Australian Government
Department of Home Affairs

Inquiry into the Migration Amendment (Clarification of Jurisdiction) Bill 2018

Senate Legal and Constitutional Affairs Legislation Committee

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Introduction

The Department of Home Affairs (the Department) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Clarification of Jurisdiction) Bill 2018 (the Bill), following the introduction of the Bill into the House of Representatives on 14 February 2018.

This submission provides a response to the reason for referral and principal issues of concern, which were raised by the Selection of Bills Committee, and also briefly explains the key measures in the Bill.

Measures in the Bill

The Bill amends the *Migration Act 1958* (the Migration Act) and makes consequential amendments to the *Administrative Appeals Tribunal Act 1975* (the AAT Act) to clarify the scope and operation of the judicial review scheme set out in Part 8 of the Migration Act. This is achieved by clarifying the types of decisions, known as 'migration decisions', subject to the scheme. The amendments are necessary to address the outcome of the Full Federal Court decision in *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125 (ARJ17).

Reason for referral

The Bill was referred to the Legal and Constitutional Affairs Legislation Committee by the Selection of Bills Committee on 15 February 2018. The reasons for referral and principal issues for consideration by the Committee as identified in the Selection of Bills Committee Report No. 2 of 2018 are:

- The complex nature of the *Migration Act 1958* and the *Administrative Appeals Tribunal Act 1975* and the potential impact of these changes warrant further consultation and investigation to ensure there are no unintended consequences.

Portfolio submission

Context

Part 8 of the Migration Act sets out a discrete judicial review scheme, which applies to certain decisions made under or in relation to the Migration Act known as 'migration decisions'. The scheme sets out a number of procedural requirements in relation to applications for judicial review of migration decisions.

A key feature of the scheme is that a challenge to a 'migration decision', subject to limited exceptions[1], must be instituted in the Federal Circuit Court at first instance.

Following the decision of the Full Federal Court in ARJ17, the judicial review scheme in Part 8 of the Migration Act no longer operates in accordance with the original policy intention. Specifically, the Full Federal Court held that certain decisions affected by jurisdictional error are not 'migration decisions' and therefore not subject to the Part 8 scheme.

The purpose of the Bill is to clarify and restore the intended operation of the Part 8 scheme in relation to judicial review of all relevant decisions. This will ensure consistency and efficiency in the management of migration litigation, and provide clarity to all stakeholders involved.

Necessity of amendments

This Bill will provide certainty around the scope and operation of the judicial review scheme under Part 8 of the Migration Act. The Bill achieves this by amending the definition of a 'migration decision' to include a 'purported non-privative clause decision' and 'purported AAT Act migration decision'. A 'purported non-privative clause decision' or 'purported AAT Act migration decision' is a decision that would be a decision of the relevant type, had it not been affected by jurisdictional error – that is, if there was not a failure to exercise jurisdiction or an excess of jurisdiction in the making of the decision. It is intended that by redefining 'migration decision' in this way, the scheme set out in Part 8 of the Migration Act will apply to all relevant decisions, regardless of whether the decision is affected by jurisdictional error or not.

The amendments in this Bill are necessary following the Full Federal Court decision in ARJ17 in which the Full Federal Court held that the reference to a 'non-privative clause decision' in the Migration Act only encompasses a valid non-privative clause decision, not one that is affected by jurisdictional error. A similar risk has been identified in relation to a reference to an 'AAT Act migration decision', that it would only encompass a valid decision. The practical effect of the Full Federal Court's decision is that until a court determines the lawfulness (whether it is without jurisdictional error) of a non-privative clause decision or an AAT Act migration decision, the procedural provisions in Part 8 of the Migration Act are inoperative.

It follows that at the time judicial review is commenced in relation to a non-privative clause decision or an AAT Act migration decision, it is not clear whether judicial review of the decision is subject to Part 8 of the Migration Act. It is

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[1] Refer *Migration Act 1958* (Cth) s476A(1):

(1) Despite any other law, including section 39B of the *Judiciary Act 1903* and section 8 of the *Administrative Decisions (Judicial Review) Act 1977* , the Federal Court has original jurisdiction in relation to a migration decision if, and only if:

(a) the Federal Circuit Court transfers a proceeding pending in that court in relation to the decision to the Federal Court under section 39 of the *Federal Circuit Court of Australia Act 1999* ; or

(b) the decision is a privative clause decision, or a purported privative clause decision, of the Administrative Appeals Tribunal on review under section 500; or

(c) the decision is a privative clause decision, or purported privative clause decision, made personally by the Minister under section 501, 501A, 501B, 501BA, 501C or 501CA; or

(d) the Federal Court has jurisdiction in relation to the decision under subsection 44(3) or 45(2) of the *Administrative Appeals Tribunal Act 1975* .

