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Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Bill 2001

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Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Bill 2001

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Contents

Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Bill 2001

Date Introduced: 5 April 2001

House: House of Representatives

Portfolio: Immigration and Multicultural Affairs

Commencement: On a date to fixed by Proclamation or 6 months and a day after it receives Royal Assent. However, the measures in Schedules 3 and 4 have a contingent commencement which is discussed in the body of this Digest.

Purpose

To

- amend the *Migration Act 1958* and the *Australian Citizenship Act 1948* to facilitate some forms of electronic communication and computer-based decision making, and
- amend the *Migration Act 1958* to clarify and expand provisions relating to the giving and receiving of documents by the Migration Review and Refugee Review Tribunals.

Background

Much of the relevant background to this Bill is contained in the Main Provisions section of this Digest. The following is a brief overview of the electronic transactions context.

Electronic Communications

Since 1998, at least, the Commonwealth Government has moved toward a national vision which involved 'providing as many affordable, equitable and accessible government information services as is practical online' and a commitment to 'delivering all appropriate services online by 2001'. It was thought that use of online technologies would encourage others 'to do their business with the government online', 'bring efficiencies to the

management of government services' and 'provide an opportunity for restructuring of government service delivery, by moving to a seamless, customer-focused structure'.[1]

One of the resulting measures was the *Electronic Transactions Act 1999*. Broadly, the *Electronic Transactions Act 1999* (ET Act) seeks to remove existing legal impediments to the use of electronic communications in the public and private sectors.[2] It is part of a uniform legislative scheme among the Commonwealth and the States and Territories.[3]

The ET Act aims to remove impediments based on statutory requirements for writing, signing and originals of documents. It provides a general framework for the giving and receiving of electronic forms of written communications. Essentially, any requirement to give information in writing is met if the information is given electronically provided:

- it was reasonable to expect that the information would be readily accessible,
- the information meets technological requirements for communication and verification (for information provided to Commonwealth entities), and
- the recipient consents to the information being given electronically (for information provided to non-Commonwealth entities).[4]

Similarly, any requirement under a Commonwealth law to produce documents is met if the document is produced electronically, provided:

- it was reasonable to expect that the information would be readily accessible, and
- the method of generating the document assured the integrity of its information.[5]

It is important to note that the ET Act is not intended to override other Acts which specify the way electronic communications are to be made.[6] Moreover, it is important to note that the permission to produce paper documents in electronic form does not apply to a wide range of initiating documents under the *Migration Act 1958* or the *Australian Citizenship Act 1948*.[7]

Computer-Based Decision Making

At least one other piece of Commonwealth legislation has sought to establish a framework for computer-based decision making. The *Family and Community Services and Veterans' Affairs Legislation Amendment (Debt Recovery) Act 2000* introduced into the *Social Security Act 1991* the following provision:

> **6A Secretary may arrange for use of computer programs to make decisions**
>
> (1) The Secretary may arrange for the use, under the Secretary's control, of computer programs for any purposes for which the Secretary may make decisions under the social security law.

(2) A decision made by the operation of a computer program under an arrangement made under subsection (1) is taken to be a decision made by the Secretary.

Main Provisions

Schedule 1 – Electronic Communications

Schedule 1 amends both the *Australian Citizenship Act 1948* and the *Migration Act 1958* to facilitate electronic communications in the ordinary administration of the Acts.

Items 1–15 amend the *Australian Citizenship Act 1948* to permit decisions, notices and orders regarding citizenship to be communicated to applicants by an 'electronic communication', which is defined in accordance with the *Electronic Transactions Act 1999*.

Items 16–20 amend the *Migration Act 1958* to permit notices to be given electronically by visa applicants regarding changes in their circumstances. They also seek to resolve possible uncertainty in this context regarding the place where applications are made.

Generally, a visa applicant must notify the Department of Immigration and Multicultural Affairs (DIMA) of changes in their circumstances. The notification rules apply differently to applicants depending upon where the visa application is made. If a visa application is made inside Australia the applicant must notify DIMA of any change in circumstances until the visa is granted. If a visa application is made outside Australia, the applicant must notify DIMA of any change in circumstance until s/he is immigration cleared. This allows DIMA to consider changes *after* visas have been granted *until* the person is immigration cleared. The obligations to notify apply notwithstanding that a visa has been granted.

