ADMINISTRATIVE ISSUES IN REFUGEE LAW

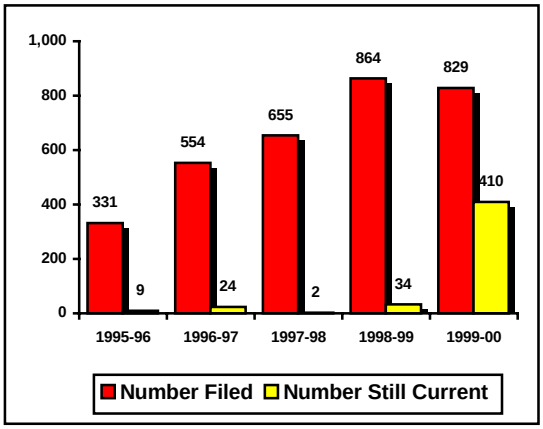
Justice R D Nicholson[*]

The words "Administrative Issues" in the title are chosen to distinguish the issues which will be discussed from issues relating to judicial review, which are addressed elsewhere in the program. To some degree the administrative and judicial issues overlap in their impact on the Federal Court of Australia. Here the focus will be on the impact of the applications for review in the migration jurisdiction of the Federal Court on management of the work of the judges and court staff. That jurisdiction arises under the *Migration Act 1958* (Cth) ("the Migration Act") which gives the Court jurisdiction to review decisions of the Refugee Review Tribunal ("the Tribunal").

Volume of applications

The Annual Report of the Federal Court of Australia 1999 - 2000 shows the following table in figure 6.7(a) at p 140:

Migration Act matters filed and current 1995-96 to 1999-2000



However, some matters were filed by parties under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("the ADJR Act"). This has occurred despite the fact that Part 8 of the Migration Act is an exclusive code. Arguably applications filed under the ADJR Act may evidence lack of representation of the applicants or the continued usage of outmoded documentation in places of detention.

From 1 July 1999 to 8 November 2000, the filings in Migration Act matters by State or Territory were as follows:

NSW	777
VIC	364
QLD	9
WA	141
SA	6
TAS	0
ACT	1
NT	0
TOTAL	1298

The appellate impact of applications is as follows. Appeals lodged by State or Territory between 1 July 1999 and 8 November 2000 were:

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[*] *Judge of the Federal Court of Australia.*

NSW	145
VIC	18
QLD	6
WA	15
SA	3
TAS	0
ACT	1
NT	0
TOTAL	188

In addition, there are five further appeals classified as "migration/refugee", making a total of 194 appellate filings in migration matters out of a total of 530 appeals. This constitutes 36.4% of the appellate work of the Federal Court.

From a judicial perspective, the advent of applications in any particular registry seems to depend less on good planning by either the Federal Court or the Department of Immigration and Multicultural Affairs ("the Department") than on the geographical location of applicants and/or their place of detention. Whatever the reason there can be no doubt from the above figures that the work of the Federal Court, particularly in Sydney, Melbourne and Perth now includes a very significant number of applications to review decisions of the Tribunal.

One feature of the applications for review of such decisions is that normal inhibitions against initiation and continuance of court process has little or no application in respect of them. The sanction of costs is not meaningful in relation to persons who have arrived on the shores of Australia without any resources and who seek to claim refugee status. Additionally, there is the inbuilt motivation of any unsuccessful applicant for such status to avoid or defer repatriation to the feared country of origin and so to seek review of the decision of the Tribunal and, if not successful, to further appeal. Each step holds the possibility that some political change may occur in the feared country which will remove the basis for that fear, whether well-founded or not.

It follows from the volume of applications that there is an increased need for expertise in migration matters on the part of Court staff.

