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Migration Litigation Reform Bill 2005

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Law and Bills Digest Section

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Migration Litigation Reform Bill 2005

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House: House of Representatives

Portfolio: Attorney-General

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Purpose

To amend the *Migration Act 1958*, the *Federal Court of Australia Act 1976*, the *Federal Magistrates Act 1999* and the *Judiciary Act 1903* to assist courts in managing their migration litigation workload.

Background

Due to the short time between the introduction of this Bill and previously scheduled debate, a brief digest covering key points was released on 15 March 2005.[1] It is now replaced by this digest.

On 16 March 2005 the Senate referred the Bill to the Senate Legal and Constitutional Legislation Committee. The Committee received 25 submissions.[2] A public hearing was held in Canberra on 13 April 2005. The Committee's report[3] was published on 11 May 2005.

Readers are also directed to Bills Digest No. 118 of 2003-04[4] on the Migration Amendment (Judicial Review) Bill 2004 (the '2004 Bill'). The 2004 Bill contained similar (although not identical) reforms to the 2005 Bill. The digest on the 2004 Bill includes extensive background, some of which is extracted in this Digest, and a detailed reading list. The 2004 Bill was also the subject of an inquiry[5] by the Senate Legal and Constitutional Legislation Committee. The 2004 Bill lapsed when Parliament was prorogued for the October 2004 federal election.

Migration litigation workload

The Explanatory Memorandum notes that:

> The Government is very concerned about the large increases in the number of migration cases in the federal courts in recent years and the very low success rate of this litigation. Migration litigation constitutes a substantial proportion of the workload of the High Court, Federal Court and Federal Magistrates Court (FMC). In recent years, the Government has won over 90 per cent of all migration cases decided at hearing. Unsuccessful cases are not necessarily unmeritorious. However, the very high failure rate reflects concerns raised, including by the courts, about high levels of unmeritorious migration litigation.
>
> The large volume of judicial review proceedings, unmeritorious litigation and delays are very costly and are placing strains on the courts and the migration system more generally. Extended waiting times in courts have been taken advantage of by some applicants using the court process simply to delay their removal from Australia and prolong their stay in the community. These delays impact on applicants with genuine claims who are waiting to have their cases considered.[6]

These concerns have been expressed by the current Government since its first attempt to limit judicial review in 1997, and were articulated in a similar form by the previous ALP Government when enacting the *Migration Reform Bill* 1992. As current Attorney-General and then Shadow Minister for Immigration Mr Ruddock said in November 1992, there is an underlying issue about access to courts for non-citizens:

> Access [to judicial review] is for Australian citizens and very often is at a cost to Australia and its citizens. To open Australia up to a situation in which the people of the world, at a cost to Australian taxpayers, can get access to our administrative review system and our legal system was never intended.[7]

When speaking on the current Bill, then Opposition Immigration spokesman Laurie Ferguson MP said in March 2005:

> There is no dispute about the problem that this legislation … seemingly seeks to tackle. In 1995-96 there were 596 judicial review applications in the migration field. The 2003-04 report of the department indicated that during 2003-04 there were 4,991. If the current figures are anything to go by, this year's expected number of judicial appeals should reach similar levels. In passing I noticed in the *Bills Digest* a contention that there has been a significant drop in judicial appeal applications from the point at which they increased due to the ban on representational actions. Yes, there has been a drop; but the current level is far in excess of that back in the late nineties. It might not now be 11½ times greater, but it is at least eight times greater, so there is still a significant problem.[8]

Penfold Review

In October 2003 the Government commissioned the Migration Litigation Review, conducted by Hilary Penfold QC, to inquire into more efficient management of migration cases. According to the Attorney-General's Second Reading Speech, the measures in the 2005 Bill 'have been drawn from recommendations by the Migration Litigation Review.' As Bills Digest no 118 of 2003-04 noted in relation to the 2004 Bill:

> 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.[9]

The findings of the Review have yet to be released. In other words, the Government has still not revealed publicly the detailed analysis from the Review on which it says the proposals in the 2005 Bill are based. As Mr Ferguson said:

> So what we have here is undoubtedly a problem, which both sides of politics feel we have to find a solution to. We have an inquiry but we do not have the revelation of the details of that inquiry. One does not know whether this is an ingredient of Hilary Penfold's suggestions. One does not know whether she had alternatives. One is unsure of whether it really canvassed all the problems that lead to the flood of litigation in the migration field. It is unsatisfactory that, given so much reliance on the inquiry by the government, the ministers and the department, nearly two years later it has not seen the light of day for the public or those people interested in this field.[10]

Despite repeated requests, the Senate Committee inquiring into the 2005 Bill was not given a copy of the Penfold Review.[11]

Palmer Inquiry

In the interim period since the Bill was introduced, the report of the Palmer Inquiry[12] has been released, detailing structural and cultural failings within the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) in relation to detention and compliance activities.

Professor Bill Maley, Director of the Asia-Pacific College of Diplomacy at the Australian National University, draws a link between restrictions on judicial review and the performance of DIMIA:

> When the courts are blocked from scrutinising administrative action to see if it is lawful, it, in effect, becomes a matter of whim whether to follow the law or not. This is what has happened in DIMIA, and the effect has been a shocking deterioration in the quality of DIMIA decision-making and the standard of behaviour of some (although by no means all) DIMIA officers.[13]

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 official 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.[14] 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.[15]

On occasion migration litigation can have a 'revolving door' characteristic. This happens where, for example, a person appeals on a point of law from the Refugee Review Tribunal or Migration Review Tribunal, and a court, in upholding the appeal, sends the matter back to the relevant tribunal for re-consideration. The tribunal must properly remake the decision in accordance with the law, otherwise there can be a further appeal to the courts. And this process can continue, so potentially applicants could be caught in a legal loop for an extended period.

Repeat applications for judicial review
1 Nov 2004 – 15 June 2005[16]

Court	**Repeat Application**	**Total**
Federal Magistrates Court	No	997
	Yes	461
	Total	1458
Federal Court	No	122
	Yes	57
	Total	179

Restricting judicial review and the privative clause

A chronology of legislation restricting judicial review in migration matters is at **Annex A**.

