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Migration Legislation Amendment Bill (No.1) 2008

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Law and Bills Digest Section

Contents

Migration Legislation Amendment Bill (No.1) 2008

Date introduced: 25 June 2008

House: The Senate

Portfolio: Immigration and Citizenship

Commencement: Sections 1 to 3, Part 2 of Schedule 3 and Item 19 of Schedule 5 commence on the day of the Royal Assent. Items 17 and 18 of Schedule 5 commence immediately before 1 July 2007. All other provisions commence on a day to be fixed by Proclamation or six months after the day of the Royal Assent whichever is the sooner.

Links: The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

Purpose

The purpose of the Bill is to clarify and improve the effectiveness of Migration and Citizenship legislation by addressing and rectifying a range of problems related to judicial and merits review, border protection, visa integrity, Australian citizenship, and other miscellaneous matters.

Background

History of the Bill

Those provisions of **Schedule 1** of the Bill relating to the executive structure of the Migration Review Tribunal (MRT) were previously introduced in Migration Legislation Amendment Bill (No.1) 2002 (the 2002 Bill). The 2002 Bill was introduced to the House of Representatives on 13 March 2002. It was subsequently referred to the Senate Legal and Constitutional Affairs Legislation Committee on 20 March 2002, which tabled its report on 18 June 2002. On 5 February 2003, the 2002 Bill was introduced to the Senate but then lapsed.[1] This Digest has been prepared using some of the information contained in the Bills Digest prepared in respect of the 2002 proposed reforms.[2]

1. Sue Harris Rimmer, 'Migration Amendment (Visa Integrity) Bill 2006', *Bills Digest*, no. 2, Parliamentary Library, Canberra, 2006-07, pp. 2–3.
2. Natasha Cica and Nathan Hancock, 'Migration Legislation Amendment Bill (No.1) 2002' *Bills Digest*, no. 21, Parliamentary Library, Canberra, 2002-03.

Similarly, **schedule 3** of the Bill reintroduces identical provisions previously contained in the Migration Amendment (Visa Integrity) Bill 2006 (the 2006 Bill). The 2006 Bill had re-introduced select, though not identical provisions from the 2002 Bill. The 2006 Bill was introduced to the Senate on 21 June 2006. It was subsequently referred to the Senate Legal and Constitutional Affairs Legislation Committee on 9 August 2006, which tabled its report on 11 September 2006. The second reading of the 2006 Bill was adjourned and the 2006 Bill subsequently lapsed. This Digest has been prepared using information contained in the Bills Digest prepared in respect of the 2006 proposed reforms.[3]

This Bill proposes to make a large number of mostly technical amendments, some of which were unsuccessfully introduced by the former coalition government, and some of which are newly drafted amendments by the current government.

Committee consideration

On 26 June 2008, the Senate Selection of Bills Committee recommended that the Bill not be referred to Committee.[4] The Senate Legal and Constitutional Affairs Legislation Committee's reports of the 2002 and 2006 Bills are the most recently available committee material published on the proposed amendments.

Financial implications

According to the Explanatory Memorandum, amendments in Schedules 1, 3, and 4 will have a minimal financial impact while the amendments in Schedule 5 are expected to have no financial impact. Amendments in Part 3 of Schedule 2 (round trip cruises and ship reporting time frames) are expected to result in minimal costs to the Commonwealth, which will be absorbed through 'existing funding arrangements'.[5] The Explanatory Memorandum also states the expected revenue gains as a result of the amendments to Schedule 2 to be 4.5 million in 2009-10 and 2.3 million in 2010-11.[6]

Main provisions

Schedule 1 – Amendments relating to judicial and merits review

The office of 'Deputy Principal Member'

Items 1-5 and 14-18 of Schedule 1 amend the *Migration Act 1958* (the Migration Act) to create and empower the office of 'Deputy Principal Member' of the MRT interposed

3. Sue Harris Rimmer, op. cit.
4. Senate Selection of Bills Committee, *Report No. 7 of 2008*, 26 June 2008, p. 3.
5. Explanatory Memorandum, Migration Legislation Amendment Bill (No.1) 2008, p. 3.
6. ibid.

between the Principal Member and the Senior Members. Although the Migration Act provides that the Refugee Review Tribunal (RRT) will consist of members, including a Deputy Principal Member,[7] there is currently no provision providing the same for the MRT. As the MRT and RRT operate administratively as one single agency, and members are cross appointed to both Tribunals, 'it is anomalous for the position of Deputy Principal Member to exist in one Tribunal but not the other'.[8]

Though the proposed amendments will, in effect, align the executive structure of the Tribunals, they do not create uniformity in the manner in which their powers are exercised, due largely to existing differences in the way the Tribunals operate. By way of example:

- **proposed subsections 354(2) and (3)** will enable the Deputy Principal Member (in addition to the Principal Member and Senior Members of the MRT) to give written directions about who is to constitute the Tribunal for the purposes of a particular review.[9] However, such directions in the RRT may only be made by its Principal Member.[10]
- the insertion of **proposed subsection 357(2A)** relating to the process to determine who will preside over a hearing when two or three Members have been constituted for the purposes of a review, has no equivalency for the RRT, as its powers are exercised by a single member only,[11] and
- **proposed paragraph 458(1)(b) and proposed subsection 459(1A)** relating to the membership and appointment of RRT Members will create a discretion (where previously there was none) as to whether the RRT's office of Deputy Principal Member is filled, in keeping with the discretionary appointment of such a person for the MRT in **proposed paragraph 395(a) and proposed subsection 396(1A).**

7. Section 458 of the Migration Act.
8. Senator the Hon Kim Carr, Minister for Innovation, Industry, Science and Research, 'Second reading speech: Migration Legislation Amendment Bill (No.1) 2008', Senate, *Debates*, 25 June 2008, p. 2.
9. For further information regarding the MRT and RRT constitution policy see: Principal Member Direction 1/2008 (issued on 14 July 2008), 'Caseload and Constitution Policy' [http://www.mrt-rrt.gov.au/docs/PMD/PMD1_2008CaseloadConstitutionPolicy.pdf], accessed on 31 July 2008.
10. Section 421(2) of the Migration Act.
11. Section 421 (1) of the Migration Act.

