Primary Decisions

- In line with Tribunal changes, procedures will be streamlined to ensure greater productivity
- Greater priority will be given to processing straightforward applications, so that applicants in genuine need and those without substantial claims are dealt with quickly.
- Where a protection visa application is made, access to work rights will be limited to those people who have been in Australia for less than 14 days in the past 12 months.

This Media Release was issued on the same day as that by the Attorney-General announcing that the Government proposed to amalgamate the 5 major merits review tribunals. That announcement is outlined in a note at the beginning of this edition of *Admin Review*. The full text of the Attorney-General's Press Release appears in TRIBUNAL WATCH (below).

Introduction of Privative Clause For Certain Migration Act Decisions

On 25 March 1997, the Minister issued a further Media Release concerning a proposed privative clause to be introduced to limit refugee and immigration litigation. The text of that Media Release follows:

"Government to limit Refugee and Immigration Litigation

The Minister for Immigration and Multicultural Affairs, Philip Ruddock has announced plans to limit the growing cost and incidence of litigation of refugee and immigration decisions.

"There has been significant growth in cases going to the courts in recent years and this has added to delays and has cost the taxpayer millions of dollars, " Mr Ruddock said.

"Immigration and refugee applicants have access to a thorough merits assessment of their case. If they are unhappy with the outcome, they can seek independent merits review before a Tribunal, so they have every chance to put their case."

"However, in addition they can also access the Federal and High Courts, giving them up to three levels of judicial review."

There are currently 623 active litigation cases in the Immigration portfolio, of which 422 relate to on-shore refugee decisions.

A substantial proportion of these cases will be withdrawn prior to hearing. Of those cases that do go onto substantive hearings, the Government currently wins 89%.

"Many people are using litigation to delay their departure even though they have no legitimate claim to remain in Australia," Mr Ruddock said.

"To address this issue, the Government will introduce a 'privative clause' for many decisions under the Migration Act, to effectively limit the volume and cost of litigation."

A privative clause is a provision within an Act of Parliament, the practical effect of which will be to limit judicial review to whether the decision maker made a decision that was within their jurisdiction and power to make. This does not affect access to merits review.

The Government has received advice from several leading Queens Counsel that this is likely to be the most effective way of addressing this problem.

The change, foreshadowed last week, follows the Coalition commitment to undertake a review of immigration decision-making and is in line with the Government's determination to simplify the decision-making system.

The 1995-96 Budget shows that litigation cost the Department of Immigration and Multicultural Affairs $7.4 million dollars. This does not include legal aid nor the cost of running the Courts."

Effect of Treaties in Administrative Decision Making – Government Response to the *Teoh* Case

On 25 February 1997 the Minister for Foreign Affairs, the Hon. Alexander Downer MP, and the Attorney-General and Minister for Justice,

the Hon Daryl Williams AM QC MP, issued a joint News Release addressing the consequences of the April 1995 High Court decision in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. The full text of the News Release and the Joint Statement attached to it, is reproduced below.

"Government response to the Teoh Case

The Minister for Foreign Affairs, Alexander Downer, and the Attorney-General, Daryl Williams AM QC, today issued a joint Executive Statement dealing with the High Court's decision in the *Teoh* case. It is to be followed by the introduction of legislation into the Commonwealth Parliament.

'This statement, which replaces the statement issued by the previous Government, will continue to ensure that treaties do not create legitimate expectations in administrative law, as well as emphasising the proper role of the Parliament in the implementation of treaties. The statement also clarifies the position of the States and Territories, Mr Williams said.

In the *Teoh* case, the Court found that by entering into a treaty the Australian Government creates a 'legitimate expectation' in administrative law that the Executive Government and its agencies will act in accordance with the terms of the treaty, even where those terms have not been incorporated into Australian law. The Court also said that where a decision-maker intends to act inconsistently with a treaty, the person affected must be given a chance to argue against it. If not, the decision could be set aside on the ground of unfairness.

The Court's decision gave treaties an effect in Australian law which they did not previously have. The Government is of the view that this development was not consistent with the proper role of Parliament in implementing treaties in Australian law.

