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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION LEGISLATION AMENDMENT BILL (No. 2) 2000

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Immigration and Multicultural Affairs,
The Hon. Philip Ruddock MP)

MIGRATION LEGISLATION AMENDMENT BILL (No. 2) 2000

OUTLINE

Overview

1 The Migration Legislation Amendment Bill (No. 2) 2000 (“the Bill”) is an omnibus Bill that makes a number of amendments to the *Migration Act 1958* (“the Act”).

2 Schedule 1 to the Bill makes a number of amendments relating to the judicial review scheme set out at Part 8 of the Act and introduces a new Part 8A into the Act. These amendments flow from the Government’s policy intention of restricting access to judicial review in visa related matters in all but exceptional circumstances. They prohibit class actions in migration litigation and limit those persons who may commence and continue proceedings in the courts.

3 Since October 1997, 14 class actions have been taken out allowing significant numbers of people to obtain bridging visas to remain in Australia until the courts determined the matter. All 10 of those class actions that have been decided – involving about 4,000 participants – have been dismissed by the courts, raising concerns that class actions are being used to encourage large numbers of people to litigate to prolong their stay in Australia.

4 These amendments do not stop judicial review of visa-related decisions affecting individuals.

5 Schedule 2 to the Bill makes a number of technical amendments to the Act:

- to clarify the scope of the Minister’s power under section 501A to set aside a non-adverse section 501 decision of the delegate or the Administrative Appeals Tribunal and substitute his or her own adverse decision;
- to rectify an omission in subsection 140(1) and paragraph 140(2)(a), which allow for the consequential cancellation of visas, so that they also apply where a person’s visa is cancelled under section 128; and
- to correct three misdescribed amendments of the Act.

FINANCIAL IMPACT STATEMENT

6 The financial impact of the amendments contained in Schedule 1 to the Bill will depend on what effect the amendments have on applications for judicial review. For instance, if the bar on class, representative or otherwise grouped actions does not increase the number of individual applications, broad costs to the Commonwealth, including costs arising from members of these actions prolonging their stay in Australia, may be reduced. However, if the number of individual applicants increases, there may be an increase in litigation costs in addition to costs associated with each individual’s prolonged stay in Australia.

7 The amendments contained in Schedule 2 to the Bill will have no financial impact.

MIGRATION LEGISLATION AMENDMENT BILL (No. 2) 2000**NOTES ON INDIVIDUAL CLAUSES****Clause 1 Short title**

1 The short title by which this Act may be cited is the *Migration Legislation Amendment Act (No. 2) 2000*.

Clause 2 Commencement

2 Subclause 2(1) provides that subject to this section, this Act commences on the day on which it receives the Royal Assent.

3 Subclause 2(2) provides that, subject to subsection (3), Part 2 of Schedule 1 and items 5, 6 and 7 of Schedule 2 commence on a day or days to be fixed by Proclamation.

4 Subclause 2(3) provides that if a provision mentioned in subsection (2) is not proclaimed within 6 months of this Act receiving the Royal Assent, then it will commence on the first day immediately after the end of that period.

5 Subclause 2(4) provides that Part 1 of Schedule 2 is taken to have commenced on 1 June 1999, immediately after the commencement of item 23 of Schedule 1 to the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998*.

6 Subclause 2(5) provides that items 8 and 9 of Schedule 2 are taken to have commenced on 1 June 1999. This was the date of commencement of the relevant parts of the *Migration Legislation Amendment Act (No. 1) 1998*.

7 Subclause 2(6) provides that item 10 of Schedule 2 is taken to have commenced immediately after the commencement of item 5 of Schedule 2 to the *Migration Legislation Amendment (Migration Agents) Act 1999*. Schedule 2 to that Act commenced by Proclamation on 1 March 2000.

Clause 3 Schedule(s)

8 This clause provides that, subject to section 2, each Act specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned. In addition, any other item in a Schedule to this Act has effect according to its terms.

SCHEDULE 1 – Jurisdiction and proceedings of courts

Part 1 – Amendments commencing on Royal Assent

Migration Act 1958

Item 1 Subsection 485(1)

1 This item omits the words “or decisions covered by subsection 475(2) or (3)” from subsection 485(1). The amendment of subsection 485(1) is consequential to the amendments made by items 2 and 3 of this Part.

