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## Migration Amendment (Judicial Review) Bill 2004

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I N F O R M A T I O N   A N D   R E S E A R C H   S E R V I C E S

Bills Digest  
No. 118 2003–04

Migration Amendment (Judicial Review) Bill 2004

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Law and Bills Digest Group  
6 May 2004

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# Migration Amendment (Judicial Review) Bill 2004

**Date Introduced:** 25 March 2004

**House:** House of Representatives

**Portfolio:** Immigration and Multicultural and Indigenous Affairs

**Commencement:** The formal provisions commence on Royal Assent. The substantive provisions commence on a day to be fixed by Proclamation or, if this is not within six months of Royal Assent, the first day after that period.

## Purpose

The purpose of the Migration Amendment (Judicial Review) Bill 2004 is to reduce the volume of migration cases before the courts by widening the operation of the provisions of the *Migration Act 1958* that restrict access to judicial review.

## Background

### Migration caseload

The Government's objective in introducing the Bill is to 'decrease delays in migration litigation while giving applicants an opportunity to challenge migration decisions'.<sup>1</sup> In the second reading speech for the Bill, the Hon. Gary Hardgrave MP said:

The Government has grave concerns about the growing number of unmeritorious judicial review applications being made. These have led to increasing costs and delays in the judicial review process. Increased delays have encouraged many applicants to litigate to the maximum regardless of the legal merits. This is solely to delay their departure from Australia.<sup>2</sup>

In October 2003 the Attorney-General, the Hon. Philip Ruddock MP, announced a Migration Litigation Review aimed at producing more efficient management of migration cases, including 'whether there are further legislative changes that we will require to see if we can get effective reduction in the non-meritorious caseload before the courts'.<sup>3</sup> The Attorney-General noted that migration applications in the Federal Magistrates Court<sup>4</sup> increased from 182 in 2001-02 to 1,397 in 2002-03, and that over the same period migration matters in the Federal Court grew from 56.5 per cent of total appeals to 66.5 per

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cent.<sup>5</sup> The Attorney-General also noted that 82 per cent of all matters filed in the High Court in 2002-03 were migration cases, compared to 41 per cent the previous year. In particular there was a substantial increase in the filing of 'constitutional writs' (where applicants go directly to the High Court under section 75 of the Constitution) – up from 300 to 2131 – of which 99 per cent were migration matters.<sup>6</sup>

According to the Attorney-General, more than one-third of migration applications in the Federal Court and the Federal Magistrates Court were withdrawn by applicants before the court reached a decision. Of the remaining cases, the Government won 92.5 per cent. In the Attorney-General's view:

These figures suggest that much court time is being wasted at taxpayer expense and litigants with meritorious claims are being inconvenienced. The Government is committed to applicants with genuine claims having their case properly considered, however great strain is being placed on the courts and the migration system more generally, by unmeritorious applications.<sup>7</sup>

These are not new concerns. In 1998 the Hon. Gerry Hand, former Minister of Immigration, Local Government and Ethnic Affairs under the previous Labor administration, told a Senate inquiry that:

Throughout my time as Minister ... I was concerned with the amount of public resources consumed in judicial review processes which ultimately did not alter the situation that the person was not entitled to remain in Australia. These resources not only included the costs to the Department. They also included the use of [scarce] legal aid funds on persons with no link to Australia when Australian citizens and permanent residents were being denied legal aid for legitimate grievances.<sup>8</sup>

The amendments in the Bill follow the completion of the Migration Litigation Review. Additional measures in response to the review (including further legislation) have also been announced.<sup>9</sup> The Migration Litigation Review has not been publicly released.

### **Why have migration cases increased?**

The following graph shows the number of applications to the High Court, Federal Court and Federal Magistrates Court for judicial review of migration decisions over the last six years.

One reason for the significant increase in migration cases in 2002/03 appears to be the 2002 High Court decision *Muin v RRT and Ors*.<sup>10</sup> This was a representative action taken by Mr Muin and Ms Lie. Following judgment, the individuals for whom Mr Muin and Ms Lie were parties in a representative capacity were directed to file individual applications for constitutional relief. The direction was required due to section 486B of the Migration Act – introduced by the *Migration Legislation Amendment Act (No. 2) 2000* – which prohibits representative or class actions. More than 1350 of the total 2925 matters (i.e. migration and non-migration) filed in the High Court in 2002-03 were due to this

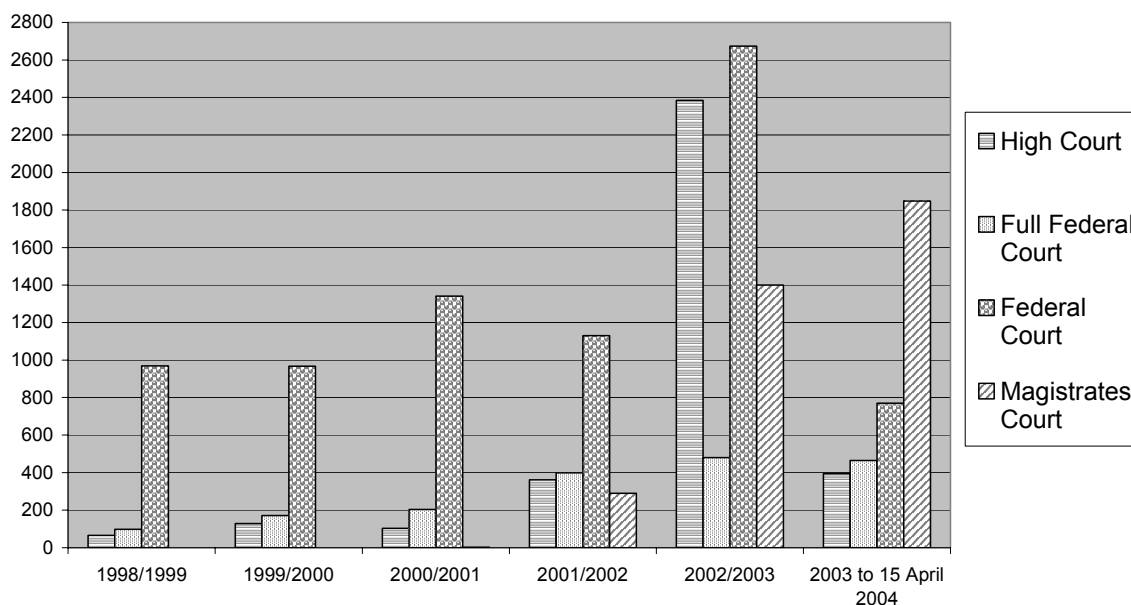
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direction.<sup>11</sup> The *Muin* decision also appears to have had a similar effect in 2002-03 on applications to the Federal Court.<sup>12</sup>

