INFORMATION, ANALYSIS
AND ADVICE FOR THE PARLIAMENT

INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 135 2002–03

Migration Legislation Amendment (Protected Information) Bill 2002

ISSN 1328-8091

The author wishes to acknowledge the assistance of Nathan Hancock of the Law and Bills Digest Group in the preparation of this Digest.

Inquiries

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2646.

Information and Research Services publications are available on the ParlInfo database.
On the Internet the Department of the Parliamentary Library can be found at:
http://www.aph.gov.au/library/

Published by the Department of the Parliamentary Library, 2003

INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 135 2002–03

Migration Legislation Amendment (Protected Information) Bill 2002

Sudip Sen
Law and Bills Digest Group
16 April 2003

Contents

Migration Legislation Amendment (Protected Information) Bill 2002

Date Introduced: 12 December 2002

House: House of Representatives

Portfolio: Immigration and Multicultural and Indigenous Affairs

Commencement: the day after Royal Assent

Purpose

- to clarify that the Minister for Immigration's authority to disclose confidential information is non-compellable, and
- to restrict the disclosure of protected information to and by the Federal Court or the Federal Magistrates Court in relation to the review of the Minister's exercise of discretion to refuse visas on character grounds.

The main purpose of this Bill is to alter the mechanism by which any information for reviewing character decisions disclosed to the Federal Court or Federal Magistrates Court[1] can be protected from further disclosure if the Court considers that it is necessary to do so. Currently, the Federal Court would protect such information if a claim of public interest immunity had been made out, ie. that it is in the public interest not to jeopardise possible information sources given the possibility that confidential information could not be protected after disclosure to the Court.

In general, as discussed below, claims of such a public interest in the past have been upheld in favour of the Minister.

Background

General legal concepts

Public interest immunity

Public interest immunity serves to protect certain categories of information because the confidentiality of the information is required by the public interest. In *Sankey v Whitlam,* Acting Chief Justice Gibbs held that the object of the immunity was to ensure the proper working of government.[2] A court will only order disclosure where, on balance, there is a greater public interest in having the information disclosed. It is a matter for the judge deciding each claim to immunity whether the documents for which immunity is sought are to be inspected in determining the claim.

In general terms, there appears to be a debate as to whether a certain rebuttable presumption against disclosure exists for particular classes of documents such as cabinet documents or whether there is a more general balancing of interests test to be applied in each case. One commentator notes that:

> … the balancing process involves an assessment of the nature of the proceedings, the public interest in maintaining procedural fairness, the injury to the litigant if the documents are withheld… and the public interest in vindication of the wider aspects of the public interest. [3]

Another relevant distinction in the balancing process in the case law is whether the proceedings are criminal or civil, with 'the implicit assumption that criminal proceedings involve much more serious issues and effects.'[4] In other words, if it is a criminal matter, then the claim to immunity would be weakened in the balancing process. In these cases, it might be argued that the consequences are very serious for the applicant, ie. refusal or cancellation of a visa, but that outcome would not expose the applicant to criminal liability.

Natural Justice

In general terms, the obligation to accord procedural fairness, or 'natural justice' or 'due process', is described as 'a common law duty to act fairly... in the making of administrative decisions that affect rights, interests and legitimate expectations'.[5] As a principle of fairness, the content of the obligation must be flexible to take account of what is fair in the circumstances,[6] but it often obliges the decision maker to provide a hearing[7] and an opportunity to deal with adverse information that is 'credible, relevant and significant to the decision to be made'.[8] The right to a hearing and the right to cross examine others arises where there are grave allegations[9] or where the decision rests on personal characteristics.[10] National security considerations may affect the content of procedural fairness. Ultimately, however, and subject to the will of the Parliament, they must be placed among other considerations in determining these issues.

The character test

Legislative history of the character test

Previous character test

A form of character test was introduced into the *Migration Act 1958* by the then Labor Government in the *Migration (Offences and Undesirable Persons) Amendment Act 1992* (the Undesirable Persons Act).[11] The purpose of the amendment was to allow the Minister to refuse permission for people to enter or remain in Australia on the basis of their character or conduct. Amongst other things, as a result of the amendments in that Act, the Minister could refuse or cancel a visa if satisfied, based on information available, that the person was not of good character due to their past criminal conduct, general conduct, or their association with another person or group who the Minister had reasonable grounds to believe had been or was involved in criminal conduct.

