



## **Express law** *fast track information for clients*

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### **High Court decision on procedural fairness**

**In a recent decision the High Court rejected applications to set aside decisions under the *Migration Act 1958* for failure to accord procedural fairness. The distinct nature of the powers conferred on the Minister by the Act meant that the exercise of the powers was not conditioned on the observance of the principles of procedural fairness.**

The decision in *Plaintiff S10-2011 v Minister for Immigration and Citizenship; Kaur v Minister for Immigration and Citizenship; Plaintiff S49/2011 v Minister for Immigration and Citizenship; Plaintiff S51/2011 v Minister for Immigration and Citizenship* [2012] HCA 31 (*Plaintiff S10-2011*) highlights that it is essentially an issue of statutory interpretation whether a statutory discretion requires that procedural fairness is accorded.

### ***Background***

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The plaintiffs sought various forms of relief (including certiorari) against the Minister for Immigration and Citizenship and the Secretary of the Department of Immigration and Citizenship.

Each of the plaintiffs had sought to attract the exercise by the Minister of a discretion, personally vested in him by the Act, to make decisions in favour of unsuccessful visa applicants and persons in detention. The Minister had issued guidelines, described by the Court as more in the nature of instructions or directions ([34], [51] and [90]), regarding the sorts of requests for consideration of the exercise of the Minister's power that could be referred to the Minister. In some cases, departmental officers had found that the plaintiffs' requests did not meet the guidelines' criteria. In other cases, the Minister himself had declined to consider exercising his discretion.

The plaintiffs sought to impugn the Minister's refusal of their requests for intervention on the basis that he had failed to accord them procedural fairness ([39]–[49]). The Act did not expressly exclude the application of procedural fairness in relation to the exercise of the relevant discretion.

### ***High Court decision***

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In 3 separate judgments, the Court unanimously dismissed the applications. All 3 judgments held that, in refusing to intervene, the Minister was not obliged to provide procedural fairness. In reaching this conclusion, all 3 judgments emphasised the unique nature of the discretion in question. The unique qualities identified included the discretion's non-compellable ([50], [99], [110]) and non-delegable ([111], [99]) nature. The nature of the discretion stood in contrast to

decisions under the regular legislative scheme concerned with whether a person satisfied conditions for the issue of visas ([53], [99] [118]).

The Court's conclusion was unaffected by the fact that departmental officers had not brought some of the plaintiffs' requests to the Minister's attention. The officers' decisions had been made in accordance with the process set out in the ministerial guidelines and there was nothing in the character of this process that attracted a requirement of procedural fairness ([51]; see also at [91] and [119]).

The guidelines in *Plaintiff S10-2011* were distinguished from the guidelines the Court considered in *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319. The guidelines in *Plaintiff S10-2011* were not an incident of the exercise of statutory power; they did not involve a decision on the part of the Minister. The activities carried out in accordance with the guidelines were preparatory to his decision and as such the guidelines merely facilitated the provision of advice to the Minister or were otherwise a screening mechanism. It followed that there was no requirement to accord procedural fairness ([46], [51], [91], [119]).

### ***Implications for Commonwealth agencies***

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*Plaintiff S10-2011* highlights that it is essentially an issue of statutory interpretation whether a statutory discretion requires that procedural fairness is accorded. The unique nature of the particular discretion in question was crucial to the decision in this case.

The Australian Government Solicitor was instructed to act for the Minister and the Secretary.

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