### Applications for judicial review of migration decisions



Source: Department of Immigration and Multicultural and Indigenous Affairs.

Another reason for the 2002-03 increase was the High Court's decision in *Plaintiff S157/2002 v Commonwealth*,<sup>13</sup> which largely negated an earlier attempt by the Government to restrict judicial review of migration decisions (see below).<sup>14</sup>

After the distorting effect of the *Muin* case on migration matters has passed, numbers of migration applications have declined in the current 2003-04 financial year.

Legislative changes in 2001 also affected the migration caseload of these courts. Under the *Judiciary Act 1903*<sup>15</sup> the High Court could remit any matter, on its own motion or on application of the parties, in full or in part, and whether or not the matter originated in the High Court. However the *Migration Legislation Amendment (Judicial Review) Act 2001* removed the power of the High Court to remit most immigration matters.<sup>16</sup>

Also in 2001 the Federal Magistrates Court (which commenced hearings in 2000) received jurisdiction in migration matters.<sup>17</sup> From the above graph this Court is attracting a steady increase in migration matters, taking on a substantial part of the burden from the Federal Court and High Court.

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In 2002-03 the Federal Magistrates Court and the Federal Court took on average 5.3 months to resolve migration matters.<sup>18</sup>

## Migration cases and the appeal process

A person wishing to stay in Australia who has been refused a visa or whose visa has been cancelled can appeal – depending on the nature of their particular case – to the Migration Review Tribunal, the Refugee Review Tribunal or the Commonwealth Administrative Appeals Tribunal. Each of these tribunals will conduct 'merits review' of the particular matter, i.e. they will *review the facts* of the case and the relevant law as if they were the original decision-maker, and either substitute their own decision or send the matter back to the appropriate immigration officials for a new decision.

If the person is unsuccessful at the tribunal stage, they can appeal directly to the Minister to use his or her personal discretion to substitute a more favourable decision. In addition, they can seek judicial review in the Federal Magistrates Court, the Federal Court or the High Court.<sup>19</sup> Judicial review involves a *review of the legality* of the tribunal's decision.

A person can only seek judicial review of the decision of one of the *tribunals* to refuse or cancel a visa. The discretionary power of the *Minister* under the Migration Act to intervene or not intervene in a matter is not reviewable by the courts.<sup>20</sup>

## Restricting judicial review of migration matters

As prominent barrister John Basten QC says, 'the history of immigration law reform over the last decade has been dominated by attempts to restrict judicial review of decision making'.<sup>21</sup> The Labor Government's *Migration Reform Act 1992* (which commenced in 1994) contained two limbs. The *first* was the replacement of broad discretionary powers for issuing visas with objective criteria which would be 'less readily reviewable'. Basten notes that 'in many respects the strategy was successful; however, there were inevitable gaps in the scheme'.<sup>22</sup> The *second* was to limit the available grounds for judicial review, excluding lack of procedural fairness, manifest unreasonableness and failure to consider relevant matters. This second limb 'suffered from serious technical difficulties'.<sup>23</sup>

After the Coalition Government came to power in 1996, it contemplated 'a more radical set of restraints on judicial review by use of an ouster clause or privative clause',<sup>24</sup> which would deny courts jurisdiction to hear appeals in immigration matters. Attempts were made in 1997 and 1998 to amend the Migration Act in this way, but such a provision did not come into effect until enactment of the *Migration Legislation Amendment (Judicial Review) Act 2001*.<sup>25</sup> A 1999 [report](#)<sup>26</sup> by the Senate Legal and Constitutional Committee sets out the background to the 2001 legislation.

The 2001 Act introduced a new Part 8 for the Migration Act, including new section 474 which provides that:

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474(1) A privative clause decision:

(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.

Section 474 defines a 'privative clause decision' as a decision of an administrative character 'made under' the Migration Act and provides a list of decisions under the Act that are *not* 'privative clause decisions'. The effect is that most migration related decisions – including all decisions on visas – are 'privative clause decisions' and, according to section 474, excluded from review by any court.

### **Plaintiff S157**

In 2003 the High Court's decision in *Plaintiff S157*<sup>27</sup> made the ban on appeals in section 474 largely ineffective. The High Court said that a migration decision affected by 'jurisdictional error' had to be 'regarded, in law, as no decision at all'.<sup>28</sup> Such a decision therefore was not a decision 'made under' the Migration Act and so could not be a 'privative clause decision' within the meaning of new section 474. The prohibition in section 474 on judicial review therefore did not apply to such invalid decisions.<sup>29</sup>

The High Court did not provide a comprehensive definition of what 'jurisdictional error' might involve, but the term seems to include any mistake that would affect the ability of a tribunal to reach a valid decision.<sup>30</sup> As the Law Institute of Victoria has said, 'the effect appears to be that all but the most minor of errors by the Migration Review Tribunal or the Refugee Review Tribunal... will be characterised as jurisdictional errors'.<sup>31</sup>

In *Plaintiff S157* a failure by the Refugee Review Tribunal to provide 'procedural fairness' to a person seeking a protection visa meant the Tribunal's refusal of the visa involved a 'jurisdictional error'. This meant the Tribunal's decision had not been validly 'made under' the Migration Act and so was not a 'privative clause decision' as defined in section 474. The non-extendable time limit of 35 days for appealing to the High Court from a 'privative clause decision' in section 486A of the Migration Act therefore did not apply to the tribunal's decision. So the plaintiff could appeal to the High Court even though this time limit had expired.

