second theme is that a similar response will be required to the range of new and challenging issues that may be thrown up by *Plaintiff M61.* There is a distinct possibility that individual proceedings brought by offshore entry applicants could become complex and protracted, and that the caseload could grow. A complicating factor, mentioned a number of times in this report, is that the proceedings may be initiated by offshore entry applicants who are detained in facilities that are geographically remote or distant from the capital city locations of the court registries and hearing rooms.

The most constructive response to this situation will be a continuation of present arrangements that facilitate regular consultation between DIAC, the Attorney-General's Department and the court officers responsible for court administration and liaison with government. The litigation issues and challenges that could arise following *Plaintiff M61* are different to those which currently typify migration litigation. I encountered an open mind to exploring the need for different arrangements to handle those issues. Courts have a duty to deal individually and rightfully with each matter filed in the court, but they recognise that special procedures or arrangements need to be put in place to ensure that migration cases are resolved as efficiently as possible.

Regular discussion may be needed between court administration and government on matters such as the number of applications for review or appeal that are filed, the location of those who have filed applications, the registries in which applications are filed, arrangements for documents to be filed and for communication between court registries and applicants in detention, exchange of documents between the parties and courts, arrangements for applicants to participate in proceedings, allocation of interpreters to cases, and other necessary arrangements if a court decides to hear a case by video or on a circuit basis in a facility at or near a detention centre.

By contrast with the effectiveness of those administrative measures, there is a mixed picture as to the effectiveness of legislative measures over the past twenty years to regulate and constrain migration litigation. Some measures have achieved the legislative objective and been unproblematic. Examples include the conferral of original jurisdiction in migration matters on the Federal Magistrates Court, the exercise of the appellate jurisdiction of the Federal Court by single Judges of the Court, and the imposition of extendable time limits for commencing legal proceedings.

Some other special legislative measures did not achieve their objective and had unanticipated consequences, as discussed in Section 7. One explanation is that courts dealt adversely with legislative measures which they perceived as limiting their ability to deal fully with the legal issues in migration cases, or which hampered their discretion to control proceedings. *Plaintiff M61* can be read in that context, as a decision in which the High Court made an unexpected ruling as to the application of the Migration Act and case law to offshore entry refugee status determination cases. The Court held that the legal provisions under consideration had a different operation than government expected.

There is the same risk — of unforeseen consequences — if the direct government response to *Plaintiff M61* is a new set of legislative measures that further isolates migration cases from the procedures that apply to other litigation. The better course as recommended above is for government to strive to develop a constructive working relationship with courts for the efficient resolution of offshore entry refugee status determination cases.

I turn now to comment on the three specific issues in the Terms of Reference for this review.

'the introduction of legislation to direct the Court to seek to resolve offshore entry person refugee status determination matters as expeditiously as is reasonable'

Legislative directions of that kind to courts and tribunals are not unprecedented:

- The *Commonwealth Electoral Act 1918* s 363A declares that the Court of Disputed Returns (the High Court: s 354) 'must make its decision on a petition as quickly as possible'
- The NSW *Civil Procedure Act 2005* s 56 provides that the 'overriding purpose' in civil proceedings 'is to facilitate the just, quick and cheap resolution of the real issues in the proceedings'; that a court 'must seek to give effect to the overriding purpose'; and parties have 'a duty to assist the court to further the overriding purpose'.
- The *Federal Court of Australia Act 1976* s 37M(1) provides that 'the overarching purpose of the civil practice and procedure provisions [of the Act] is to facilitate the just resolution of disputes: (a) according to law; and (b) as quickly, inexpensively and efficiently as possible'. The section further provides that the overarching purpose includes, inter alia, 'the efficient use of the judicial and administrative resources' of the Court, 'the efficient disposal of the Court's overall caseload' and 'the disposal of all proceedings in a timely manner' (s 37M(2)). The parties to a civil proceeding must act 'in a way that is consistent with the overarching purpose' (s 37N).
- The *Migration Act 1958* s 420 provides that the Refugee Review Tribunal 'is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick'
- The *Administrative Appeals Tribunal Act 1975* s 33 provides that proceedings before the Tribunal 'shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act … and a proper consideration of the matters before the Tribunal permit'.