The Digest for the Undesirable Persons Act noted its origins in the proposal by the Hell's Angels Motorcycle Club to hold their World Run in Adelaide in November 1991. The Minister refused to issue visas to known members because the organisation was allegedly involved in criminal activities. Members of the Club successfully argued that the Minister had wrongly taken into account the applicant's membership and the Club's alleged involvement in criminal activity.[12]

The current character test

The current character test was introduced by the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (the 1998 Act). The issue for the present Bill is whether the Federal Court should protect certain information relating to character and conduct from disclosure. Currently, for information to be protected under section 503A it must meet the following conditions, the information must be:

- communicated by a gazetted agency (domestic and international intelligence and law enforcement bodies)[13]
- communicated by that agency to a person who is an authorised migration officer
- communicated on condition that it be treated as confidential, and
- relevant to the exercise of the Minister's power to make a character decision.

The current section 503A is about protecting information that is provided to the Minister on a confidential basis by intelligence and law enforcement organisations. In introducing the 1998 Act, the Minister stated:

> Criminal intelligence and related information is critical to assessing the criminal background or associations of non-citizen visa applicants and visa holders. At present, it is difficult for the Department to use such information in making character decisions because its disclosure might be threatened. Australian and international law enforcement agencies are reluctant to provide sensitive information unless they are sure that both the information and its sources can be protected … This Bill increases the level of protection for such information. I cannot overstate the importance of this protection of preventing the entry of foreign criminals to Australia … [14]

In the debates on the Bill, it was argued that the provisions of the Bill relating to confidential information perhaps went too far. Support was expressed for the Administrative Appeals Tribunal submissions to the Senate inquiry into the Bill which stated that the information should at least be available to the members of the Tribunal on a confidential basis for the purpose of review.[15] Subsection 503A(3) states that it is a matter for the Minister as to whether he or she will make a declaration allowing for the release of protected information to specified parties on particular conditions.

Case history of the character test

In general terms, a simplified fact scenario would be as follows:

- an application for a visa is refused on the grounds of character under section 501 *based on* information that the Minister has gained through intelligence and supported by a claim of protecting national interest
- the applicant denies the allegations of their involvement in criminal activity or associations with criminal organisations and appeals to the Federal Court
- the Minister makes a public interest immunity claim in relation to certain information upon which he or she has relied, and
- the applicant seeks access to that information in order to be granted an opportunity to answer the claims against them.

Cases prior to introduction of section 503A

The history of cases involving possible disclosure of protected information in similar circumstances is worth noting in order to better explain relevant situations and evaluations that have been made in relation to them by courts in the past. In general, claims of public interest immunity were upheld against applications for further details regarding the information relied upon to inform the Minister's refusal or cancellation of visas on character grounds.

In *Choi v Minister for Immigration and Multicultural Affairs,*[16] the applicant had failed to meet the character requirements under paragraph 501(2)(a) of the Migration Act and the Minister was satisfied that the visa refusal was in the national interest. It was alleged that the applicant was a member of the Wo Shing Tong Triad group. The applicant sought to

inspect the relevant documents but the Minister and the Australian Federal Police claimed public interest immunity. Mr. Choi consistently maintained that he was not a member of, or associated with, the Triad group. Lindgren J acknowledged 'it is difficult, if not impossible for him to disprove the allegation made against him, at least without having access to the information upon which the Minister has relied'.[17] However, Lindgren J upheld the public interest immunity claim by stating that, in this case, the public interest immunity in the open administration of justice was outweighed by the public interest in the free flow of confidential information internationally in respect of grant entry visas and keeping out of Australia persons of bad character.[18]

In *Chu Sing Wun v Minister for Immigration and Ethnic Affairs*, the Regional Migration Director said in his refusal letter to Mr. Chu that the Department had

> given great weight to confidential material that strongly implicated Mr. Chu as being directly involved in criminal activity and identified him as a known associate of Triad and criminal elements.[19]

Allegations made against Mr. Chu were more extensive than the ones made about Mr. Choi.