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'.[17] The Labor Government's *Migration Reform Act 1992* (which commenced in 1994) began the trend by replacing broad discretionary powers for issuing visas with objective criteria which would be 'less readily reviewable'. It also limited the grounds for judicial review. 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',[18] 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*.[19]

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

> *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*[20] 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'.[21] 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.

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.[22]

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.

While the High Court held section 474 to be constitutionally valid, Chief Justice Gleeson reiterated that under section 75(v) of the Australian Constitution the 'jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament'.[23] The High Court noted that any such legislation 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.[24]

Main Provisions

The main proposals in the Bill are to:

- **Direct migration cases to the Federal Magistrates Court (FMC)**
  - The Federal Court will have limited jurisdiction in migration matters, restricted to complex cases referred by the FMC and review of decisions to cancel the visas of, or deport, people on 'character' grounds
  - Nearly all migration cases remitted from the High Court will be channelled directly to the FMC

  (Item 17)

- **Ensure identical grounds of review in migration cases**
  - The grounds of review in migration matters in the FMC will be the same as those in the High Court under s75(v) of the Constitution. Section 75 of the Constitution states that the High Court has 'original jurisdiction' (i.e. the authority to hear cases) in all matters:

    > *(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.*

  (Item 17)

- **Impose uniform time limits in migration cases**
  - Applications to the FMC, Federal Court and the High Court must be made within 28 days of actual (rather than deemed) notification of a 'migration decision'. A 'migration decision' includes a '*privative clause* decision', a '*purported privative clause* decision', and a '*non-privative clause* decision' — i.e. in effect any decision made under the Migration Act or 'purportedly' made under the Act. See discussion on privative clause decisions above. The 28 day time limit can be extended by a further 56 days if a request for further time is made within 84 days of actual notification of the decision
  - A 'purported' privative clause decision means a decision that would be valid if it were not for 'a failure to exercise jurisdiction' or 'an excess of jurisdiction' in the making of the decision.

  (Items 11-15, 18 and 30-33)

- **Facilitate quicker handling of migration cases**
  - Require applicants to disclose previous applications for judicial review of the same migration decision
  - Expressly provide for the High Court to remit migration and other cases to the Federal Court and FMC 'on the papers' (i.e. without a hearing)

  (Items 10 and 37)

- **Deter unmeritorious applications**
  - Prohibit lawyers, migration agents and others from encouraging a person to commence or continue migration litigation in a court if the litigation has 'no reasonable prospect of success', with the risk of a personal costs order for contravening this prohibition
  - Migration litigation can have 'no reasonable prospect of success' even if it is not 'hopeless' or 'bound to fail'
  - A lawyer must not file a document commencing migration litigation unless the lawyer 'certifies in writing' that 'there are reasonable grounds for believing that the migration litigation has a reasonable prospect of success'

  (Item 38)

- **Summary judgments**
  - Allow the High Court, Federal Court and FMC to dispose of a matter summarily on their own initiative if satisfied that there are no reasonable prospects of success

– As with 'unmeritorious' migration litigation, a defence or prosecution can have 'no reasonable prospect of success' even if it is not 'hopeless' or 'bound to fail.'

(Items 7, 8, and 9)

Position of non-government parties

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 to the approach in the current Bill. 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. The objective is to limit applicants to one tier of judicial review.[25]

The Labor Senators issued additional comments to the 2005 report by Senate Legal and Constitutional Legislation Committee, stating they remain concerned about time limits and the constitutional validity of the Bill in particular and calling for the release of the Penfold Review:

> Labor Senators again note that the Bill may be unconstitutional insofar as it imposes non-discretionary, absolute time limits for the judicial review of migration decisions, including those decisions suffering from serious jurisdictional error.[26]

In his second reading speech on the current Bill in March 2005, then Opposition spokesman Laurie Ferguson moved that the House of Representatives note with concern:

> (1) that certain policies of the Government, including processes for the use of ministerial discretion, limited tenure for members of the Refugee Review Tribunal, aspects of the detention policy and a lack of proper case management for claimants, have caused a significant increase in migration litigation;
>
> (2) that the Government refuses to make the report of the Penfold inquiry public and urgently requests the Government to make the report available;
>
> (3) that this Bill uses the mechanism of 'purported privative clause decisions' to restrict judicial review of decisions made with jurisdictional error, which may be ineffective;
>
> (4) the views of Labor Senators during consideration of the Migration Amendment (Judicial Review) Bill 2004 that similar time-limit provisions could be unconstitutional;
>
> (5) that the time-limits proposed could prevent some applicants from exercising their right to judicial review;

(6) that this Bill make changes to the Acts governing the High Court, Federal Court and Federal Magistrates Court with respect to summary judgements that would affect all litigation, not simply migration litigation;

(7) that the provisions allowing cost orders against persons who encourage others to commence litigation without reasonable prospects of success would apply to volunteer and pro bono lawyers and advisers, and would apply without any cap on the costs that could be ordered and that these provisions may be too broad, with no clear explanation of how the 'no reasonable prospects of success' test is to work in practice; and

(8) that this Bill does not include the proposal contained in the Australian Labor Party's policy 'Protecting Australia and Protecting the Australian Way' to establish a Refugee Status Determination Tribunal .

Other parties

The Australian Democrats issued a dissenting statement to the 2005 report by Senate Legal and Constitutional Legislation Committee, also calling for the release of the Penfold Review:

> The Bill is based on a false premise and is unworkable and potentially dangerous. As the Democrats stated in respect of the earlier Migration Amendment (Judicial Review) Bill 2004:
>
> > *Once we start limiting access to the courts for particular sections of the community, we are creating a legal system that does not hold everyone equal in the eyes of the law. It is imperative that those seeking asylum are not denied access to judicial review, particularly given the legitimate concerns about the adequacy of the existing determination process. We should be working harder to ensure that justice is delivered rather than subverted.*
>
> These comments apply equally to the Bill and now have even more force given the recent injustices wrought by the Government against its own citizens who have the misfortune to become embroiled in its immigration regime.[27]

In relation to the 2004 Bill, the Greens noted 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'.[28]

