CHAPTER 1

Introduction

Referral of the inquiry

1.1 The Migration Legislation Amendment Bill (No. 1) 2014 (the Bill) was introduced into the House of Representatives by the Minister for Immigration and Border Protection, the Hon Scott Morrison MP, on 27 March 2014.[1]

1.2 On the same day, the Senate referred, on the recommendation of the Selection of Bills Committee, the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 6 June 2014.[2] On 27 May 2014, in its interim report, the committee advised the Senate that it intended to present its final report by 21 August 2014.[3]

Overview of the Bill

1.3 The Bill comprises of six schedules which are aimed at clarifying various provisions in the *Migration Act 1958* (the Migration Act) and the *Australian Citizenship Act 2007* (the Citizenship Act). According to the Explanatory Memorandum (EM), the Bill would:

- clarify the limitations which exist with regards to valid applications made by persons who have been refused a visa or who have held a visa that was cancelled;
- ensure that a bridging visa application is not an impediment to removal from Australia;
- change the current debt recovery provisions so that they apply to all people smugglers and illegal foreign fishers;
- alter the role of individuals appointed as authorised recipients, and the Migration Review Tribunal (MRT) and the Refugee Review Tribunal's (RRT) obligation to give documents to authorised recipients;
- allow for greater use of material and information obtained under a search warrant; and
- amend the scope of the procedural fairness provisions that apply to visa applicants.[4]

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1 House of Representatives, *Votes and Proceedings*, No. 34-27 March 2014, p. 436.

2 *Journals of the Senate*, No. 26-37 March 2014, p. 741.

3 Senate Legal and Constitutional Affairs Legislation Committee, *Interim report for the inquiry into the Migration Legislation Amendment Bill (No. 1) 2014 [Provisions]*, May 2014, p. 1.

4 Explanatory Memorandum (EM), p. 1.

Rationale for the Bill

1.4 As each of the six schedules to the Bill address different issues, they have been considered separately in this chapter.

Application for further visas (Schedule 1)

1.5 Schedule 1 of the Bill would amend sections 48, 48A and 501E of the Migration Act to further restrict the circumstances under which a non-citizen, who has previously had their visa application refused or cancelled, can apply for another visa while within Australia.

1.6 In particular, these amendments would ensure that these restrictions on reapplying continues to operate even where the application was made on behalf of a non-citizen (due to mental impairment or because they were a child) and the non-citizen neither knew nor understood the nature of the application.[5]

1.7 In his second reading speech, the minister stated that the amendments proposed in Schedule 1 of the Bill would:

> …protect the integrity of Australia's visa systems by ensuring that minors or mentally impaired persons who have been refused a visa and who do not otherwise have a lawful basis for remaining in Australia, cannot make or have made on their behalf, unmeritorious visa applications in order to prolong their stay in Australia. It also ensures that different members of the same family unit, some of whom may be minors or mentally impaired, who applied for visas together will receive consistent immigration outcomes and be bound by the same consequences.[6]

1.8 These amendments are a result of the recent Federal Circuit Court decision of *Kim v Minister for Immigration*.[7] The case concerned a 19 year old girl who wished to apply for a student visa but was prevented from doing so due to a previous protection visa application being made on her behalf by her father when she was 14. She was not aware of this application. The Court found that the issue was whether she 'had achieved an understanding and intelligence sufficient to enable her to understand fully' what the visa application made by her father involved, and if so, her parents did not have the right to apply on her behalf. The decision was appealed, with the Court upholding that Kim's application was not invalid by virtue of the previous application made on her behalf.[8] The Federal Court focused on whether it was the respondent who made the application. In May 2014, a Special Leave Application was filed in the High Court.

1.9 The minister has referred to the policy intention behind the amendments:

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5 EM, pp 5–11.

6 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, Second Reading Speech, *House of Representatives Hansard*, 27 March 2014, p. 3328.

7 [2013] FCCA1526.

8 *Minister for Immigration and Border Protection v Kim* [2014] FCAFC 47.

> …the application of sections 48, 48A and 501E will not be determined by reference to a retrospective and subjective assessment of the person's knowledge or understanding of the visa application made on their behalf. Instead, the application of these provisions can be determined by reference to the objective criterion of whether or not the person has been refused a visa since they last entered Australia as a matter of fact.[9]

Removal of people on bridging visas (Schedule 2)

1.10 Section 198 of the Migration Act provides for when non-citizens can be removed from Australia. Under paragraph 198(5)(b), the Department of Immigration and Border Protection (the department) is required to remove a non-citizen as soon as reasonably practicable where the non-citizen has failed to exercise their right to apply for a visa (under section 195) or right to apply for the revocation of the cancellation of their visa (under section 137K).