Abolition of the 'handing down' procedure

Items 6-9 of Schedule 1 will abolish the 'handing down' procedure for the MRT, while items **19-22 of Schedule 1** will abolish it for the RRT. The current procedure (in the context of the MRT) is outlined in the Explanatory Memorandum,

> In general terms, the current process requires the MRT to invite a review applicant and the Secretary to be present when a decision is to be handed down (although there is no requirement for them to attend) and the Principal Member or other authorised person by the Principal Member, conducts the handing down by reading the outcome of the decision. The date of the decision is the date the decision is handed down. If the applicant or their representative is not present at the handing down, the Tribunal must notify the applicant by giving them a copy of the written statement prepared under subsection 368(1), within 14 days after the day on which the decision is handed down. Section 368C provides in effect that applicants are taken to be notified of a decision when their representatives are notified of the decision.[12]

A background paper on proposed amendments to the Migration Act, issued by the then Department of Immigration and Multicultural Affairs in 2006 reportedly stated that the handing down process was administratively costly with no apparent benefit to the applicant. It apparently further noted that since the commencement of the procedure, only about 22% of review applicants had attended the handing down of their decisions.[13]

Items 7 and **20** provide that the Tribunals will be required to notify an applicant of a decision (other than an oral decision) 'by giving' the applicant and the Secretary a copy of the decision within 14 days after the day on which the decision is taken to have been made.[14] **Items 6** and **19** provide that a decision (other than an oral decision) is taken to have been made on the date of the decision.[15] This new formulation largely reflects the notification procedure that currently applies to persons in immigration detention.[16] **Items**

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12. Explanatory Memorandum, p. 7. The same procedure in the context of the RRT is outlined at p. 12.

13. As noted in Jillian Segal, President of Administrative Review Council, Letter to the then Department of Immigration and Multicultural Affairs: *Proposed amendments to the Migration Act*, 31 October 2006, p. 2.

14. Proposed sections 368A and 430A of the Migration Act. The proposed formulation for notification of decisions contained in Schedule 1 of the Bill closely resembles the statutory formulation that applied prior to the commencement of the handing down procedure on 1 June 1999, though the Migration Act at that time did not contain a provision stating when a decision was taken to have been made.

15. Proposed subsections 368(1) and 430(1) of the Migration Act.

16. See subsections 368D(2) (relating to the MRT) and 430D(2) of the Migration Act (relating to the RRT). There is currently no provision stating when a decision of a person in immigration detention is 'taken to have been made', however, the Courts have inferred that such a decision is made when the decision is finalised, as evidenced by the date of signing

9 and 22 will repeal **existing subsections 368D(2) and 430D(2)** which provided different notification procedures for such persons. Under the proposed amendment, notification of *all* decisions (other than those given orally) will now simply be governed by **proposed subsections 368A and 430A.**

According to the second reading speech, the proposed new method for notifying parties of a Tribunal decision will be simpler and thereby reduce the risk of administrative error[17] which suggests that the handing down procedure which was introduced in 1999 to 'create certainty of dispatch',[18] has not, in retrospect, achieved its intended purpose.

The point at which the Tribunals cease to have power to reconsider or reopen a case that has been finalised has been the subject of considerable judicial consideration and it is perhaps this issue that the proposed amendments seek to remedy and put beyond doubt.[19] The issue has most frequently arisen in the context of the RRT when an applicant has sought to submit additional material for consideration after a decision has been signed but before it has been handed down. Some believe that such a situation 'has arisen from the unfortunate propensity of the Refugee Review Tribunal to 'hand down' a decision long after the member 'signs' it'.[20]

The removal of the handing down procedure may resolve some of the uncertainty surrounding the point at which the Tribunals' powers are spent, though delays in actual dispatch may nonetheless result in the continued practice whereby applicants seek to submit additional (and perhaps more up-to-date) information for consideration following the dating of the decision.

The Bill introduces new more relaxed dispatch requirements. For instance, though the Bill provides that dispatch of a decision (not given orally) must occur within 14 days after the day on which it is made, if the Tribunals do not comply, such a failure will not invalidate the decision.[21] This is a marked departure from the existing statutory scheme, failure to

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by the Presiding Member: *SZJHK v Minister for Immigration and Citizenship* [2007] FMCA 248, per Nicholls FM at 35.

17. Senator the Hon Kim Carr, op. cit., p. 2.

18. Explanatory Memorandum, Migration Legislation Amendment Bill (No.1) 1998, p. 11.

19. The doctrine of 'functus officio' is a description or consequence of the performance of a function having regard to the statutory power or obligation to perform that function. The effect of the application of the doctrine is that once the statutory function is performed there is no further function or act for the person authorised under the statute to perform: *R v Moodie; Ex parte Mithen* (1977) 17 ALR 219 at 225; *Comptroller-General of Customs v Kawasaki Motors Pty Ltd* (1991) 32 FCR 219 at 225.

20. *SZEUZ v Minister for Immigration & Anor* [2005] FMCA 967, per Smith FM at 32.

21. Proposed subsections 368A(3) of the Migration Act (relating to the MRT) and 430A(3) (relating to the RRT).

comply with which may have resulted in the Tribunal decision being invalidated. Delayed notification may affect review applicants' ability to meet the new time period in which to lodge an application for judicial review (35 days). This shifts the onus on to applicants to provide the Courts with written reasons why they should be granted an extension in which to apply - arguably adding to the already sizeable migration caseload of the Courts.

Notwithstanding, the Administrative Review Council (ARC) notes that the abolition of the handing down procedure would not only bring the Migration Act into line with the statutory provisions for the Administrative Appeals Tribunal, the Veterans Review Board and the Social Security Appeals Tribunal (which do not require decisions to be formally handed down), it would also create administrative efficiencies. However, they note that the proposed amendments would also 'effectively reduce the amount of time currently available to applicants to present all relevant material to the Tribunals'.[22] Consequently, they have urged that in considering the amendments to the Migration Act, careful consideration is given to ensure that those seeking to present new information to the Tribunals have sufficient opportunity to do so prior to finalisation.[23]

Giving and receiving of review documents

Proposed subsections 379EA and **441EA** provide that when two or more persons apply together to the Tribunals to have a decision reviewed, the Tribunal will not be required to give each person a copy of the documents. Instead these proposed provisions will enable the Tribunals to give the documents to only one of the review applicants, and any others will be *deemed* to have received the documents. According to the Explanatory Memorandum, this will bring the Tribunals' communication procedures into line with that of the Department of Immigration and Citizenship (DIAC) (as outlined in section 52(3C)).[24]

Though this proposed amendment will undoubtedly create administrative efficiency, it may nonetheless result in the effective denial of procedural fairness to some review applicants if, during the period of review (which can often involve a substantial period of time), there is a breakdown in relations resulting in review applicants not residing at the same residential address and not communicating about correspondence received from DIAC.

Time limits in applying for judicial review

Items 30-36 of Schedule 1 of the Bill amend the time limits imposed on applications for judicial review. Existing sections 477 (Federal Magistrates Court), 477A (Federal Court)

22. Jillian Segal, op. cit, p. 2.

23. ibid.