General comments

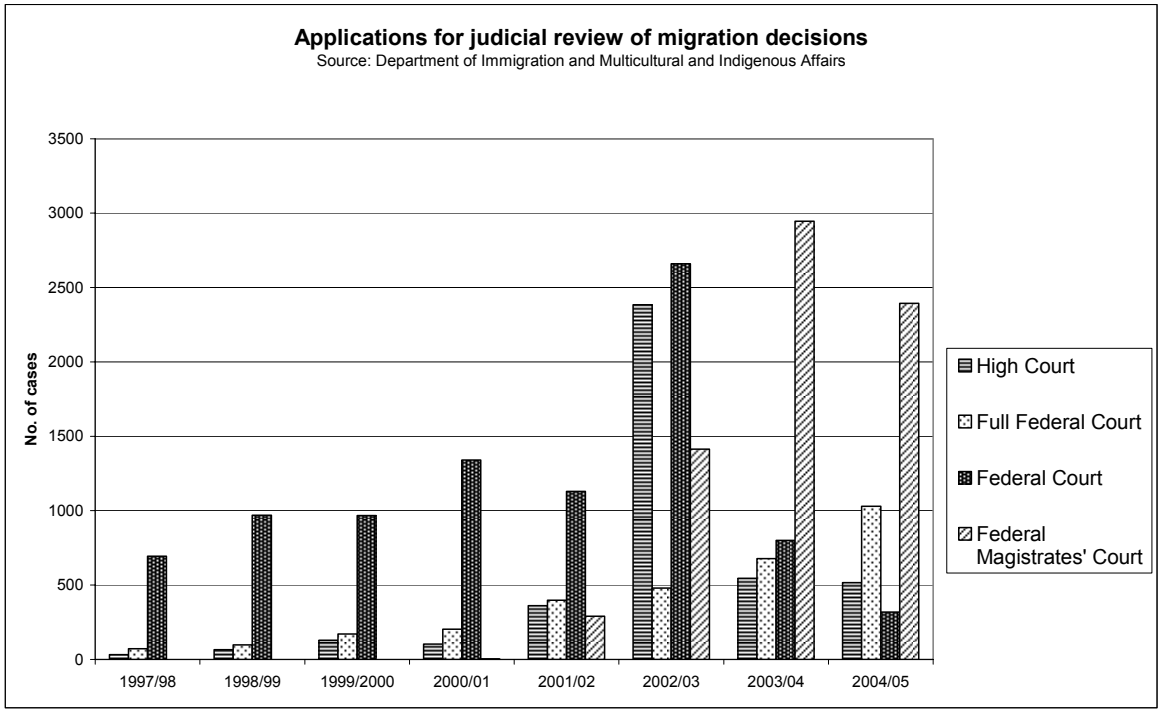
Migration Litigation Workload

A key issue in the debate over migration litigation has been what amounts to an 'abusive' migration claim. A report in 2003 by the Administrative Review Council (ARC) concluded that the identification of abuse in migration litigation remains 'difficult and subjective'.[29] The ARC said that abuse is not necessarily evidenced by the number of applications for review, the number of unsuccessful applications or the number of withdrawals.[30] The ARC concluded that 'accordingly, the view may be taken that "abuse" should not readily be relied on by government as a reason for limiting review in a particular area'.[31] The ARC also suggested that if the Government feels compelled to respond to strains on financial and human resources presented by high volumes of migration claims, it should ensure an adequate alternative to judicial review.

The report by the Senate Legal and Constitutional Legislation Committee into the 2004 Bill noted DIMIA figures indicating that between July 2003 and April 2004, 93% of applications for judicial review were dismissed by the courts. The Committee observed, however, that DIMIA was unable to explain to it the 'distinction between an unsuccessful application and an unmeritorious one.'[32]

The table below shows figures for judicial review applications in migration matters in various courts from 1997 to 2005. As the Digest on the 2004 Bill noted, there was a large increase in applications in 2002/03 after the government prohibited 'representative' actions in migration matters, causing the single *Muin* case to be split into an additional 1350 matters, which were filed in the High Court in that financial year.[33] After the distorting effect of the *Muin* case on migration matters passed, numbers of migration applications have declined dramatically.

As the Attorney-General's second reading speech notes, 8 additional magistrates for the Federal Magistrates Court (FMC) were funded in the 2004-05 budget. The FMC commenced hearings in 2000 and received jurisdiction in migration matters in 2001. The graph below indicates that the FMC is playing the role intended for it, taking on a substantial part of the burden in migration matters from the Federal Court and the High Court.



The extent to which the reforms proposed in the Bill are now necessary is unclear. This is reflected in the recommendation by the Senate Legal and Constitutional Legislation Committee in its 2005 report that if the current Bill is passed, it should be subject to a full report to Parliament by the Minister after 12 months and repeal of the summary dismissal provisions after 18 months.[34]

Legislative versus administrative reform

Another general issue is whether administrative reforms should be adopted in preference to legislative restrictions on judicial review. In 1997 Australian immigration law academic Professor Mary Crock said administrative changes:

> … would address the problems of cost and efficiency without impugning the fundamental rights and interests of those affected by adverse migration decisions ... [and would] have the added attraction of targeting the heart of the problem without taking the heart out of the system.[35]

This issue was also highlighted in the hearings into the 2005 Bill by the Senate Legal and Constitutional Legislation Committee. Professor George Williams and Dr Ben Saul said that the need for the legislation would be substantially reduced if other alternatives were first pursued, such as:

> ... improving primary decision-making; enhancing the RRT's independence; increasing legal aid funding to improve the quality of migration advice about judicial

> review; removing restrictive interpretations of the refugee definition, and establishing complementary protection as a new migration status; and abolishing mandatory detention.[36]

Similarly, the Law Society of South Australia argued that:

> In seeking to reduce the number of matters before the courts, the government response has focussed on implementing barriers and restrictions on the judicial process. It has failed to consider the structural reasons behind the problem. In particular, it has failed to introduce measures designed to improve the quality and transparency of primary decision making. It has also failed to address the consistency, quality and transparency of both the Migration Review Tribunal and the Refugee Review Tribunal. Further, the government has made no proposals designed to strengthen the availability of legal advice and assistance, whether pro bono or otherwise, to applicants before the tribunals leaving some of the most vulnerable members of society to attempt to represent themselves in these matters.[37]