Items 17 and **18** seek to resolve uncertainty that may arise as to the question of where an application is made. It may be difficult in practice to determine where electronic applications are 'made' because of the possibility that the application may be made on a form accessible from and within the DIMA domain. An e-mail application may traverse various servers and routes and is essentially unseen before reaching the DIMA domain. Some uncertainty may also arise as to the question of when an application is made.

These items propose to resolve this uncertainty by relying not on where the visa application is made but on where the applicant is when the visa is granted.

Schedule 2 – Computer-Based Decision Making

Australian Citizenship Act 1948

The intention is that a computer program may be used to perform the functions that currently are or may be performed by the Minister under the *Australian Citizenship Act 1948* and regulations. **Proposed subsection 36A(1)** provides that a computer program may be used to make decisions, exercise powers, comply with obligations or do other any related things that currently may (or must) be made, exercised, complied with or done by the Minister. **Proposed subsection 36A(2)** provides that any of these functions performed by the operation of a computer program are deemed to have been performed by the Minister.

Proposed section 36B deals with the situation where the computer program malfunctions. A program 'functions correctly' if it produces outcomes which comply with the legislation and would have been valid if they had been 'made', or had been produced, by the Minister (**proposed subsection 46B(2)**). An authorised person may issue certificates to the effect that the program is operating correctly with respect to specified periods and outcomes. In citizenship proceedings these certificates provide prima facie evidence of these matters (**proposed subsection 46B(1)**). Where a certificate states that the program has malfunctioned, the Minister may remake a decision in accordance with the legislation provided the decision is more favourable to the applicant (**proposed section 36B**).

Proposed subsection 36B(2) provides that the Minister does not have a duty to consider whether to exercise the power to remake the decision in **proposed subsection 36B(1)**. This construction is predominantly used in the migration context to prevent the Minister from being compelled to consider whether to exercise a wide remedial discretion.[8] If the outcome does not actually comply with the legislation or is invalid, a judicial review court may compel the Minister to remake the decision in accordance with the law. **Proposed subsection 36B(2)** is not intended to prevent this but to 'ensure that the Minister can correct adverse decisions without the need for applicants to seek external review'.[9]

Proposed subsection 36B(3) provides that the Minister may exercise the power to remake the decision irrespective of any law of the Commonwealth or rule of common law. This is intended to displace the '*functus officio* principle',[10] which would ordinarily prevent a decision maker without express authority from altering a final and operative decision.[11] The '*functus officio* principle' is applicable because the decisions made by computer programs are deemed to have been made by the Minister. As such, unless there is a power to reconsider the decision, or it is quashed by a court, it cannot be remade by the Minister.

Migration Act 1958

The proposed amendments to the *Migration Act 1958* operate similarly to those described above. But, programs may only be used in relation to a subset of the Minister's functions under the Act. This subset, the 'designated migration law', includes the key machinery provisions relating to visas for non-citizens (other than bridging visas)[12] and any other

provisions of the Act or regulations that the Minister determines (**proposed subsection 495A(3)**). A determination is a disallowable instrument (**proposed subsection 495A(4)**).

Programs may not be used in relation to the wide remedial discretion in section 48B[13] (**proposed paragraph 495A(3)(a)**).[14] This discretion must be exercised personally by the Minister. However, it would appear that programs may be used in relation to the wide remedial discretion in section 37A (temporary safe haven visas).[15] Moreover, it is at least *possible* that programs could be used in relation to the remaining discretions. The Minister is permitted to determine 'any provision' of the Act or regulations to be part of the 'designated migration law' (**proposed paragraph 495A(3)(b)**). Thus, in theory, the Minister could determine that these provisions form part of the 'designated migration law', making them subject to the application of programs. In reality, however, this is unlikely. First, the determination might be invalid for being beyond the scope, purpose and object of the Act, in light of the express prohibition in relation to section 48B. Second, it may not be possible or advisable to include discretionary functions within a computer program.

Schedule 3 – Giving and Receiving Documents (Migration)

The commencement of **Schedule 3** is contingent upon the commencement of Schedule 14 of the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000. If Schedule 14 commences before this Bill, then **Schedule 3** does not commence.