Statutory provisions of that kind are generally construed as being a guideline or exhortation, and not imposing an enforceable duty or direct obligation upon a court or tribunal to act in a particular manner (eg, *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611). Nor does such a direction absolve a court from acting according to law, dealing properly with all legal issues and according natural justice to the parties (eg, *Collins v Repatriation Commission* (1994) 33 ALD 557). In particular, a statutory direction to courts to proceed expeditiously could not have led to a different result in cases such as *Plaintiff M61* or *SAAP*, where the Court's ruling manifestly affected the migration caseload by necessitating reconsideration by DIAC or rehearing by the tribunals of a sizeable number of earlier cases involving the same legal issue.

A statutory direction can nevertheless have an influence on the conduct of proceedings. For example, a provision such as the NSW *Civil Procedure Act 2005* s 56 has been relied on by a court to reinforce that all parties should act as model litigants, and that a failure to do so could result in an adverse costs order: *Priest v State of NSW* [2007] NSWSC 41. A court could also rely upon a statutory direction in deciding the priority for listing cases for hearing, or to support a decision by the court to proceed in a manner that avoids technicality and formality and to require the parties to assist the court to be expeditious.

It is doubtful, however, that a statutory direction to be expeditious that applied specifically to judicial review proceedings commenced by offshore entry persons would have a practical effect. No substantive guidance is given as to what measures — or, more particularly, what extra measures — a court should take to ensure expedition. The court also faces the quandary of understanding why the legislative direction applies to only one category of case (proceedings commenced by offshore entry persons). Are those cases to be resolved ahead of other migration cases, and if so why? And is the position different if there are compelling reasons to give priority to another case, for example, because the plaintiff is in detention?

The view expressed to me by all those consulted during this review is that it is the accustomed practice of courts to be watchful for cases that require expeditious resolution. Special arrangements to avoid delay in migration litigation have already been implemented by the courts. It is not readily apparent that courts could implement a different approach that would achieve greater expedition than at present. There is a risk that a statutory direction embodying the Government's concern that matters be dealt with expeditiously would be read as a slight on how matters are presently handled. The Minister's announcement that two extra Federal Magistrates will be appointed to deal with an expected increase in litigation following *Plaintiff M61* is a more tangible measure for minimising the duration of the judicial review process.

In conclusion, I do not recommend that the Government sponsor a legislative direction of this kind. The Government's concern can as well be conveyed to the courts by means other than a statutory direction. A constructive exchange between courts and executive agencies about the causes of delay in litigation and the measures that can be implemented in response is more likely to yield positive results.

'the removal in offshore entry person refugee status determination matters, of the right of appeal from the Federal Magistrates Court to the Federal Court'

It would be open to the Parliament to implement this change. Both the Federal Court and its jurisdiction are created by statute, and it is open to the Parliament to alter or take away that jurisdiction by a later statute. There are many example of this occurring, including in relation to the Federal Court's migration jurisdiction as well as its appellate jurisdiction. For example, s 24(1AA) of the Federal Court Act prevents appeals to the Court in certain matters, such as an appeal against a decision of the Court to refuse leave to institute proceedings or to provide an extension of time for doing so. In summary, there is no apparent constitutional principle or implication that limits the legislative authority of the Parliament to abolish appeals to the Federal Court in migration matters.

I do not recommend however that this course be adopted. This is based on three considerations: migration matters are currently dealt with efficiently by the Federal Court; it is foreseeable, if the Federal Court was removed from the appeal process, that more applications for leave to appeal would be filed in the High Court and take longer to resolve; and the Federal Court otherwise makes a positive contribution to the disposition of migration matters that should be retained. I shall elaborate on those three points.

The Federal Court has effective measures in place to ensure that migration appeals are dealt with promptly. As described in Section 9, matters filed in the Court are referred to a

migration listing clerk, a local migration liaison judge, and a Full Court unit that prepares a summary of the case; standard directions are issued to the parties; the appellate jurisdiction of the Court in migration matters is usually exercised by a single Judge; four appeal periods of up to one month are scheduled each year, at which most Federal Court Judges are available to handle appeals; and matters are generally listed for hearing in the next appeal period following the filing of an appeal.

Statistics given in Section 9 confirm the effectiveness of those measures. The average time for finalising appeals is close to the Federal Court's time disposition goal of three months from the date of commencement; the average length of proceedings is less than in the FMC and the High Court; and the number of appeals to the Court continues to decline each year.

