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Jurisdiction of the Federal Magistrates Service
Legislation Amendment Bill 2001

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

Bills Digest
No. 49 2001-02

Jurisdiction of the Federal Magistrates Service Legislation
Amendment Bill 2001

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Law and Bills Digest Group
13 September 2001

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Jurisdiction of the Federal Magistrates Service Legislation Amendment Bill 2001

Date Introduced: 30 August 2001

House: House of Representatives

Portfolio: Attorney-General

Commencement: On Royal Assent

Purpose

To confer jurisdiction in migration matters on the Federal Magistrates Court (FMC).¹

Background

The Federal Magistrates Court

General

The FMC is the first lower level federal court in Australia.² It was established by the *Federal Magistrates Act 1999*. Its jurisdiction is conferred and described by the *Federal Magistrates (Consequential Amendments) Act 1999*.³ When introducing the Federal Magistrates Bill 1999, the Attorney-General remarked:

The Federal Magistrates Service is intended to provide a quicker, cheaper option for litigants and to ease the workload of both the Federal Court and the Family Court. When fully established, it will free up the Federal and Family Courts to focus on the more complex matters that require the attention of a superior court judge.

The FMC is a Chapter III court.⁴ Federal magistrates are appointed by the Governor-General and remain in office until the age of 70 years.⁵ Like other Chapter III judges⁶ they cannot be removed except by an address of both Houses of Parliament on the grounds of proved misbehaviour or incapacity.⁷ While the Court Act provides for the appointment of part-time magistrates, all current federal magistrates are full-time office holders.⁸

The Chief Federal Magistrate was appointed in February 2000 and the first federal magistrates were appointed in June 2000. The first sittings of the FMC were on 3 July 2000 in Adelaide, Melbourne, Newcastle, Brisbane, Townsville, and Parramatta. The

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Court now also sits in Canberra, Launceston and Sydney with regular circuit sitting to a number of metropolitan and regional centres including Darwin and Dandenong.⁹ There are now six federal magistrates in NSW and the ACT, four in Victoria, three in Queensland, one in Tasmania and one in South Australia.¹⁰ To date, the Court's work has been mainly in family law and bankruptcy.¹¹

The Attorney-General has praised the FMC for providing 'cheaper'¹², simpler and faster court services ... in its first year of operation'.¹³ However, some concerns have been expressed about the adequacy of the Court's funding. Commenting on the Budget in May 2001, the Law Council of Australia remarked:

The Federal Magistrates Service has received a minimal funding increase. While the Government says the Service is aimed at providing simpler, cheaper and quicker justice there are already reports of delays in hearing matters in Canberra and Newcastle. Since its establishment last year, the Law Council has been concerned that the funding for this new court would not be adequate to meet the demand for its services and its stated aims.¹⁴

In July 2001, the Attorney-General reported that in the first year of the FMC's operations, more than 4,500 family law matters (other than divorces) and 2,000 non-family law applications had been filed with the FMC.¹⁵ A table of State-by-State filings for the FMC is attached to this Digest.

Questions relating to funding and resources are likely to be raised in the context of granting an additional jurisdiction—in migration matters—to the FMC. When the Bill was introduced into the Parliament, the Attorney-General said:

I expect that the conferral of migration jurisdiction on the Service will lead to an increase in work for the Service. The Government proposes to appoint additional magistrates to the Federal Magistrates Service so that it will be able to manage the additional workload. The number of extra magistrates required is still to be determined.

The Attorney-General's Department will advertise this weekend for expressions of interest for Federal Magistrates to be based in Sydney or Melbourne. The new Federal Magistrates will hear matters in all areas of the Service's jurisdiction, including family law and the proposed new migration jurisdiction.¹⁶

Jurisdiction

The FMC does not have any jurisdiction that is solely its own. Instead, it has concurrent jurisdiction with the Federal Court of Australia and the Family Court of Australia, although in some areas its jurisdiction is more limited than that of the two other courts.

The FMC is a statutory court and thus exercises the jurisdiction conferred on it by legislation. The relevant legislation gives the FMC jurisdiction in certain areas—for example, administrative law, bankruptcy, family law (including child support), human

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rights and trade practices—but also places restrictions on the court in certain of those areas, explicitly excludes some matters from its purview and makes the Federal Court a gatekeeper in respect of other matters.