Item 2 Subsection 485(3)

2 This item repeals subsection 485(3) and substitutes new subsections 485(3) and 485(4) to clarify the position regarding the Federal Court’s jurisdiction in relation to matters remitted to it pursuant to section 44 of the *Judiciary Act 1903*. New subsection 485(3) makes it clear that if the High Court remits a matter relating to a judicially-reviewable decision (as defined in subsection 475(1)) to the Federal Court, this matter must be treated as if it were a judicially-reviewable decision under section 476 or 477 (as applicable in the particular case).

3 Further, new subsection 485(4) makes the previously understood position manifestly clear that in relation to a matter referred to in new subsection 485(3), the Federal Court is subject to the limitations, powers and requirements in Division 2 of Part 8 of the Act (other than section 478). For instance, the only grounds of review available to the Federal Court are those in section 476 or 477 (as applicable in the particular case).

Item 3 After section 485

4 This item inserts new section 485A after section 485 in Part 8 of the Act.

Section 485A Federal Court does not have any jurisdiction in relation to non-judicially-reviewable decisions

5 New section 485A clarifies that the Federal Court does not have any jurisdiction in relation to non-judicially-reviewable decisions covered by subsection 475(2) or (3). This is the case despite any other law, including sections 39B and 44 of the *Judiciary Act 1903*.

Item 4 After Part 8

6 This item inserts new Part 8A into the Act.

Part 8A – Restrictions on court proceedings

Section 486A Time limit on applications to the High Court for judicial review

7 New subsection 486A(1) provides that an application to the High Court in its original jurisdiction under the Constitution for judicial review of a decision covered by subsection 475(1), (2) or (3) must be made within 28 days of the notification of the decision. This is intended to ensure that challenging a subsection 475(1), (2) or (3) decision in the High Court does not become a way of circumventing the time limits for applications to the Federal Court under Part 8 of the Act.

8 New subsection 486A(2) prevents the High Court from making an order allowing an application to be made outside of the 28 day period provided for in new subsection 486A(1).

9 New subsection 486A(3) provides that the regulations may prescribe matters regarding the notification of a decision for the purposes of new section 486A.

Item 5 Application of amendments

10 Subitem 5(1) provides that items 1 and 3 of this Schedule apply to proceedings (including applications for leave to appeal or other appeal proceedings) begun after Royal Assent. For example, the amendments made by items 1 and 3 apply to an appeal proceeding relating to a first instance proceeding even where the first instance proceeding was begun prior to Royal Assent.

11 Subitem 5(2) provides that item 2 of this Schedule applies to matters remitted to the Federal Court after Royal Assent.

12 Subitem 5(3) provides that item 4 of this Schedule applies to subsection 475(1), (2) or (3) decisions made after Royal Assent.

Part 2 – Amendments commencing on Proclamation

Migration Act 1958

Item 6 At the end of Part 8A

13 This item adds new sections 486B and 486C to new Part 8A as inserted by Part 1 of this Schedule.

Section 486B No multiple parties in migration litigation

14 New subsection 486B(1) bars class, representative or otherwise grouped court actions in relation to both High Court and Federal Court proceedings that raise an issue in connection with visas (including if a visa is not granted or has been cancelled), deportation, or removal of unlawful non-citizens. The provision also covers an issue such as a decision that a visa application was not a valid visa application in accordance with section 46 of the Act.

15 New subsection 486B(2) ensures that new subsection 486B(1) applies despite any other law, including the *Federal Court of Australia Act 1976* or any Rules of Court.

16 New subsection 486B(3) ensures that new subsection 486B(1) applies despite any other law unless a provision of an Act, which commences after new section 486B, expressly states that it applies despite new section 486B.