1.11 Item 1 of Schedule 2 of the Bill would change the wording of subsection 198(5) so that it refers to substantive visas under section 195 and the revocation of the cancellation of substantive visas under section 137K. The effect of this amendment is that where a non-citizen has applied for a bridging visa, but has not yet applied for a substantive visa, they are not allowed to remain in Australia.

1.12 The EM notes that while the policy intention behind existing subsection 198(5) is that 'a bridging visa application is not a temporary or permanent bar to removal', this was never specified explicitly.[10] In *Foo v Minister for Immigration and Multicultural and Indigenous Affairs*,[11] the Federal Court of Australia held that the use of the word 'visa' in subsection 198(5) would encompass bridging visas.

1.13 The EM states that it is not the government's intent that non-citizens who have applied for bridging visas remain in 'a state of indefinite immigration detention',[12] while the minister noted that the current state of the law has resulted in a small cohort of detainees being unable to be removed from Australia.[13]

1.14 Item 2 of Schedule 2 would insert new subsection 198(5A), which specifically provides that the department cannot remove a non-citizen where they have made a valid application for a protection visa and the visa has not been refused or the

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9 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, Second Reading Speech, *House of Representatives Hansard*, 27 March 2014, p. 3328.

10 EM, p. 12.

11 [2003] FCA 1277.

12 EM, p. 13.

13 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, Second Reading Speech, *House of Representatives Hansard*, 27 March 2014, p. 3329.

application has not been finally determined. This includes applications made outside the time limit.[14]

Expansion of debt recovery provisions (Schedule 3)

1.15 Items 1 to 3 of Schedule 3 of the Bill would amend the Migration Act to ensure that all persons who have been convicted of either people smuggling or an offence relating to the control of fishing remain liable to the Commonwealth for their detention and removal costs.

1.16 There are currently cases where these provisions do not apply, such as where a person was not initially suspected of a people smuggling offence and therefore not detained or where they are not considered to be in immigration detention.[15] The minister has also stated that there currently appears to be some confusion as to when the debt provisions can be applied.[16]

1.17 According to the minister, the amendments contained in Schedule 3 would remedy these inconsistencies:

> Changes to the Act will make it clear that these provisions will apply either at the time of conviction or after the convicted people smuggler or illegal foreign fisher has completed serving the whole or part of their criminal sentence. These amendments will also clarify that detention transportation and removal costs are recoverable from a convicted people smuggler or illegal foreign fisher regardless of their current status or whether or not they were believed to be a people smuggler or illegal foreign fisher at the time of their immigration detention.[17]

Role of authorised recipients (Schedule 4)

1.18 Schedule 4 would alter the role of individuals appointed as authorised recipients, and the MRT and the RRT's obligation to give documents to authorised recipients.

1.19 Section 494D of the Act allows a visa applicant to nominate another person (known as the authorised recipient) to do things on behalf of the visa applicant 'that consist of, or include, receiving documents' that relate to matters under the Migration Act or the Migration Regulations 1994. Where a visa applicant has not appointed an authorised recipient, all written communications from the minister or the review

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14 Subsection 195(1) of the Act provides that a detainee must apply for a visa within 2 working days after the day he/she has been told by an officer the consequences of his/her detention under section 194 of the Act. However, if he/she informs the offer of his/her intention to apply for a visa paragraph 195(1)(b) allows the detainee an additional 5 days after the two day period has expired in which to apply.

15 EM, p. 15.

16 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, Second Reading Speech, *House of Representatives Hansard*, 27 March 2014, p. 3329.

17 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, Second Reading Speech, *House of Representatives Hansard*, 27 March 2014, p. 3329.

tribunals will be sent directly to the applicant. However, when an authorised recipient has been appointed, there is no need for the minister to also notify the visa applicant.

1.20 Items 1, 6 and 11 of Schedule 4 of the Bill would alter the role of the authorised recipient to ensure that they are only authorised to receive documents and not act as an agent of the visa applicant in their dealings with either the minister or the tribunals.[18]

1.21 Items 2 and 7 of Schedule 4 of the Bill would clarify that both the RRT and the MRT have a statutory obligation to give documents to an authorised recipient, instead of the review applicant, regardless of whether the review application itself was properly made.[19]

1.22 Both of the amendments proposed in Schedule 4 of the Bill are a response to recent Federal Court decisions. As noted by the minister in his second reading speech:

> The first amendment addresses the Full Federal Court's decision in *SZJDS v Minister for Immigration and Citizenship* [2012] FCAFC 27, in which the Full Federal Court found that the MRT or the RRT's obligation to give documents to an authorised recipient does not extend to review applications which have not been properly made. The amendment will put it beyond doubt that where an authorised recipient has been authorised by a review applicant to receive documents on their behalf, the MRT or the RRT must, consistent with the review applicant's wish, give documents relating to the review to the authorised recipient, even if the review application itself was not properly made.
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> The second amendment is to clarify the intended operation of the provisions relating to authorised recipients. Currently, the Act provides that an authorised recipient can do things on behalf of an applicant or a person that consist of, or include, receiving documents in connection with the application or matters arising under the Act or the Migration Regulations 1994. This is broader than the policy intention for the role of an authorised recipient, which is only to receive documents and not do anything else on behalf of the applicant or person, and has led to comments by the Full Federal Court in *MZZDJ v Minister for Immigration and Border Protection* [2013] FCAFC 156 that the relevant provision means that an authorised recipient is "constituted effectively as the agent of the visa applicant'.
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> The amendment therefore removes the current distinction between applications for visas.[20]

18 EM, pp 18–26.

19 EM, p. 19.

20 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, Second Reading Speech, *House of Representatives Hansard*, 27 March 2014, p. 3329.

Use of material seized under a search warrant (Schedule 5)

1.23 Schedule 5 of the Bill would allow for material obtained by way of a search warrant issued under the *Crimes Act 1914* to be used for the purpose of making certain administrative decisions under either the Migration Act or the Citizenship Act.

1.24 Item 2 would amend the Migration Act to allow for material obtained under such a warrant to be used for the following purposes:

- making a decision, or assisting in making a decision, to grant or refuse to grant a visa;
- making a decision, or assisting in making a decision, to cancel a visa;
- making a decision, or assisting in making a decision, to revoke a cancellation of a visa; and
- making a decision in relation to the detention, removal, or deportation of a non-citizen from Australia.[21]

1.25 Item 1 would make similar amendments to the Citizenship Act to allow material obtained to be used for the following purposes

- making a decision, or assisting in making a decision, to approve or refuse to approve a person becoming an Australian citizen;
- making a decision, or assisting in making a decision, to revoke a person's Australian citizenship; and
- making a decision, or assisting in making a decision, to cancel an approval given to a person under section 24 of the Citizenship Act.[22]

1.26 The minister has stated that 'the amendment would not further extend coercive powers or administrative responsibilities, simply provide further information to administrative officers for more effective decision making'.[23]

Procedural fairness (Schedule 6)

1.27 The amendments contained in Schedule 6 of the Bill would alter the application of the procedural fairness requirements set out under section 57 of the Migration Act. These provisions require the minister to provide an applicant with any relevant information with regards to their case, provided it is not non−disclosable.[24] However, section 57(3) provides that this obligation only applies to situations where

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21 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, Second Reading Speech, *House of Representatives Hansard*, 27 March 2014, p. 3330.

22 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, Second Reading Speech, *House of Representatives Hansard*, 27 March 2014, p. 3330.

23 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, Second Reading Speech, *House of Representatives Hansard*, 27 March 2014, p. 3330.

24 Subsection 57(1) of the Migration Act. Section 5 of the Migration Act defines non‑disclosable information as information or matter whose disclosure would, in the minister's opinion, be contrary to the national interest or would result in a breach of confidence action.

the applicant is in the migration zone and which are subject to merits reviews by either one of the refugee tribunals.

1.28 Item 2 of Schedule 6 of the Bill would repeal section 57(3) so that the procedural requirements under the Act would apply to all visa applicants, regardless of whether they are onshore or offshore.

1.29 These amendments are also in response to a court decision:

> The amendment addresses the finding of the High Court in the case of *Saeed v Minister for Immigration and Citizenship [*2010] HCA 23 that although the Act does not require an opportunity to comment to be given to applicants for visas not subject to MRT or RRT review, nevertheless there is a requirement under the common law to provide the visa applicant with an opportunity to comment before a decision can be made on the visa application. The *Saeed* decision means that procedural fairness must be given to all visa applicants.[25]

1.30 As noted by the minister, there would still be differences between the way onshore and offshore applications are processed, with only applicants in the migration zone also being subject to the common law rule with regards to hearings.[26]

Conduct of the inquiry

1.31 In accordance with usual practice, the committee advertised the inquiry on its website and wrote to a number of organisations and individual stakeholders inviting submissions by 28 April 2014. Details of the inquiry were placed on the committee's website at http://www.aph.gov.au/senate_legalcon.

1.32 The committee received 5 submissions, which are listed at Appendix 1. All public submissions were published on the committee's website.

1.33 The committee held a public hearing in Sydney on 28 July 2014. A list of stakeholders who have evidence at the public hearing is provided at Appendix 2.

Acknowledgement

1.24 The committee thanks the organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.25 References in this report to the committee Hansard are to the proof. Hansard and page numbers may vary between the proof and the official Hansard transcript.

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25 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, Second Reading Speech, *House of Representatives Hansard*, 27 March 2014, p. 3330.

26 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, Second Reading Speech, *House of Representatives Hansard*, 27 March 2014, pp. 3330-1331.