Apart from section 486A, the High Court's decision in *Plaintiff S157* alters the operation of several other provisions in Part 8 of the Migration Act.<sup>32</sup>

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## The Constitution and judicial review

In deciding *Plaintiff S157* this way, the High Court avoided a constitutional confrontation. As Duncan Kerr MP and Professor George Williams point out:

This construction of s 474 had the advantage of enabling the court...to determine that judicial review remained open to the plaintiff, while not having to strike down s 474 for breaching the Constitution. The court thereby avoided the possibility of the confrontation with the legislature and executive that may have been provoked by a finding that any attempt to remove the possibility of review of executive decisions is constitutionally prohibited.<sup>33</sup>

Section 75 of the Constitution states that the High Court has 'original jurisdiction' (i.e. the authority to hear cases) in all matters:

*(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party,...*

*(v) in which a writ of Mandamus [directing that an officer do a certain action] or prohibition [preventing an officer from doing a certain action] or an injunction [halting a current or future action for a period of time] is sought against an officer of the Commonwealth.*

These provisions in the Constitution ensure that the legality of actions by the Commonwealth and its officers can be tested in the High Court. As Chief Justice Gleeson said in *Plaintiff S157*, section 75(v) 'secures a basic element of the rule of law'.<sup>34</sup> His fellow judges agreed, saying that this provision:

is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them...In the end...this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.<sup>35</sup>

According to the High Court, because on their proper construction neither section 474 nor section 486A of the Migration Act applied to invalid decisions, the provisions did not prevent the Court exercising its jurisdiction under section 75 of the Constitution.<sup>36</sup> So no constitutional conflict arose in *Plaintiff S157*.

Importantly, however – given the amendments to the Migration Act proposed in this Bill – the High Court said that if the Act not only prevented appeals from valid decisions but also from 'purported' or invalid decisions, it 'would be in direct conflict with s 75(v) of the Constitution and, thus, invalid'.<sup>37</sup> As Chief Justice Gleeson said, the 'jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament'.<sup>38</sup> In addition the High Court noted that any such provision would also contravene the 'separation of powers' doctrine implicit in the Constitution which prevents a non-judicial body such as a tribunal being the final arbiter of whether its decisions are legal.<sup>39</sup>

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## The approach in the Bill

The main aim of the Bill is to at least partially counter the effect of *Plaintiff S157* by bringing 'purported' decisions of migration review tribunals within the scope of the Migration Act, *except for* the purpose of section 474. By excluding section 474 the Bill does not extend the ban on judicial review in that section to invalid or 'purported' migration decisions, thus avoiding a direct conflict with section 75(v) of the Constitution or a direct infringement of the separation of powers doctrine.

By including 'purported' decisions as 'privative clause decisions' for other relevant sections of the Migration Act, the effect of the Bill will be to:

- impose/re-impose time limits on applications for judicial review (**sections 477 and 486A**)
- prevent judicial review of a migration decision where merits review is available (**section 476**), and
- ensure judicial review of migration decisions is exclusive to the High Court, the Federal Court and the Federal Magistrates Court (**section 484**).

In addition to re-imposing time limits on judicial review, the Bill also removes the requirement in **section 486A** for 'actual' notification of an adverse decision before the time period for an appeal to the High Court starts to run.

## ALP Position

Whilst the ALP agrees that the number of asylum seekers utilising the processes of judicial review should be reduced, it has suggested an alternative approach. The ALP proposes to:

abolish the Refugee Review Tribunal (RRT) and replace it with a Refugee Status Determination Tribunal (RSDT) with a legally qualified Chair, and then provide appeals to the Federal Magistrates Court.<sup>40</sup>

The objective is to limit applicants to one tier of judicial review.<sup>41</sup>

## Other parties

The view of the Greens is that whilst 'there is obviously a problem with too many migration cases appearing before the higher courts...seeking to further undermine the rights of asylum seekers is not the way to address it'.<sup>42</sup>

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## Main Provisions

### Schedule 1 – Amendments relating to judicial review

**Item 2** amends **subsection 5(1)** of the Migration Act by inserting a new definition of 'privative clause decision'. *Except for* the purpose of **section 474** (non-review of privative clause decisions), any 'privative clause decision' in the Migration Act will now also include a 'purported' decision. A 'purported decision' means a decision affected by jurisdictional error, i.e. either 'a failure of jurisdiction...or an excess of jurisdiction...in the making of the purported decision'. **Item 2** attempts to (partially) counter the High Court's statement in *Plaintiff S157* that invalid or 'purported' migration decisions were not decisions validly 'made under' the Migration Act, so actions in relation to such decisions could not be governed by provisions in the Act.

**Items 3 and 4** amend the time limits in **section 477** for seeking judicial review of 'privative clause decisions' in the Federal Court and Federal Magistrates Court. The courts will be able to extend the current 28 day period for lodging an appeal by up to 56 days if they are satisfied 'that it is in the interests of the administration of justice to do so'.

Before the High Court's decision in *Plaintiff S157*, the provision in **section 477** for appeals within a certain time from 'privative clause decisions' to the Federal Court or Federal Magistrates Court was by and large nugatory, since **section 474** prevented any appeal from such decisions.<sup>43</sup> After *Plaintiff S157* appeals can be made to these courts where the relevant decision is merely a 'purported' one – and therefore outside the scope of **section 474** – because of 'jurisdictional error'. The effect of **item 2** is that the new provisions governing time limits in the amended **section 477** will apply to appeals from invalid or 'purported' decisions of the migration tribunals.