It is foreseeable that removal of appeals to the Federal Court would result in an increased number of applications for special leave to appeal to the High Court. Some if not many of the matters that are currently appealed from the FMC to the Federal Court (likely to be close to 300 in 2010) could instead be the subject of a special leave application to the High Court. This could include applications for High Court review of FMC interlocutory rulings refusing an extension of time to commence proceedings or dismissing matters that did not raise an arguable case.

This could add substantially to the special leave caseload of the High Court. As noted in Section 9, each special leave application is examined by two Justices, and some applications are set down for brief oral argument. It is likely to take longer to decide an increased number of special leave applications. It may also take longer to decide individual applications, as the Justices would not have the benefit of a Federal Court decision that clarified and elucidated the legal issues in the case. It is probable also that special leave would be granted by the High Court in a higher number of cases. The Federal Court upholds a small number of appeals each year, and the possible flow-on effect of removing the Federal Court is that those matters would be identified by the High Court during the special leave process and be set down for hearing.

The High Court heard and delivered reasons in 49 appeals in 2010. A small increase in that number could add noticeably to the work of the Court and to the time taken to resolve appeals, including migration appeals. If so, this would counteract any reduction in the duration of litigation that would flow from removing the right of appeal to the Federal Court.

Another possibility, which could also prolong resolution of migration matters, is that the High Court could remit a higher number of matters to the FMC for rehearing. There could also be an increased number of applications for judicial review of migration matters in the High Court's original jurisdiction under Constitution s 75. The number of such applications is presently low, because the jurisdiction of the three courts is similar in scope and there is adequate opportunity for legal issues to be ventilated in the FMC and the Federal Court. A party aggrieved by a perceived legal error of the FMC, or whose case was dismissed at an interlocutory stage by the FMC, might take the precautionary step of commencing proceedings in the High Court's original jurisdiction, either instead of or in addition to

applying for special leave to appeal. Even if the s 75 application was futile, it would add to the overall time taken to finalise the matter.

The view expressed to me by many people consulted during this review is that Federal Court appeals add considerable value to migration decision making and review. The Federal Court is a highly respected court, constituted by Judges who have considerable experience in judicial review and migration law. The Court plays a different role to that of the FMC, which is now the trial court in migration matters, hears a larger volume of cases each year than the Federal Court, deals with cases at a stage when the issues in dispute may not be sharply defined, and as a lower tier trial court it is expected to deal with matters quickly and without unnecessary formality. The Federal Court, by contrast, hears a smaller number of cases, its appellate role is to focus on the legal issues relating to refugee law and the handling of matters by DIAC and the FMC, and the issues before the Federal Court are likely to be better defined (if only because there is an FMC decision and reasons before the Court).

Commentators (during this review and generally) point to the quality of the reasons delivered by the Federal Court and their influence on the development of migration law in particular and administrative law more generally. The removal of appeals to the Federal Court would deny the FMC, the migration tribunals, decision makers and legal advisers of the learning, wisdom and experience in the Court's reasons for decision. An unintended effect could be poorer immigration decision making, which would in turn add to the number of legal disputes and undermine the integrity of migration decision making.

A variation of the option of abolishing appeals to the Federal Court would be to impose a leave requirement on all appeals to the Federal Court from the FMC brought by offshore entry persons. It is not unusual that leave is required to appeal from one court to another (for example, Federal Court Act s 24(1A)). Such a requirement enables the appeal court to vet all appeals, to focus on important issues of law that justify its attention, and to shield other parties to a dispute from the time and expense of unwarranted and prolonged litigation. The party seeking leave retains the opportunity to challenge a disputed ruling by a trial court, but bears an initial burden of persuading the appeal court that continuation of the litigation is appropriate.

In principle there is much to be said for this option, but in practice it is doubtful that it would be effective in substantially reducing the length of migration appeal proceedings. It is likely to take a matter of weeks for a leave application to be filed in the Federal Court, served on the Minister and the Department, set down for an interlocutory hearing and then be heard and resolved by the Court. If there is little merit or substance in the leave application, it is probable that it could be disposed as quickly by the Federal Court under present arrangements. On the other hand, if the leave application does raise an arguable point the proceeding is likely to take longer if it proceeds through both an interlocutory and a substantive hearing.

It is partly for those reasons, as noted in Section 9, that the FMC makes infrequent use of the summary dismissal procedure in the Federal Magistrates Court Rules. There is also a risk

that a party denied leave to appeal to the Federal Court will choose the alternative path of commencing fresh proceedings in the original jurisdiction of the High Court.