24. Explanatory Memorandum, pp. 9 and 14.

and 486A (High Court) of the Migration Act are in a similar form and set out the time period in which applications must be lodged. The current statutory framework sets strict time frames and requires applications to be lodged within 28 days of the actual (as opposed to deemed) notification of the decision. The Courts may grant an extension of another 56 days if such an order is sought within 84 days of actual notification of the decision and the Courts consider it in the interests of the administration of justice to do so.[25] The proposed amendments arise from two court cases handed down in 2007.

Bodruddaza v Minister for Immigration and Multicultural Affairs

The first judgment was *Bodruddaza*[26] in which the High Court unanimously declared section 486A (time limit on applications to the High Court for judicial review) invalid on the basis that the provision was inconsistent with the power of judicial review contained in section 75(v) of the Constitution.[27] In the majority's view, section 486A could not be read down or severed to preserve any valid operation.[28]

Minister for Immigration and Citizenship v SZKKC

In *SZKKC*[29] the full bench of the Federal Court considered what is involved in the concept of notification of the decision for the purposes of section 477. Section 477 provides that the time period for initiating proceedings in the Federal Magistrates Court commences when an applicant is *actually* notified of the migration decision. As noted in the Explanatory Memorandum, actual notification (as opposed to deemed notification) creates uncertainty because it can be difficult to ascertain when an applicant is actually notified.

Most of the other relevant provisions in the Migration Act dealing with notification[30] contain deeming provisions, that is, irrespective of when an applicant is actually notified, the applicant is taken or *deemed* to have been notified by operation of the Migration Act.

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25. Sections 477, 477A and 486A of the Migration Act.

26. (2007) 234 ALR 114

27. Section 75 of the Constitution relevantly states that the High Court has 'original jurisdiction' 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.

28. *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 234 ALR 114, per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ at 55, 57–58.

29. [2007] FCAFC 105

30. See Divisions 5 and 7A of Part 7 of the Migration Act.

However, in their Honours' view, such deeming provisions were ineffective for the purposes of section 477 due its designed operation. Though subsection 430D(2) relating to notification of decisions where the applicant is in immigration detention, also requires actual (as opposed to deemed) notification, the High Court in *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 210 ALR 190 ('*WACB'*) held that physical delivery was required in such cases. Accordingly, the majority in *SZKKC* concluded that for the purposes of section 477, the sole method of actual notification is by physical delivery (by hand) to the applicant personally.[31]

Such an interpretation stemmed from a combination of the decision of *WACB* and the actual wording of the section 477, the result of which left the Courts with no room to manoeuvre and according to Justice Giles created an absurdity in the operation of the legislation.[32] Significantly, Justice Buchanan was of the view that the problem appeared in very large measure to have been created by the introduction of the requirement for 'actual (as opposed to deemed) notification' in section 477 (and section 477A and section 486A) without much attention to how these additional provisions would interact with the comprehensive and interlocking arrangements already in place in Part 7 and also in other Parts of the Migration Act.[33]

Items 30, 32 and 34 amend **existing sections 477, 477A and 486A** by providing that an application for review of a migration decision may be made to the Courts within 35 days of the day on which the decision is taken to have been made or such longer period as the Courts order. Pursuant to **proposed subsections 368(1) and 430(1),** a decision will be taken to have been made on the date of the written statement.

Proposed subsections 477(2)-(4), 477A (2)-(4) and 486(1A)-(3) provide that an application may be made in writing to have the 35 day period extended. Such an application must explain why the extension is necessary and why it is in the interests of the administration of justice that it be granted. The Court may then grant an extension of time for a period that it considers appropriate. According to the Explanatory Memorandum, vesting the Courts with such a broad discretion will protect applicants from possible injustice.[34]

In *Plaintiff S157/2002 v Commonwealth* [2003] 211 CLR 476 ('*Plaintiff S157*') Callinan J stated that he did not doubt that the Commonwealth has the power to prescribe time limits on the High Court in relation to the remedies available under section 75 of the Constitution 'but [those] time limits must be truly regulatory in nature and not such as to make any

31. *Minister for Immigration and Citizenship v SZKKC* [2007] FCAGC 105 at 37.

32. ibid., at 4.

33. ibid., per Buchanan J at 43.

34. Explanatory Memorandum, p. 17.

constitutional right of recourse virtually illusory…'.[35] In his Honour's view, 35 days accompanied by a power to extend time might perhaps lawfully be prescribed.[36]

Though the proposed amendments 'will reinstate effective and uniform time limits for applying for judicial review of migration decisions'[37] by re-introducing deemed (as opposed to actual) notification, the proposed amendments may also possibly increase applications to the Courts to use their discretion to allow judicial review outside the prescribed time period which may consequentially not only increase the Courts' migration caseload but also exacerbate existing delays in the judicial review process.

Item 41 of Schedule 1 outlines the transitional arrangements for applicants who have received their Tribunal decision but have not initiated proceedings in the Courts prior to the commencement of the amendments.

Schedule 2 – Amendments relating to border protection

Part 1 – Special purpose visas

Special purpose visas are a discrete category of visa which enable prescribed persons or classes of persons to enter Australia. They are distinguishable from other visas as they do not require individual visa applications or determinations. In a sense, they are not so much visas as an open permission for a specified category of persons to enter Australia for a given purpose.[38] The classes of prescribed persons to date have included, for example, members of the British royal party, military personnel, airline crew members, and Indonesian traditional fishermen.[39]

Special purpose visas were introduced in 1994 to 'clarify the status of persons currently exempt from the requirement to hold an entry permit to enter and remain in Australia'. They were intended to 'provide lawful status for non-citizens who are presently exempt non-citizens' to be 'held when, and for as long as, a non-citizen continues to be present in Australia for a specified purpose'.[40] However, the Minister has power to exclude certain persons or classes of person from access to special purpose visas. Subsection 33(9) of the

35. *Plaintiff S157/2002 v Commonwealth* [2003] 211 CLR 476, per Callinan J at 176.

36. ibid., per Callinan J at 176.

37. Explanatory Memorandum, p. 15.

38. Natasha Cica and Nathan Hancock, op. cit., p. 5.

39. Migration Regulations 1994, reg. 2.40.

40. See generally Ian Ireland and Sarah O'Brien, 'Migration Legislation Amendment Bill 1994', *Bills Digest*, no. 36, Parliamentary Library, Canberra, 1994.

Migration Act allows the Minister to make a determination that it is 'undesirable' that a person or persons within a class enter or remain in Australia.[41]

Item 1 of Schedule 2 amends existing subsection 33(5) of the Migration Act in relation to the point at which a special purpose visa ceases to be in effect. Currently, a special purpose visa expires at the *end of a day* which means that migration officers must wait until the end of the day before any action can be taken whereas under the proposed amendment, the visa may also cease to be in effect at a specified time. A special purpose visa may cease at a particular time where a declaration under subsection 33(9) is expressed to take effect at a specified time.[42]

Items 2 and 3 of Schedule 2 insert the words 'the end of the day' to existing subparagraphs 33(5)(a)(i) and (ii) and 33(b)(i) to (iv) to preserve the effect of old subsection 33(5) for cases where the special purpose visa was intended to cease on a particular day.