The Committee acknowledged concerns in relation to the current Bill's 'perceived failure to adequately address structural and policy problems associated with judicial review of migration matters.' And it agreed that addressing some of these problems 'in the ways suggested by submissions and witnesses may have considerable merit'. The Committee recognised, in particular, that 'it may be more effective to address the causes of "unmeritorious" litigation as opposed to concentrating solely on its effect.'[38] Nevertheless, according to the Committee:

> … the Bill represents one of the strategies that may be helpful in streamlining judicial review of migration litigation, forming part of a broader strategy aimed at addressing some of the problematic issues at the heart of migration law in Australia. Therefore, subject to its earlier recommendations, the committee considers that the Bill should be passed by the Senate.[39]

Specific Comments

In its report on the 2005 Bill, the Senate Committee observed that:

> Although many submissions and witnesses were supportive of any efforts to improve the overall efficiency of migration litigation and, in particular, to reduce genuinely unmeritorious claims, the overwhelming majority of evidence received by the committee expressed strong opposition to key aspects of the Bill.[40]

Prohibition on unmeritorious applications

The Bill gives discretion to courts to decide whether an 'unmeritorious' application for review of a migration decision has been brought and whether a personal costs order should be made against any 'person' who has encouraged this, which can include the applicant, his or her lawyer or migration agent, *or anyone else*.

Strong objections were made to the Senate Committee about the fact that any person, whether involved in the litigation or not, could be subject to a personal costs order if a court found that they had encouraged a litigant to 'commence or continue' migration litigation. Professor Williams said that:

> In general, I support the idea of cost orders being available to courts in circumstances where there is an abuse of process or a range of other matters that ought to lead to special types of costs or even damages being awarded. The problem with this is that it does go far beyond the carefully constructed limits that have been imposed. I am concerned at the absence of an appropriate knowledge requirement on the person who might be 'encouraging' another person. It may be possible that something said without knowledge that might not be seen as normally giving rise to any legal consequences in this case might. You can imagine many circumstances where well-meaning people might make comments encouraging people, and it is not normally accepted that that should lead to these types of cost orders.[41]

Parliament might note that on the terms of proposed **Item 38** of the Bill, the possibility of personal costs order for commencing or continuing migration litigation where there is 'no reasonable prospects of success' would apply as much to the Commonwealth and its lawyers and other advisers as it would to people refused permission to stay in Australia. When speaking on the current Bill in May 2005, Government MP Petro Georgiou noted recent Federal Court cases which 'raised serious questions about the willingness of the Department of Immigration to fight the issue through the courts'. Mr Georgiou said that:

> In one case, in December last year, the matter was heard in the Federal Court for eight days before the department of immigration agreed to obtain the urgent psychiatric opinion that the man was seeking, which led to his immediate transfer to a psychiatric facility. The department litigated this case for eight days and then accepted that there was a need for urgent psychiatric intervention before the case was concluded.[42]

He also observed that in April 2005:

> … the department was once again in the Federal Court asserting that it was entitled not to obtain independent psychiatric assessments of two detainees, despite receiving opinions from external psychiatrists and a general practitioner that the treatment that the two men were receiving was inadequate or inappropriate.[43]

Mr Georgiou noted the comment of the judge in the case that had the two men not been transferred to a psychiatric hospital before proceedings ended, he would have ordered them to be. As the judge said, however, this 'in no way addressed the regrettable need for the applications to be made'. Mr Georgiou remarked that:

> I do not know the precise definition of 'unmeritorious' but it would not seem to me that this action on the part of the Commonwealth was meritorious.[44]

Parliament may wish to consider obtaining detailed advice on the full legal consequences of proposed **Item 38**.

The Bill directs courts, where they find that migration litigation had no reasonable prospect of success, to consider whether a personal costs order should be made. This may amount to intrusion of the legislature into the 'judicial power' of the Commonwealth in contravention of Chapter III of the Constitution. In addition, as Professor Williams noted:

> I am troubled by the possibility of a court making an order in a matter against people who are not parties to the matter and not normally seen as connected to the matter. I can see the possibility of constitutional issues arising from that in that it arguably extends beyond the power of the court to make orders beyond that group of people, particularly to people who clearly here would be third parties in that they do not actually have any active involvement in the litigation. [45]

The Committee said that terms in **Item 38** were undefined and their effect was unclear. It noted that:

> In the committee's view, the evidence presented by representatives from both the Attorney-General's Department and DIMIA did little to allay concerns raised in relation to the 'unmeritorious' proceedings provisions of the Bill. In particular, the representatives were not able to adequately explain how these provisions would operate in practice, nor how people would be able to determine whether in fact their actions are covered by the Bill.[46]

Most lawyers giving evidence to the inquiry into the 2005 Bill by the Senate Legal and Constitutional Legislation Committee felt the provisions targeted the legal profession and that it would be difficult to judge whether they would fall foul of the unmeritorious provisions in providing advice, especially given uncertainty over key terms in **Item 38**, for example what might amount to 'encouraging' migration litigation.[47]

In 1992 when discussing what he described as a crisis in assessing refugee claims — mainly arising from 20,000 Chinese nationals seeking to stay in Australia after the 1989 Tiananmen massacre — the current Attorney-General and then Opposition spokesman for Immigration Mr Ruddock criticised the Keating Government for seeking to blame lawyers and refugee organisations for providing 'legal advice and assistance to asylum seekers'. Mr Ruddock stated:

> I want to make it clear that I do not put the blame on the legal profession. I do not find it in the least surprising that those in the legal profession—given their duties and responsibilities, given the nature of the training that they receive and given the employment difficulties that so many of them have in this recession, also a Government creation—use their creative endeavours to find their way through the system that the Government puts in place. That does not surprise me in the least. The lawyers have to be sufficiently adroit and flexible to be able to make the changes to deal with that situation. The Government cannot bleat about the fact that they find ways through the system. It also cannot complain that the refugee organisations would seek to offer advice and assistance because that is exactly what I would expect them to do.[48]

Many submissions to the Committee suggested that volunteers and 'pro-bono' legal providers may be unwilling to expose themselves to personal liability and might well be dissuaded from assisting asylum-seekers and others with limited capacity to conduct their own migration litigation, particularly in the most difficult cases where skilled advocacy was most needed.[49]

It was following its discussion of this issue that the Committee recommended amending the Bill to insert a requirement that one year after the Bill's commencement, the Minister for Immigration should report to Parliament on its operation.[50]

Summary Judgments

The provisions in the Bill allowing summary judgments at the initiative of the High Court, Federal Court or FMC apply not just to migration matters but to all matters. It is suggested that Parliament should seek specific advice on the full implications of this proposal for the range of federal litigation, including outside the migration area.