The applicant made three applications to the Federal Court for review of the respondent's decisions.[20] The non-disclosure of confidential information was central to these applications. In the first application, public interest immunity was claimed in respect to some documents relating to 'law enforcement, national security, international relations and the proper working of Government'.[21] The Department refused the applicant's request to view the information stating that:

> to disclose to Mr. Chu the details of the adverse material could reveal the sources of that material and cause serious harm to those sources and to Australia's ability to rely on those sources in the future.[22]

The Department also argued that disclosure would be contrary to the national interest. Justice French stated:

> Where the interests affected by the disclosure of documents involve national security or the relationships with other governments the impact of which is peculiarly within the knowledge of the executive, the contentions of the Executive will be given particular weight.[23]

Another application for review was based upon grounds of a denial of natural justice.[24] The applicant alleged that he was given no, or no reasonable opportunity, to place evidence or submissions before the respondent on the confidential materials and that the delegate's decision was 'effectively incontestable and unchallengeable.'[25] The applicant relied on the reasoning of the Full Court in *Minister for Immigration and Local Government and Ethnic Affairs v Kurtovic*[26] where Gummow J noted that:

> …procedural fairness requires that the nature of the allegations raised…be disclosed to the applicant or his legal representatives, so that advice may be given to the respondent on whether to accept the appellant's invitation to make written submissions, and if so, how these submissions should be framed.[27]

In *Kurtovic*, the applicant was not given any summary of the matters before the decision maker and was merely invited to make submissions without having any means of knowing what adverse matters might have been taken into account. Beaumont J in the Federal Court distinguished the reasoning in *Kurtovic* from the case in question arguing that although Mr. Chu was not given the details of the confidential information, he was given a summary of information and he was on notice of its essential features and therefore the matters that might have been taken into account.[28]

The question to the Full Federal Court was whether the Court should be invited to view the material for purposes of deciding whether its contents were adequately summarised and fairly put to the applicant. The appellant asked that relevant documents be taken into evidence for the Court to assess. The respondent (the Minister) asked the Court to impose an onus upon the applicant to establish that it was 'on the cards' that the confidential information would be helpful to him in establishing one or other of his grounds upon which he based his application for an order of review.[29] As a matter of procedure, it was not permissible for the applicant to merely conduct a 'fishing expedition'. Carr and Sundberg JJ rejected the Minister's argument in holding that the applicant was reasonable in requesting that relevant documents be taken into evidence, on a confidential basis, in order for the Court to decide at least the procedural fairness issue.[30] Kiefel J, dissented by asserting that courts should not examine such material absent some reason for doubting the summary of factors which led to the delegate's decision that the requirement of good character was not met. It was noted that do so would be to 'undertake an investigation to assess what weight ought to be given to pieces of information, without evidence or explanation from the delegate.'[31]

The majority summarised the position of where a claim for procedural fairness may arise:

> …Judicial review of the confidential material might be seen simply as the price payable (on particular occasions such as a this), for adjusting procedural fairness requirements downwards in the course of protecting another public interest…
>
> We do not think that judicial examination of the confidential material at the urging of the appellant amounts to condonation of a 'fishing' expedition. We would distinguish this case from the mainstream of public immunity cases. This is, of course, an administrative law case. The confidential information is a *central* part of the case. If the confidential information is sufficiently summarised and disclosed to the fullest extent as is consistent with protection of the source or sources, then that will dispose of the procedural fairness point in favour of the respondent.[32]

The majority inspected the documents in this case, and held that the details in the departmental report amounted to adequate disclosure of the information and that the appellant was clearly accorded procedural fairness.

Cases after section 503A

The implication of the introduction of section 503A is that the Minister was no longer required to rely on a claim of public interest immunity in order to protect information from being disclosed *to* the Federal Court. However, in cases where information *was* disclosed under a subsection 503A(3) declaration to the Federal Court, the Minister would have to argue that there was a public interest immunity in not making this information available to the applicant or the public. This is the main concern of the present Bill.

Both *Choi* and *Chu* concerned the impact of using confidential information on the obligation to accord procedural fairness. Access by the courts to that information was only required to satisfy the procedural point. Given that the content of the procedural fairness obligation can be determined by statute, the introduction of 503A has been held to resolve this issue.

This is evidenced by the most recent case of *Wong v Minister for Immigration and Multicultural and Indigenous Affairs* which is a decision to refuse a renewal of a student visa under section 501. [33] Under this power, the Minister can refuse to grant a visa to a person where he or she reasonably *suspects* that a person does not pass the character test and is satisfied that the refusal is in the national interest. Subsection 501(5) states that the rules of natural justice do not apply to such a decision.