**Items 10 and 11** bring the provisions in **section 486A** governing time limits for appeals to the High Court from 'privative clause decisions' into line with the new wording in amended **section 477** for appeals to the Federal Court and Federal Magistrates Court. The time limit for appealing directly to the High Court from a 'privative clause decision' will be reduced from the current 35 days to 28 days. However the High Court will be able to extend that period by up to 56 days if it is 'satisfied that it is in the interests of the administration of justice to do so'.

In *Plaintiff S157* the High Court held that **section 486A** did not apply to invalid or 'purported' decisions affected by jurisdictional error which were not therefore 'privative clause decisions' within the meaning of the Migration Act. **Item 2** attempts to bring 'purported decisions' within the scope of **section 486A**, thereby placing a maximum time limit of 84 days from the date of notification for lodging an appeal from such decisions with the High Court.

**Item 10** also removes the requirement in the current **section 486A** for 'actual (as opposed to deemed) notification' of an adverse decision before the time limit for appealing to the

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High Court begins to run. As the Explanatory Memorandum notes, this will align the time limit provisions in **section 486A** with current time limits for appealing to the Federal Court and Federal Magistrates Court. It will mean that:

the issue of whether or not a person was actually notified of a decision would no longer be relevant in deciding whether or not the High Court could hear the application for judicial review.<sup>44</sup>

The requirement for 'actual' rather than 'deemed' notification was inserted in **section 486A** by the *Migration Legislation Amendment Act (No. 1) 2001*. At the time the Government said this amendment was needed:

as a consequence of the commencement of the *Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act 2001* ("the Electronic Transactions Act")...This is because the Electronic Transactions Act provides for the deemed receipt of decisions. This consequential amendment to the Bill will ensure there is no ambiguity.<sup>45</sup>

## Concluding Comments

### Migration Litigation Review

The Government says that the amendments made by the current Bill 'follow the completion of the Attorney-General's recent Migration Litigation Review',<sup>46</sup> which was commissioned specifically to consider 'whether there are further legislative changes' that could be made to reduce the migration caseload in the courts.<sup>47</sup>

The Government has asked Parliament to approve the current Bill without releasing the Migration Litigation Review. There has been no public indication of what its conclusions and recommendations were. This prevents any assessment either of the adequacy of the Review in addressing the issue of migration caseload or the adequacy of the Bill as a response to the Review.

### Justification for the Bill

In particular, access to any analysis of the migration caseload issue done for the Migration Litigation Review would enable Parliament to judge the necessity for the amendments in the current Bill.

According to the Government's second reading speech, 'the statistics speak for themselves'.<sup>48</sup> Yet it is not plain that they do. After a substantial jump in 2002-03, there has been a marked drop-off in migration cases in the current financial year in the Federal and High Courts. Moreover, a large part of the increase in 2002-03 appeared to be due to policy measures of the Government itself, especially the decision not to allow

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representative actions in migration matters.<sup>49</sup> An inevitable side-effect of this decision was an increase in individual migration cases.

The peak in numbers of migration applications in 2002-03 follows the sharp increase in unauthorised arrivals (particularly by boat) between 1999 and 2001.<sup>50</sup> The reduction in unauthorised arrivals since that time<sup>51</sup> would need to be taken into account in assessing the future migration caseload.

The Attorney-General highlighted the growth in migration applications in the Federal Magistrates Court between 2001-02 and 2002-03. However this court only commenced in 2000, receiving jurisdiction to hear migration matters in October 2001. A steady increase in migration matters might be expected as those seeking review of migration decisions became aware of the new avenue open to them.

A further increase in migration applications is already apparent for the Federal Magistrates Court in 2003-04. But the purpose of the court is to 'provide a quicker, cheaper option for litigants and to ease the workload of both the Federal Court and the Family Court.'<sup>52</sup> From the figures in the above table, the Federal Magistrates Court appears to be fulfilling the role assigned to it, easing the pressure on the Federal and High Courts in migration matters.

In relation to the Attorney-General's claim of a 92.5 per cent success rate in migration cases before the Federal Court and Federal Magistrates Court, this figure does not appear to allow for matters withdrawn by the Government before hearing or matters remitted by consent to the migration tribunals.

### **Reducing 'unmeritorious' migration cases**

In its submission to the Migration Litigation Review, the Law Institute of Victoria said it was not in a position to dispute the Government's claim of high numbers of 'unmeritorious' migration matters commenced by applicants but then withdrawn. However it noted the need for applicants to issue legal proceedings before the Government would consider a challenge to decisions of the migration tribunals, and said that 'many applicants are pressured, by the strict time limits, into issuing claims to protect their legal position'.<sup>53</sup> The Institute called for an investigation of reasons for the high appeal rate from the Refugee Review Tribunal, stating that:

Applicants and advocates experiences of the RRT are generally unsatisfactory...it is not just the decisions themselves but the decision making process which causes applicants to be so dissatisfied; and that perception that they have not had a fair hearing is undoubtedly one of the factors which leads applicants to appeal.<sup>54</sup>

The Institute made a number of suggestions to reduce the appeal rate from the Refugee Review Tribunal which would in turn reduce the number of court appeals that are withdrawn.<sup>55</sup>

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## **The rule of law and migration appeals**

To what extent the large (and increasing) number of migration applications in the Federal Magistrates Court and the greatly reduced (but still significant) number of applications in the Federal and High Courts remain an issue is unclear. However it is important to have adequate provision for judicial review of decisions under the Migration Act.<sup>56</sup> As Chief Justice Gleeson noted, for example, 'decisions as to whether a person is someone to whom Australia owes protection obligations often turn upon questions of law; sometimes complex and difficult questions of law'.<sup>57</sup> Senator Cooney (ALP) observed in an earlier migration debate that:

The immigration department makes some very vital decisions. Perhaps the most vital one is whether or not a person is a refugee. But there are other decisions which have great consequence such as whether a person will be able to come to Australia as a migrant, as a long-term visitor or simply for a holiday. They are all decisions that affect people's lives and affect them quite significantly....

