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Migration Amendment (Notification Review) Bill 2008

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Law and Bills Digest Section

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Migration Amendment (Notification Review) Bill 2008

Date introduced: 4 September 2008

House: House of Representatives

Portfolio: Immigration and Citizenship

Commencement: Sections 1 to 3 commence on the day of Royal Assent. All other provisions generally commence on a day to be fixed by Proclamation, or six months after the day of Royal Assent, which ever is the sooner. However, for items 3, 5, 13 and 15, commencement is further dependent on the commencement of item 13 of Schedule 1 to the *Migration Legislation Amendment Act (No.1)*.[1]

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 amend the *Migration Act 1958* (Cth) (the Migration Act) to provide that the Department of Immigration and Citizenship (the Department) and the Migration and Refugee Review Tribunals (Tribunals) no longer have to *strictly* comply with the legislation's notification requirements.

Background

Notification regime

The Migration Act and the Migration Regulations 1994 (the Regulations) contain numerous provisions that prescribe how the Department and the Migration Review Tribunal ('MRT') and the Refugee Review Tribunal ('RRT') will communicate with visa applicants. These provisions are collectively known as the *notification regime*.

The notification regime is an integral part of the immigration processing system and associated due process in decision-making. It prescribes that particular information may,

1. Item 13 of the proposed *Migration Legislation Amendment Act (No.1) 2008* provides that when two or more persons apply for a review of a decision together, documents given to any of them in connection with the review will be taken to be given to each of them.

and in certain circumstances, *must* be imparted to visa applicants in a certain way. If the Department and the Tribunals correctly notify applicants, then they are deemed to have received the notification and importantly, their legal rights[2] and obligations[3] are triggered and the consequences for their action or inaction can lawfully follow.[4]

For example, section 66 of the Migration Act provides that the Department must notify an applicant of a decision to refuse a visa in a prescribed way. The notification must not only contain specific information such as the criterion or provision of the Act or Regulations that was not satisfied but also if the applicant has a right to have the decision reviewed by the MRT, RRT or Administrative Review Tribunal (AAT) and when the application needs to be lodged and where etc. This information *must* be provided to applicants using one of four methods outlined in the Act[5], such as by post or fax.

Effective notification under section 66[6] triggers section 494C of the Migration Act which provides that an applicant is *deemed* to have received the document within a specified time. For instance, if the document was sent within 3 working days of the date of the document to an address in Australia, the applicant is deemed to have received it within 7 working days after the date of the document. An applicant wishing to have an adverse primary decision independently reviewed *must* initiate the review process within the time stipulated in the notification (normally 21 days). Failure to do so will result in a forfeiture of the right of review.

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2. Such as the right to receive an invitation to a hearing before the MRT or RRT (sections 360 and 425 of the Migration Act) and the right to receive particulars of any information the MRT or RRT considers would be the reason (or part of the reason) for affirming the Department's decision under review and the corresponding right to comment on or dispute such information (subsections 359A(1) and 424A(1) of the Migration Act).

3. Such obligations include appearing before the MRT or RRT if invited to do so (sections 362B and 426A of the Migration Act) and responding to an invitation to give additional information or comments on information to the MRT or RRT within a stipulated time (sections 359C and 424C of the Migration Act). Failure to comply with such obligations has serious consequences i.e. the Tribunals in both circumstances can proceed to make a decision without taking any further action.

4. Incorrect notification can have serious consequences for a person's immigration status. For further information see: Commonwealth Ombudsman, *Report into referred immigration cases: Notification Issues*, Commonwealth of Australia, Report No. 9/2007, June 2007.

5. See sections 494B, 379A, and 441A of the Migration Act.

6. Subsection 66(4) of the Migration Act provides that failure to give notification of a decision does not affect the validity of the decision. Migration Legislation Amendment Bill (No.1) 2008 inserts proposed new subsections 368A(3) and 430A(3) which will provide that a failure to notify parties of a Tribunal decision (other than decisions given orally) will similarly not affect the validity of the decision.