Mr Wong was given a decision record which stated that there was a reasonable suspicion based on protected information that he did not pass the character test because of his past and present general conduct. The record also stated that the national interest could be damaged if Australia was seen to provide a safe haven for people who have committed serious crimes in another country and seek to evade that country's law enforcement action. In the Department's submission to the Minister, it was noted that Mr Wong may, on the basis of the record, be able to convince the Minister to exercise his power to revoke the decision. The trial judge agreed that:

> The tenor of [the Record of Decision] is to the effect that Mr Wong may be able to discern the type of case which is being made against him although he will not have access to the specific information which he would normally be entitled to in the absence of s 503A. His entitlement to such information and specific allegations might otherwise result from the implication into the Act of the principles of natural justice. *However, there is an express prohibition in s 503A which shows a clear intent to limit disclosure of information which can be provided to an applicant. Such a clear expression is effective to preclude the operation of the audi alteram partem* [hear the other side] rule in the fullest sense: see *Twist v The Council of the Municipality of Randwick* (1976) 136 CLR 106 at 109-110. Section 501(5) in terms provides that natural justice is not to apply to a decision made under s 501(3). [34]

Mr Wong argued that he could not address specific matters based on this general information in the decision record and that the Minister should have been advised that the failure to provide the protected information would render it impossible to answer the claims made against him. He failed in the argument that he had not been given a sufficient summary.

Importantly however, another case has referred to the possibility of the impact of using such information on the court's ability to conduct judicial review for an error of law. Access in these cases is a more serious issue. In *Wu v Minister for Immigration and Multicultural Affairs,*[35] it was argued that, for the Minister to form a 'reasonable suspicion' as to bad character, the grounds for that suspicion, ie. information that formed the basis of that suspicion, had to be made available to the court and the applicant in order to be (objectively) tested. This argument relied on cases such as *Liversidge v. Anderson* which deal with the power of a court to examine the reasonableness of a reasonable suspicion:

> 'Reasonable cause' for an action or a belief is just as much a positive fact capable of determination by a third party as is a … legal right….[a] 'reasonable cause' for a belief, when the subject of legal dispute, has always been treated as an objective fact, to be proved by one or other party and to be determined by the appropriate tribunal.[36]

However, the court rejected this approach, following cases such as *R v Connell; Ex parte The Hetton Bellbird Collieries* which deal with the power of a decision maker to form his or her own suspicion or opinion on a matter:

> [W]here the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to *an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts*. [37]
>
> … What the court does do is to enquire whether the opinion required by the relevant legislative provision has really been formed. If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of the power is absent, just as if it were shown that the question was arbitrary, capricious, irrational or not bona fide. [38]

The position in Australia thus appears to be that the information forming the basis of the reasonable suspicion need not be objectively tested (as would have been required by a *Liversidge* style argument). However the Full Federal Court in *Wu* did, in passing, refer to the possibility, since evidence of Mr Wu's good character was before the Minister and the Minister could have disclosed it under paragraph 503A(3), of an argument that an evidentiary burden should pass to the Minister. The Court stated that 'in the absence of any explanation as why the Minister had not followed the course described,' it would be open to the court to conclude that the 'no evidence' ground provided for under paragraph

476(1)(g) could be made out. However, since that submission did not form part of Mr Wu's submissions, the Court refrained to express a view on the issue.[39]

Comment:

Although it is always a matter for the Minister, in practice, even after the introduction of section 503A, the need to disclose at least that much information as to put the person affected by the information 'on notice of its essential features' would nevertheless appear to be a consideration. It is possible that the Minister, although not technically legally obliged to disclose any protected information under existing subsection 503A(3), would still choose, after consulting the gazetted agency, to disclose as much of the information as he or she can. This is not least because of concerns regarding basic notions of procedural fairness and accountability in the use of confidential national security information, but because, despite the fact that the rules of natural justice are not to apply to character decisions on national interest grounds (subsection 501(5)), there is still a remote possibility of review if there is considered to be an error of law.

This may consist of a contention that there is no basis at all for the Minister's decision, 'no evidence', or that the decision that an individual did not meet the good character requirements is so unreasonable that no reasonable person could have drawn that conclusion.[40] To say the least, these grounds of review would appear to set an extremely high standard for applicants, particularly in the context of the legislative intent evinced by the privative clause provisions (section 474). Nevertheless, they may be relevant in the context of the current climate of judicial review in the Federal Court and High Court. A court faced with a *completely* 'closed shop' in terms of access to protected information may be more ready to embark on an examination of character decisions for jurisdictional error, based on these grounds. As recent litigation on privative clauses has demonstrated,[41] judicial review courts are likely to react against any attempt to completely exclude them from considering fundamental questions at the threshold.