...the purpose of judicial review is to make sure the decisions made under the Migration Act are decisions which are made in accordance with the law and made in accordance with the evidence. That oftentimes is difficult to do. Given the consequences of the decisions that are made by the department, it would be very bad if those decisions were made contrary to the law and contrary to the evidence. The idea of having a judicial review is to ensure that the process by which those decisions are made is correct.<sup>58</sup>

What effect the measures in this Bill will have on the migration caseload is also unclear. According to the Government, 'approximately 40% of all current applications are being made outside the time limits specified in the existing provisions, with some being lodged up to 6 years after the original visa decision under challenge'.<sup>59</sup> In the Government's view, stipulating a blanket 28 day time limit with an additional discretionary period for lodging a migration application will reduce judicial review applications by 25-30 per cent, saving around 5 to 7 million dollars per year in litigation costs.<sup>60</sup>

## **Commonwealth power and the validity of the Bill**

The Bill does not fully utilise the Commonwealth's constitutional powers with respect to judicial review. As a leading commentator on Australian immigration law, Dr Mary Crock, pointed out:

The government clearly has the power to exclude judicial review by the Federal Court. This court is merely a creature of statute, and the statute that creates it determines its judicial powers and jurisdiction.<sup>61</sup>

The same point also applies to the recently created Federal Magistrates Court, also a 'creature of statute'. To the extent therefore that the Government wishes to reduce the 'unmeritorious caseload' in migration matters currently faced by these courts, it has full

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power to do so. The Bill, however, merely limits but does not exclude judicial review by the Federal Court and the Federal Magistrates Court.

Dr Crock's observation also indicates that provisions in the Bill relating to the Federal Court and Federal Magistrates Court may be valid even if those concerning the High Court are not.

### 'Purported' decisions

A consequence of the finding in *Plaintiff S157* that invalid or 'purported' decisions are not decisions 'made under' the Migration Act is that a court first has to decide whether a migration decision is lawful before determining whether the Act applies.<sup>62</sup> Since the first step is judicial review, this means that provisions in the Migration Act imposing restrictions such as time limits on judicial review 'serve no useful purpose'.<sup>63</sup> As the second reading speech said, 'Courts have to undertake complete judicial review of all migration decisions, regardless of the amount of time that has passed, to determine the lawfulness of the decision'.<sup>64</sup>

There is therefore some logic to the attempt in the Bill to bring invalid or 'purported decisions' within the scope of the Migration Act. On this basis, the time limits and other restrictions on judicial review in the Act would be effective in preventing applicants who do not comply with such provisions from appealing to a court, without a court first having to decide whether the Act applies. As noted above, the Bill takes heed of the decision in *Plaintiff S157* and avoids a direct constitutional confrontation by excluding 'purported' decisions from the ban on judicial review in section 474 of the Migration Act.

However, can a 'purported decision' – which, as the High Court said in *Plaintiff S157*, is 'no decision at all at law' – be brought under the other provisions of the Migration Act by virtue of a definition change in that Act?

On one view this poses no difficulties, simply involving a logical application of the proposed definition of 'privative clause decision' in the Bill. On the other hand, the High Court has declared in *Plaintiff S157* that 'purported' or invalid decisions are *not* decisions under the Migration Act. So changing a definition in the Migration Act can have no effect on the status of something that is outside the operation of that Act.

In addition, what **paragraph 5(1)(b)** of the Bill says, in effect, is that a 'privative clause decision', i.e. a 'decision of an administrative character *made under* the Migration Act' includes any decision that would have been '*made under*' the Act save only for the fact that it was not '*made under*' the Act. This is the same as saying, for example, that 'a cat' includes anything that would have been 'a cat' save only for the fact that it was not 'a cat' (including a dog, pyramid, encyclopaedia etc). On the face of it, there is no limit to what might be included in such a 'definition'.

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On its terms, therefore, the proposed new definition of 'privative clause decision' in **paragraph 5(1)(b)** is open-ended. Whatever the mistake or error by the decision maker, there will still be a 'privative clause decision' for all purposes of the Migration Act except section 474. Indeed, there may not need to be a 'decision' or anything resembling the normal understanding of a 'decision' at all. The Bill includes 'anything listed in subsection 474(3)' of the Act as a 'purported decision'. So, for example, purported 'conduct preparatory to making a decision',<sup>65</sup> a purported 'failure or refusal to make a decision',<sup>66</sup> or a purported 'refusal to do any other act or thing'<sup>67</sup> would all be 'privative clause decisions' subject to the time limits and other restrictions on judicial review in the current Migration Act. There would be obvious difficulties in recognising eg not merely a 'refusal' to do something, but a *purported* refusal to do 'any act or thing' as action (or inaction) that starts the clock running on the short time limit prescribed in the Act for lodging an appeal.

This approach could increase not decrease litigation in migration matters. It means that any communication to a migration applicant or his or her lawyer might amount to notification of a 'purported decision'.<sup>68</sup> Especially given the short time frame available, an applicant's lawyer might think it prudent to lodge an appeal simply to guard against this possibility.

It may be that a court would adopt an approach along the lines of the 'Hickman provisos'<sup>69</sup> to limit the scope of a 'purported decision' as defined in the Bill. But this could defeat the purpose of the Bill, requiring judicial consideration of whether a 'purported decision' met such criteria before it was known whether the restrictions on judicial review in the Migration Act applied.

### **Time limits and constitutional validity**

The potentially unlimited scope of 'purported decision' as defined by the Bill is also relevant to assessments of the constitutional validity of time-limit provisions in the Migration Act such as **section 486A**.