Note: An appeal in relation to any of the following migration decisions cannot be made to the Federal Court under section 44 of *the Administrative Appeals Tribunal Act 1975* :

(a) a privative clause decision;
(b) a purported privative clause decision;
(c) an AAT Act migration decision.

In addition, reference of a question of law arising in relation to a review of any of the proceedings mentioned in paragraph (a), (b) or (c) cannot be made by the Tribunal to the Federal Court under section 45 of the *Administrative Appeals Tribunal Act 1975*.

The only migration decisions in relation to which an appeal under section 44 of that Act, or a referral under section 45 of that Act, can be made to the Federal Court are non-privative clause decisions.

therefore not clear whether the judicial review proceedings should be subject to the procedural requirements set out in Part 8, and should therefore be instituted in the Federal Circuit Court. If a challenge to a decision were commenced in the Federal Court, a substantial hearing would be required to determine whether the relevant decision is affected by jurisdictional error, and in turn, whether the Federal Court has jurisdiction to hear the matter. This is an inefficient use of the Court's time, and does not reflect the original policy intention of Part 8 of the Migration Act that a migration decision, subject to limited exceptions, must be instituted in the Federal Circuit Court at first instance. The proposed amendments seek to overcome the effect of the decision in ARJ17 by including a 'purported non-privative clause decision' and a 'purported AAT Act migration decision' in the definition of 'migration decision' so that the issue of whether there is a jurisdictional error in the decision does not need to be determined to establish which court has jurisdiction.

The Bill also makes consequential amendments to section 43C of the AAT Act to refer to the new defined term 'purported AAT Act migration decision'. Currently the AAT Act includes a reference to an 'AAT Act migration decision' to provide that Part IVA of the AAT Act does not apply. As a 'purported AAT Act migration decision' is now separately defined, it is also necessary to include in section 43C of the AAT Act, a reference to a 'purported AAT Act migration decision'. This will ensure that the jurisdiction of such a decision continues to be determined by reference to Part 8 of the Migration Act.

The measures in this Bill will clarify the intended scope of the judicial review scheme under Part 8 of the Migration Act. The Bill will give effect to the original policy intention that there be a consistent judicial review scheme in relation to relevant decisions made under or in relation to the Migration Act.

Access to judicial review

The Bill does not exclude judicial review of the purported decisions it deals with. Rather, it seeks to apply jurisdictional limits in accordance with Part 8 of the Migration Act to such proceedings, consistent with the original policy intention.

Part 8 of the Migration Act currently applies to a 'migration decision', as defined in subsection 5(1), including a 'purported privative clause decision' (which includes a decision on a visa), a 'non-privative clause decision' and an 'AAT Act Migration decision'. The Bill does not introduce a new framework for accessing judicial review of a migration decision. Rather it ensures that a 'purported non-privative clause decision' and a 'purported AAT Act migration decision' are brought within the existing framework in Part 8 of the Migration Act for migration decisions as was always intended.

The amendments will affect applicants who seek judicial review of a purported non-privative clause decision, or a purported AAT Act migration decision, made on or after the commencement of the Bill. Applicants who fail to institute proceedings in accordance with Part 8 of the Migration Act may be affected by this measure – however, the Court ultimately has a discretion to extend the timeframe to apply for review. Encouraging prospective applicants to commence judicial review proceedings in the correct judicial forum within the period of time provided will contribute to the efficient management of migration litigation while still providing access to judicial review.

The judicial review scheme and requirements which this Bill seeks to restore were first introduced into, and passed by the Parliament in 1992. Significant amendments since the introduction of Part 8 of the Migration Act include amendments in 2001 to introduce the 'privative clause decision' (see the *Migration Legislation Amendment (Judicial Review) Act 2001*), and amendments in 2005 in response to the High Court decision in *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2 (see the *Migration Litigation Reform Act 2005*) where the scheme was extended to operate in relation to a 'purported privative clause decision'.

The amendments in this Bill similarly respond to the decision in ARJ17, which has, in part, affected the intended operation of the Part 8 scheme. The measures in this Bill continue consistent efforts to ensure that the judicial review

scheme set out in Part 8 of the Migration Act operates as intended and as already applied to other decisions under, or in relation to, the Migration Act.

In developing this Bill, the Department consulted with the Attorney General's Department, which scrutinised the measures from administrative law policy and legislative framework perspectives, and considered implications for the Court's workload and resourcing. No significant issues were raised during this consultation process.