Part 2 – Reporting on passengers and crew of aircraft and ships

Items 4-8 of Schedule 2 make minor amendments to existing subsections 64ACA, 64ACB, and 64ACC of the *Customs Act 1901* relating to general reporting requirements. The proposed amendments clarify that the obligation on the operator of a ship or aircraft to provide reports on passengers and crew members who will be on board their aircraft or vessel upon arrival to the Australian Customs Service (ACS) is a requirement to report on them *individually* (on each passenger and each member of the crew) not on them generally.

Items 12-13 similarly clarifies that for the purposes of existing subsection 245L(2) of the Migration Act, the requirement that operators of ships and aircrafts report on passengers and crew, is a requirement to report on them *individually*.[43]

Item 14 repeals existing subsection 245L(5) and substitutes **proposed subsections 245L(5) and (5A)** which relate to the time for reporting on passengers or crews on a ship. The amendment provides that the time frame in which to report will be prescribed in the Regulations.[44]

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41. Subsection 33(9) of the Migration Act.

42. Explanatory Memorandum, p. 24.

43. For further information regarding reporting obligations under the Advance Passenger Processing System see: Department of Immigration and Citizenship, 'Australia's APP' [http://www.immi.gov.au/media/publications/visa-entry/_pdf/APP_Guide_full_manual.pdf], accessed on 1 August 2008.

44. All disallowable instruments must be either notified or published in the *Gazette* and tabled in each House of Parliament.

Item 17 inserts **proposed paragraph 504(1)(jaa)** which enables a person who is alleged to have committed an offence against subsection 245N(2) ('Offence for failure to comply with reporting obligation') to pay the Commonwealth, as an alternative to prosecution, a prescribed penalty not exceeding 10 penalty units ($1100).[45] The second reading speech notes that 'this regime is expected to be less costly to administer and easier to implement'.[46]

Part 3 – Round trip cruises

Item 19 of Schedule 2 amends the Migration Act by inserting **proposed subsections 169(2)-(5)** which provide that passengers aboard 'international passenger cruise ships'[47] on round-trip cruises are required to undergo immigration clearance (as set out in section 166) unless the Minister or Secretary of the Department of Immigration determine otherwise. **Proposed subsection 169(5)** provides that such a determination is a legislative instrument.[48]

Part 4 – Enforcement visas

Items 21-22 of Schedule 2 incorporates enforcement visas[49] as a class of visa listed in existing subsection 31(2) of the Migration Act. According to the Explanatory Memorandum, the failure to list section 38A (enforcement visas) in section 31(2) as a class of visa provided for in the Migration Act, was an oversight.[50]

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45. A penalty unit is currently $110: *Crimes Act 1914* section 4AA.

46. Senator the Hon Kim Carr, op. cit., p. 3.

47. Proposed new subsection 169(4) defines 'international passenger cruise ship' as a ship that has sleeping facilities for at least 100 persons (other than crew members), and is being used to provide a service of sea transportation of persons from a place outside Australia to a port in Australia, and that service is provided in return for a fee payable by persons using the service, and is available to the general public.

48. Therefore the *Legislative Instruments Act 2003* would not apply as the decision would be administrative rather than legislative in character.

49. Enforcement visas are granted to persons suspected of being illegal foreign fishers and to persons suspected of being environmental offenders by operation of law when fisheries or environment officers take enforcement action under the *Fisheries Management Act 1991*, the *Torres Straight Fisheries Act 1984* or the *Environment Protection and Biodiversity Conservation Act 1999*: Explanatory Memorandum, Migration Legislation Amendment Bill (No.1) 2008, p. 48.

50. Explanatory Memorandum, p. 33.

Schedule 3 – Amendments relating to visa integrity

Part 1 – Immigration clearance status of non-citizen children born in Australia

The Migration Act draws a distinction between 'entry' and 'immigration clearance', and between 'lawful non-citizens' and 'immigration cleared' non-citizens. A person 'enters Australia' if they 'enter the migration zone'.[51] A person is 'immigration cleared' if they 'enter Australia' at a port or prescribed place, provide evidence of their identity and visa, and leave with permission of a clearance officer (except to be in immigration detention). A person is also 'immigration cleared' if they are initially refused or bypass immigration clearance, *but* are subsequently granted a 'substantive visa' under subsection 172(1)). Similarly, a lawful non-citizen is a non-citizen in the migration zone who *holds a valid visa*.[52] An immigration cleared non-citizen is a non-citizen in the migration zone who has been *immigration cleared*.[53]

A non-citizen child who is born in the 'migration zone' is taken to have 'entered Australia' when s/he was born.[54] These children are taken to hold a visa on a similar basis as their parents.[55] However, there is currently no provision clarifying the immigration clearance status of non-citizen children who were born in Australia. This Bill seeks to address that omission.

Immigration clearance is of importance for a number of reasons:

- It affects a non-citizen's access to visas under the Migration Regulations,[56] especially bridging visas;
- It affects immigration detention. An unlawful non-citizen, that is a non-citizen in the 'migration zone' without a visa, must be detained.[57] A lawful non-citizen may be detained if they hold a visa that may be cancelled. An immigration cleared non-citizen may only be detained if they are likely to attempt to evade or otherwise not cooperate with immigration officers;[58]
- It affects access to visas in relation to safe third country rules. If a non-citizen is covered by an agreement between Australia and a 'safe third country', their access to

51. Section 5 of the Migration Act.
52. Section 13 of the Migration Act.
53. Subsection 172(1) of the Migration Act.
54. Section 10 of the Migration Act.
55. Section 78 of the Migration Act.
56. Section 40 of the Migration Act.
57. Section 189 of the Migration Act.
58. Subsections 192 (1) - (2) of the Migration Act.

visas will be substantially diminished.[59] If they have been immigration cleared, they are prevented from applying for protection visas. However, if they have not been cleared they may not apply for *any* visa. Similar restrictions on access to visas apply if a non-citizen is a national of two or more countries or has a right of entry into a declared safe third country;[60]

- It affects cancellation of visas. The general power to cancel visas - for example, because of non-compliance with visa conditions - does not apply to permanent visas if the visa holder is in the migration zone and has been immigration cleared;[61] and
- It also affects review rights. Generally, the MRT may not review a decision to refuse to grant or to cancel an onshore visa if that decision was made before the person was immigration cleared.[62]

Item 1 inserts **proposed paragraph 172(1)(ba)**, which provides that a non-citizen child who is born in Australia is 'immigration cleared' if, at the time of his or her birth, at least one of the child's parents was immigration cleared on their last entry into Australia.