17 New subsection 486B(4) sets out a number of exceptions to the general rule in new subsection 486B(1). In particular:

- new paragraph 486B(4)(a) ensures that members of the same family, as defined in the regulations, are not prevented from being applicants in an application for judicial review in the High Court or the Federal Court. This allows family members both themselves and/or as representatives of other members of the same family to be involved in multiple party proceedings;
- new paragraph 486B(4)(b) ensures that persons performing statutory functions, such as the Human Rights and Equal Opportunity Commissioner, are not prevented from being involved in multiple party proceedings in the High Court or Federal Court;
- new paragraph 486B(4)(c) ensures that the Attorney-General of the Commonwealth or of a State or Territory is not prevented from being involved in multiple party proceedings in the High Court or Federal Court; and
- new paragraph 486B(4)(d) allows, as necessary, for the prescription in the regulations of other persons who are not subject to the bar in new subsection 486B(1). For example, it is intended that the regulations will provide that the “next friend” of a minor or a mentally disabled person who is not a family member (and so not covered by new paragraph 486B(4)(a)) can be involved in multiple party proceedings in the High Court or Federal Court if necessary.

Section 486C Persons who may commence or continue proceedings in the Federal Court

18 New section 486C imposes additional standing requirements to those currently existing in relation to Federal Court matters whether brought under Part 8 of the Act or otherwise. By “standing” we mean the persons who may commence or continue a proceeding in the Federal Court that raises a relevant issue. The relevant issue is an issue:

- in connection with visas (including if a visa is not granted or has been cancelled), deportation, or removal of unlawful non-citizens; and
- that relates to the validity, interpretation or effect of a provision of the Act or the regulations.

19 The purpose of these additional standing requirements is to confine any Federal Court challenge to a person who is the subject of a visa or deportation decision, or removal action, or to another person who has standing in respect of that particular decision. This is the case whether or not the proceeding raises an issue other than the relevant issue. For constitutional reasons, new section 486C does not apply to the High Court.

20 New section 486C is not intended to operate in relation to persons bringing an action pursuant to section 477 of the Act for failure to make a decision, as that action would not relate to the validity, interpretation or effect of a provision.

21 New subsection 486C(2) specifies the persons who have standing under new subsection 486C(1).

22 In relation to a proceeding under Part 8 of the Act, new paragraph 486C(2)(a) provides that the following persons may commence or continue a proceeding in the Federal Court that raises a relevant issue:

- if the decision that gives rise to the relevant issue is covered by paragraph 475(1)(a) or (b) – the applicant in the review by the relevant Tribunal; or
- if the decision that gives rise to the relevant issue is covered by paragraph 475(1)(c) – the person who is the subject of the decision.

23 However, as noted, this provision is not intended to confer any additional jurisdiction on the Federal Court. It only deals with the standing of persons where the Federal Court otherwise has jurisdiction in relation to the decision.

24 In relation to any proceeding other than those to which Part 8 applies, new paragraph 486C(2)(b) provides that the following persons may commence or continue a proceeding in the Federal Court that raises a relevant issue:

- a person who is the subject of a visa or deportation decision, or a removal action, that gives rise to the relevant issue; or
- a person who may appeal to the Federal Court under section 44 of the *Administrative Appeals Tribunal Act 1975* in respect of a visa or deportation decision that gives rise to the relevant issue.

25 Further, new paragraph 486C(2)(c) provides that in any case the following persons may commence or continue a proceeding in the Federal Court that raises a relevant issue:

- the Minister;
- the Attorney-General of the Commonwealth or of a State or Territory;
- a person performing statutory functions (for example, the Human Rights and Equal Opportunity Commissioner).

26 In addition, new subparagraph 486C(2)(c)(iv) allows, if necessary, for the prescription in the regulations of other persons who may commence or continue a proceeding in the Federal Court that raises a relevant issue.

27 New subsection 486C(3) ensures that section 486C applies to *all* proceedings in the Federal Court.

28 The purpose of subsection 486C(4) is to limit existing standing provisions. It does not give a person standing that he or she does not otherwise have to commence or continue a proceeding.

29 New subsections 486C(5) and 486C(6) ensure that new section 486C applies despite any other law unless a provision of an Act, which commences after new section 486C, expressly states that it applies despite new section 486C.

