

# Chapter 1

## Introduction and background

1.1 On 15 February 2018 the Senate referred the Migration Amendment (Clarification of Jurisdiction) Bill 2018 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 5 June 2018.<sup>1</sup>

1.2 The Senate Committee for the Selection of Bills recommended that the bill be referred for inquiry for the following reasons:

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.<sup>2</sup>

### Background and purpose of the bill

1.3 On 14 February 2018, the Assistant Minister for Home Affairs, the Hon. Alex Hawke MP, introduced the bill into the House of Representatives. In his second reading speech he explained that the proposed amendments in the bill are in response to a Federal Court decision<sup>3</sup> where it was held that an error in certain decisions did not fall within the definition of a 'migration decision'.<sup>4</sup> Assistant Minister Hawke outlined the purpose of the bill:

The measures in this bill will restore the intended scope of the judicial review scheme under the Migration Act and restore the original policy intent so that there is a uniform judicial review scheme that clearly applies to all migration decisions. This will ensure a more consistent and official judicial review scheme in relation to migration decisions.<sup>5</sup>

1.4 The Explanatory Memorandum (EM) provides some background to the judicial review scheme under the *Migration Act 1958* (Migration Act) and challenges to a migration decision:

Part 8 of the Migration Act establishes a judicial review scheme for migration decisions and limits the application of other legislation, including the *Administrative Decisions (Judicial Review) Act 1977* and the *Judiciary Act 1903*. A key feature of this judicial review scheme is that a

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1 *Journals of the Senate*, No. 87, 15 February 2018, pp. 2738–2740.

2 Senate Standing Committee for the Selection of Bills, *Report No. 2 of 2018*, 15 February 2018, Appendix 4.

3 *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125.

4 The Hon. Alex Hawke MP, Assistant Minister for Home Affairs, *House of Representatives Hansard*, 14 February 2018, p. 1340.

5 The Hon. Alex Hawke MP, Assistant Minister for Home Affairs, *House of Representatives Hansard*, 14 February 2018, p. 1340.

challenge to a *migration decision* must (subject to limited exceptions) be instituted in the Federal Circuit Court at first instance, rather than in the Federal Court.<sup>6</sup>

## **Key provisions**

1.5 The bill would amend the Migration Act as well as make consequential amendments to the *Administrative Appeals Tribunal Act 1975* (AAT Act).

### ***Definition of a migration decision***

1.6 Currently the Migration Act defines a 'migration decision' to mean:

- (a) a privative clause decision; or
- (b) a purported privative clause decision; or
- (c) a non-privative clause decision; or
- (d) an AAT Act migration decision.<sup>7</sup>

1.7 A privative clause decision is defined in subsection 474(1) of the Migration Act as a decision that:

- (a) is final and conclusive; and
- (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
- (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.<sup>8</sup>

1.8 The bill proposes to repeal the current definition of a 'migration decision'. In addition to the decisions outlined above, the definition of a 'migration decision' would be expanded to also include a 'purported non-privative clause decision' and a 'purported AAT Act migration decision'.<sup>9</sup>

1.9 A 'purported non-privative clause decision' is defined in new subsection 5EA(1) of the bill to mean 'a decision purportedly made, proposed to be made, or required to be made...that would be a non-privative clause decision if there were not a failure to exercise jurisdiction; or an excess of jurisdiction'. The EM explains the intended effect of the proposed amendment:

The effect of this amendment is to ensure that the jurisdictional arrangements made by the Migration Act for a *non-privative clause decision* apply in the same way to a decision that would be a *non-privative clause decision* were that decision not affected by jurisdictional error.<sup>10</sup>

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6 Migration Amendment (Clarification of Jurisdiction) Bill 2018, Explanatory Memorandum (Explanatory Memorandum), p. 4.

7 *Migration Act 1958* (Migration Act), section 5.

8 *Migration Act 1958*, subsection 474(1).

9 Migration Amendment (Clarification of Jurisdiction) Bill 2018 (bill), subsection 5(1).

10 Explanatory Memorandum, p. 5.

1.10 Similarly, new subsection 5EB(1) of the bill defines a 'purported AAT Act migration decision' to mean 'a decision purportedly made, proposed to be made, or required to be made, under a provision of the [AAT Act] that would be an AAT Act migration decision if there were not a failure to exercise jurisdiction; or an excess of jurisdiction; in the making of the decision.'

1.11 In addition, new subsections 5EA(2) and 5EB(2) respectively state that the term 'decision' includes anything listed in subsection 474(3) of the Migration Act and new subsection 474A(2) of the bill.

1.12 New subsection 474A(2) of the bill provides a non-exhaustive list of administrative actions that would constitute a decision for the purposes of an 'AAT Act migration decision' and a 'purported AAT Act migration decision'. The EM notes:

The definition of decision in new subsection 474A(2) identifies a non-exhaustive list of administrative actions and substantially mirrors the list in subsection 474(3)...New subsection 474A(2) relates only to establishing jurisdiction and the procedure of courts pursuant to Part 8 of the Migration Act, and does not affect any exercise of power under the AAT Act.<sup>11</sup>

1.13 The effect of the proposed amendments are that challenges to 'purported non-privative clause decisions' and 'purported AAT Act migration decisions' fall under the judicial review process of Part 8 of the Migration Act and therefore must be heard in the Federal Circuit Court rather than the Federal Court. The EM states that the proposed definition would make clear that such decisions fall under the definition of a 'migration decision' and therefore proceedings relating to a challenge of such decisions would need to be instituted in the Federal Circuit Court rather than the Federal Court.<sup>12</sup>

### ***Consequential amendment***

1.14 The bill contains a consequential amendment to the AAT Act. As stated in the EM, this 'ensures that the jurisdiction of the Federal Circuit Court and the Federal Court in relation to a *purported AAT Act migration decision* is determined by sections 476 and 476A of the Migration Act respectively, consistent with the original policy intention of Part 8 of the Migration Act.'<sup>13</sup>

1.15 Item 9 of the bill clarifies that the amendments will not affect the jurisdiction of the Federal Circuit Court or Federal Court before the commencement of this item.

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11 Explanatory Memorandum, p. 6.

12 Explanatory Memorandum, p. 4.

13 Explanatory Memorandum, p. 7.

## Compatibility with human rights

1.16 According to the EM, the 'bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.'<sup>14</sup>

1.17 The Parliamentary Joint Committee for Human Rights considered the bill and concluded that the bill did not raise any human rights concerns.<sup>15</sup>

1.18 The bill was also considered by the Senate Standing Committee for the Scrutiny of Bills who noted that it 'has no comment on this bill.'<sup>16</sup>

## Financial implications

1.19 The EM states that '[t]here is no financial impact on Government revenue from this Bill.'<sup>17</sup>

## Conduct of the inquiry

1.20 Details of the inquiry were advertised on the committee's website, including a call for submissions to be received by 13 April 2018. The committee also wrote directly to a number of relevant individuals and organisations inviting them to make submissions. The committee received 11 submissions, which are listed at appendix 1 of this report. All submissions are available in full on the committee's website.

## Structure of this report

1.21 This report consists of two chapters:

- This chapter provides an overview of the bill's intent and provisions, as well as the administrative details of the inquiry.
- Chapter 2 discusses the key issues raised by submitters about the proposed amendments, and outlines the committee's views and recommendation.

## Acknowledgements

1.22 The committee thanks all organisations that made submissions to this inquiry.

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14 Explanatory Memorandum, p. 8.

15 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report 3 of 2018*, 27 March 2017, p. 137.

16 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, 21 March 2018, p. 23.

17 Explanatory Memorandum, p. 2.