There are two limitations to this change. The proposed change only applies to non-citizen children *on their birth entry to Australia*, and 'does not provide immigration clearance for any subsequent entry to Australia'.[63] Second, the exemption only applies to children who are born to parents one of which *has been immigration cleared*.

In its 2002 submission to the Senate Legal and Constitutional Legislation Committee, the International Commission of Jurists (Australian Section) raised the issue of children who are born to parents who become 'immigration cleared' at a later date:

> We suggest that there needs to be an … amendment following 172(c). This would provide immigration clearance for children who were born … to parents who bypassed … clearance who were subsequently granted a substantive visa. Under the current legislation, a child born to a person who arrived as a stowaway, or on a false document, and was later granted a substantive visa, is not immigration cleared. The child is not covered by the visa if he/she was born prior to the date of the visa.[64]

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59. See Part 2, Division 3, Subdivision AI of the Migration Act.
60. Sections 91E and P of the Migration Act.
61. Subsection 117(2) of the Migration Act.
62. Subsections 338(2) and (3) of the Migration Act.
63. Explanatory Memorandum, p. 35.
64. International Commission of Jurists (Australian Section), Submission No. 7, Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee - Provisions of the Migration Legislation Amendment Bill (No.1) 2002*, 4 April 2002, p. 3.

This suggestion was not taken up by the Senate Committee in its 2002 recommendations[65] and none of the provisions of this Bill would remedy this situation.

Item 2 of Schedule 3 states that the amendment made by item 1, applies only to a non-citizen child who was born in Australia on or after **1 September 1994**. The Explanatory Memorandum states that this date 'corresponds with the introduction of the concept of 'immigration clearance' into the Migration Act by the *Migration Reform Act 1992*'.[66]

Children born in Australia protected by parents' visa(s)

Item 5 of Schedule 3 inserts **proposed subsection 173(2)** into the Migration Act to address an anomaly between the notion of birth entry and the requirement to enter via a port.

As noted above, a non-citizen child who is born in Australia is taken to hold a visa on a similar basis as his or her parents.[67] However, strictly speaking, a visa holder usually enters Australia at a port or on a pre-cleared flight. Entry which fails to comply with these requirements invalidates the visa.[68] In other words, 'birth entry' of a non-citizen child technically seems to be an entry that offends section 43 of the Migration Act.[69]

Proposed subsection 173(2) states that these non-citizen children are not to be taken, by virtue of that birth, to have entered Australia in a way that contravenes section 43 of the Migration Act.

Item 6 of Schedule 3 states that the amendment made by **Item 5**, applies only to a non-citizen child who was born in Australia on or after **1 September 1994**, and who is taken to have been granted a visa or visas under section 78 of the Migration Act. This date corresponds to the date when the concept of 'immigration clearance' was introduced into the Migration Act by the *Migration Reform Act 1992* which commenced in 1994.[70]

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65. Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee - Provisions of the Migration Legislation Amendment Bill (No.1) 2002*, June 2002, p. 7.

66. Explanatory Memorandum, p. 35.

67. Section 78 of the Migration Act.

68. Section 174 of the Migration Act.

69. Explanatory Memorandum, p. 36.

70. Explanatory Memorandum, p. 37.

Part 2 – Criminal Code harmonisation measures

People smuggling offences in sections 229(1), 232(1B) and 232A(2): a reversed onus of proof

The Migration Act contains various offences relating to the 'unlawful' entry of non-citizens into Australia. Whilst it is *not* an offence for a non-citizen to arrive in Australia without a visa, it *is* an offence for a person to be involved in bringing such non-citizens to Australia.

There is a lack of clarity in relation to the evidential burden in relation to exemptions to some of these offences.

Absolute liability as set out by section 6.2 of the *Criminal Code Act 1995* means that (a) there are no fault elements for any of the physical elements of the offence; and (b) the defence of mistake of fact under section 9.2 is unavailable.

Strict liability under section 6.1 of the Criminal Code sets out that (a) there are no fault elements for any of the physical elements of the offence; but (b) the defence of mistake of fact under section 9.2 is available. All other defences apply to both strict and absolute liability offences.

Subsection 229(1) of the Migration Act makes it an offence for the carriers of non-citizens – defined as the master, owner, agent, charterer and operator of a vessel - to bring a non-citizen into Australia, *unless* any one of the circumstances in existing paragraphs 229(1)(a)-(e) applies. In sum, these circumstances are: the non-citizen holds a valid visa, is eligible for a special purpose or special category visa, or is covered by an exemption from the requirement to hold a visa.[71] The offence is one of *absolute liability*, subject to defences established in subsection 229(5), which describe circumstances that overlap considerably with the circumstances set out in paragraphs 229(1)(a)-(e). The onus of proof is on the defendant in respect of establishing these defences.

The exemptions from the requirement to hold a visa cover an inhabitant of the Protected Zone travelling to a protected area in connection with traditional activities; New Zealanders, Norfolk Islanders and certain compliance cases; and any class of person covered by regulations.

The stated issue in relation to this offence is 'whether the matters in paragraphs 229(1)(a) to (e) constitute matters of exception or elements of the offence in subsection 229(1).'[72] As noted, guilt is imposed '*unless*' various circumstances exist. This can be interpreted as imposing guilt on a defendant '*unless*' s/he puts in evidence regarding those circumstances. This evidential burden overlaps with the defences in section 229 of the

71. As set out in subsections 42(2), (2A) and (3) of the Migration Act.

72. Explanatory Memorandum, p. 37.

Migration Act. The Explanatory Memorandum to the 2006 Bill stated that this overlap and the very wide potential operation of the offence, were unintended consequences.[73]

Items 7 and 8 of Schedule 3 clarify that the matters in paragraphs 229(1)(a)-(e) are matters of the offence. Thus guilt is imposed '*if*' the various circumstances in paragraphs 229(1)(a)-(e) do not exist. This removes the unintended consequences described above.

Item 9 of Schedule 3 preserves the reversal of the onus of proof relating to the exemptions in existing subsections 42(2)-(3) of the Migration Act.

The defendant retains the evidential burden in respect of the exemption from the requirement to hold a visa. As the Explanatory Memorandum explains 'the defendant must adduce or point to evidence that suggests a reasonable possibility that the matters in subsections 42(2), (2A) or (3) exist'.[74] If this is done, then the prosecution must prove beyond reasonable doubt that these matters do not exist.