The Minister's non-compellable discretions

The proposed amendments seek to clarify that a power to make a declaration in order to release information under subsection 503A(3) is non-compellable. In other words, the Minister cannot be required to make a decision as to whether certain confidential information is made available for the purpose of reviewing an adverse character decision.

This is similar to existing non-compellable discretions under the Migration Act. For example, the Minister has powers to override an adverse decision of the Migration or Refugee Review Tribunals (sections 351 and 417 respectively) and the failed results of Administrative Appeals Tribunal appeals to those decisions (sections 391 and 454 respectively). This means that the Minister can exercise his or her discretion in favour of an applicant that has failed an appeal or review process.

Section 48A states that an applicant who has been refused a protection visa cannot apply for one again. Section 48B gives the Minister a power to grant exemptions to this rule.

Other such discretions include the ability of the Minister to grant an exemption to apply for a visa where such a person would otherwise be banned (see sections 91F, 91L, 91Q), and the power to change the duration of temporary safe haven visas (subsections 37A(2) or (3)). All of these provisions are powers for the Minister to exercise a discretion, and each set of provisions contains a non-compellable element along the following lines:

> The Minister does not have a duty to consider whether to exercise the power…in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances.

It is proposed that similar words be added into section 503A in order to clarify that the Minister is not obliged to consider authorising the disclosure of protected information.

Main Provisions

Item 1 inserts the discretion as to whether to make a declaration authorising protected information to a list of discretions that cannot be reviewed by the Federal Court.

Item 2 inserts **proposed subsection 503A(3A)** which states that the Minister does not have a duty to consider whether to declare that specified information in specified circumstances may be disclosed to a specified Minister, Commonwealth agency, court or tribunal as provided for in existing subsection 503A(3). Before making a declaration under subsection 503A(3), the Minister must consult the gazetted agency from which the information came.

In other words, the Minister's choice not to exercise his discretion to disclose information is not a reviewable decision.

Existing subsection 503(4) states that a Commonwealth officer who receives information under a subsection 503A(3) declaration must only disclose that information in accordance with the conditions of that declaration. **Item 3** inserts **proposed subsection 503A(4A)** which states that any information disclosed to a Commonwealth officer under a subsection 503A(3) declaration cannot be required to be disclosed or given in evidence to the Federal Court or the Federal Magistrates Court without:

- a separate declaration under existing subsection 503A(3) for disclosure to the Court.
- a declaration under proposed subsection 503B(6). Proposed subsection 503B(6) provides for disclosures to be made to the Federal Court or the Federal Magistrates Court in order for it to determine whether it should make a permanent non-disclosure order rather than for a substantive purpose, eg. for review of a character decision (see item 6 below).

Existing subsection 503(5) states that a tribunal which receives information under a subsection 503A(3) declaration must only disclose that information in accordance with the

conditions of that declaration. **Item 4** inserts **proposed subsection 503A(5A)** which is a restriction provision identical to proposed subsection 503A(4A) for disclosures made to Tribunal members (rather than Commonwealth officers).

Item 6 inserts **proposed section 503B** allows for the Federal Court to make *permanent non-disclosure orders* which must be read in conjunction with **proposed section 503C** which requires the Minister to apply for *interim non-disclosure orders.*

Proposed subsection 503B(1) states that the Federal Court or the Federal Magistrates Court may, on application by the Minister, make appropriate orders to ensure that if a subsection 503A(3) declaration comes into force (ie. that information is disclosed), that the information received under it is not divulged or communicated to the applicant or their legal representative in relation to the substantive proceedings, nor disclosed to any other member of the public. Before such a non-disclosure order can be made by the Federal Court or Federal Magistrates Court, the following conditions must be satisfied:

- the information was communicated to an authorised migration officer by a gazetted agency on the condition that it be treated as confidential information and the information is relevant to the exercise of a power to make a decision in relation to the refusal or cancellation of a visa on character grounds (existing sections 501-501C) or information is communicated to the Minister or an authorised migration officer under paragraphs 503A(1)(a) or (b), and

- the information is relevant to proceedings before the Federal Court or the Federal Magistrates Court (substantive proceedings) that relate to the refusal or cancellation of a visa on character grounds, and

- no subsection 503A(3) declaration is in force authorising the disclosure of the information to the Federal Court of the Federal Magistrates Court for the purposes of substantive proceedings.