This issue was canvassed extensively in the Senate inquiry, with most submissions noting that the common law test for summary dismissal that a matter needed to be 'manifestly groundless' or 'hopeless or bound to fail' was well-established.[51] It was also noted that the Federal Government had not pressed in court for use of the existing powers of summary dismissal, but that it had enjoyed a high rate of success where it had sought summary dismissal.[52]

The Committee therefore recommended that items 7, 8 and 9 of the Bill be repealed at the end of 18 months from their date of commencement.

Time limits and 'purported decisions'

Items 18 and **30-33** impose 28 day time limits on the FMC, Federal Court and High Court in relation to a 'migration decision', defined as any decision either actually or 'purportedly' made under the Migration Act.

As explained above, in *Plaintiff S157* the High Court said that a decision under the Migration Act affected by 'jurisdictional error' (i.e. a significant mistake) was not a valid decision under the Act.[53] So appeals from such a decision could not be caught by the time limits in the Act. The High Court called migration decisions with such mistakes 'purported' decisions.

The 2005 Bill amends the Migration Act so that it specifically includes 'purported decisions'. Any time limits on appealing in the Act will now apply to 'purported' decisions. Logically, however, it is difficult to see how this can be effective. The High Court has said that 'purported' decisions are outside the scope of the Migration Act. So amending the Migration Act itself cannot bring them within its scope.

Importantly, a 'purported' decision is defined by **Item 14** of the Bill to include anything listed in s474(3) of the Migration Act. So, for example, purported 'conduct preparatory to making a decision', a purported 'failure or refusal to make a decision' or a purported '*refusal to do any other act or thing*' would all be subject to the time limits and other restrictions on judicial review in the Migration Act. There are two main issues with this definition.

Firstly, as Professor Williams and Ben Saul pointed out in their submission to the inquiry by the Senate Legal and Constitutional Affairs Committee on the 2005 Bill, the inherent vagueness of a definition that includes 'any other act or thing' might mean the provision is too indefinite to be a 'law' that can be enacted by Parliament under section 51 of the Constitution. As Professor Williams explained:

> I am concerned about the very idea of providing a legal framework for the regulation of a purported decision. It seems to be a strange thing to do indeed, within a legal framework that is meant to be compliant with the rule of law, to seek to regulate something which, by its very nature, is illegal or an unlawful decision. In terms of the constitutional problems that might flow from that, significantly this does not make such decisions unreviewable. If it did, I think it is very likely that the bill would have been unconstitutional as a result of the decision in Plaintiff S157, but clearly a sensible decision has been made not to go down that path. However, there are further, less likely problems with the legislation, even in its current form. The mere idea of regulating a purported decision may give rise to a question about whether the regulation is a law at all, as is required by section 51 of the Constitution.[54]

Secondly, the wide definition of 'purported' decision may make it difficult for people to recognise that some decision or action, or inaction, has occurred which has started time limits running for lodging an appeal. The consequence may be that people may seek to lodge 'precautionary' appeals in case they have been the subject of a 'purported' decision without this being obvious to them. This will be all the more difficult, however, because of the proposal in the Bill to 'penalise' unmeritorious applications. In practice, therefore, applicants may be caught between, on the one hand, a vague definition of 'migration decision' linked to strict time limits for appealing and, on the other hand, a prohibition on appealing if there are 'no reasonable prospects' for success, linked to personal costs orders.

In their submissions to the Senate Committee inquiry into the 2005 Bill, the Law Council of Australia and Australian Lawyers for Human Rights emphasised the likelihood of complex litigation over the privative clause provisions in the Bill:

> On one level, there seems to be an irony in introducing provisions to limit judicial review that will encourage litigation: once again the High Court will be asked inevitably to rule on the effect of the amendments. On the other hand, it is difficult to see that the amendments will have any effect at all on the ultimate jurisdiction asserted by the High Court (and through it, the lower Federal Courts).
>
> ALHR agreed that any '(f)urther tinkering with the privative clause is likely to lead to further complex litigation to tease out the actual effect of the privative clause' and

> that 'there will be no marked "efficiency" in moving the cases as it is clear that the High Court's jurisdiction cannot be ousted'.[55]

The Constitution and time limits

The Commonwealth has constitutional power to exclude or limit judicial review by the Federal Court or the Federal Magistrates Court. Both are created by legislation. It is that legislation, as amended from time to time by Parliament, which determines their judicial powers and jurisdiction.

As noted above, however, the jurisdiction of the High Court under s 75(v) of the Constitution to review actions by the Commonwealth cannot be taken away by Parliament. Current section 486A of the Migration Act sets a time limit of 35 days for appealing to the High Court, with a prohibition on any extension beyond that time. **Items 30 and 31** of the current Bill reduce this to 28 days from the time of 'actual' notification of a migration decision to appeal to the High Court, although this period can be extended by a further 56 days if a request for further time is made within 84 days of notification of the decision.

In *Plaintiff S157*, Justice Callinan addressed the issue of time limits and s75(v) of the Constitution. He said that the Commonwealth could prescribe time limits on the High Court in relation to judicial review, but only if this amounted to a 'regulation' of appeals and not a prohibition'.[56] He said the time limit of 35 days in existing section 486A of the Migration Act with a ban on extending this period 'made any constitutional right of recourse' under s75(v) 'virtually illusory'. This was especially the case where the people seeking remedies may not speak English and 'will often be living or detained in places remote from lawyers'. Section 486A was therefore invalid to the extent that it purported to impose such a time limit.[57] Of particular importance to Justice Callinan was that section 486A attempted to take away the discretion that the High Court has under its own Rules to extend the time for appeal.