As noted above, imposition of time-limits for judicial review for the Federal Court and Federal Magistrates Court does not involve the same constitutional questions as arise in the case of the High Court.

In *Plaintiff S157*, Justice Callinan said the Commonwealth could validly regulate the procedure for seeking relief under section 75 of the Constitution. So it undoubtedly had the power to prescribe time limits on the High Court in relation to judicial review. But 'the regulation must be truly that and not in substance a prohibition'.<sup>70</sup> Setting a time limit for appeals in section 486A of only 35 days when the people seeking remedies may not speak English and 'will often be living or detained in places remote from lawyers' in effect denied them access to the remedies in section 75. This made 'any constitutional right of recourse virtually illusory'.<sup>71</sup>

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Justice Callinan said that 'a substantially longer period might perhaps be lawfully prescribed, or perhaps even thirty-five days accompanied by a power to extend time'.<sup>72</sup> Instead the Bill reduces the time for appealing to the High Court to 28 days, although it will allow the High Court to permit an appeal within a further period of twice this length. Placing a maximum time on use of the High Court's discretion in migration matters, however, amounts to an absolute prohibition on appeals under section 75 outside this time, with no allowance for the circumstances of any particular case.<sup>73</sup> As Chief Justice Gleeson noted, some grounds for review might not be discovered until after any fixed time limit expires.<sup>74</sup>

The removal of the requirement for 'actual' notification of a tribunal decision adds at least two further potential difficulties. The first is that the provisions in the Migration Act concerning 'notification' are not straightforward. The exact amount of time depends on the interaction of different sections in the Act and the method of communication used by the tribunal.<sup>75</sup> Applicants would require legal advice to know which provisions applied to understand the time they have to lodge an appeal. The second is the possibility of a delay between *deemed* and *actual* notification. For example, the Migration Act allows a tribunal to deliver a document to the last residential or business address provided by the applicant.<sup>76</sup> Time starts to run even if the applicant is no longer at the address (as in the case, for instance, of an immigration detainee moved to another detention centre). In addition, where a document has been posted, the period for appealing begins at the date of the document;<sup>77</sup> where it has been faxed or emailed the appeal period starts on the day of transmittal.<sup>78</sup> In either case the appeal period starts to run down without regard to whether the applicant has actually received the document.

In terms of migration caseload, shortening the time period for appeals and removing the requirement for 'actual' notification may increase applications to the Court to use its discretion to allow judicial review.

It could be argued that the Bill's combination of a fixed time limit and 'deemed' rather than 'actual' notification also increases the likelihood that migration applicants – especially those who are in remote locations and/or do not have English language skills – will in practice be denied access to judicial review under section 75 of the Constitution. Especially when the broad scope of 'purported decisions' and the potential difficulty of identifying them are also taken into account, the provisions in the Bill may amount to an impermissible 'ousting' or curtailment of the Court's constitutional jurisdiction under section 75.

### **Further Reading**

A list of articles and submissions relevant to this digest is provided in the endnotes.<sup>79</sup>

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- 2 Gary Hardgrave (Minister for Citizenship and Multicultural Affairs), 'Second reading: Migration Amendment (Judicial Review) Bill 2004', House of Representatives, *Debates*, 25 March 2004, p. 27212.
- 3 P. Ruddock, transcript of press conference, 27 October 2003.
- 4 Created in July 2000, the Federal Magistrates Court received jurisdiction in migration matters in October 2001.
- 5 P. Ruddock, *Migration Litigation Review to improve access to justice*, media release, Parliament House, Canberra, 27 October 2003.
- 6 P. Ruddock, *High Court workload needs addressing*, media release, Parliament House, Canberra, 22 January 2004.
- 7 P. Ruddock, *Migration Litigation Review to improve access to justice*, op. cit.
- 8 Senate Legal and Constitutional Committee, *Report into Migration Legislation Amendment (Judicial Review) Bill 1998*, tabled 21 April 1999, p. 7, at <http://www.aph.gov.au/senate/committee/history/committee/legcon.htm>.
- 9 P. Ruddock, media release 058/2004, 6 May 2004: <http://www.ag.gov.au/www/MinisterRuddockHome.nsf/Web+Pages/E744455E2EE739E2CA256E8C000B85B0?OpenDocument>
- 10 [2002] HCA 30 (8 August 2002).
- 11 High Court of Australia, *Annual Report 2002-03*, p.9.
- 12 Federal Court of Australia, *Annual Report 2002-03*, Chapter 3.
- 13 (2003) 211 CLR 476 (4 February 2003).
- 14 See discussion in Federal Court of Australia, op. cit., Chapter 3.
- 15 Section 44.
- 16 Migration Act subsection 476(4).
- 17 Migration Act sections 483A. Conferred by *Jurisdiction of the Federal Magistrates Service Legislation Amendment Act 2001*.
- 18 Department of Immigration and Multicultural and Indigenous Affairs fact sheet, *Litigation involving migration decisions* at <http://www.immi.gov.au/facts/09litigation.htm>. In its latest annual report the Federal Court explains that to help manage its migration workload, it aims to resolve migration matters within four months where the applicant is in migration detention, and within six months in other cases. In 2002-03, 68 per cent of cases involving an applicant in detention were completed within four months, and 88 per cent of other cases were