Under the Australian Constitution, the Executive Government has the power to make Australia a party to a treaty. It is for Australian parliaments, however, to change Australian law to implement treaty obligations. The Joint Statement and the subsequent legislation will confirm the role of Parliament in the changing of Australian law to implement treaties, the Ministers said.

Mr Downer noted that the Government had also established comprehensive procedures to enhance the participation of Parliament, the States and Territories and the wider community in the treaty making process. These new procedures include the establishment of a Joint Parliamentary Committee on Treaties and the creation of a Treaties Council.

'The Executive Government should not manage the treaty making process in isolation,' Mr Williams said. That process has clearly been enhanced by the participation of the Parliament, the States and Territories and the wider community.'

The new Statement replaces the earlier Statement of 10 May 1995 in respect of administrative decisions made from today. A copy of the new Statement is attached.

JOINT STATEMENT

THE MINISTER FOR FOREIGN AFFAIRS

AND THE ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

25 February 1997

THE EFFECT OF TREATIES IN ADMINISTRATIVE DECISION-MAKING

This statement addresses the consequences of the 7 April 1995 decision of the High Court in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. In relation to administrative decisions made from today, it replaces the joint statement made on 10 May 1995 by the then Minister for Foreign Affairs and the then Attorney-General.

2. In the *Teoh* case the majority of the High Court held that entry into a treaty by Australia creates a 'legitimate expectation' in administrative law that the Executive Government and its agencies will act in accordance with the terms of the treaty, even where those terms have

not been incorporated into Australian law. The High Court held that, where a decision-maker proposes to make a decision which is inconsistent with such a legitimate expectation, procedural fairness requires that the person affected by the decision be given notice and an adequate opportunity to put arguments on the point. The High Court made clear that such an expectation cannot arise where there is either a statutory or executive indication to the contrary.

3. It is a longstanding principle that the provisions of a treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into domestic law by statute. The High Court in the *Teoh* case affirmed that principle but at the same time gave treaties an effect in Australian law, as described in the previous paragraph, which they did not previously have. The Government is of the view that this development is not consistent with the proper role of Parliament in implementing treaties in Australian law. Under the Australian Constitution, the Executive Government has the power to make Australia a party to a treaty. It is for Australian parliaments, however, to change Australian law to implement treaty obligations.

4. The purpose of this statement is to ensure that the executive act of entering into a treaty does not give rise to legitimate expectations in administrative law.

5. The act of entering into a treaty is unlike the considered statements of public policy which previously had been held by the courts to give rise to a legitimate expectation in administrative law. The prospect was left open by the *Teoh* case of decisions being challenged on the basis of a failure sufficiently to advert to relevant international obligations including where the decision-maker and person affected had no knowledge of the relevant obligation at the time of the decision. This is not conducive to good administration.

6. Therefore, we indicate on behalf of the Government that the act of entering into a treaty does not give rise to legitimate expectations in administrative law which could form the basis for challenging any administrative decision made from today. This is a clear expression by the Executive Government of the Commonwealth of a contrary indication referred to by the majority of the High Court in the *Teoh* Case.

7. Subject to the next paragraph, the executive indication in this joint statement applies to both Commonwealth and State and Territory administrative decisions and to the entry into any treaty by Australia in the future as well as to treaties to which Australia already is a party. In relation to administrative decisions made in the period between 10 May 1995 and today reliance will continue to be placed on the joint statement made by the then Minister for Foreign Affairs and the then Attorney-General on 10 May 1995.

8. Where a State or Territory government or parliament takes, or has taken, action to displace legitimate expectations arising out of entry into treaties in relation to State or Territory administrative decisions this statement will have no operation in relation to those decisions.

9. The Government will also introduce legislation to provide that the executive act of entering into a treaty does not give rise to legitimate expectations in administrative law.

ALEXANDER DOWNER DARYLWILLIAMS

Government Opposes Privacy Regime for Private Sector

In this section of the last issue of *Admin Review* it was reported that the Attorney-General's Department had released for comment a discussion paper concerning privacy protection in the private sector.

The Prime Minister has now announced that the Commonwealth Government opposes the proposals. The Prime Minister's Press Release dated 21 March 1997 says

> "I took the opportunity of today's Premiers Conference to raise the Commonwealth's concerns regarding proposals to implement a privacy regime for the private sector. The Commonwealth op-