Justice Callinan said that 'a substantially longer period [than 35 days] might perhaps be lawfully prescribed, or perhaps even thirty-five days accompanied by a power to extend time'.[58] Instead the Bill reduces the time for appealing to the High Court, although an extension, itself with a set time limit, is possible. However the Bill will maintain the prohibition in subsection 486A(2) on the High Court allowing appeals outside the (extended) time set in the Bill.

Placing a maximum time on use of the High Court's discretion in migration matters, amounts to an absolute ban on appeals under section 75 outside this time, with no allowance for the circumstances of any particular case. The difficulty the Federal Government faces in proposing a set, non-extendable maximum period for appealing to the High Court is, as Chief Justice Gleeson noted in *Plaintiff S157*, that some grounds for review might not be discovered until after any fixed time limit expires.[59] Any people in such a position would therefore be denied their constitutional right to appeal to the High

Court against the actions of the Commonwealth. To the extent that provisions in the current Bill have this effect, they are likely to be constitutionally invalid.

The potentially unlimited scope of a 'purported' migration decision as defined by the Bill is also relevant in assessing the constitutionality of the time limit provisions. As noted above, a 'purported' decision is defined to include 'conduct preparatory to making a decision', a purported 'failure or refusal to make a decision' and a purported 'refusal to do any act or thing'. If it was clear that any migration decision would be readily identifiable by someone who may wish to exercise their constitutional right to appeal, imposing a time-limit on that right may have more chance of being valid. But it is far from clear that a person will be able to identify the range of mistaken decisions, preparatory conduct or refusals to do other acts or 'things' as 'migration decisions' to which the time limits set by the Bill will apply. The existence of a discretion on the part of the High Court to extend the time for any appeal becomes more important in this context. The broad scope of a 'purported' migration decision thus reduces the prospect that the time-limits on appeals to the High Court proposed in the Bill are constitutionally valid.

Remitting migration matters to the FMC from the High Court

Pursuant to section 44 of the *Judiciary Act 1903*, the High Court could remit any matter to another federal court, 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. Importantly however, the *Migration Legislation Amendment (Judicial Review) Act 2001*, which commenced in September 2001, removed the power of the High Court to remit matters that relate to immigration decisions where those decisions a) have a merits review process attached,[60] and b) are subject to the Minister's discretion to substitute a more favourable decision.[61] It follows that these constitutionally entrenched matters must now be reviewed by the High Court itself.

Item 17 of the Bill does not change this position, but simply directs the High Court to remit other migration matters directly to the FMC.

Jurisdiction of the Federal Magistrates Court and 'issue estoppel'

Item 17 of the Bill provides that the FMC is to have the same jurisdiction in relation to migration decisions as the High Court has under section 75(v) of the Constitution. The explanatory memorandum explains that:

> This means that the grounds of judicial review are the same whether an application for judicial review of a migration decision is filed in the FMC or in the High Court. *Identical grounds make it easier for the courts to deal with applicants attempting to seek multiple rounds of judicial review of the same migration decision, by reference to the doctrine of issue estoppel.*

Under the doctrine of 'issue estoppel', parties may be prevented or 'estopped' from pursuing a particular issue of law or fact in later proceedings if the issue has been already been dealt with in previous proceedings. As Halsbury's Laws of Australia explains:

> The judgment of the court is a conclusive determination not only of the ultimate finding in the case but also of all the issues necessary to the decision. Hence, an issue of fact or of law so determined cannot afterwards be raised between the same parties or their privies in subsequent proceedings brought to pursue some other claim or cause of action.[62]

Item 17 will operate in conjunction with **Item 37** which will require applicants to disclose previous applications for judicial review in any court of the same migration decision. The explanatory memorandum comments:

> The provision is designed to assist the courts to identify applications which have already been the subject of proceedings for judicial review of tribunal decisions and discourage applicants from attempting to re-litigate these matters, including as a means to delay their removal from Australia.[63]

It is surprising that such a provision might be necessary. Even if federal courts do not have an accurate cross-referencing system, presumably the Commonwealth, against whom all migration actions are taken, must have a record of which applicants have made applications to which courts.

It is hard to say whether **Items 17 and 38** will have any practical effect on the number of migration appeals. While the FMC will have the same jurisdiction as the High Court under s 75(v) of the Constitution, within that there are multiple grounds at common law for seeking judicial review. One could envisage three general scenarios:

- The RRT or MRT is directed to remake a decision because of an error of law. If the tribunal makes the same error, the applicant will have a further right of appeal. Issue estoppel could not be used against the applicant. The issue may have been decided by a court, but the tribunal still has to re-make its decision properly taking into account the court's finding on that issue.

- The tribunal re-makes the decision and makes a different error. Issue estoppel could not be raised against the applicant since it would be a different issue that is the basis for any appeal.

- The tribunal re-makes the decision properly taking into account the court's decision on the issue appealed against, and without other errors. Only in this case would issue estoppel be effective in preventing further appeals.

However a migration matter would still need to be returned to a court to decide which of the above situations applied. If, for example, the applicant alleged a different set of errors then presumably that would need to go some way or all the way through the review

process before there was a determination that no further errors had been made. So there would still be some level of burden imposed on the courts by each new claim before it could be terminated on the basis of issue estoppel. It may be that this is an inherent problem in a process that remits the matter back to the administrative tribunal rather than enabling the court to make a replacement decision (federal courts can only decide issues of law, not determine what the appropriate decision should have been 'on the merits').

Further reading

- HREOC submission to the Penfold Review at http://www.humanrights.gov.au/legal/submissions/migration.html.
- B. O'Shea, submission from the Law Institute Victoria to the Penfold Review, 4 December 2003, at http://www.liv.asn.au/news/pro_issues/livsubs/2003/20031205migrationlitigation.pdf.
- Amnesty International submission to the Penfold Review at http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/mig_judicial_04/submissions/sub08att.pdf.
- Senate Legal and Constitutional Legislation Committee *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.
- Senate Legal and Constitutional Legislation Committee, *Provisions of the Migration Amendment (Judicial Review) Bill 2004*, June 2004.
- Administrative Review Council, *The Scope of Judicial Review*: *Discussion Paper*. 2003.
- J. Basten, 'Revival of procedural fairness for asylum seekers', *Alternative Law Journal*, vol 28, no. 3, June 2003 pp. 114–156.
- J. McMillan, 'Controlling immigration litigation – a legislative challenge', *People and Place* vol 10 no 2, 2002, pp 16-28.
- *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

Endnotes

1 See: Bills Digest 132, 2004–05, http://www.aph.gov.au/library/pubs/bd/2004-05/05bd132.pdf.

2 http://www.aph.gov.au/senate/committee/legcon_ctte/mig_litigation/submissions/sublist.htm.