Importantly, a December 2007 investigation by the Commonwealth Ombudsman into the Department's notification of decisions and review rights found shortcomings in a number of areas. In assessing a sample of some 1800 notifications and statements of reasons, it found that,

> …DIAC's overall management of notification of adverse decisions is not coordinated or consistent. There was significant variation in the quality of information presented in notification letters, many of which fell considerably short of best practice standards. In some instances, this limited a visa applicant's ability to seek review or successfully reapply. In other instances, the information was overly complex, confusing and poorly presented.[7]

The Minister for Immigration and Citizenship, Senator the Hon Chris Evans reportedly stated in response to the Ombudsman's report that he would 'continue to drive cultural change in the Department to ensure that the problems identified by the Ombudsman do not re-emerge'. [8]

Strict or substantial compliance

Those provisions in the legislation that stipulate that notification *must* occur in a certain way, *must* contain certain information, and *must* be given to a specific person at a specific address in order for legal consequences to flow, require strict compliance with their terms. In turn, the Courts have adopted a strict interpretation of the notification provisions irrespective of whether applicants were actually notified, predominantly on the basis of natural justice and parliamentary intent,

> In my opinion, the provision of s 422B, which makes the content of Division 4 and Division 7A, together with ss 416, 437 and 438 a complete code for the discharge of the Tribunal's obligations in relation to the natural justice hearing rule, suggests that Parliament intended that there be strict adherence to each of the procedural steps leading up to the hearing. Each of the procedural steps is imperative and must be complied with in the manner described in the Act.[9]

Consequently, there have been numerous judgments handed down by the courts that have found that the Department and the Tribunals have *not* correctly notified applicants. The most significant of these include:[10]

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7. Commonwealth Ombudsman, *Notification of decisions and review rights for unsuccessful visa applicants*, Commonwealth of Australia, Report No. 15/2007, December 2007, p. 2.
8. A. Symonds, 'Immigration criticised over visa advice', *Australian Financial Review*, 20 December 2007. See also response by the Secretary, Mr Andrew Metcalfe at p.31 of the Report.
9. *SZIZO v Minister for Immigration and Citizenship* [2008] FCAFC 122, per Lander J at 87.
10. Department of Immigration and Citizenship, Procedures Advice Manual 3 (PAM3), as at 9 August 2008.

- *Chan Ta Srey v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1292 (‘*Srey*’) in which notification was held to be invalid because it had relied on regulation 5.03 which had been found to be invalid in a previous decision;
- *Chand v Minister for Immigration and Multicultural and Indigenous Affairs* [2000] FCA 1743 in which notification was found to be invalid because it had not been sent to the applicant’s ‘nominated representative’ in accordance with the applicant’s instructions;
- *VEAN of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 311 (‘*VEAN*’) in which notification was found to be invalid because the envelope was addressed to the applicant ‘care of’ the authorised recipient[11] rather than to the authorised recipient in accordance with the applicant’s instructions;
- *Khan v Minister for Immigration and Citizenship* [2007] FMCA 419 in which notification of a family member of the main applicant was found to be invalid on the basis that only the primary applicant had been notified;[12]
- *Han v Minister for Immigration and Citizenship* [2007] FMCA 246 in which notification was found to be invalid on the basis that there was insufficient evidence to reveal that the notification was dispatched within 3 working days of the date of the document;
- *Pomare v Minister for Immigration and Citizenship* [2008] FCA 458 in which notification was found to be invalid because it did not state the street address of the Tribunal registry office.

In the Government’s view, strict compliance with the notification regime has resulted in the courts identifying technical defects in notification ‘which have proved difficult, if not impossible, to address through further litigation or administrative reforms’.[13]

The Commonwealth Ombudsman appears to a certain extent to disagree with such a view. In investigating and reporting on the Department’s response to a significant notification case (*Srey*) it observed,

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11. An ‘authorised recipient’ is a person nominated by the applicant to receive written communications from the Department or Tribunals. Sections 379G, 441G and 494D of the Migration Act currently requires them to send an ‘authorised recipient’ any written communication relating to the visa application that would otherwise have been sent to the visa applicant.