Overview

Schedule 3 seeks to amend Part 5 of the *Migration Act 1958*. Part 5 deals with review of migration decisions and forms a partial code for the purposes of merits review by the Migration Review Tribunal (MRT) and the Administrative Appeals Tribunal (AAT). Schedule 3 reproduces a number of amendments proposed in Schedule 14 of the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000. This Bill is associated with the Administrative Review Tribunal Bill 2000 which seeks to establish a single Administrative Review Tribunal (ART) for merits review.

The duplication is made on the assumption that the present Bill may pass before the Administrative Review Tribunal Bills are passed. While the Government envisaged that the ART would commence on 1 July 2001. The Bills have been blocked in the Senate, prompting the Attorney-General to observe in February 2001 that 'the likelihood of the ART being established [in 2001] is rapidly receding'.[16] The Consequential and Transitional Provisions Bill would permit commencement as late as mid 2002.[17]

However, the commencement provisions in the present Bill serve to ensure that if the assumption is proved wrong, the amendments in **Schedule 3** will not take effect.

Proposed Amendments

Among other things, Schedule 14 of the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000 aims to ensure that provisions of the *Migration Act 1958* which relate to review of migration decisions will constitute a self-contained code for the purposes of review by the (proposed) ART. One aspect of the proposed code is a movement away from oral hearings to 'review on the papers':

> One of the most significant changes in the migration area is the move away from oral hearings. Currently, the [Migration Review Tribunal] or [Refugee Review Tribunal] may conduct a review on the papers only where the outcome of the review will be a decision in the applicant's favour or the applicant consents to a review being conducted without a hearing. The [Administrative Appeals Tribunal], which currently reviews applications relating to business visas, criminal deportation and character decisions, has no power to proceed without a hearing. …
>
> Under the Bill, the [Immigration and Refugee Division of the (proposed) Administrative Review Tribunal] has a positive obligation to consider conducting a review on the papers not only in cases where the outcome will be favourable to the applicant, but in every case, even if the decision would be adverse to the applicant.[18]

Thus, as the Government indicated, '[t]he review procedure in the new [part of the *Migration Act 1958*] is based on review on the papers and discretionary hearings'.[19]

Consistent with the movement to 'review on the papers' in Schedule 14 is a clarification of how particular documents are to be given by the Tribunal and (deemed to be) received by the Secretary or applicant. It is in this respect that **Schedule 3** duplicates Schedule 14.

Documents Covered

Schedule 3, items 1–9 set out the particular documents to be covered by the clarified procedures. They are documents issued by the Tribunal (MRT) where it:

- seeks additional information from applicants and others (**item 4**),
- gives (credible, relevant and significant)[20] adverse information to applicants (**item 5**)
- gives notice to applicants of invitations to appear before the MRT (**item 6**)
- gives notice of decision and invites parties to the 4handing down of the decision (**item 7**)
- gives a copy of the decision to the Secretary (**items 8** and **9**)

The range of circumstances covered are largely the same as those covered in the current *Migration Act 1958* except in relation to immigration detainees. The range is also similar to Schedule 14 except in relation to invitations to attend the handing down of a decision. (The requirement would not be applicable given the movement to review on the papers.)

Methods for Giving and Receiving Tribunal Documents

Schedule 3, item 11 sets out the rules regarding the giving and receiving of documents.

Currently, these matters are contained in section 379A of the *Migration Act 1958* and regulation 5.03 of the Migration Regulations 1994.[21] The rules have different origins and history. The rules regarding the receiving of documents were introduced in 1989.[22] The rules regarding the giving of documents were introduced more recently in 1998.[23]

Giving Documents

Documents given to applicants (and others) must comply with **proposed section 379A**. Documents given to the Secretary must comply with **proposed section 379B**. Essentially, the methods are the same as in the current *Migration Act 1958* except that they are more explicit in relation to who may give documents and how they may be given.

Broadly, the current methods permit documents to be given by hand to the applicant or to a person at their residential address or to be sent physically, electronically or otherwise to the applicant at their last residential or service address. If documents are sent, the MRT must keep a 'receipt or other evidence indicating the date of dispatch'. Either way, it is sufficient if the document is a 'facsimile, or a certified copy' of the original.