3 Senate Legal and Constitutional Legislation Committee, *Provisions of the Migration Litigation Reform Bill 2005* , http://www.aph.gov.au/senate/committee/legcon_ctte/mig_litigation/report/index.htm.

4 http://www.aph.gov.au/library/pubs/bd/2003-04/04bd118.pdf.

5 http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/mig_judicial_04/index.htm.

6 Explanatory Memorandum, p. 1.

7 House of Representatives, *Debates*, 11 November 1992, speech starting p. 3142.

8 House of Representatives, *Debates*, 17 March 2005, speech starting p. 61.

9 Bills Digest no 118 2003–04, p. 9.

10 House of Representatives, *Debates*, 17 March 2005, speech starting p. 61.

11 *Provisions of the Migration Litigation Reform Bill 2005*, at p. 1 and para 3.95.

12 M. Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau,* Canberra, July 2005, at: http://www.minister.immi.gov.au/media_releases/media05/palmer-report.pdf.

13 W. Maley, 'Cavalier attitude to asylum-seekers due to a lack of judicial oversight', *Canberra Times*, 14 June 2005, p. 13.

14 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.

15 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 or her discretionary power under the Migration Act was not reviewable.

16 Source: DIMIA: DIMIA did not collect figures on repeat applications for judicial review before November 2004.

17 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/Jrnart/QO7761.pdf (link not available outside Parliament).

18 Basten, op. cit., p. 114.

19 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. See also the *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. See Annex A.

20 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476

21 ibid., p. 506.

22 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.

23 211 CLR 476 at 482 (Gleeson CJ).

24 ibid. at 484 (Gleeson CJ) and 505 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)

25 Stephen Smith (Shadow Minister for Immigration), *Government's introduction today of migration judicial review legislation,* media release, Parliament House, Canberra, 25 March 2004.

26 *Provisions of the Migration Litigation Reform Bill 2005*, op. cit., p. 35

27 ibid., pp. 37–38

28 House of Representatives, Debates, 25 March 2004, p. 26493.

29 Administrative Review Council, The Scope of Judicial Review: Discussion Paper, 2003, p. 77.

30. ibid., 76–77.

31 ibid, p. 77.

32 *Provisions of the Migration Amendment (Judicial Review) Bill 2004*, p. 8

33 ibid., p. 2.

34 *Provisions of the Migration Litigation Reform Bill 2005*, op. cit., pp. 11, 23.

35 M. Crock, *Immigration Law and Practice,* Federation Press, Sydney, 1997, p. 59.

36 *Provisions of the Migration Litigation Reform Bill 2005*, op. cit., p. 33.

37 ibid., p. 30

38 ibid.

39 ibid.

40 ibid., p. 5.

41 ibid., p. 13.

42 House of Representatives, *Debates*, 10 May 2005, p. 46.

43 ibid.

44 ibid.

45 See also *Provisions of the Migration Litigation Reform Bill 2005*, op.cit., at p. 15, paragraph 3.38

46 ibid., pp. 22–23

47 ibid., pp. 13–23, paragraphs 3.24-3.68

48 House of Representatives, Debates, 11 November1992, speech starting p. 3142

49 *Provisions of the Migration Litigation Reform Bill 2005*, op. cit., p. 15.

50 ibid., p. 23.

51 ibid., p. 5. The common law test of 'manifestly groundless' or 'hopeless and bound to fail' has been laid down in cases such as *General Steel Industries Inc v Commissioner for Railways (NSW)*(1964) 112 CLR 125; and *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62).

52 ibid., p. 7.

53 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476

54 *Provisions of the Migration Litigation Reform Bill 2005*, op. cit., p. 27.

55 ibid., pp. 26–27

56 (2003) 211 CLR 476 at 537.

57 ibid., 537–8.

58 ibid., 538.

59 Ibid.

60 Subsections 476(4) and (1) of the Migration Act.

61 Subsections 476(4) and (2) of the Migration Act.

62 *Halsbury's Laws of Australia* 190-40 Distinction between res judicata, issue estoppel and Anshun estoppel in Butterworths Online.

63 Explanatory memorandum, p. 18.

Appendix A

Chronology of Commonwealth legislation restricting judicial review of migration decisions

Migration Reform Act 1992

Reps: Introduced 4/1//92, passed 11/11/92

Sen: Introduced 12/11/92, passed 8/12/92

Introduced Part 4B Migration Act: Review of Decisions by Federal Court

- s.166L defined a judicially-reviewable decision
- s. 166LA decisions reviewable by the Federal Court

'The Reform Bill proposes significant extensions to the current system for review of migration decisions. Credible independent merits review will ensure that the Government's clear intentions in relation to controlling entry to Australia, as set out in the Migration Act, are not eroded by narrow judicial interpretations. Under the Reform Bill, the following people who are adversely affected by a decision will be entitled to independent merits review: onshore refugee claimants; onshore cancelled visa holders, except those cancelled at the border; onshore applicants for a visa, except those detected at the border; and an Australian sponsor of an offshore applicant for a visa.' (Source: Minister for Immigration, Local Government and Ethnic Affairs, 2nd R speech 4/11/92)

Migration Act 1958 was renumbered by Migration Legislation Amendment Act 1994 (No.60 1994). S.166L was renumbered to s.474.