12. Migration Legislation Amendment Bill (No.1) 2008 creates proposed subsections 379EA and 441EA which will provide that the Tribunals will no longer be required to give *each* person included in a combined application, a copy of the document. For further information see: Elibritt Karlsen, ‘Migration Legislation Amendment Bill (No.1) 2008’, *Bills Digest*, no.8, Parliamentary Library, Canberra, 2008-09, p. 8.

13. Explanatory Memorandum, Migration Amendment (Notification Review) Bill 2008, p. 2.

> Although the legislative and policy regime in relation to notification is highly prescriptive and provides a comprehensive guide to DIAC officers, DIAC could have done more. DIAC could have responded to this problem in a more timely manner to ensure that training and quality assurance measures, for example, were in place to complement the prescriptive statutory regime. DIAC could have alerted its staff to the potential consequences of such deficiencies.[14]

However, the Commonwealth Ombudsman also stated that,

> As a general observation, the prescriptive nature of the notification regime is a double-edged sword. Strict compliance by DIAC with the legislation will be enough to ensure legally effective notification, even if the letter remains unread or is lost in the post. Conversely, a small deviation from the requirements of the legislation can render the notice legally ineffective, even though the notice was received and read.[15]

The Department processes some 12, 000 visa applications every day[16] and according to the Department's 2006/07 Annual Report, 'there were 3678 applications and appeals to the courts lodged against departmental or tribunal decisions compared to 3893 in 2005 - 06'.[17]

The Government has announced that the proposed amendments in this Bill are 'the initial steps in a broader series of measures that are being contemplated by the Government'.[18]

Committee consideration

On 4 September 2008, the Senate Selection of Bills Committee recommended that the Bill not be referred to a Committee.[19]

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14. Commonwealth Ombudsman, op. cit., June 2007, p. 4.
15. ibid., p. 5.
16. Mr Andrew Metcalfe, Plenary address at the Transformations Conference 2006, Federation of Ethnic Community Councils of Australia, Canberra (29 November 2006), www.immi.gov.au/about/speeches-pres/_pdf/2006-11-29_FECCA_Secretarys_plenary_address.pdf, as cited in Commonwealth Ombudsman, op. cit., December 2007, p. 3.
17. Department of Immigration and Citizenship, '2006 – 07 Annual Report', [http://www.immi.gov.au/about/reports/annual/2006-07/html/outcome1/output1_3_6.htm#table47], accessed on 15 September 2008.
18. The Hon Laurie Ferguson, Parliamentary Secretary for Multicultural Affairs and Settlement Services, 'Second reading speech: Migration Amendment (Notification Review) Bill 2008', House of Representatives, *Debates*, 4 September 2008, p. 1.
19. Senate Selection of Bills Committee, *Report No.10 of 2008*, 4 September 2008, p. 3.

Other parties policy positions

According to at least one media report, former Minister for Immigration and Multicultural Affairs, the Hon Kevin Andrews, was planning to seek advice from the Commonwealth Solicitor-General about changing the law relating to notification if the coalition was re-elected in 2007. [20] Following the discovery of so-called '*VEAN* errors' in a 2007 detention case, he allegedly commented to the media that the *VEAN* ruling and subsequent changes on the issue were 'undermining the integrity of the immigration program' and was quoted as having said 'I think most people find it a bit absurd – this just seems to me to be mind-blowing legal pettiness'.

Financial implications

According to the Explanatory Memorandum, the amendments will have no negative financial impact. Rather, the changes may result in savings to the Commonwealth in the long term due to a reduction in litigation on issues relating to notification.[21]

Main provisions

Communicating with minors

Sections 379AA and 441AA of the Migration Act provides that if the legislation does not specify that a document must be given to an applicant by a specific or prescribed method, the Tribunals may give the document by any method that it considers appropriate.