Item 10 applies to a similar *absolute liability* offence established by section 232 of the Migration Act. This offence applies to the master, owner, agent and charterer of a vessel, where a non-citizen has entered Australia on the vessel without a valid visa, unless s/he is covered by an exemption from the requirement to hold a visa.[75] The offence also applies where a non-citizen has left the vessel in Australia (otherwise than in immigration detention) where s/he has been placed on the vessel for removal or deportation from Australia.

Proposed subsection 232(1B) makes it clear that the evidential burden is on the defendant in relation to establishing that one of the exemptions contained in subsections 42(2) to (3) applies. The Explanatory Memorandum states that this is 'consistent with subsection 13.3(3) of the *Criminal Code*, which provides that a defendant bears an evidential burden in relation to any matters of exception to an offence.'[76]

Items 11 and **12** apply to an offence established by section 232A, which makes it an offence to organise or facilitate bringing a group of five or more non-citizens into Australia if they have no lawful right to come to Australia. This is not an absolute liability offence; the defendant must be reckless as to whether the non-citizens had a lawful right to enter, in order for the offence to be established. Again, the offence does not apply if the non-citizen is covered by an exemption to the requirement to hold a visa.[77]

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73. Explanatory Memorandum, Migration Amendment (Visa Integrity) Bill 2006, p. 6.

74. Explanatory Memorandum, p. 38.

75. As set out subsections 42(2), (2A) and (3) of the Migration Act.

76. Explanatory Memorandum, p. 39.

77. As set out subsections 42(2), (2A) and (3) of the Migration Act.

Proposed subsection 232A(2) makes it clear that the evidential burden is on the defendant in relation to establishing that one of the exemptions applies. Again, the Explanatory Memorandum states that this is 'consistent with subsection 13.3(3) of the *Criminal Code*, which provides that a defendant bears an evidential burden in relation to any matters of exception to an offence.'[78]

People smuggling offences in s 233(1)(a) – strict liability

Existing paragraph 233(1)(a) of the Migration Act establishes another people smuggling offence, making it offence to 'take any part' in 'the bringing or coming to Australia of a non-citizen under circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of this Act.' The maximum penalty for contravening this provision is imprisonment for 10 years or 1000 penalty units, or both.

Item 13 of Schedule 3 inserts **proposed subsection 233(1A)**, to make it clear that *strict liability* applies to this offence. The Explanatory Memorandum to the 2006 Bill stated that this amendment was necessary to *restore* the application of strict liability to this offence.[79] The SLCL Committee's report noted:

> The Law Institute of Victoria argued that it was inappropriate for strict liability to apply to any element of an offence which carried a penalty of 10 years in prison and/or a fine of 1000 penalty units ($110 000).
>
> DIMIA responded that the effect of section 233(1)(a) currently was to make it an offence for someone to participate in the bringing or coming of a non-citizen into Australia being reckless as to whether the non-citizen has a lawful right to come to Australia. It said that the Director of Public Prosecutions wrote to it in September 2001 saying that, because of the application of the Criminal Code, the offence in section 233 had been altered. The courts had interpreted the offence in s 233 as being a strict liability offence, and this had not been picked up in the harmonisation exercise that was undertaken the previous year. The amendment would ensure that the provision operated in the way it always had. It was being made a strict liability offence again.[80]

Commenting on the more general policy question of whether strict liability is appropriate where an offence carries a heavy penalty of this kind, the SLCL Committee's report continued:

> DIMIA also referred to a number of provisions in Commonwealth Acts which provided for elements of offences punishable with imprisonment for 10 years or more

78. Explanatory Memorandum, p. 40.

79. Explanatory Memorandum, Migration Amendment (Visa Integrity) Bill 2006, p. 10.

80. Senate Legal and Constitutional Legislation Committee, op. cit., pp. 9–10.

> to be subject to strict (or absolute) liability. However, most of these related to elements which might be seen as subsidiary…
>
> On the other hand, there are some offences where (as is the case with s 233(1)(a)) the element to which strict or absolute liability applies appears to be fundamental to the criminality. …
>
> It appears that there are very few Commonwealth offences where strict liability applies to a fundamental element. However, as DIMIA pointed out, there is an objective element to the offence, namely, the presence of circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of the Migration Act. There is no such objective element in the strict/absolute liability offences mentioned in paragraphs 2.17-2.18 above. The presence of this objective element in an offence against s 233(1)(a) means that substituting strict liability for recklessness will not greatly reduce the burden on the prosecution ….
>
> The Committee notes concerns in respect of strict liability raised in other reports of this Committee and of the Scrutiny of Bills Committee. However, in this instance, the change from recklessness to strict liability is justified in the current context. Having regard to the above considerations and to the fact that the maximum penalty had already been set at its current level by the *Migration Legislation Amendment Act No 1) 1999* on 22 July 1999 (i.e. before the Application of Criminal Code Act took effect in 2001), the Committee is satisfied that the maximum penalty for the offence is not unacceptably harsh.[81]

A different view on this matter was expressed by (then) Australian Labor Party Senator Barney Cooney, in his comments appended to the SLCL Committee's report:

> The legislation attaches strict liability to elements of offences set out in sections 233 and 241 of the Migration Act 1958. These crimes carry a maximum penalty of 10 years. It is exceptional for strict liability to be assigned to elements of offences as serious as these. However there is now a trend for this to happen with Commonwealth legislation. This is unacceptable and should be rejected. Most serious crime is dealt with by State and Territory Parliaments and Governments and they appear to be able to cope with it without resorting to strict liability. The Federal Bodies seem to lack the same ability.[82]

In his own appended comments, former Australian Democrats Senator Andrew Bartlett expressed his support for the conclusions and recommendations contained in the main report of the SLCL Committee, but additionally stated that he retained 'some concerns regarding the implications and potential application of the amendments that introduce

81. ibid.

82. ibid., p. 15.

strict liability … My concern is that the penalty for such offences may in some circumstances far outweigh what may be just and reasonable in the circumstances'.[83]

Other offences

Items 14–17 of Schedule 3 make amendments to existing subsections 268BJ(1) and 268CN(1) and to section 268CM of the Migration Act in relation to compliance with the requests of *authorised officers.*

Part 3 – The taking of securities

Generally, an authorised officer may take securities to ensure a person's compliance with any condition imposed in pursuance of the Migration Act or Regulations.[84] If a person fails to comply with a condition of a security, the full amount may be recovered in a court against any or all of the parties or subscribers to the security.[85]

While it is implied in section 269, the provision is not specific as to the taking of securities *before* visa applications are determined. The issue arose in *Tutugri v Minister for Immigration and Multicultural Affairs* [1999] FCA 1785 (*'Tutugri'),* specifically, over the power of the MRT to take securities in respect of a decision under review.