Migration Legislation Amendment Bill (No.4) 1997

Reps: Introduced 25/6/97 Passed: 3/9/97

Senate: Introduced 22/9/97

This Bill proposed amendments to the Migration Act and the *Administrative Decisions (Judicial Review) Act 1977* in relation to judicial review of immigration decision-making, including:

- Introduce a new judicial review scheme, in particular a privative clause, to cover decisions under the Migration Act relating to the ability of non-citizens to enter and remain in Australia;

- Apply the new judicial review scheme to both the Federal Court and the High Court; and

- Allow specified decisions to be reviewable under the Administrative Decisions (Judicial Review) Act. (Source: Explanatory Memorandum to the Bill)

The provisions relating to judicial review were removed into the Migration Legislation Amendment Bill (No.5) 1997. 'The bill gives legislative effect to the government's pre-election policy commitment that we would restrict access to judicial review in migration matters in all but exceptional circumstances. That commitment was given in light of the extensive merits review rights in the migration area and arose from concerns about the growing cost and incidence of, and delays resulting from, migration litigation.' (Source: Migration Legislation Amendment Bill (No.5) 1997; 2nd R 3/9/97 Minister for Immigration and Multicultural Affairs)

Migration Legislation Amendment Bill (No.5) 1997

Reps: Introduced 3/9/97 Passed: 24/9/97

Senate: Introduced 29/9/97 2nd reading adjourned

The provisions of this bill remained the same as in (No. 4) Bill of 1997.

'To give effect to the government's commitment, this bill introduces a new judicial review scheme to cover decisions under the Migration Act relating to the ability of non-citizens to enter and remain in Australia. The key mechanism in the new scheme is the privative clause provision at new section 474.

The privative clause, and the related provisions, will replace the existing judicial review scheme at part 8 of the Migration Act. Unlike the existing scheme, the new judicial review scheme will also apply to the High Court and not just the Federal Court.' (Source: Migration Legislation Amendment Bill (No.5) 1997, 3/9/97 2R speech by Minister for Immigration and Multicultural Affairs). The bill was to be debated in the Senate but Parliament was prorogued in August before the election in October.

Parliament prorogued August 1998

Election held 3 October 1998

Migration Legislation Amendment (Judicial Review) Bill 1998

Senate: Introduced 2/12/98 2nd R adjourned 2/12/98

The content and purpose of this bill was transferred from the Migration Legislation Amendment (No.5) 1997.

Migration Legislation Amendment (Judicial Review) Act 2001 (No.134 2001)

This bill was the 1998 bill

Senate: Introduced 2/12/98, passed 26/9/01

Reps: Introduced 26/9/01, passed 27/9/01

Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 No. 128, 2001

Reps: Introduced 18/9/01, passed 19/9/01

Sen: Introduced 20/9/01, passed 26/9/01

This Act added s.494AA to the Migration Act imposing a bar on certain legal proceedings relating to 'offshore entry persons'.

'The purpose of this bill is to make some consequential amendments to the Migration Act and migration regulations following the excision of some Australian territories from the migration zone in respect of unauthorised arrivals…Related provisions in the bill will preclude the institution of legal proceedings relating to such people in any court—apart from the High Court of Australia.'(Source: Minister for Immigration and Multicultural and Indigenous Affairs, 2nd Reading speech)

Migration Legislation Amendment (Transitional Movement) Act 2002

Reps: Introduced 13/3/02; Passed 14/3/02
Sen: Introduced 20/3/02, passed 21/3/02

This Act added s.494AB to the Migration Act imposing a bar on certain legal proceedings relating to 'transitory persons'.

'This bill proposes amendments which will allow such a person, to be called a "transitory person", to be brought to Australia from one of the declared countries in exceptional circumstances. The government will not be bringing persons who have been assessed as

refugees according to UNHCR guidelines to Australia under the provisions proposed by this bill. To make this clear, I am foreshadowing that the government will be bringing forward an amendment to the bill specifically to exclude these refugees from the ambit of the proposed provision, and we will be making that amendment for more abundant precaution. I do not think there is any doubt that we will make that amendment for that purpose.' (Source: Minister for Immigration and Multicultural and Indigenous Affairs, 2nd R speech)

Migration Legislation Amendment (Judicial Review) Bill 2004

Reps: Intro. 25/3/04; Passed 31/3/04

Senate: Intro. 31/3/04; 2nd reading adjourned 31/3/04

This bill sought to amend the Migration Act to include 'purported' decisions in the definition of 'privative clause decision', except for the purpose of s474 of the Act; and to restore the original procedural intent of the migration judicial review scheme in relation to: time limits on judicial review applications; exclusive jurisdiction of the High Court, Federal Court and Federal Magistrates Court to hear judicial review of migration applications; and restrictions on judicial review of decisions where merits review of the primary decision is available; and makes a consequential amendment to the *Administrative Decisions (Judicial Review) Act 1977*. Also contains application provisions.

Lapsed at the end of the 40th Parliament (Senate Bills List 2005)

Migration Amendment (Detention Arrangements) Act 2005 (No. 79 of 2005)

Reps: Introduced 21/6/2005, passed 22/6/2005

Sen: Introduced 23/6/2005, passed 23/6/2005

- **Subsection 474(3)(a)** of the Migration Act was amended by this Act to include a decision to vary a determination as a privative clause decision, for example under the new power in 197AD.

- **Subsection 474(7)(a) -** Decisions of the Minister not to exercise or not to consider the exercise of the powers in sections 195A, 197AB and 197AD are also privative clause decisions. * This proposed subsection does not exist in the current Migration Act as yet but will be added by the Migration Litigation Reform Bill 2005 if that Bill is passed by Parliament.

Migration Litigation Reform Bill 2005

Reps: Introduced 10/3/2005, passed 10/5/2005

Senate: Introduced 11/5/2005, 2nd R adjourned 11/5/2005

Amends the *Migration Act 1958* and 4 other Acts in relation to migration litigation by increasing the role of the Federal Magistrates Court (FMC); ensuring identical grounds of review in migration cases in the High Court and the FMC; imposing uniform extendable time limits for applications for judicial review of migration decisions; improving court processes to facilitate quicker handling of cases; deterring unmeritorious applications by broadening the grounds on which a court can summarily dispose of proceedings; and making the Chief Federal Magistrate responsible for the administration of the FMC. Definitions of non-privative clause decision and purported privative clause decision. (Source: Senate Bills List as at 7 July 2005)

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2404.