Thus, in the area of family law, the FMC can hear applications for divorce, spousal maintenance applications, applications for parenting orders; it can make enforcement, location and recovery orders and determine parentage. It can deal with child support matters. However, it can only deal with property disputes where the value of the property is less than \$300 000 or the parties agree.

Further, the FMC has a restricted administrative law jurisdiction. The FMC has jurisdiction to hear appeals from decisions of the Administrative Appeals Tribunal (AAT) but only where the appeal is commenced in the Federal Court and transferred by that Court to the FMC. Additionally, there are restrictions on the appeals that can be transferred. For instance, an appeal from a decision by an AAT presidential member cannot be transferred to the FMC. Nor can appeals from AAT decisions relating to administrative decisions under legislation in the Immigration and Multicultural Affairs portfolio.¹⁷

The FMC's jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act) is not dependent on matters being transferred to it by the Federal Court. However, it cannot review administrative decisions made under the *Australian Citizenship Act 1948*, the *Immigration (Guardianship of Children) Act 1946*, the *Migration Act 1958* or under regulations made under any of those Acts.¹⁸

The Federal Magistrates Act, the *Federal Court Act of Australia Act 1976* and the *Family Law Act 1975* also contain general provisions covering the transfer of matters between the courts. Among other things, these provisions are designed to ensure that more complex matters are dealt with by the appropriate superior court rather than by the FMC. The Federal Magistrates Act enables the FMC to transfer a matter to the Federal or Family Courts on its own motion or on the application of a party. In deciding whether to transfer proceedings to the Federal or Family Courts, the FMC must consider a number of matters including whether proceedings in an associated matter are pending in another court, whether the FMC has sufficient resources to hear and determine the matter, the interests of the administration of justice, and factors set out in the Federal Magistrates Rules.¹⁹ These factors include whether the proceeding is likely to involve questions of general importance such that it would be desirable for the matter to be heard by the Federal or Family Courts.²⁰ The FMC website states that while there is no strict indicator of complexity, a general guide is that less complex matters will require less than 2 days court hearing time.²¹

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Review of migration decisions

Administrative law is designed to ensure that Government decisions are made lawfully and that the rights of people affected by those decisions are protected.

In some circumstances, it is possible to obtain a review of migration decisions made by the Department of Immigration and Multicultural Affairs. Two types of review may be available. Merits review involves an administrative tribunal such as the Migration Review Tribunal (MRT), the Refugee Review Tribunal (RRT) or the Administrative Appeals Tribunal (AAT) deciding whether a decision being challenged is the ‘correct or preferable’ one after a review of the facts.²² A merits review tribunal can ordinarily substitute a new decision for the one being challenged. Judicial review involves consideration of whether the law was correctly applied and may be sought if merits review is unavailable or an applicant wishes to challenge a merits review decision. Judicial review does not ordinarily involve the court substituting a new decision. However, it may quash the decision or send it back to the decision-maker for further consideration.

Relevant Commonwealth merits review bodies—the MRT, RRT and AAT—have different responsibilities in migration law. For example, the MRT may be able to review a decision to cancel a visa or refuse a visa, other than a protection visa. The RRT may be able to review a decision to refuse or cancel a protection visa. The AAT may be able to review a decision to cancel a business visa or refuse or cancel a visa on character grounds.

The system of judicial review of migration decisions in Australia has been described as ‘bifurcated’.²³ It involves the Federal Court and the High Court. Part 8 of the Migration Act enables the Federal Court to review what are called ‘judicially-reviewable decisions’. This expression is defined to include decisions of the MRT, the RRT and other decisions made under the Migration Act or regulations that relate to visas.

The grounds on which the Federal Court can review judicially-reviewable decisions are contained in section 476 of the Migration Act. They include certain types of error of law, and restricted grounds related to failure of jurisdiction, improper exercise of power, fraud or bias. Some grounds of review which would otherwise be available under the AD(JR) Act or as a result of applications made under subsection 39B(1) of the *Judiciary Act 1903* are not available when the Federal Court is exercising its migration jurisdiction. Grounds of review which are unavailable include failure by a decision-maker to observe natural justice, taking irrelevant considerations into account, failing to take relevant considerations into account and *Wednesbury*²⁴ unreasonableness.