The proposed amendments will permit documents to be:

- given by hand, posted[24] or transmitted by fax, e-mail or other electronic means
- handed to persons at the *business* address of the applicant
- posted or transmitted without a 'receipt or other evidence indicating the date of dispatch', although posted documents must be sent within 3 days of the document date, and
- given, posted or transmitted as *uncertified copies* (**proposed section 379E**).

As above, the proposed methods for giving and receiving documents are similar to those in Schedule 14 except that the class of persons authorised to give documents in **Schedule 3** is defined more explicitly[25] and potentially more widely,[26] than in Schedule 14.

Receiving Documents

Documents given to applicants (and others) are subject to **proposed section 379C**. Documents given to the Secretary are subject to **proposed section 379D**. These provisions establish identical rules for when particular documents are deemed to have been received:

- documents that are given by hand to the party or to a person at their residential or business address are deemed to have been received by the party immediately
- documents that are posted and delivered within Australia, within 7 days, and[27]

- documents that are sent by fax, e-mail or other electronic means, at the end of the day.

Giving Documents to Immigration Detainees

Currently, the provisions regarding the giving of documents do not apply to immigration detainees who have been rejected for a bridging visa.[28] Under the regulations, documents may be served on immigration detainees by being handed to them personally or to another person authorised by them. As in Schedule 14, **items 4**, **5** and **6** will require that documents given to immigration detainees in accordance with a method prescribed in the regulations. However, and by contrast with Schedule 14, **items 4**, **5** and **6** will permit the regulations to prescribe the methods that are described in **proposed section 379C**.

In effect, these amendments serve to clarify the extent to which the regulations may deal with giving and receiving of documents in relation to immigration detainees and permit the Government to reverse the current exclusion of immigration detainees from the current statutory regime dealing with the giving and receiving of documents.

Special Issues for Giving Party Documents

Proposed section 379F deals with the giving of documents to the MRT in the context of MRT-reviewable decisions, such as decisions regarding bridging visas.[29] Essentially documents given to the MRT by the Secretary, applicants, etc. may be:

- given to the Registrar, Deputy Registrar or officer of the MRT
- given by a method set out in MRT directions, or
- given by a method prescribed in regulations.

As with the regulations, the directions may permit copies to be given to the MRT.

Refugee Review Tribunal

Schedule 3, items 12–20 essentially duplicate the amendments proposed above in the context of the Refugee Review Tribunal. It should be noted that one of the key changes proposed in the Administrative Review Tribunal Bills is the replacement of the MRT, RRT and AAT with a single ART. Hence, the duplication is not present in Schedule 14.

Schedule 4 – Technical Amendments

Schedule 4 according to the Second Reading Speech 'corrects some minor technical errors and misdescribed amendments in the *Migration Act 1958*'.[30]

Concluding Comments

The following comments address two issues:

- the context and potential disadvantages surrounding electronic communications, and
- the potential limitations of computer-based decision making.

Electronic Communications

As indicated in the Background section of this Digest, the measures proposed in the Bill operate in the context of a wider movement towards online government services. In particular, the measures associated with 'electronic transactions' might be assumed to operate in the framework already developed by the *Electronic Transactions Act 1999* (ET Act). Both the Bill and the ET Act 'speak to each other' in some form or other. However, there may be some uncertainty, and possibly some disadvantages, regarding the dialogue.

Generally, the ET Act is drafted so that its facilitative provisions will not apply to frustrate the operation of the *Migration Act 1958*. Section 11 of the ET Act permits a person to produce paper documents in electronic form provided the method of generating the electronic form of the document was reliable and accessible. However, this provision does not apply to documents that must or may be produced under the *Migration Act 1958* in relation to the application for or grant of visas.[31] Nor does it apply in relation to the 'application of a migration law to a non-citizen who … does not hold, or is reasonably suspected of not holding, a visa, or … seeks to enter Australia unlawfully, or is reasonably suspected of seeking to enter Australia unlawfully'.[32] It is clear that non-citizens who apply for visas will not be able to produce documents in electronic form for the purposes of their visa application. They must produce the originals. However, it is unclear whether and to what extent the very general prohibition on the production of electronic documents in relation to the 'application of a migration law to [an unlawful] non-citizen' may conflict with the provisions proposed in the current Bill or left to be dealt with in regulations.