Limited jurisdiction

The limited jurisdiction of the Federal Court in relation to applications under Pt 8 of the Migration Act has been dealt with comprehensively elsewhere (Robert Beech-Jones, "Pt 8 of the *Migration Act 1958* (Cth) and the decisions in *Abebe* and *Eshetu*"[1]). The jurisdiction is confined by Pt 8. It is limited to "judicially reviewable decisions". The grounds of review are significantly narrower than those available under s 5 of ADJR Act and s 39B of the Judiciary Act 1903 (Cth). They are the grounds, now becoming well known to counsel, in s 476(1) of the Act. Applications are restricted by the time within which they must be made.

There are two administrative impacts of this regime of limited jurisdiction. The first is that it forces counsel in the presentation of applications to craft the approach within the limited jurisdiction. Submissions that may have been perhaps more effectively or comprehensively made on another basis are made to some degree to assume the permitted form. The second impact is that judges are constantly dealing with a relatively narrow range of issues, with the focus of argument being on whether facts fall within the permitted narrower range.

1 (2000) 24 *AIAL Forum* 32.

One predicted outcome of the limitation of jurisdiction was more extensive focus on the ground of actual bias: see *Sun Zhan Qui v Minister for Immigration & Multicultural Affairs*.[2] There Wilcox J said:

> [I]f *Eshetu* is overruled, disappointed applicants will have no choice but to search among those few grounds for an arguable ground of review. It will not be surprising if, in their disappointment at the tribunal's decision, many claim actual bias. The result will be to substitute for an inquiry into the character of the decision an inquiry into the character of the decision-maker.

The ground has indeed been relied upon in recent applications to the Court but it is a difficult ground to make out and it is unlikely to be casually included in the grounds of a represented applicant.

Following the decision in *Minister for Immigration & Multicultural Affairs v Singh*,[3] there has also been an increasing use of s 476(1)(a) so far as it can be utilised with respect to the procedural requirements of s 430 of the Act. This involves intense focus on determining what are the material facts. *Singh* gave the following guidance on that issue at par 56:

> Accordingly if a decision, one way or the other, turns upon whether a particular fact does or does not exist, having regard to the process of reasoning the Tribunal has employed as the basis for its decision, then the fact is a material one. But a requirement to set out findings on material questions of fact, and refer to the material on which the findings are based, is not to be translated into a requirement that all pieces of conflicting evidence relating to a material fact be dealt with: *see Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at pars [65] and [67].
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> Thus whilst materiality will not necessarily depend upon how an applicant chooses to present the issues, we do not agree that the only material facts are those on which the Tribunal is legally required to make findings: contrast *Xu v Minister for Immigration & Multicultural Affairs [1999] FCA 1741* at pars [49] and [51]. A fact is material if the decision in the practical circumstances of the particular case turns upon whether that fact exists.

Nevertheless, what this means in the context of a particular case opens up room for extensive factual submissions.

To some degree the impression is left that the present intense scrutiny on how the Tribunal went about its functions is antithetical to the concept that the reasons of tribunals should not be examined with an eye too finely attuned to error. In *Minister for Immigration & Multicultural Affairs v Wu Shan Liang*,[4] Chief Justice Brennan and Justices Toohey, McHugh and Gummow stated:

> It was said in (*Collector of Customs v Pozzolanic* (1993) 43 FCR 280) that a court should not be "concerned with looseness in the language…nor with unhappy phrasing" of the reasons of an administrative decision-maker. The Court continued: "The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error.[5]

The Court continued:

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2 (1997) 151 ALR 515 per Wilcox J at 551.

3 (2000) 98 FCR 469.

4 (1996) 185 CLR 259.

5 At 272.

> These propositions are well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed. In the present context, any court reviewing a decision upon refugee status must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision.

Other areas on which there is a discernible increased focus of argument, perhaps encouraged by the limited jurisdiction, are in respect of the application of the prohibition against refoulement in Article 33 and the Tribunal's examination of the precise conditions and circumstances under which repatriation to a third country would take place.