As one commentator has remarked:

The obvious difficulty created by Part 8 of the Migration Act is that it creates a ‘bifurcated judicial review process’. The High Court has a constitutionally entrenched jurisdiction to grant prerogative relief against officers of the Commonwealth, including Ministers. So long as that jurisdiction remains intact, an aggrieved applicant may seek prerogative relief from the High Court in respect of a migration decision on

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grounds excluded by Part 8, including a denial of natural justice and a failure by the decision-maker to take relevant considerations into account. The High Court's jurisdiction is not affected by the fact that the Federal Court has been deprived of jurisdiction to review the particular decision by virtue of Part 8 of the Migration Act. The practical effect of the 'bifurcation' is that, in certain circumstances, a person wishing to challenge an adverse migration decision can do so only by invoking the original jurisdiction of the High Court.²⁵

A further difficulty with the existing system is that if the High Court remits a migration matter to the Federal Court under section 44 of the Judiciary Act, the Federal Court can only exercise the powers it conferred on it by Part 8 of the Migration Act.²⁶

Judicial workloads in migration matters

Part 8 restrictions on the Federal Court's ability to review migration decisions have resulted in an increase of migration cases going to the High Court in its original jurisdiction. As stated above, this jurisdiction is constitutionally conferred and allows the Court to review decisions of Commonwealth officers and grant remedies.²⁷ The increase in the High Court's workload in migration matters has been the subject of political and judicial comment.

In *Re The Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham*, a case decided in January 2000 involving a section 75(v)²⁸ application to the High Court against an RRT decision, McHugh J said:

In *Abebe v The Commonwealth*, Gleeson CJ and I pointed out that:

"[T]he Parliament has chosen to restrict severely the jurisdiction of the Federal Court to review the legality of decisions of the Refugee Review Tribunal. That restriction may have significant consequences for this Court because it must inevitably force or at all events invite applicants for refugee status to invoke the constitutionally entrenched s 75(v) jurisdiction of this Court. The effect on the business of this Court is certain to be serious."

This case is but one of many applications for prerogative relief against the Tribunal currently pending in this Court. Its procedural history vividly illustrates that the serious effect on the Court's business, which Gleeson CJ and I predicted in *Abebe*, is now being experienced. The case also demonstrates, if demonstration were necessary, that the effect of restricting the jurisdiction of the Federal Court to hear applications by persons claiming refugee status will often be to produce two hearings instead of one (a partial remitter to the Federal Court and a hearing in this Court), to lengthen the time taken to dispose of those applications and to use the time of the Federal judiciary inefficiently. A single judge of the Federal Court can, subject to appeal, dispose of a case in the Federal Court. A Justice of this Court can only dispose of an application by holding that the applicant has not overcome the low hurdle for the grant of an order nisi. Even then his or her decision may be subject to appeal. If an

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order nisi is granted, the matter can only be disposed of by the Full Court of this Court unless it "appears to be one of urgency".

The effect of restricting the jurisdiction of the Federal Court must inevitably impose on the Justices of this Court the dilemma of choosing between two unpalatable alternatives. The first alternative is to give preference to the applications of persons held in custody and claiming refugee status to the detriment of the Court's general constitutional and appellate jurisdiction. The second alternative is to continue to give preference to the constitutional and appellate jurisdiction of the Court with the result that claimants for refugee status are detained in custody for longer periods than is likely to have been the case if the Federal Court had retained all of its jurisdiction to deal with refugee cases.

One of the principal reasons for the setting up of the Federal Court in 1976 was the recognition that, with more and more matters arising under laws of the Parliament, this Court could not act as a federal trial court and still have adequate time for research and reflection in respect of the important matters falling within its constitutional and appellate jurisdiction. ...

Given this history and the need for this Court to concentrate on constitutional and important appellate matters, I find it difficult to see the rationale for the amendments to the *Migration Act* (Cth) ("the Act") which now prevent this Court from remitting to the Federal Court all issues arising under that Act which fall within this Court's original jurisdiction. No other constitutional or ultimate appellate court of any nation of which I am aware is called on to perform trial work of the nature that these amendments to the Act have now forced upon the Court.