Broadly, all persons who are unlawful non-citizens will become immigration detainees. Therefore, there is a direct relationship between the prohibition discussed above and the provisions in this Bill. It is therefore significant to recall the treatment of immigration detainees in relation to the rules regarding the giving and receiving of documents. As indicated above, the Bill clarifies the extent to which the regulations *may* deal with immigration detainees and permits the standard rules to apply. However, no details are given and this uncertainty, combined with the uncertain operation of the ET Act, raises a question as to how the rules for the giving and receiving of documents, and electronic communications in particular, will apply to or affect immigration detainees.

It is worth noting that the rules in the Bill regarding the receipt of electronic documents apply despite the default deeming rule in the ET Act. Broadly, the default rule is that communications are not deemed to have been received until the communication enters the

'information system' designated by the addressee.[33] As indicated above, under **proposed subsections 379C(6)** and **379D(5)** documents that are transmitted by fax, e-mail or other electronic means are deemed to have been received at the end of the day on which the document is 'transmitted'. While the definitions of 'information system' and 'transmitted' seem to be fairly malleable, it is at least possible that the rules operate differently. The first may relate to the time at which a message reaches the addressee's e-mail server. The second may relate to the time at which the message leaves the addressor's e-mail server. This may disadvantage applicants who may not have the frequency of access or quality of service which may be assumed for other persons including the MRT and the Secretary.

Computer-Based Decision Making

The Extent of Discretion

Arguably, only limited use may practicably be made of computer programs in decision making. If there is any room for subjective consideration or discretion in relation to the functions performed by the program, then it may be impossible or inadvisable to incorporate within a program the capacity to determine which issues are relevant or to weigh and balance competing considerations. Nor may it be possible to program the necessary flexibility in relation to the requirements of natural justice appropriate to the circumstances of a given case. However, if there is no room for subjective consideration or discretion and the functions performed by the program are purely objective, then its use may not invite problems. It is thus presumed that programs will only be used to perform purely objective functions and that decisions, powers and obligations which involve subjective judgement or discretion will remain the responsibility of the Minister or his or her (human) delegate(s).

The Certificate

Four matters are worth noting in relation to the certificate. First, it may be issued by *any* person, whether a departmental officer or otherwise, provided they, or a class of persons to which they belong, are authorised in writing by the Minister. Second, the matters which determine whether a computer program is functioning correctly, that is whether the program produces outcomes which are consistent with legislation and are otherwise valid, appear to be questions of law. Third, the matters which determine correctness focus on outcomes rather than processes and relate to the general operation of the program rather than its operation in a particular case. Fourth, the *prima facie* evidential status given to the certificate has the effect of placing the onus of proof on the individual so that '[a] person who disagrees with the matters stated in a certificate bears the onus of proving otherwise'.[34]

In one sense, there may be no issue with the evidential status of the certificate, if it does not affect the onus of proof in criminal proceedings under the relevant Act. In administrative law, the onus of proof is generally on the applicant. Thus, administrative acts are presumed to be valid and the onus is on the party challenging them.[35] However,

courts have been prepared to reverse this onus where executive discretion interferes with liberty or property rights.[36] By contrast, in criminal law, the onus of proof is generally on the prosecution.[37] Some statutory provisions reverse the onus of proof on the basis that the relevant matters are not within the capacity of the prosecution to prove or disprove. Traditionally, such provisions are viewed with concern by parliamentary committees.[38] Thus, ordinarily, provided the matters addressed by the certificate are solely administrative in nature, the certificate does no more than restate the presumption in administrative law.

In another sense, there may be an issue related to the capacity of individuals to disprove that the program is functioning correctly. Arguably, the certificate will contain two assertions (a) that the computer produced specified outcomes during a specified time or period and (b) that those outcomes were consistent with the legislation and were valid for the purposes of administrative law. While an individual may be able to put into question the fact that a program produces a specified outcome, the department alone would seem to have the capacity to prove this matter. For example, the issue may rest on some undetected flaw or defect in programming which is not within the individual's knowledge. Moreover, while an individual may be able to put into question the fact that an outcome is consistent with the legislation, he or she may not be able to prove that it is inconsistent with the legislation or legally invalid without knowing the exact manner and context in which the program operated. For example, the issue may rest on the extent to which the program includes or rejects considerations on the basis of relevance, the weight it gives to various considerations, or the extent to which it complies with natural justice requirements, etc.