Proposed subsection 503B(2) clarifies that non-disclosures made under proposed subsection 503B(1) include an order that:

- some or all of the public are to be excluded during some or all of the substantive proceedings

- no report of some or all of the proceedings is to be published, or

- no person has access to a file or a record of the Federal Court or Federal Magistrates Court containing protected information without its consent.

Proposed subsection 503B(4) states that the power to make permanent non-disclosure orders is to be exercised by a single Judge or Magistrate.

Proposed subsection 503B(5) sets out an exhaustive list of matters to which the Federal Court or the Federal Magistrates Court must have regard when exercising its power to

make a non-disclosure order. It is worth noting that despite the list being exhaustive, it contains the 'interests in the administration of justice factor':

- the fact that the information was originally communicated to an authorised migration officer by a gazetted agency on condition that it be treated as confidential information
- Australia's relations with other countries
- the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation and security intelligence
- in a case where the information was derived from an informant – the protection and safety of informants and of persons associated with them
- the protection of the technologies and methods used (whether in or out of Australia) to collect, analyse, secure or otherwise deal with, criminal or security intelligence
- Australia's national security
- the fact that the disclosure of information may discourage gazetted agencies and informants from giving information in the future
- the effectiveness of the investigations or official inquiries and Royal Commissions
- the interests of the administration of justice, and
- such other matters (if any) as are specified in the regulations,

and must not have regard to other matters.

Proposed subsection 503B(6) states that the general prohibition on disclosure of confidential information as set out in existing subsections 503A(1) and (2) does not prevent the disclosure of information to the Federal Court for the purposes of deciding whether the application for non-disclosure order should be allowed (non-substantive purposes). Disclosure for this purpose is to be distinguished from disclosure for the purpose of substantive proceedings which would require a declaration under existing subsection 503A(3) (**proposed subsection 503B(7)**). The Minister can make such a declaration under existing subsection 503A at any time, including whilst the Federal Court is considering whether to make a non-disclosure order under proposed subsection 503B(1) (**proposed subsection 503B(10)**). Even if the Minister is successful in gaining a non-disclosure order from the Federal Court, he or she may nevertheless refuse to disclose the information under subsection 503A(3). In other words, even if the Federal Court agrees to make a non-disclosure, ie. making it an offence for a person to engage in conduct that would contravene the order not to disclose, the Minister can nevertheless refuse to exercise his or her power to authorise disclosure (**proposed subsection 503B(11)**).

Proposed subsection 503B(8) requires that the Minister and the applicant in relation to the substantive proceedings must consent to any variation or revocation of a non-disclosure order.

Proposed subsection 503B(9) states that the Minister can withdraw his or her application for a non-disclosure order at any time.

Proposed subsection 503B(12) states that a person is guilty of an offence punishable by up to 2 years imprisonment if the person engages in conduct contravening a non-disclosure order that is in force

Proposed subsection 503B(13) states that the section has effect despite anything in any other provision of the Migration Act or any other law of the Commonwealth.

Proposed subsection 503B(14) defines the applicant for the purposes of the section with regard to the proceedings that would be covered by it.

Proposed subsection 503B(15) includes:

- a definition of 'conduct' that encompasses the failure to do an act that may lead to a contravention of a non-disclosure order.
- a definition of 'proceeding' which encompasses any court proceeding, whether between parties or not, and including any incidental proceedings and appeals.

Proposed section 503C would allow the Federal Court to make *interim* non-disclosure orders. These orders are designed to protect information that has not been disclosed to assist with the resolution of substantive proceedings (subsection 503A(3) declaration), but merely disclosed to enable the Federal Court to decide whether an application for a non-disclosure order should proceed (in accordance with subsection 503B(6)).

At least 7 days before making a permanent non-disclosure application (proposed subsection 503B(1)), the Minister must give the Federal Court written notice of the intention to make the application. If such a notice has been given, the Federal Court may make such orders it considers appropriate to ensure that information, disclosed in accordance with subsection 503B(6), is not communicated in circumstances that might undermine, prejudice or pre-empt the Federal Court's consideration of the permanent non-disclosure application or the Minister's consideration of whether to make a declaration authorising the disclosure of information to the Federal Court.

Again, the Federal Court's orders can include that some or all of the public are to be excluded during part or all of the proceedings, that part or all of the application report not be published, and an order for ensuring that no person has access to a file or a record of the Federal Court that contains the information.

The remaining provisions for interim non-disclosure orders are similar to those for permanent non-disclosure orders.