Justice Lee took the view that the power to take securities was specific, flowing from a power to impose conditions in the granting of a visa. The MRT's power to impose conditions was not prospective: '[t]he Tribunal was not empowered to require the applicant to provide a deposit of cash in advance of the grant of a visa and, therefore, before any condition had been imposed on the visa granted'. Neither was it retrospective: '[i]f the Tribunal made a decision to grant a visa its power would then be spent [i.e. it would be *functus officio*]'.[86]

Justice Lee's reasoning on the first question was that '[p]ersons providing security must know the terms of the condition that is being secured and, therefore, what act, or conduct, will amount to a failure to comply with the condition and make the security liable to forfeiture'.

In the Government's view this raises an issue in relation to the primary decision maker:

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83. ibid., p. 16.

84. Subsection 269(1) of the Migration Act.

85. Subsection 269(4) of the Migration Act.

86. *Tutugri v Minister for Immigration and Multicultural Affairs* [1999] FCA 1785, per Lee J at 48–49.

> In *Tutugri* the Federal Court raised significant doubts about the power of an authorised officer to request and take security for compliance with conditions to be imposed on a visa before the visa is granted. This is because a condition on a visa does not bind the applicant until the visa is granted and a condition cannot be said to have been 'imposed' prior to grant.[87]

Proposed subsection 269(1A) clarifies this matter. It provides that an authorised officer may require and take securities before a visa is granted if it is for compliance with conditions 'that will be imposed on the visa', and s/he 'has indicated those conditions to the applicant'.

It is worth noting that the prospective/retrospective argument was not the only concern raised by Justice Lee in *Tutugri*. He also noted the MRT's limited role, drawing on a basic distinction between the status of a primary decision maker and a merits review body:

> The function of the Tribunal is to determine whether the decision under review was the correct or preferable decision. In carrying out that function the Tribunal may exercise the powers and discretions conferred on the person who made the decision, *limited, however, to the purpose of the review*. That is not an authority to make a new and separate decision … [Its task] was to 'address the same question that was before the decision-maker' and not a distinct and separate question and [it] *was not able to make any decision an officer may have been authorised to make under the Act*.[88]

Taken together, these arguments suggest that it is not appropriate for a tribunal vis-à-vis an officer to impose conditions or sanctions to ensure compliance with the visa regime. Views may differ as to whether a tribunal *can* impose sanctions that were not originally imposed by the original decision maker. But, there is a policy question as to whether a tribunal *should* be able to do so. The amendments do not seem to answer this question.

Part 4 – Minor amendments

Items 21-22 of Schedule 3 amend section 48 of the Migration Act which prohibits visa applicants from lodging repeat applications (other than for certain prescribed visas), after last entering Australia, in circumstances where their application has been refused or cancelled. Subsection 48(2) currently provides that in certain situations, persons are to be taken to have been continuously in the migration zone (Australia) despite having left and returned to the country. **Proposed subsection 48(2)** confirms that section 48 'applies only in respect of applications made while a non-citizen is in the migration zone'. **Proposed subsection 48(3)** provides that the holder of a bridging visa who leaves and later returns to Australia is nevertheless taken to have been continuously in the migration zone despite

87. Explanatory Memorandum, p. 44.

88. *Tutugri*, per Lee J at 46.

that travel. This amendment will correct an anomaly in the Migration Act which enables holders of a particular bridging visa to circumvent the operation of section 48.[89]

Item 24 inserts **proposed subsection 82(7A)** into the Migration Act which makes it clear that a bridging visa permitting the visa holder to remain in, or to travel to, enter and remain in Australia until a specified event happens, ceases to be in effect *the moment* the event happens, rather than at the end of the day on which the event occurs.

Schedule 4 – Miscellaneous

Item 2 of Schedule 4 amends subsection 193 of the Migration Act which sets out the application of law to certain persons in immigration detention. Currently paragraph 193(1)(d) of the Migration Act provides that sections 194 (detainee to be told of consequences of detention) and 195 (detainee may apply for visa) of the Migration Act do not apply to a person in immigration detention who has held an 'enforcement visa' that is no longer valid and who has not been a 'lawful non-citizen' since it expired.

Under the proposed amendment, the right to be told of the consequences of detention and to apply for a visa will not apply to persons in immigration detention who have held an enforcement visa that is no longer valid and have not been granted a *substantive* visa (a visa other than a bridging visa, criminal justice visa or an enforcement visa) since its expiration.

Significantly, this amendment, when read in conjunction with 198(2) of the Migration Act will also mean that such persons must be removed as soon as reasonably practicable from Australia. Under the current statutory framework, such persons could not be removed if they had been granted a *non-substantive* visa (such as a criminal justice visa or a bridging visa) as the granting of such visas would render them lawful.[90]

Item 4 of Schedule 4 changes the means by which the Minister will communicate with visa applicants by removing the mandatory requirement to communicate through an 'authorised recipient' in particular circumstances. An 'authorised recipient' is a person nominated by the visa applicant to receive written communications from DIAC. Section 494D currently requires the Department to send an 'authorised recipient' any written communication relating to the visa application that would otherwise have been sent to the visa applicant.[91] In most circumstances, the visa applicant will not also receive a separate copy of any communication.

Proposed subsection 494D(5) creates a discretion whether to communicate with a visa applicant's authorised recipient if the authorised recipient is not a 'registered migration

89. Explanatory Memorandum, pp. 45–46.

90. Explanatory Memorandum, p. 48.

91. See section 494D of the Migration Act.

agent',[92] the Minister reasonably suspects that that the authorised recipient is giving 'immigration assistance'[93], *and* the visa applicant has been notified (by one of the methods specified in section 494B) that the Minister does not intend to give documents to the authorised recipient.

Item 5 of Schedule 4 makes a technical amendment by inserting **proposed section 501HA** into the Migration Act. This proposed amendment will clarify that if a person held a visa or permit (under the Migration Reform (Transitional Provisions) Regulations which commenced on 1 September 1994) that continues in effect as a transitional (permanent) or transitional (temporary) visa, or is taken to hold a transitional (permanent) visa, then for the purposes of sections 501 to 501H, such persons are *taken to have been granted a visa*.

This amendment addresses comments by the Federal Court in the decision of *Moore v Minister for Immigration and Citizenship* [2007] FCA 626 ('*Moore'*) that cast doubt on whether a previous character cancellation decision made under subsection 501(2) of the Migration Act was valid in circumstances where the visa came to be 'held' rather than 'granted' as subsection 501(2) only permits cancellation of a visa that has been 'granted'.[94]

More recently, the full bench of the Federal Court in the decision of *Sales v Minister for Immigration and Citizenship* [2008] FCAFC 132 ('*Sales'*) affirmed that subsection 501(2) of the Migration Act only permits cancellation of a visa that has been 'granted' or is deemed by express statutory provision to be granted to a person.[95] A Transitional (Permanent) visa held by virtue of the *Migration Reform (Transitional Provisions) Regulations* of 1994 is not granted, nor deemed to be granted, and therefore cannot be cancelled pursuant to subsection 501(2).