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- completed within six months of the applicant filing the action. See Federal Court of Australia *op. cit.*, Chapter 3.
- 19 Migration Act sections 483A and 484. Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* provides that 'statutory' judicial review is not available for certain migration decisions (i.e. 'privative clause decisions' within the meaning of the Migration Act). Where the ADJR Act excludes review, 'common law' judicial review (for example, an application for a 'constitutional' or 'prerogative' writ under s 75 of the Constitution or s39B of the Judiciary Act) is generally available. The grounds for seeking review under the ADJR Act and the common law are similar, although common law applicants do not get the benefit of section 13 of the ADJR Act which confers a statutory right to obtain reasons for a decision. A court can order reasons to be provided in common law judicial review but this is not automatic.
  - 20 Some provisions in the Migration Act confer a discretionary power on the Minister to determine that certain provisions of the Act should not apply or to make a 'more favourable decision' (sections 37A, 46A, 46B, 48B, 72, 91F, 91L, 91Q, 137N, 261K, 351, 391, 417, 454, 495B, 501A, 501J, 503A). These provisions state specifically that the Minister *does not have a duty* to exercise this power. In *Ex Parte S134* (2003), the High Court said this wording means that the Minister's refusal to use his discretionary power under the Migration Act was not reviewable.
  - 21 J. Basten, 'Revival of procedural fairness for asylum seekers', *Alternative Law Journal*, vol 28, no. 3, June 2003, p.114. See also J. McMillan, 'Controlling immigration litigation – a legislative challenge', *People and Place* vol 10 no 2, 2002, pp 16-28, at <http://parlinfoweb.parl.net/parlinfo/Repository1/Library/Jrnat/QO7761.pdf> (link not available outside Parliament).
  - 22 Basten, *op.cit.*, p 114.
  - 23 *ibid.*, See the High Court's decision in *Yusuf* (2001) 206 CLR 323.
  - 24 *ibid.*
  - 25 Previous title: Migration Legislation Amendment (Judicial Review) Bill 1998. The substantive provisions of this Bill were originally introduced in Migration Legislation Amendment Bill (No. 4) 1997 on 26 May 1997. Following criticism of the privative clause proposal, those aspects of the No. 4 Bill were introduced separately in the Migration Legislation Amendment Bill (No. 5) 1997. Although both Bills were passed by the House of Representatives and introduced in the Senate, the second reading debate was not completed before the 38th Parliament was prorogued. The privative clause proposal was reintroduced in Migration Legislation Amendment (Judicial Review) Bill 1998 which was introduced into the Senate in December 1998 and eventually passed by the Senate in September 2001.
  - 26 *Report into Migration Legislation Amendment (Judicial Review) Bill 1998*, tabled 21 April 1999, at <http://www.aph.gov.au/senate/committee/history/committee/legcon.htm>.
  - 27 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
  - 28 *ibid.*, at 506.
  - 29 The High Court pointed out in *Plaintiff S157* (at 501) that contrary to suggestions from the Commonwealth, there was 'no general rule as to the meaning or effect of privative clauses.'

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Instead this was worked out by looking at the specific legislation introducing them. The Migration Act defined a 'privative clause decision' as one 'made under' the Act. Any decision not properly 'made under' the Migration Act was therefore not a 'privative clause decision' for the purposes of that Act.

- 30 In *Craig v South Australia* (1995) 184 CLR 163 (at 179) the High Court said that if an administrative tribunal 'falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.'
- 31 Law Institute Victoria, *Submission to Migration Litigation Review*, 4 December 2003, p.2, at [http://www.liv.asn.au/news/pro\\_issues/livsubs/2003/20031205migrationlitigation.pdf](http://www.liv.asn.au/news/pro_issues/livsubs/2003/20031205migrationlitigation.pdf).
- 32 Including sections 476 (Federal Court and Federal Magistrates Court have no jurisdiction where merits review available; 477 (time limits for applications for judicial review to Federal Court and Federal Magistrates Court); 478 (persons who can apply for judicial review); 479 (parties to review); 483 (appeals to Federal Court from the Administrative Appeals Tribunal); and 484 (exclusive jurisdiction of Federal Court and Federal Magistrates Court re privative clause decisions). In addition, statutory judicial review under the ADJR Act of invalid migration decisions now appeared to be available, since Schedule 1 of that Act no longer applied to such decisions (see ADJR Act Schedule 1 para (da); and *Plaintiff S157* at 511).
- 33 Duncan Kerr and George Williams, 'Review of executive action and the rule of law under the Australian Constitution', (2003) 14 *Public Law Review* 219 at 224.
- 34 211 CLR 476 at 482.
- 35 (2003) 211 CLR 476 at 513–14.
- 36 The High Court said that the 2001 legislation introducing the new Part 8 of the Migration Act (including sections 474 and 486A) was based on a misunderstanding of the 'three *Hickman* provisos'. In *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, Justice Dixon stated that privative clauses were (at 614-15):

interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority, provided always that the decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.

In *Plaintiff S157*, the High Court said (at 510) that the view of the *Hickman* provisos which informed the drafting of the new Part 8 'is wrong because it seeks to treat "the three *Hickman* provisos" as if they were the only limits upon the power of those who made privative clause decisions under the Act. But the three *Hickman* provisos qualify the "protection it [the privative clause] purports to afford", not the powers of those who make privative clause decisions.' This meant that the 'fundamental premise for the legislation [is] unsound...'