The limited jurisdiction has of course also had its impacts elsewhere than the Federal Court. The High Court of Australia has found that its original jurisdiction pursuant to s 75(v) of the Australian Constitution is constantly enlivened in respect to issues which now cannot come before the Federal Court in the exercise of its limited jurisdiction. Justice McHugh in *Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham*[6] said:

> In *Abebe v Commonwealth*, Gleeson CJ and I pointed out that:
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> [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 s75(v) jurisdiction of this court. The effect on the business of this court is certain to be serious.

His Honour continued:

> 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 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".
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> 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.

His Honour concluded:

6 (2000) 168 ALR 408 at 409.

> 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.

Form of application

Most applicants for refugee status are, at least at the time of lodging their application, unrepresented by legal expertise and unadvised by it. The result is that they utilise such form of application and standard statement of grounds as may be available in the place of detention or application.
One of the difficulties with this is that those forms have been either adapted from other cases or formulated with reference to different matters. For example, the forms that have been used by detainees from Port Hedland place heavy reliance upon both limbs of s 476(1)(e) of the Act. The true case for the particular applicant may not necessarily lie in either or one of those limbs.

This is exacerbated by the fact that the applicants are not necessarily familiar with the language in which the application form is drafted. Consequently, they are both linguistically and legally inhibited in making their choice of the case to pursue before the court.

That does not preclude them from subsequently amending the application as permitted by Order 13 r 2(1) of the Federal Court Rules. However, should they remain unrepresented, their case goes to the court in ill-chosen terms.

Would it be preferable to have an application form in simple terms with the opportunity for grounds to be lodged subsequently? Alternatively, for a subsequent opportunity to be given to the Court to assist an applicant in formulating relevant grounds if remaining unrepresented?

Obtaining representation

Sometimes from the environs of the place of detention an applicant will obtain knowledge of the need or desirability of applying for legal assistance as well as forms to enable this to be done. Such forms do not appear to be routinely made available. Opportunity may need to be given for them to be made available to a detained applicant and for him or her to have assistance in completing them if linguistically unable to comprehend them. To this extent an additional burden may be cast on the respondent's representatives either to instigate the occurrence of these arrangements or to assist with them.

An application for such assistance is a relevant consideration to the exercise of the Court's discretion pursuant to O 80 of the Federal Court Rules.
That Order relevantly reads:

> 3 Pro Bono Panel
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> The Registrar may maintain, in each District Registry, a list of persons:
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> (a) who are legal practitioners in the State or Territory where the District Registry is located; and
> (b) who have agreed to participate in the scheme.
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> 4 Referral to a legal practitioner

(1) The Court or a Judge may, if it is in the interests of the administration of justice, refer a litigant to the Registrar for referral to a legal practitioner on the Pro Bono Panel for legal assistance.
(2) For subrule (1), the Court or Judge may take into account:
  (a) the means of the litigant; and
  (b) the capacity of the litigant to obtain legal assistance outside the scheme; and
  (c) the nature and complexity of the proceeding; and
  (d) any other matter that the Court, or Judge, considers appropriate.
(3) A referral to the Registrar is effected by the issue of a Referral Certificate in accordance with Form 161 in relation to the litigant.

(4) If a Referral Certificate has been issued, the Registrar must attempt to arrange for the legal assistance mentioned in the certificate to be provided to the litigant by a legal practitioner on the Pro Bono Panel.
(5) However, the Registrar may refer a litigant to a particular legal practitioner only if the practitioner has agreed to accept the referral.

5 Kind of assistance

A referral may be made for the following kinds of assistance:
(a) advice in relation to the proceeding;
(b) representation on direction, interlocutory or final hearing or mediation;
(c) drafting or settling of documents to be filed or used in the proceeding;
(d) representation generally in the conduct of the proceeding or of part of the proceeding.

Since the introduction of that Rule on 7 December 1998, 42 Barristers and 12 firms of solicitors in Western Australia have assumed membership of the Pro Bono Panel. Nationally the figure is 250 barristers and 98 firms of solicitors.