There is no ground whatever for thinking that the judges of the Federal Court are not capable of dealing with all issues arising under the Act which fall within this Court's jurisdiction. Although the refugee matters that cannot be remitted to the Federal Court do arise under this Court's constitutionally entrenched jurisdiction, most of them are not constitutional matters as that term is ordinarily understood. The great majority of the matters which cannot be remitted simply involve questions of administrative law with which the Federal Court has long been familiar and in respect of which it has great experience and expertise. ...

The reforms brought about by the amendments are plainly in need of reform themselves if this Court is to have adequate time for the research and reflection necessary to fulfil its role as "the keystone of the federal arch" and the ultimate appellate court of the nation. I hope that in the near future the Parliament will reconsider the jurisdictional issues involved.²⁹

The change in the Court's workload was described in its *Annual Report* for 1999-2000:

The number of order nisi³⁰ applications filed during the year remained high, following the trend noted in 1998-99. More than 70% of the order nisi applications filed during 1999-00 involved immigration matters. The impact of this growing jurisdiction is most obvious in the increase of single Justice hearings. In 1998-99 there were 25 single Justice hearings involving order nisi applications. In 1999-00 this figure soared

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to 173, of which 88% involved immigration matters. These applications consume a large amount of judicial time, particularly in cases requiring more than one hearing.³¹

More recently, the Minister for Immigration and Multicultural Affairs stated that migration applications to the High Court declined by 27 per cent from the 1999–2000 to the 2000–2001 financial years.³²

In May 2001, articles dealing with the High Court's workload in migration matters appeared in the *Weekend Australian* and the *Australian* newspapers.³³ The *Weekend Australian* reported that the Attorney-General and the Minister for Immigration and Multicultural Affairs had discussed the issue. The article continued:

Legal academics and Law Council of Australia president Anne Trimmer have lent their support to the possibility of using the Federal Magistrates Service to deal with less complex appeals against Refugee Review Tribunal decisions.

High Court observers, including leading constitutional academics, have warned that the seven High Court judges face a crisis because of the increase in immigration matters that can no longer be heard by the Federal Court.³⁴

However, giving a migration jurisdiction to the FMC will not, of itself, result in fewer applications being made to the High Court unless—despite the fact that the FMC will have the same limited migration jurisdiction as the Federal Court—applicants are persuaded they will have a speedier, more informal or less expensive hearing than in the High Court³⁵ or the High Court's jurisdiction is validly circumscribed.³⁶ A media release by the Minister for Immigration and Multicultural Affairs in July 2001 contained the following comments:

... the [Law] Council's suggestion to use the Federal Magistrates Service (FMS) to reduce the increasing burden on the High Court was also off target as that would do little more than add another stage to the review process³⁷, enabling people to further prolong their stay in Australia.

However, the Minister said the Government was examining how the use of the FMS could make a positive contribution to reducing abuse of the judicial review process. To achieve this end, limitations on access to other review processes would be necessary.³⁸

Since 1997, the Government has been attempting secure the passage of legislation to restrict the High Court's ability to review migration decisions. In 1997, the Migration Legislation Amendment Bill (No. 4) 1997 was introduced into the Parliament. This Bill sought to restrict access to Federal and High Court judicial review of migration decisions through the use of privative clauses. Additionally, it amended the structure of merits review of migration decisions. The privative clause proposals were the subject of criticism, removed from the Bill and included in a new Bill—the Migration Legislation Amendment Bill (No. 5) 1997. Parliament was prorogued for the 1998 General Election before either Bill had passed. In 1998, the Migration Legislation Amendment Bill (No. 1)

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1998 (which reflected the remnant No. 4 Bill) was enacted. The No. 5 Bill was substantially re-introduced as the Migration Legislation Amendment (Judicial Review) Bill 1998 on 2 December 1998. The Second Reading debate was adjourned on the same date and has not yet resumed. However, debate is now scheduled for 17 September 2001.³⁹

For an account of the Migration Legislation Amendment (Judicial Review) Bill 1998, readers are referred to *Bills Digest No. 90 1998-99*⁴⁰ and to the report of the Senate Legal and Constitutional Legislation Committee.⁴¹

Other proposals for amending migration laws

A number of migration bills are currently before the Parliament. The Migration Legislation Amendment (Judicial Review) Bill 1998 has already been described. Other Bills include the Migration Legislation Amendment Bill (No. 6) 2001.⁴² Among other things, this bill defines persecution for the purposes of protection applications.