In a specific sense, there may be an issue related to the capacity of individuals to disprove that the program was functioning correctly in relation to their particular case. While it may be accepted that a program has operated correctly during a specified time or period in relation to general circumstances, it may be possible that it has not operated correctly in relation to a particular circumstance because of a particular hardware or software fault.

Endnotes

1 Commonwealth of Australia, *A Strategic Framework for The Information Economy: Identifying priorities for action*, December 1998, Section 2.10—Implement A World Class Model For Delivery Of All Appropriate Government Services Online.

2 For more information, see Mark Tapley, 'Electronic Transactions Bill 1999' *Bills Digest No. 64 1999-2000* at http://www.aph.gov.au/library/pubs/bd/1999-2000/2000BD064.htm [31/05/01].

3 While some States and Territories already have legislation dealing with electronic transactions, the Standing Committee of Attorneys-General has endorsed a uniform Electronic Transactions Bill 2000 based on the *Electronic Transactions Act 1999*: The Hon. Daryl Williams AM QC MP, 'Agreement on a Uniform Approach to Electronic Transactions Laws',

Press Release, 3 April 2000 at http://law.gov.au/aghome/agnews/2000newsag/725_00.htm [10/4/00].

4 *Electronic Transactions Act* 1999, Section 9.

5 Section 11.

6 Subsection 9(3).

7 Schedule 1.

8 Extension of period for temporary safe haven visas (*Migration Act 1958*, s 37A(6)); relief from bar on further application for protection visas (s 48B(6)); determinations relating to eligibility for bridging visas (s 72(7)); relief from bar on visa applications made by persons covered by safe third country agreements (s 91F(6)); relief from bar on alternative visa applications by safe have visa holders (s 91L(6)); relief from bar on visa applications by persons who may be protected by safe third countries (s 91Q(7)); relief from forfeiture of thing condemned after being seized at the border (s 261K(2)); substitution of more favourable decision for MRT decision (s 351(7)), AAT decision (ss 391(7) & 454(7)), or RRT decision (s 416(7)); substitution of less favourable decision regarding visas (s 501A(6)).

9 *Explanatory Memorandum*, p. 10.

10 *Explanatory Memorandum*, p. 12.

11 Where a decision maker makes a final and operative decision and there are no other duties or powers that may be performed or exercised, s/he is said to be *functus officio*. The classic case is in relation to writs of prohibition. It is used as a 'defence' to such a writ because the writ may only lie against a body which actually has some outstanding duties or powers.

12 Subdivisions A, AA, AB and AC of Division 3 of Part 2 of the *Migration Act 1958*.

13 Subsection 48B(6) provides a relief from a statutory bar on further application for protection visas.

14 This discretion relates to relief from a statutory bar on further application for protection visas.

15 This is the only other wide remedial discretion included in Subdivisions A, AA, AB and AC of Division 3 of Part 2 which describes the scope of the 'designated migration law).

16 The Hon. Daryl Williams AM QC MP, 'Labor and Democrats Undermine Tribunal Reform', *Media Release*, 27 February 2001.

17 ibid.

18 Katrine Del Villar, Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000, *Bills Digest No. 80 2000–01* at http://www.aph.gov.au/library/pubs/bd/2000-01/01BD080.pdf [30/05/01].

19 Explanatory Memorandum to the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000, p 186.

20 The requirement in subsection 259A(1), which is the subject of **item 5**, essentially states one aspect of the obligation to accord procedural fairness to applicants. Procedural fairness is described as 'a common law duty to act fairly... in the making of administrative decisions