The following table sets out the numbers of referrals made since the scheme commenced, the number of migration referrals since the scheme commenced and the number of referrals in 2000.

State/Territory	Date at which information compiled	Referrals since scheme commenced	Migration referrals since scheme commenced	Referrals in 2000
ACT	2/00	4	na	na
New South Wales	30/6/00	22	15	10
Queensland	1/8/00	22	3	16
South Australia	-	-	-	-
Tasmania	2/00	1	na	na
Victoria	2/11/00	80	52	52
Western Australia	13/11/00	74	64	52

In 1999 in Western Australia, therefore, a total of 22 referrals were made under O 80 subr 4(3). From 1 January 2000 to 13 November 2000, 52 referrals had been made, all but five of which were made in respect of immigration matters in Western Australia. It can be safely assumed that a large burden is therefore falling on the members of the Panel in respect of unrepresented applicants. The most interesting statistic concerning the work of pro bono panellists would be that which showed the extent to which their work in advice or drafting itself has led to concessions by the respondent.

From a judicial perspective, whether or not an applicant is represented can clearly have a major impact. As previously mentioned, it can affect the grounds upon which the case for an applicant relies. It reflects in the extensiveness of argument. Such is the difference that it may be suspected that an applicant without legal assistance may have a case which even a

court with an eye tuned to the possibility will not appropriately locate in the absence of identification of the issue and argument directed towards it.

Interpreters

Enough has already been said of the linguistic difficulties faced by refugee applicants to highlight the importance of proper interpretation to the operation of the jurisdiction of the Federal Court in relation to them. The role and the need for interpreters is important in the formulation of procedural orders in the directions hearing; in the presentation of an unrepresented applicant's conception of his or her case; in the conduct of the hearing; in the comprehension of the reasons and in the formulation of orders.

Communication with the courts is therefore a significant issue for applicants. It may be complicated by a difficulty in locating an interpreter experienced in the particular language or dialect of the applicant.

Factors identified by the Federal Court to be taken into account in connection with issues relating to interpretation include the following:

- not all interpreters can read the language: the terms of their employment with Translating and Interpreting Service ("TIS") is in relation to the spoken word;
- translating is more expensive than interpreting;
- turn around of translating is 10 days for non-urgent matters, 3 for urgent;
- if documents to be used at directions hearings are to be forwarded to the interpreter, they have to be forwarded to TIS at least 10 days before the appointment and an additional charge would apply;
- their interpreting and translating service at the various detention centres is informal;
- often the time allowed for the interpreter and applicant to go over material to be used at the hearing has been spent in silence.

Directions hearings

Experience has shown that the respondent Minister's representative has played a significant part in assisting the Court and the applicant in formulating procedural directions for the future conduct of the matter. While initially these directions program a matter through to hearing, adjustment is needed where an applicant has not previously had the opportunity or understood the opportunity to apply for legal aid and obtain representation.

Applicants may sometimes be assisted by persons in detention who share with them the same language. Alternatively, they may be assisted by an English speaking friend.

Directions are normally forwarded to the place of detention of an applicant. However, if the applicant is unable to read the English language it is necessary to have the interpreter, who would otherwise be present at the directions hearing, interpret the document to the applicant. Sometimes draft directions are faxed to an applicant at a place of detention and either the fax does not reach them in time for the hearing or they fail to bring it to the hearing. The latter is of no import if the document is in any event interpreted to them. Applicants frequently appear without papers, having left them back in their room.

There is a proposal under consideration in the Federal Court that initial programming directions could be subsumed as part of case management arrangements. This may be an appropriate development. Considerable judicial time is utilised while matters are interpreted at this preliminary stage to unrepresented applicants. However, in the event that references are required to a pro bono panel pursuant to O 80 of the Federal Court Rules, above, that

would require the matter to be remitted to a judge for consideration of that aspect. There would seem no reason why that could not be done on the papers provided there was appropriate evidence from the directions hearing to enable the exercise of the judicial discretion to make the referral in accordance with the requirements of the Rule.