30 New subsection 486C(7) sets out relevant definitions for the purposes of new section 486C.

Item 7 Application of amendments

31 Subitem 7(1) provides that the amendments made by Part 2 apply to a proceeding if the application to commence the proceeding is filed in court on or after 14 March 2000 being the date of introduction of the Bill to the Parliament. This is intended to prevent the commencement of large class actions which may have occurred if the amendments made by this Part only operated after Proclamation.

32 Paragraph 7(2)(a) provides that the amendments do not apply if the relevant court began the substantive hearing of the proceeding before the commencement of Part 2. The substantive hearing means the hearing dealing with the substantive issues and not, for example, preceding hearings on interlocutory matters or directions hearings.

33 Paragraph 7(2)(b) provides that the amendments do not apply to an application for leave to appeal, or any other appeal proceeding, filed on or after 14 March 2000 where the original court application was filed before that day.

Item 8 Transitional – proceedings that contravene new section 486B

34 Subitem 8(1) provides that the High Court or Federal Court must treat a proceeding, which began before the commencement of Part 2 of this Schedule and which contravenes new section 486B, as if it lacked jurisdiction to hear the proceeding when it was begun.

35 However, subitem 8(2) allows a person who has an interest in the proceeding mentioned in subitem 8(1) to commence fresh proceedings within 28 days after the commencement of Part 2 of this Schedule (despite the time limit in section 478 of the Act). In commencing fresh proceedings, the person must comply with the Act (as amended by this Part) and all other laws including those relating to standing or requiring a fee to be paid.

36 Subitem 8(3) clarifies that fresh proceedings cannot be commenced by a person in respect of a proceeding to which item 9 applies.

Item 9 Transitional – proceedings that contravene new section 486C

37 This item provides that the Federal Court must treat a proceeding, which began before the commencement of Part 2 of this Schedule and contravenes new section 486C, as if it lacked jurisdiction to hear the proceeding when it was begun.

Item 10 Transitional – refund of application fees

38 Under subitem 10(1) the Commonwealth must, on application, refund a fee paid by a person in respect of a proceeding that is not continued because of the operation of item 8 or 9.

39 Where a proceeding was brought on behalf of more than one person, subitem 10(2) provides that the fee must be refunded to a person authorised in writing by all such persons to receive it.

Item 11 Transitional – regulations

40 This item permits a regulation made for the purposes of new paragraph 486B(4)(a) or (d) or subparagraph 486C(2)(c)(iv) of the Act to have effect from the date of introduction of the Bill to Parliament despite section 48 of the *Acts Interpretation Act 1901*.

41 For example, a regulation allowing the “next friend” of a minor or a mentally disabled person to be a party in a High Court or Federal Court proceeding despite subsection 486B(1) can operate from the date of introduction of the Bill to Parliament.

SCCHEDULE 2 – Technical Amendments

Part 1 – Character Test

Migration Act 1958

Item 1 Paragraph 501A(1)(c)

1 This item amends section 501A to clarify the policy intention that the Minister has the power to set aside a non-adverse subsection 501(1) decision of a delegate or the Administrative Appeals Tribunal (“the AAT”) and substitute his or her own adverse decision.

2 Currently, paragraph 501A(1)(c) incorrectly suggests that the AAT has a power to *grant* a visa when reviewing a section 501(1) decision made by a delegate of the Minister.

3 However, subsection 501(1) only confers a power to *refuse to grant* a visa to a person, or not to refuse to grant a visa, depending on whether or not the decision maker is satisfied that the person passes the character test. Subsection 501(1) does not confer a power to actually grant a visa. The power to grant a visa is contained in section 65 of the Act.

4 As paragraph 500(1)(b) gives the AAT power to review a section 501 decision made by a delegate of the Minister, the AAT does not actually have the power to grant a visa. This item ensures that the Minister can set aside the AAT’s non-adverse subsection 501(1) decision and substitute his or her own adverse decision.

Item 2 At the end of subsection 501A(1) (after paragraph (d))

5 This item clarifies the intended scope of the Minister’s power of intervention under section 501A where the delegate or the AAT has made a decision not to exercise the power in subsection 501(1) or 501(2).

6 Under section 501 the decision-maker may refuse to grant a visa or to cancel a visa if satisfied that the person does not pass the character test in subsection 501(6). Thus, there are two circumstances in which the power in section 501 will not be exercised:

- where the decision-maker is satisfied that the person passes the character test; or
- where the decision-maker is not satisfied that the person passes the character test but exercises his or her discretion not to refuse to grant the visa or cancel the visa.