A variation would be a leave procedure similar to that in the *High Court Rules 2004* rule 41.10, applying to unrepresented applicants (described in Section 9). Before the respondent is notified of a special leave application, the unrepresented applicant is required to file a summary of argument that is examined on the papers by two Justices, who may deny the application without requiring the respondent to file a response. This procedure would not necessarily prevent delay in the leave procedure, particularly if there is delay by an applicant in filing the written summary of argument. For that reason my view is that it would be premature to consider implementing this option prior to there being a substantial number of offshore entry person appeals from the FMC to the Federal Court that take longer to resolve than appeals are being resolved at present.

Accordingly, on balance I do not recommend that a leave procedure be introduced at this stage for appeals from the FMC to the Federal Court in offshore entry cases.

'the provision of guidance to appellants so as to contribute to the efficient operation of courts'

It is important to clarify the objective sought in providing guidance to appellants or, more particularly, to offshore entry persons. At least three possibilities need to be considered.

One objective is to augment the principle of justice that a person should have adequate access to legal advice and guidance. That principle is the more important if a person does not understand the nature of the legal issues they may encounter in making an application or commencing a proceeding. No more is expected than that the person should be better informed, and to that extent the provision of legal advice meets the objective. This may in turn contribute to the efficient operation of the legal or judicial system, but that is a secondary consideration.

DIAC already pursues this objective through the arrangements for advice and assistance provided to offshore entry asylum claimants under the IAAAS scheme, described in Section 10. It is a valuable scheme but of limited scope. The advice provided is in relation to making an asylum claim and does not extend to advice on commencing legal proceedings to challenge a negative assessment. Advice of that kind comes mainly through the pro bono, community legal assistance and legal aid schemes that are also described in Section 10. It may be that that avenue of free advice to offshore entry persons will become more important following *Plaintiff M61*, although there is an obvious logistical hurdle in the advice being provided by existing providers to persons who are in remote detention facilities.

What is needed in the interim is for DIAC or the Attorney-General's Department to prepare an information sheet to be made available to offshore entry persons at the time of being given a negative POD assessment. The information sheet should explain (in the appropriate language) the legal rights of the person to seek judicial review of the negative assessment, the procedure for doing so and the available avenues for obtaining legal assistance. One of

those avenues may, in the longer term, need to be an expanded scheme of legal aid or assistance, as discussed in Section 5.

A second objective in providing legal guidance is to discourage unmeritorious litigation, namely the commencement or continuation of migration legal proceedings that have little prospect of success. A related objective, if proceedings are commenced by an unrepresented person, is to ensure the person understands the legal issues and prospects of success and acts in a way that reflects that understanding. This objective, if achieved, contributes directly to the efficient operation of the judicial system.

A Legal Advice Scheme with that broad objective, described in Section 10, was established by the NSW Bar Council and the Law Society of WA with financial support from DIAC. Under the scheme, an unrepresented protection visa applicant can obtain free legal advice from a legal practitioner concerning the judicial review process, the preparation of a case and their prospects of success. While the scheme provides valuable support to unrepresented visa applicants, there is no hard evidence to suggest that it has discouraged people from commencing or continuing legal proceedings that are unlikely to succeed, or that it has shortened the length of proceedings in which advice was made available. Refinement or expansion of this scheme does not seem warranted in response to *Plaintiff M61.*

A third objective in providing legal guidance to applicants is to assist them in resolving legal claims. This issue was discussed in Section 5, under the heading of providing legal assistance, advice or representation to offshore entry persons. Three points were made in that discussion:

- It is premature for government to announce or implement a new scheme of legal assistance, advice or representation for offshore entry persons. The size and nature of the litigation caseload following *Plaintiff M61* is uncertain, and a new scheme could run counter to government policy of facilitating dispute resolution by means other than litigation.
- It may later be necessary for government to adopt new arrangements for providing legal assistance to offshore entry persons, or to expand one or other of the existing schemes that provide advice or assistance on migration law matters. This step may be needed to address practical difficulties that beset judicial review proceedings either planned or commenced by unrepresented offshore entry persons who are located in remote detention facilities.
- DIAC should consider adopting a provisional scheme for reimbursing all or part of the legal costs of an offshore entry person in test case litigation that raises a significant legal issue about the POD process, or judicial review of actions taken under that process.

Other legislative amendment issues

Two other legislative amendment issues were raised by those consulted for this inquiry.