Because they are frequently in detention at the time of lodgement of their applications for review of the decision of the Tribunal, applicants have rarely attended a directions hearing in person. Communication with them has occurred by teleconference. More often than not the interpreter is linked from another place than that at which the applicant is then located. With the introduction of the system of temporary protection visas for intending refugee applicants, this may change.

There is a repetitive but understandable difficulty in having unrepresented applicants comprehend the difference between an error of fact and an error of law. Directions hearings have endeavoured to accommodate this by giving an applicant the opportunity, in lieu of an affidavit, to file a written statement stating in the applicant's own way what he or she sees as the difficulties with the decision of the Tribunal. The Court and the respondent are then left with the task of considering which grounds of the Court's jurisdiction are enlivened by the statement.

Associates are not infrequently rung by refugee applicants seeking information and advice. This of course is not advice which they can deliver.

Consent orders requiring reconsideration by the Tribunal

In *Kovalev v Minister for Immigration & Multicultural Affairs*[7] French J made a consent order in terms which set out the basis upon which the matter was remitted to the Tribunal for reconsideration according to law. He had declined to make an order which did not specify that basis. His reason for requiring the specification was, essentially, that in making a consent order the Court must have regard to the limits of its power and the basis of its exercise. In so deciding, French J acknowledged that there was said to be some difference in the approach taken by the judges of the Court to the making of consent orders of that kind. The decision in *Kovalev* was not appealed by the respondent Minister.

In *Kapagama v Minister for Immigration & Multicultural Affairs*[8] Whitlam J heard submissions from experienced senior counsel for the respondent Minister in opposition to the formulation of orders making the specification as in *Kovalev*. In the result, the orders in *Kapagama* were crafted to delete reference to the words "according to law" and no specification occurred. Principal among the submissions by senior counsel was that the authority to remit for reconsideration in s 481 of the Migration Act removed any basis for the application of the reasoning in *Kovalev*.

There remains a difference in approach to this issue among judges of the Federal Court. The point has arisen in a case and may require resolution.

Hearings

In the case of an unrepresented applicant attendance at a hearing will be by way of video-link. Video courts are now established in the Federal Court which enable the case to be conducted as near as possibly to the mode which would apply should the applicant be present personally in Court. Again, the role of the interpreter is crucial.

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7 [1999] FCA 557.

8 [1999] FCA 1881.

Order 33 r 15 of the Federal Court Rules provides:

> 15(1) Where a party to a proceeding before the Court is in lawful custody, the Court may on the request of that party, or of any other party, or of its own motion make an order requiring production of that party and may make such order in relation to the continuing custody of that party as may in the opinion of the Court be appropriate.
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> 15(2) An order made under sub-rule (1) may if the Court thinks it appropriate be in accordance with Form 46B in the First Schedule.

To date it has not been necessary to make "bring up" orders to assure the attendance of a party from a prison or detention centre where that is necessary. A letter of request has proved sufficient. Additionally, Registry staff have established a good working arrangement with staff of the various detention centres and are in frequent contact with them.

Where an applicant has legal representation there is no legal need for personal attendance or for any teleconference or video-link to the court. Considerations of expense preclude the provision for such a link when representation is available and being utilised.

Hearings are usually conducted in the capital city nearest the place of an applicant's detention. However, it sometimes occurs that an applicant is in detention in (say) Port Hedland and a hearing is to be located in (say) Sydney. Where there are migration agents acting for the applicant at the place of hearing in that other city or there are relatives of the applicant located there, it may be the case on some occasions that an administrative decision by the Department may be made to transport the applicant to the place where the hearing occurs.

Hearings normally tend to last in the order of two hours. Where interpretation is necessary that occupies considerable time. Likewise, detailed examination of the reasons to bring them within the limited grounds of jurisdiction can also be time consuming. Significant time impacts in this respect can be assisted where counsel puts in writing in advance details of particular perceptions of the reasoning of a Tribunal. This enables both the Court and the respondent to prepare appropriately.