More recently, the Government announced that it will introduce legislation on 17 September 2001 excising Christmas Island and Ashmore Reef from the Migration Zone.⁴³

Main Provisions

Schedule 1

Items 1-6 are consequential amendments generated by the extension of the FMC's jurisdiction to migration matters.

Subparagraph 42(2A)(e)(ii) of the Migration Act deals with High Court and Federal Court orders in the context of the removal of unlawful non-citizens from Australia.

Other provisions in the Migration Act deal with what happens when:

- the Federal Court sets aside a decision cancelling a person's visa [subsection 114(1)], and
- the Federal Court sets aside a decision cancelling a person's approval as a business sponsor [subsection 137G(1)].

Subsection 153(2) of the Migration Act provides that a non-citizen must not be removed or deported from Australia if doing so would breach a High Court or Federal Court order.

Items 1-4 of Schedule 1 insert references to the Federal Magistrates Court in each of the provisions just described.

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Item 5 replaces the current heading to Part 8 of the Migration Act ('Review of decisions by Federal Court') with a new heading—'Review of decisions by Federal Court or Federal Magistrates Court' which reflects the extension of the FMC's jurisdiction. **Item 6** makes a similar amendment to the heading to Division 2 of Part 8.⁴⁴

Division 2 of Part 8 of the Migration Act deals with Federal Court review of certain administrative decisions—called 'judicially-reviewable decisions'. 'Judicially reviewable decisions' are certain decisions made by the MRT, RRT or other decisions made under the Migration Act or regulations that relate to visas (section 475).

Section 476 of the Migration Act sets out the limited grounds on which an application can be made to the Federal Court by a person who wants a decision judicially reviewed. These grounds include lack of jurisdiction, improper exercise of power and error of law. **Item 7 of Schedule 1** inserts a reference to the FMC into section 476.

Section 477 of the Migration Act enables a person to apply to the Federal Court for review of a decision-maker's failure to make a judicially-reviewable decision. **Items 8 and 9** enable the FMC, as well as the Federal Court, to hear applications for review in respect of failure to make decisions.

Section 478 of the Migration Act provides that an application under sections 476 or 477 must be made according to Federal Court rules and lodged with the Federal Court within 28 days of the applicant being notified of the decision. **Item 11** inserts **new section 478A** which replicates section 478 in relation to the FMC.

Items 12-18 amend section 481 of the Migration Act. Section 481 sets out the orders that the Federal Court can make when reviewing a judicially-reviewable decision or a failure to make a judicially-reviewable decision. These include orders quashing the decision, referring the matter back to the decision-maker or declaring the rights of the parties. **Items 12-18** enable the FMC to make the same orders.

Section 482 of the Migration Act says action can be taken to implement an administrative decision even if a review application has been made to the Federal Court—except where the Federal Court orders the action to be stayed. **Items 19-23** insert references to and provisions about the Federal Magistrates Court into section 482. The new provisions relating to the FMC replicate existing provisions relating to the Federal Court.

Section 485 of the Migration Act provides that the Federal Court does not have any additional jurisdiction in relation to judicially-reviewable decisions—other than the jurisdiction conferred by Part 8 or under section 44 of the *Judiciary Act 1903*.⁴⁵ **Items 24-27** amend section 485 by adding references to the Federal Magistrates Court.

Section 486 of the Migration Act declares that the Federal Court's jurisdiction in relation to judicially-reviewable decisions excludes the jurisdiction of all courts other than the High Court's jurisdiction under section 75 of the Constitution. **Item 28** amends section 486 so it will provide that the jurisdiction of the Federal Court and the Federal Magistrates

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Court excludes the jurisdiction of all other courts—except for the High Court’s section 75 jurisdiction.

Subsection 500(6) of the Migration Act provides that where an application has been made to review a Ministerial deportation decision under section 200 of the Migration Act, the order is not taken to have ceased simply because certain orders have been made by the AAT or the Federal Court. **Item 29** adds references to the Federal Magistrates Court.

Item 30 is an application provision. For example, it provides that amendments relating applications under section 476 of the Migration Act (for review of judicially reviewable decisions) apply to applications made on or after the commencement of the Federal Magistrates Service Legislation Amendment Act 2001.