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- 37 211 CLR 476 at 506 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). The Court also noted (at 505) that a 'privative clause provision' could not oust its jurisdiction under section 75(iii) of the Constitution.
- 38 211 CLR 476 at 482 (Gleeson CJ).
- 39 211 CLR 476 at 484 (Gleeson CJ) and 505 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
- 40 Stephen Smith (Shadow Minister for Immigration), *Government's introduction today of migration judicial review legislation*, media release, Parliament House, Canberra, 25 March 2004.
- 41 S. Morris, 'Labor backs call to cut appeals', *The Australian*, 29 December 2003, p. 5.
- 42 M. Organ, MP, 'Second reading: Migration Amendment (Judicial Review) Bill 2004', House of Representatives, *Debates*, 25 March 2004, p. 26493.
- 43 Chief Justice Gleeson pointed out in *Plaintiff S157* that even on the Commonwealth's view of section 474, there would have been some decisions which that section – designed to meet the criteria of the 'Hickman provisos' (see note 32) – would not protect eg a 'decision procured by corrupt inducement'. Such a decision would clearly not be a 'bona fide attempt to exercise power'. 211 CLR 476 at 494.
- 44 Explanatory memorandum, Migration Amendment (Judicial Review) Bill 2004, p. 6.
- 45 Supplementary explanatory memorandum (Government), Migration Legislation Amendment Bill (No. 1) 2001, paras 5 & 6.
- 46 Hardgrave, op. cit.
- 47 Ruddock, Transcript of press conference, 27 October 2003.
- 48 Hardgrave, op. cit.
- 49 When introducing this change in March 2000, the then Minister for Immigration and Multicultural and Indigenous Affairs, the Hon. Philip Ruddock MP, noted that:
- while class actions might well be appropriate in allowing individuals to sue large organisations in expensive consumer related actions, they are inappropriate in relation to migration matters...The government believes that, in the migration area, such actions are causing a substantial number of persons to litigate who would not otherwise do so, merely to get a bridging visa to prolong their stay in Australia.
- See P. Ruddock (Minister for Immigration and Multicultural and Indigenous Affairs), Second reading: Migration Legislation Amendment Bill (No. 2) 1999 [2000], House of Representatives, *Debates*, 14 March 2000, p. 14622.
- 50 Department of Immigration and Multicultural and Indigenous Affairs fact sheet, [Unauthorised arrivals by air and sea](http://www.immi.gov.au/facts/74unauthorised.htm), at <http://www.immi.gov.au/facts/74unauthorised.htm>.
- 51 *ibid.*
- 52 D. Williams (Attorney-General), Second reading: Federal Magistrates Bill 1999, House of Representatives, *Debates*, 24 June 1999, p. 7365.

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- 53 Law Institute Victoria, *op. cit.*, pp 2–3.
- 54 *ibid.*, p. 6.
- 55 Including: earlier mediation; pre-hearing conferences (which already happen in the Migration Review Tribunal); appointing members to the Tribunal for extended and non-renewable periods to assist perceptions of their independence; and establishing 'well thought out and transparent' selection criteria for members of the Tribunal which would 'improve the quality of decision making'. See *ibid.*, p. 4.
- 56 For a discussion of the role of judicial review in relation to the Migration Review Tribunal, see A. Glass, 'Good MRT Decisions and Judicial Review', Paper presented at the joint annual conference of the Refugee Review Tribunal and the Migration Review Tribunal, Sydney, 1-2 November 2001, available at <http://parlinfoweb.aph.gov.au/parlinfo/Repository1/Library/miscitem/HMBC60.pdf> (link not available outside Parliament).
- 57 211 CLR 476 at 492.
- 58 Senator Barney Cooney, House of Representatives, *Debates*, 15 February 2000, p. 11788.
- 59 Hardgrave, *op. cit.*
- 60 *ibid.*
- 61 M. Crock, *Immigration and Refugee Law in Australia*, The Federation Press, Sydney, 1998, p. 294.
- 62 As noted both in the Government's second reading speech and by the High Court itself in *Plaintiff S157* (211 CLR 476 at 508).
- 63 *Plaintiff S157* 211 CLR 476 at 509.
- 64 Hardgrave, *op. cit.*
- 65 Migration Act paragraph 474(3)(h).
- 66 Migration Act paragraph 474(3)(j).
- 67 Migration Act paragraph 474(3)(f).
- 68 Eg a tribunal might discuss whether an applicant should be allowed to present additional evidence, thinking it had made a decision on this but not actually doing so. Or it might actually decide this but its communication to the applicant could be ambiguous. Despite such a 'failure to properly exercise jurisdiction', there would be a 'purported decision' within the meaning of **proposed paragraph 5(1)(b)** which would trigger the time limits in the Act.
- 69 See endnote 36. This might mean that any restrictions on judicial review would only be valid where the 'purported' decision:
- was a 'bona fide attempt' to exercise the decision-maker's power
  - related to the subject matter of the authorising legislation
  - was 'reasonably capable of reference' to the power given to the decision-maker.

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- 70 211 CLR 476 at 537.
- 71 *ibid.*, at 538.
- 72 *ibid.*
- 73 As Justice Callinan pointed out, setting a time limit on appeals to the High Court is contrary to the provision in the High Court Rules (O 60 r 6) to extend the time for appeals 'as the justice of the case requires'. *ibid* at 537–538.
- 74 211 CLR 476 at 494.
- 75 Migration Act sections 379C, 379A and 379AA (Migration Review Tribunal); sections 441C, 441A and 441AA (Refugee Review Tribunal).
- 76 Sections 379A and 441A.
- 77 Subsections 379C(4) and 441C(4).
- 78 Subsections 379C(5) and 441C(5).
- 79 Further reading:
- J. Basten QC, 'Revival of procedural fairness for asylum seekers: the case of S157 and protection of human rights', *Alternative Law Journal*, vol.28, no. 3, June 2003, pp. 114–116, 156  
<http://parlinfoweb.parl.net/parlinfo/Repository1/Library/Jrnart/HRGA62.pdf>
- J. Basten QC, 'S157 and Protection of Human Rights', working paper 2003/2 Australian Human Rights Centre, [http://www.ahrcentre.org/Publications/basten\\_s157.htm](http://www.ahrcentre.org/Publications/basten_s157.htm)
- J. Basten QC, 'Developments in Judicial Review in the Context of Immigration Cases', a comment prepared for the Judicial Conference of Australia's Colloquium 2003, Darwin, 30 May 2003.  
<http://www.jca.asn.au/Basten.pdf>
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[http://www.lawsocietywa.asn.au/ronald\\_wilson](http://www.lawsocietywa.asn.au/ronald_wilson)
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- E. Edson. 'S157, the Rule of Law and Individual Rights' paper presented to the University of Adelaide Law School and the Australian Institute of Administrative Law Administrative Law

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**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

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