Item 7 validates past transitional visa cancellation decisions made under sections 501, 501A, 501B, 501C or 501F of the Migration Act. The proposed amendment contained in item 5 will have retrospective application, meaning the amendment will apply to purported decisions to cancel transitional visas (temporary or permanent) once the item commences.

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92. Section 275 of the Migration Act defines a 'registered migration agent' as an individual registered as a migration agent under section 286 of the Migration Act 1958.

93. Section 276 of the Migration Act defines 'immigration assistance'. See also Department of Immigration and Citizenship, 'immigration assistance' brochure available online at http://www.immi.gov.au/gateways/agents/pdf/immigration-assistance.pdf.

94. Explanatory Memorandum, p. 50.

95. *Sales v Minister for Immigration and Citizenship* [2008] FCAFC 132, per Gyles and Graham JJ at 9.

Schedule 5 – Amendments relating to Australian citizenship

Items 1-16 of Schedule 5 amend the *Australian Citizenship Act 2007* (the Citizenship Act).

Item 6 amends existing paragraph 21(6)(d) of the Citizenship Act so that an applicant for citizenship by conferral on the grounds that their parent is a former Australian citizen is only required to be of 'good character' if they are aged 18 years or over at the time of application. This is consistent with other provisions of the Citizenship Act that only require applicants aged 18 years and over to meet the 'good character' requirement.[96]

Items 17-18 make minor amendments to items 5B and 7 of Schedule 3 of the *Australian Citizenship (Transitionals and Consequentials) Act 2007* in relation to the Minister's discretion over residence requirements under subsections 22(5), 22(6) and 22(11) of the Citizenship Act. **Item 19** validates past decisions taken in respect of subitems 5B(1) or 7(2) of Schedule 3 since the *Australian Citizenship (Transitionals and Consequentials) Act* commenced (1 July 2007).

Stateless persons

Items 1-2 of Schedule 5 amend existing paragraphs 16(2)(c) and 16(3)(c) so that stateless persons (persons who have not been a national or a citizen of any country) do not have to satisfy the Minister that they are 'of good character' as is presently required.

Items 3-5 amends existing provisions to provide that some general eligibility criteria must be satisfied not only at the time the Minister makes a decision on the application, but also at the time the application is lodged. In contrast, **Item 7** provides that the relevant time for assessing the eligibility of Stateless persons to become Australian citizens pursuant to existing subsection 21(8), is at the time the Minister makes a decision on the application, and not, as is currently the case, when the application is lodged.

Item 8 amends paragraphs 21(8)(d) and (e) to change the eligibility criterion for stateless persons born in Australia. Under the proposed amendments, a Stateless person will satisfy one of the general eligibility criteria if they are not entitled to acquire the nationality or citizenship of a foreign country.

The Human Rights and Equal Opportunity Commission (HREOC) has previously argued that the criterion currently contained in subsections 21(8)(d) and (e) of the Citizenship Act that a stateless person does not, at the time the person made the application, have *reasonable prospects of acquiring the nationality or citizenship of a foreign country and has never had such reasonable prospects,* was an additional condition not permitted by the

96. Explanatory Memorandum, p. 54.

1961 United Nations Convention on the Reduction of Statelessness (the Statelessness Convention).[97] This view was shared by Professor Kim Rubenstein who considered that,

> Section 21(8) regarding statelessness mirrors the previous Act's provisions, but (8)(c)'s breadth may make it inconsistent with the International Convention for the Reduction of Statelessness to which Australia is a signatory.[98]

Article 1.2 of the Statelessness Convention lists four grounds upon which an application for citizenship may be validly refused. The grant of citizenship may be conditional upon the person concerned always having been stateless.[99] In HREOC's view, this means that a person may be ineligible for citizenship if they have *actually* acquired the nationality of another country. HREOC asserts, 'it does not permit an exception where the person has or had *reasonable prospects* of acquiring another nationality'.[100]

It is not clear why the language of the Convention has not been adopted in the Bill (i.e. 'always have been stateless'). To do so would arguably negate any concerns that the proposed amendment may not be entirely consistent with Australia's obligations under the Statelessness Convention. To shift the focus from grant to a question of *entitlement* may also present difficulties with interpretation. For instance, if a country retains even a small element of discretion to reject an application for citizenship, would it not be inaccurate to conclude that such a person is 'entitled' *per se* to that country's citizenship? Similarly, a person might be entitled to acquire the citizenship of another country but as a result of not having taken the necessary steps to acquire it, may nonetheless remain stateless. Under the proposed amendment such a person would presumably not be eligible to become an Australian citizen, though under the Statelessness Convention, such an individual would *ipso facto* satisfy the precondition that they have 'always been stateless' and therefore be deserving of national protection.

Items 12-13 amend existing subsections 24(2) and 24(4C) respectively to remove the Minister's discretion to refuse a Stateless person becoming an Australian citizen who has nonetheless satisfied the criteria contained in proposed subsection 21(8) of the Citizenship

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97. Human Rights and Equal Opportunity Commission, Submission No. 50, Senate Legal and Constitutional Legislation Committee, '*Provisions of Australian Citizenship Bill 2005 and Australian Citizenship (Transitionals and Consequentials) Bill 2005*', 2006, p. 5.

98. Professor Kim Rubenstein, Submission No. 65, Senate Legal and Constitutional Legislation Committee, '*Provisions of Australian Citizenship Bill 2005 and Australian Citizenship (Transitionals and Consequentials) Bill 2005*', 2006, p.3. Note the requirement that a person must not at the time of making the application have reasonable prospects of acquiring the nationality of a foreign country was previously contained in subsection 21(8)(c) of the *Australian Citizenship Bill 2005*.

99. *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975), Article 1, paragraph 2(d).

100. Human Rights and Equal Opportunity Commission, op. cit., p. 5.

Act. Consequential amendments are also made to proposed section 24 which confirms that Stateless persons may nevertheless have their application refused on the basis that they have been convicted of a national security offence or have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least five years.

Item 15 repeals existing paragraph 34(3)(a) and inserts **proposed paragraph 34(3)(a)** which provides that where a person would become stateless if their citizenship were revoked, the Minister must not revoke that person's citizenship if after lodging the application, the person has only been convicted of a serious offence (an offence for which they have been convicted and sentenced to death or to a serious prison sentence). This amendment will ensure that the Citizenship Act is consistent with Article 8 of the Statelessness Convention which permits a State to deprive a person of his or her nationality in circumstances where the person would become stateless, where the nationality has been obtained by misrepresentation or fraud.[101]

101. Explanatory Memorandum, p. 58.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2759.