7 It was always intended that the Minister should be able to intervene under section 501A in both these circumstances. This amendment makes it clear that the Minister can intervene under section 501A whether or not the non-adverse section 501 decision was reached because the person was found to pass the character test or otherwise.

Item 3 After subsection 501A(4)

8 In combination with subsections 501A(2) and 501A(3), new subsection 501A(4A) puts it beyond doubt that the Minister has the power to intervene at any point after a non-adverse decision under subsection 501(1) has been made by a delegate or the AAT whether the intervention occurs immediately or after a decision to grant has been made.

9 For example, where the section 501 delegate decides not to exercise the power conferred by subsection 501(1) to refuse to grant a visa to the person on character grounds and the section 65 delegate subsequently grants the visa, new subsection 501A(4A) clarifies that the Minister has the power to cancel that visa.

Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998

Item 4 Paragraph 33(1)(c) of Schedule 1

10 This item amends item 33 of Schedule 1 to the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (“the Character Act”). Item 33 sets out transitional arrangements that allow the Minister to set aside and substitute a non-adverse decision made under section 501 as it was in force prior to its repeal and substitution by the Character Act.

11 Like paragraph 501A(1)(c), paragraph 33(1)(c) incorrectly suggests that the AAT has a power to grant a visa when in fact it does not. Thus, this item amends paragraph 33(1)(c) to remove any suggestion that the AAT has the power to grant a visa when reviewing a section 501 decision made by a delegate of the Minister.

Part 2 – Other technical corrections

Migration Act 1958

Item 5 Subsection 140(1)

Item 6 Paragraph 140(2)(a)

12 These items rectify a minor omission in subsection 140(1) and paragraph 140(2)(a) which allow for consequential cancellation of visas. Thus, as originally intended, subsection 140(1) and paragraph 140(2)(a) will also apply where a person’s visa is cancelled under section 128.

Item 7 Application of amendment

13 This item provides that paragraph 140(2)(a), as amended by item 6, only applies where a visa has been cancelled under section 128 after the commencement of item 6.

Migration Legislation Amendment Act (No.1) 1998

Item 8 Item 6 of Schedule 2

14 This item repeals item 6 of Schedule 2 to the *Migration Legislation Amendment Act (No. 1) 1998* (“MLAA (No. 1) 1998”) which contains a misdescribed amendment to the Act.

15 Item 6 of Schedule 2 to MLAA (No. 1) 1998 provides for “Immigration Review Tribunal” to be omitted and substituted with “Migration Review Tribunal” in paragraph 318(1)(b) and subsection 320(1) of the Act.

16 However, at the time that MLAA (No. 1) 1998 received the Royal Assent neither section 318 (which no longer contained a paragraph (1)(b)) nor subsection 320(1) of the Act contained a reference to “Immigration Review Tribunal”. Therefore, the amendment contained in item 6 of Schedule 2 to MLAA (No. 1) 1998 is incorrect.

Item 9 Item 12 of Schedule 3 (heading)

17 This item amends the heading of item 12 of Schedule 3 to MLAA (No. 1) 1998 to correct a misdescribed amendment of the Act.

18 Item 12 of Schedule 3 to MLAA (No. 1) 1998 provides for the insertion of new section 441A at the end of Division 7 of Part 6 of the Act. However, this amendment is incorrect because it should provide for the insertion of new section 441A at the end of Division 7 of Part 7 not Division 7 of Part 6.

Migration Legislation Amendment (Migration Agents) Act 1999**Item 10 Item 5 of Schedule 2 (heading)**

19 This item amends the heading of item 5 of Schedule 2 to the *Migration Legislation Amendment (Migration Agents) Act 1999* (“the Migration Agents Act”) to correct a misdescribed amendment of the Act.

20 Item 5 of Schedule 2 to the Migration Agents Act adds new paragraph (h) at the end of section 316. However, section 316 contains two subsections and it was intended that new paragraph (h) would be added to the end of subsection 316(1) not subsection 316(2).