Concluding Comments

Relevant precedents suggest that the Federal Court may be unlikely to find that the public interest in protecting the confidentiality of such information would be outweighed by the fundamental right of review interests of an applicant. In the Minister's view, it would nevertheless appear that traditional reliance upon the public interest immunity test does not provide enough certainty for possible disclosures by the Federal Court. As a result, the Bill seeks to codify a mechanism through which subsequent disclosures can be limited.

It is worth noting that there does appear to be at least one instance in which the Federal Court has ruled against the Minister with regard to the disclosure of information. In that case, it was decided that the source of the information, ie. the identity of the agency, and proof that it was provided to the Minister on a confidential basis, could be disclosed because those particular facts were not held to be 'protected information' under section 503A.[42] The Government amendments in the House of Representatives include provisions to address this situation.[43]

In general terms, the Minister already has control over the initial disclosure of the information to any party in subsection 503A(3), including to a court or a tribunal. In the past, it has been possible to at least infer the nature of the case to answer from the documents made available to the court. Documents were made available, presumably, because there remains at least a possibility that an adverse character decision is reviewable by the Federal Court on the grounds of an error of law. It is possible that the mechanism of interim and permanent non-disclosure orders may, in practice, have the effect of enabling the Minister to further rely on protected information in making character decisions secure in the knowledge that further disclosure would be an offence. It is difficult to imagine a circumstance in which the Minister would authorise the disclosure of any information if the Federal Court is likely to find that a non-disclosure order is not justified in the terms sought. Indeed, the legislation makes it clear that even if a permanent or interim non-disclosure order is granted, the Minister could nevertheless refuse to authorise the disclosure of any information.

Endnotes

---

1 Hereinafter, for convenience, references to the Federal Court should be taken to include references to the Federal Magistrates Court where appropriate.

2 *Sankey v Whitlam* (1978) 142 CLR 1 per Gibbs ACJ at 40.

3 Anne Cossins, 'Revisiting Open Government' *Federal Law Review,* Vol. 23, No. 2, 1995, p. 253.

4 ibid.

5 *Kioa v West* (1985) 159 CLR 550 per Mason J at 584.

6 *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 per Kitto J at 504; *Salemi v Minister for Immigration and Ethnic Affairs* (1977) 14 ALR 1 at 19; *Kioa v West*, loc. cit. per Mason J at p. 585; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 per Deane J at 652.

7 *F.A.I. Insurances Ltd v Winneke* (1982-83) 151 CLR 342 per Mason J at 363.

8 *Kioa v. West*, loc. cit. per Brennan J at 629; See *Cooper v. Wandsworth Board of Works* (1863) 143 ER 414; *Commissioner of Police v. Tanos* (1958) 98 CLR 383 per Dixon CJ and Webb J at 395; T. *A. Miller Ltd v. Minister of Housing and Local Government* [1968] 1 WLR per Denning MR, at 995; *Twist v. Randwick Municipal Council* (1976) 136 CLR 106.

9 *Roderick v AOTC* (1992) 111 ALR 83.

10 *Excell v Harris* (1983) 51 ALR 137.

11 Previously, there were regulations which deemed an applicant not to be of good character, if for example, he or she has, in the reasonable belief of the Minister, been involved in activities indicating contempt or disregard for the law or for human rights.

12 For further information see Bills Digest on the Migration (Offences and Undesirable Persons) Amendment Bill 1992, 12 December 1992.

13 It is worth noting that questions have been raised about whether the Gazettal, which consisted of a reference to law enforcement bodies in a generic list of Countries, was specific enough. For example, see *NAAO v Secretary, Department of Immigration and Multicultural Affairs* [2002] FCA 292; 66 ALD 545, where it was questioned whether a reference to the Chinese Government itself was sufficiently specific at 553–4. Government Amendments introduced into the House of Representatives on 19 March 2003 (amendment 2) address this situation by providing definitions for gazetted agency and foreign law enforcement body.

14 Second Reading Speech, Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998. *House of Representatives Debates,* 2 December 1998, p. 1240.

15 See for example, speeches by Senator Margetts, *Senate Debates*, 25 November 1998, p. 662 and Mr Laurie Ferguson MP, *House of Representatives Debates,* 2 December 1998, p. 1240.

16 *Chu Sing Wun v Minister for Immigration and Ethnic Affairs* (1998) 55 ALD 140.

17 *Choi v Minister for Immigration and Multicultural Affairs* (1998) 55 ALD 140 at: 142.

18 *Choi v Minister for Immigration and Multicultural Affairs* (1998) 55 ALD 140 at: 145–6.