Schedule 2

Item 1 of Schedule 2 amends the Administrative Appeals Tribunal Act so that the Federal Court can transfer appeals from AAT decisions in migration matters to the FMC. At present, the Federal Court is prevented from doing so.⁴⁶ This amendment will apply to appeals commenced in the Federal Court on or after the commencement of the Jurisdiction of the Federal Magistrates Service Legislation Amendment Act 2001 (**item 6**).

Item 2 amends the AD(JR) Act so that the FMC can hear ADJR applications for review of migration decisions. **Items 3-5** will enable the FMC to hear applications for review of conduct, failure to make a decision or reasons for decision in relation to migration matters. These amendments will apply to decisions made under the AD(JR) Act on or after the commencement of the Federal Magistrates Service Legislation Amendment Act 2001 (**item 6**).

Endnotes

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- 1 The Court is also referred to as the Federal Magistrates Service (subsection 8(2), *Federal Magistrates Act 1999*).
 - 2 Other federal courts are superior courts—the High Court, the Federal Court and the Family Court.
 - 3 Jurisdiction may also be vested expressly or impliedly by other statutes as a result of section 15C of the *Acts Interpretation Act 1901*.
 - 4 In other words, it exercises the judicial power of the Commonwealth. Section 71 of the Constitution, part of Chapter III, enables the Parliament to create federal courts.
 - 5 Sub-items 1(1) & (4) of Schedule 1, Federal Magistrates Act.

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- 6 In *Re Bryant; Ex parte Guarino* [2001] HCA 5 (14 February 2001) Hayne J said, ‘... the title given to the judicial officer ... is not determinative of the constitutional reach of sec 79 [which refers to ‘judges’] and the other provisions in Ch III. The constitutional reach of sec 79 extends to the Federal Magistrates appointed to serve in the court created by Parliament by the Act.’
- 7 Item 9, Schedule 1, Federal Magistrates Act.
- 8 Sub-item 1(6), Schedule 1, Federal Magistrates Act. However, the Chief Federal Magistrate holds office on a full-time basis—sub-item 1(5), Schedule 1, Federal Magistrates Act.
- 9 <http://www.fms.gov.au/html/introduction.html> (current at 10 September 2001).
- 10 <http://www.fms.gov.au/html/magistrates.html> (current at 10 September 2001).
- 11 Attorney-General, *News Release*, ‘Federal Magistrates Service—one year on’, 3 July 2001.
- 12 An example of how the FMC compares is shown in the relative costs of filing fees. The FMC filing fee is \$250. The fee for initiating proceedings in the Federal Court is \$526.
- 13 Attorney-General, *News Release*, ‘Federal Magistrates Service—one year on’, 3 July 2001. See also, ‘Court of first resort’, *Weekend Australian*, 3 March 2001, ‘Magistrates a success—Williams’, *Financial Review*, 27 July 2001.
- 14 Law Council of Australia, ‘Budget does little to improve access to justice’, 23 May 2001.
- 15 Attorney-General, *News Release*, ‘Federal Magistrates Service—one year on’, 3 July 2001.
- 16 Attorney-General, *News Release*, ‘Federal Magistrates Service jurisdiction extended’, 30 August 2001.
- 17 Subsection 44AA(2), Administrative Appeals Tribunal Act.
- 18 Subsections 5(4), 6(4) and 7(3), AD(JR) Act. The FMC is thus excluded from hearing applications under statutes in the Immigration and Multicultural Affairs portfolio which relate to decisions, conduct relating to decision-making or failures to make decisions.
- 19 Subsections 39(3) and (4), Federal Magistrates Act.
- 20 Rule 8.02(4).
- 21 <http://www.fms.gov.au/html/introduction.html> (current at 10 September 2001).
- 22 Administrative Review Council, *Review of Commonwealth Merits Tribunals. Discussion Paper*, September 1994.
- 23 Gaudron & Kirby JJ; Gummow J, *Minister for Immigration and Multicultural Affairs v. Eshetu* (1999) 197 CLR 611 at 641 and 658, respectively—quoted in Ronald Sackville, ‘Judicial review of migration decisions: an institution in peril?’, *UNSW Law Journal*, 23(3), 2000, pp. 190-207.
- 24 *ibid.* *Wednesbury* unreasonableness is unreasonableness in exercise of an administrative power which is so unreasonable that no reasonable person could have so exercised the power: *Associated Provincial Picture Theatre Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.
- 25 Sackville, *op.cit.*, pp. 192-3.