First, DIAC will need to monitor whether legislative changes are required to deal with unforeseen issues that arise as a consequence of the ruling in *Plaintiff M61*. Many provisions

of the Migration Act are directed specifically to tribunal and court review of protection visa decisions concerning onshore claimants. An example was the provisions discussed in Section that confer jurisdiction on the FMC. There will be a need to monitor the application of those and other provisions to offshore entry person claims.

Another possible discontinuity is that the procedure of the RRT must conform to the code stipulated in ss 422B – 429A of the Migration Act, whereas the procedure of IPA reviewers must conform to the common law requirements of natural justice. The FMC, in reviewing the legal validity of refugee status decisions, will therefore be applying different legal principles to onshore and to offshore asylum claims. This issue will need to be monitored to evaluate whether the same code of procedure (statutory or common law) should apply to all refugee status decisions.

The other legislative reform issue raised forcefully by some people and groups consulted in this inquiry was the wisdom of the Government decision to maintain two different systems for refugee status assessment and independent review of assessments. It was noted that the former Refugee Status Determination Process – comprising refugee status assessment, independent merits review, executive guidelines and offshore assessment – was adopted with a view to restricting judicial review of decision making in that arena. That rationale, it is argued, has been undermined by the High Court's decision in *Plaintiff M61*.

The probable result is that POD assessments can be judicially reviewed by the FMC, and appealed to the Federal Court and the High Court. However, the framework for judicial review is not as certain, and judicial review of POD assessments could be more problematic than judicial review of RRT decisions. The better and fairer approach, it was argued, would be to establish a single system for all refugee status assessment, under which primary decisions would be reviewable on the merits by the RRT and RRT decisions would be judicially reviewable by the FMC. As well as providing greater legal certainty, this approach would also engage the established expertise, efficiency and respect of the RRT.

A suggested variation of this approach is that review of primary refugee status decisions should be undertaken by the Administrative Appeals Tribunal or by a new tribunal headed by a judicial officer, similar to the new tribunal arrangements in New Zealand and the United Kingdom, described in Section 11.

A single decision making scheme would avoid the outcome that has occurred in Australia that claims from within the one family are assessed under both systems. The claims of an offshore entry parent will be assessed under the POD system, but if the parent is moved to a mainland detention centre and gives birth to a child, an asylum claim by the child will be reviewable by the RRT. There is the risk that conflicting decisions concerning the same family will be made under both systems.

It was also forcefully argued that a single refugee assessment system would be the fairer approach, by conceding the same legal rights and protection to all asylum claimants, and

not differentiating on the basis of mode of arrival in Australia.[17] Offshore entry claimants are at least as deserving of the same level of legal protection, it was argued, because the history of claim determination confirms that the majority of their claims are accepted by Australia as engaging its protection obligations. Nor is there the same factual level of concern, as there is for onshore claimants, that review proceedings can be instituted with a strategic eye to prolonging Australian residence rather than raising a serious dispute about the merits or legality of an adverse decision.

That issue falls beyond the scope of this inquiry, and I offer no comment on whether separate systems should be maintained for assessment of onshore and offshore claims. It is clear from the text of the announcement on 7 January 2011 by the Minister for Immigration and Citizenship that the Australian Government has made a policy decision to maintain separate systems. It is ultimately for the Government to decide in the context of future developments whether to review that policy decision.

[17] Eg, Australian Human Rights Commission, *Immigration Detention and Offshore Processing on Christmas Island* (2009) Part 8.

Glossary

AAT	Administrative Appeals Tribunal
DIAC	Department of Immigration and Citizenship
FMC	Federal Magistrates Court
IAAAS	Immigration Advice and Application Assistance Scheme
IMA	Independent Migration Authority
IMR	independent merits review
IRT	Immigration Review Tribunal
MIRO	Migration Internal Review Office
MRT	Migration Review Tribunal
OEP	offshore entry person
POD	protection obligations determination
POE	protection obligations evaluation
RRT	Refugee Review Tribunal
RSA	refugee status assessment
RSD	refugee status determination

Legislation

ADJR	*Administrative Decisions (Judicial Review) Act 1977*
Federal Court Act	*Federal Court of Australia Act 1976*
Federal Magistrates Act	*Federal Magistrates Act 1999*
Judiciary Act	*Judiciary Act 1903*
Migration Act	*Migration Act 1958*
Refugees Convention	1951 Convention relating to the Status of Refugees and the 1967 Protocol to that Convention