Reasons

One of the impacts on the judiciary of the volume of applications in this jurisdiction is that the members of the judiciary acquire an increasing familiarity with what may be described as the world's trouble spots. Statistics included in the Refugee Review Tribunal's Annual Report 1999 - 2000 indicated that the top ten countries for new applications in that year to the Tribunal were: Indonesia (19.2% of all applications lodged), China (14.5%), Philippines (10.3%), India (8.3%), Malaysia (4.7%), Sri Lanka (3.8%), Bangladesh (3.5%), South Korea (3.2%), Iraq (2.5%) and Fiji (2.4%). Impressionistically, hearings in the Court tend to bring a focus on issues concerning Iraq, Afghanistan and Sri Lanka. It may be that the more complex the issues the more likely applications relating to applicants from those areas will reach the Court.

One feature of the increasing volume of applications is the impact they have on judicial knowledge of country information. Frequency of applications relating to a particular country requires increased advertence in the preparation of reasons to the precise information which was before the Tribunal the decision of which is under review. That, of course, must be a far greater problem for the Tribunal where there is substantially greater likelihood of the same Tribunal member hearing a volume of applications from the same country.

Reasons are sometimes given orally but, particularly where it is necessary to respond to detailed submissions, reasons will be given after reservation and in writing.

Written reasons themselves are not interpreted to an applicant. Where oral reasons are delivered it is possible to have them interpreted to the applicant depending on the time available. There is presently a gap in enabling an applicant to understand the reasoning of the Court should he or she desire to do so.

Appeals

On appeals, the issues of whether the appellant is represented and whether there is an interpreter required retain their significance.

Just as difficulties arise in the formulation of the application itself in the case of an unrepresented applicant, so difficulties arise in the formulation of grounds of appeal. This is quite critical to the progress of the appeal. Likewise, on the hearing of the appeal the articulation of the appellant's case is fundamental to the likely success of the appeal.

There is further equally critical preliminary issue. Who is to prepare the appeal book? It is similar to the sort of issue that arises in a court of criminal appeal in relation to appeals from sentencing by imprisoned appellants. At present, no resource is made available to assist with it in the migration jurisdiction.

The Convention and the future

Applications to appeal the decision of the Tribunal refusing refugee status to an applicant are a significant present proportion of the Federal Court's jurisdiction. Necessarily, the exercise of that portion of its jurisdiction constitutes an avenue of considerable expense for the Court in relation to its staff and interpreters and for others in relation to counsel where they are appointed.

Whether or not such representation should be made available to such applicants or appellants is an issue of policy in the political arena. On the one hand it is consistent with Australia's claim to be a civilised country reflecting the application of the rule of law. On the other, it is resource intensive and occupying an increasing proportion of the judicial time, primary and appellate, of the Federal Court.

The vesting of migration jurisdiction in the Federal Court occurs in application of Australia's obligations under the Refugees Convention. Article 16.1 provides "a refugee shall have free access to the courts of law on the territory of all Contracting States". In Australia this cannot be satisfied by reference to the Tribunal alone for Ch III of the Australian Constitution makes clear the permitted ways in which the federal judicial power can be exercised. For Australia to avoid the administrative impacts of refugee applications on the High Court and Federal Court it would have to resile from the apparent obligation arising under Article 16.1.

Other pressures exist on the Refugees Convention. They have arisen world-wide as a result of the unprecedented movement of people and consequent escalation in the number of refugee applications. Australia does not stand alone in measuring the impact of the Refugees Convention on its institutions, including the Courts and the Tribunal. These global pressures may well lead to political debate on the future form of the Convention. In the meantime, short of resilement from the obligations it has accepted, Australia has no choice but to address the issues experienced by its relevant judicial institutions, to which this contribution to the Conference has directed some attention.