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- 26 *ibid.*
- 27 Section 75(v), Constitution. The remedies are mandamus, prohibition and injunction. Other remedies—certiorari and declaration—are not expressly mentioned in section 75(v) but may be sought in conjunction with mandamus, prohibition or injunction.
- 28 Of the Commonwealth Constitution.
- 29 (1999) 168 ALR 407 at 409-411.
- 30 An order that the writ be issued unless the defendant can show cause why it should not be issued.
- 31 High Court of Australia, *Annual Report 1999-2000*, p. 5.
- 32 Philip Ruddock MP, Minister for Immigration and Multicultural Affairs, *News Room*, ‘Law Council the real hurdle in reducing High Court burden’, *MPS 089/2001*, 3 July 2001.
- 33 ‘Little appeal in justice strained by heavy migrant load’, *The Australian*, 28 May 2001; ‘Help for the High Court’, *The Weekend Australian*, 26 May 2001. These press reports were the subject of questioning at Estimates Committee hearings conducted by the Senate Legal and Constitutional Legislation Committee in May 2001.
- 34 ‘Help for the High Court’, *The Weekend Australian*, 26 May 2001.
- 35 The use of prerogative writs may be more cumbersome—for example, in relation to procedure—than statutory judicial review. Additionally, it appears that the High Court has generally adopted the practice of remitting those parts of applications for orders nisi that appear to be based on Part 8 (Migration Act) grounds to the Federal Court and adjourning the rest of the application until the Federal Court proceedings are completed. See Butterworths, *Practice & Procedure. High Court and Federal Court of Australia*. See also an account of Federal Court and High Court processes in *Re The Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (1999) 168 ALR 407 at 409-11.
- 36 Through the use of a constitutionally valid privative clause.
- 37 It is not clear, however, why this would add another stage to the review process rather than simply provide an alternative court to the Federal Court for the conduct of Part 8 judicial reviews of migration decisions.
- 38 Philip Ruddock MP, Minister for Immigration and Multicultural Affairs, *News Room*, ‘Law Council the real hurdle in reducing High Court burden’, *MPS 089/2001*, 3 July 2001. However, this Bill does not reduce access to other review processes.
- 39 Senate Draft Legislation Program, 2001 Spring Sittings — Week 4 (17 – 20 September 2001).
- 40 Krysti Guest, Migration Legislation Amendment (Judicial Review) Bill 1998, *Bills Digest No. 90. 1998-99*. This Digest was written before the introduction of Government amendments to the Bill.
- 41 Senate Legal and Constitutional Legislation Committee, *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999.
- 42 See forthcoming Bills Digest.

Warning:

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This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- 43 'Refugees showdown', *The Sunday Age*, 9 September 200; 'Howard plan to "pull back" migration zone', *Sydney Morning Herald*, 9 September 2001.
- 44 Presently 'Review of decisions by Federal Court', it will be altered to read, 'Review of decisions by Federal Court or Magistrates Court'.
- 45 Section 44 deals with the remittal of matters by the High Court to other courts.
- 46 Paragraph 44AA(2)(b).

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Appendix

State-by-State filings for the FMC at 3 July 2001

Location	No. of family law applications	No. of non-family law applications	No. of divorce applications filed	No. of cases transferred from Family and Federal Courts
National	28,000	2,000	23,500	2,000+ (both courts)
Brisbane	4,000	490	3,550	340+ (both courts)
Townsville	1,200	-	950	53+ (Family Court only)
Sydney	3,000+	460	3,000	40+ (both courts)
Parramatta	4,500	-	3,350	256+ (Family Court only)
Newcastle	3,000	-	2,500 +	245+ (Family Court only)
ACT	1,100	20	8,00	155+ (Family Court only)
Melbourne	7,000	710	5,450	600+ (Family Court) 25+(Federal Court)
Dandenong	1,500	-	1,350	60+ (Family Court only)
South Australia	2,000	250	1,750	140+both courts)
Tasmania	700	15	500	85+ (both courts)
Northern Territory	400	8	300	
Western Australia	-	50	-	-

Source: Attorney-General, *News Release*, 'Federal Magistrates Service—one year on', 3 July 2001.

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