19 *Chu Sing Wun v The Minister for Immigration and Local Government and Ethnic Affairs* No. WAG195 of 1992 FED NO. 407 Practice and Procedure, FCA (WA), French J, 2 June 1993.

20 *Chu Sing Wun v The Minister for Immigration and Local Government and Ethnic Affairs* No. WAG195 of 1992 FED NO. 407 Practice and Procedure, FCA (WA), French J, 2 June 1993; *Chu Sing Wun v Minister for Immigration* (1995) 39 ALD 328, Carr J; and *Chu Sing Wun v The Minister for Immigration and Local Government and Ethnic Affairs* 45 FCR 540.

21 The claim for public interest immunity came on for hearing before Sweeney J on 22 April 1993, cited in *Chu Sing Wun v The Minister for Immigration and Local Government and Ethnic Affairs* No. WAG195 of 1992 FED NO. 407 Practice and Procedure, FCA (WA), French J, 2 June 1993, at ¶4.

22 Letter from the Department, *Chu Sing Wun v Minister for Immigration* (1995) 39 ALD 328, at 330.

23 *Chu Sing Wun v The Minister for Immigration and Local Government and Ethnic Affairs* No. WAG195 of 1992 FED NO. 407 Practice and Procedure, FCA (WA), French J, 2 June 1993, at ¶7.

24 *Chu Sing Wun v The Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 314.

25 *Chu Sing Wun v The Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 314 at [6] under 'natural justice'.

26 *Minister for Immigration and Local Government and Ethnic Affairs v Kurtovic* (1990) 92 ALR 93.

27 *Minister for Immigration and Local Government and Ethnic Affairs v Kurtovic* (1990) 92 ALR 93 at 124.

28 *Chu Sing Wun v The Minister for Immigration and Local Government and Ethnic Affairs* 45 FCR 540 at 19.

29 Carr and Sundberg JJ, *Chu Sing Wun v The Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 314 at 341.

30 *Chu Sing Wun v The Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 314. The respondent relied upon Lord Fraser in *Air Canada v Secretary of State of Trade* (1983) 1 All ER 718-719 which explained that, as a matter of practice and procedure, it was not enough for the party seeking disclosure to show that the documents would help establish the truth one way or the other. The party seeking discovery or disclosure of documents at an interlocutory stage, it was held, must show that the documents are likely to assist his own case.

31 *Chu Sing Wun v The Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 314 at 345.

32 *Chu Sing Wun v The Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 314 at 345, emphasis added.

33 *Wong v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 440 (20 December 2002).

34 http://www.austlii.edu.au/au/cases/cth/federal_ct/2002/959.html at ¶ 41.

35 *Wu v Minister for Immmigration and Multicultural Affairs* [2001] FCA 89 (16 February 2001).

36 *Liversidge v. Anderson* [1942] AC 206 per Atkin LJ at 228–229.

37 *R v Connell; Ex parte The Hetton Bellbird Collieries* (1944) 69 CLR 407

38 ibid., per Latham CJ at 432.

39 *Wu v Minister for Immmigration and Multicultural Affairs* [2001] FCA 89 (16 February 2001), ¶16.

40 Traditionally, this is known as 'Wednesbury unreasonableness', Lord Greene MR stated the ground was designed to permit decisions that were manifestly absurd, disagreement with the decision maker's conclusions would certainly not suffice. Australian courts have generally followed Lord Greene's characterisation as a starting point. *Associated Provincial Picture Houses v Wednesbury* [1948] 1 KB 223. In the sphere of character decisions, it is difficult to envision a circumstance in which a court would hold that the Minister's decision would be 'manifestly absurd' in this sense. There has been much debate about the appropriateness and scope of unreasonableness as a ground of review. See, for example, Naomi Sidebottom, 'Is there still a role for unreasonableness?' *Murdoch University Electronic Journal of Law* Vol. 8, No. 1 (March 2001).

41 *Plaintiff S157/2002 v Commonwealth of Australia (Plaintiff S157/2002)* (2003) 195 ALR 23; [2003] HCA 2.

42 *NAAO v Secretary, Department of Immigration and Multicultural Affairs*, [2002] FCAFC 292, Full Federal Court, 20 March 2002, Joint judgement of Spender, Gyles and Conti JJ.

43 See **proposed new section 503D** and **item 4** of **proposed new Schedule 2** of the Government Amendments (amendments 3 and 5) introduced into the House of Representatives on 19 March 2003.