which affect rights, interests and legitimate expectations': *Kioa v West* (1985) 159 CLR 550, per Mason J, at 584. As a principle of fairness, the content of the obligation must be flexible to take account of what is fair in the circumstances (*Mobil Oil Australia Pty Ltd v. Federal Commissioner of Taxation* (1963) 113 CLR 475, per Kitto J at 504; *Salemi v. Minister for Immigration and Ethnic Affairs* (1977) 14 ALR 1 at 19; *Kioa v. West* (1985) 159 CLR 550, Mason J, at 585; *Haoucher v. Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, per Deane J, at 652) but it often obliges the decision maker to provide a hearing (*F.A.I. Insurances Ltd v Winneke* (1982-83) 151 CLR 342, per Mason J, at 363) and an opportunity to deal with adverse information that is 'credible, relevant and significant to the decision to be made': *Kioa v. West (Minister for Immigration and Ethnic Affairs)* (1985) 159 CLR 550 per Brennan J, at 629; See *Cooper v. Wandsworth Board of Works* (1863) 143 ER 414; *Commissioner of Police v. Tanos* (1958) 98 CLR 383, per Dixon CJ and Webb J, at 395; *Twist v. Randwick Municipal Council* (1976) 136 CLR 106.

21 Paragraph 504(1)(e) of the Act permits regulations to made governing the giving, lodgement and service of documents to or on the Minister, Secretary and other persons. These regulations may extend to rules regarding when documents are deemed to have been received (subsection 504(3)). These rules apply notwithstanding the *Evidence Act 1995* (subsection 504(3A)).

22 *Migration Legislation Amendment Act 1989*, No. 59 of 1989, section 33 which introduced the present subsection 504(3).

23 *Migration Legislation Amendment Act (No. 1) 1998*, No. 113 of 1998, section 37 which introduced section 379A.

24 That is, by 'prepaid post or other prepaid means': **proposed subsections 379A(4)** and **379B(3)**.

25 The amendments in Schedule 14 refer to 'a member, staff or a consultant' whereas the amendments in Schedule 3 refer to 'a member, the Registrar, a Deputy Registrar or another officer of the Tribunal, or a person authorised in writing by the Registrar'.

26 In theory, a 'person authorised in writing by the Registrar' need not be 'staff' or a 'consultant' but could be any other person capable of acting as the Tribunal's agent.

27 Documents that are given and/or received outside Australia are deemed to have been received in 21 days.

28 *Migration Act 1958*, sections 31, 72 and 73; Migration Regulations 1994, regulation 2.20. Bridging Visas are available to 'eligible non-citizens' which, in the present context includes:

- minors where release would be in the best interests of the child and parents
- spouses and family members of Australian citizens or permanent residents
- elderly, that is persons aged 75 years and over
- persons with special needs based on health or previous experience of torture or trauma

The Minister may also make a personal determination in relation to an individual where:

- the person has made a valid application for a protection visa

- the person has been in detention for over 6 months since the application
- the Minister has not yet made a primary decision
- the Minister considers that release would be in the public interest.

29 Most of the decisions made under the *Migration Act 1958* are MRT-reviewable decisions, a significant exception, for present purposes being in relation to RRT-reviewable decisions. For example, a decision to refuse a protection visa is a RRT-reviewable decision (section 411(1)(c)) whereas a decision to refuse a bridging visa to an immigration detainee is a MRT-reviewable decision (subsection 338(4)).

30 The Hon. Philip Ruddock, MP, Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Bill 2001, Second Reading Speech, House of Representatives, *Debates*, 5 April 2001, p. 26528.

31 *Electronic Transactions Act 1999*, Schedule 1, item 1(a).

32 Schedule 1, item 1(b)

33 Section 14. An 'information system' is a 'system for generating, sending, receiving, storing or otherwise processing electronic communications': section 5. It would include 'all or part of a communications network, such as a system operated by a Commonwealth Department': Explanatory Memorandum to the Electronic Transactions Bill 1999, p 17.

34 *Explanatory Memorandum*, p. 12.

35 *F Hoffmann–La Roche & Co Attorney-General v Secretary of State for Trade and Industry* [1975] AC 295; *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 1)* (1991) 103 ALR 661.

36 *R v Secretary of State for the Home Department; Ex parte Khawaja* [1984] AC 74; *Challenge Plastics Pty Ltd v Collector of Customs* (1994) 126 ALR 731.

37 *Woolmington v DPP* [1935] AC 462.

38 Undue Trespass on Personal Rights and Liberties - Standing Order 24 (1)(a)(i) – guidance in Scrutiny of Bills Committee, *The Work of the Committee during the 37th Parliament: May 1993 - March 1996*, Chapter 2 at http://www.aph.gov.au/senate/committee/scrutiny/work37/Chapter2.htm [20/04/01].