Item 2 and 12 insert proposed new subsections 379AA(2) and 441AA(2), which provide that if an applicant is a minor (less than 18 years of age), Tribunal staff may give documents to another person if they believe that other person has 'day-to-day care and responsibility' for the minor or they work for an organisation that does so. However, the recipient must be at least 18 years of age and their duties must to some extent involve the care and responsibility for the minor. The Explanatory Memorandum notes that in such cases, carers are the people most likely to act on the notification in the interests of the minor.[22]

If the document is given in this way, then the Tribunals are *deemed* to have given the document to the minor, though they are not prohibited from giving the minor a copy of the document as well.

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20. C. Hart, 'Andrews orders snap review of detainees', *Weekend Australian*, 17 November 2007.

21. Explanatory Memorandum, op. cit., p. 4.

22. ibid., p. 4., paragraph 9.

Proposed subsections 379AA(4) and 441AA(4) provides that the Tribunals are *deemed* to have validly 'given' the document even if the document, the envelope containing the document or any accompanying material contains an error or omission that is *minor or insignificant*, unless the person can show that the error or omission substantially prejudices them.

Importantly, where previously the onus was on the Department and the Tribunals to correctly notify applicants, the onus will now shift to applicants to show that they have *not* been properly notified on the grounds that the relevant error or omission has substantially prejudiced them.

It is not clear what type of error or omission would be classified as 'minor or insignificant', though it appears this would be an administrative matter for the Department or Tribunals to determine.

It is also not clear from the wording of the proposed amendment whether the onus is on the minor or the carer to establish the perceived prejudice. However, it appears more likely that it would be for the minor to do so because the same provision, vis-à-vis 'authorised recipients' (see below) places the onus on the applicant and not the recipient to do so.

Items 3 and 13 insert proposed subsections 379AA(2A) and **441AA(2A).** These state that the above provisions will not apply if the minor has applied to the Tribunal for review of a decision with another person. In such circumstances, the Tribunals will only be required to give the documents to one of the review applicants, not each of them.[23]

Sections 397A and 441A of the Migration Act outline the methods by which the MRT and RRT respectively can, and in some circumstances *must* give documents to applicants. The methods include:

- giving the recipient the document by hand;
- handing the document to another person at the last residential or business address provided to the Tribunal by the recipient;
- dispatching the document within 3 working days by prepaid post or by other prepaid means; and
- transmitting the document by fax, e-mail or other electronic means.

Items 4 and 14 insert proposed subsections 379A(1A) and 441A(1A), which specifically provide that the Tribunals may give a document to the carer of a minor (as described above) by dispatching the document within 3 working days by prepaid post or by other prepaid means or transmitting the document by fax, e-mail or other electronic

23. **Proposed section 379EA** of Migration Legislation Amendment Bill (No.1) 2008. For further information see: Elibritt Karlsen, 'Migration Legislation Amendment Bill (No.1) 2008', *Bills Digest*, no.8, Parliamentary Library, Canberra, 2008-09, p.8.

means. Importantly, the note confirms that if such methods are used, then the minor is *deemed* to have received the document in accordance with the time specified in sections 379C and 441C of the Migration Act[24] and any action required to be taken by the minor will need to be taken within the time period specified in the document.

Items 6 and 16 provide that if a document is dispatched to the carer of a minor within 3 working days by prepaid post or by other prepaid means, the Tribunals must address the envelope using the last address for a carer known by the Tribunal.

Similarly, **items 7 and 17** provide that if a document is transmitted to the carer of a minor by fax, e-mail or other electronic means, the Tribunals must use the last fax number or electronic address that is known by the Tribunal.

Items 5 and 13 confirm that the above provisions will not apply if the minor has applied to the Tribunal for review of a decision with another person. In such circumstances, the Tribunals will only be required to give the documents to one of the review applicants, not each of them.[25]

The above amendments relating to the giving of documents to minors by the Tribunals are mirrored in **items 21 – 26** in respect of the Minister (through the Department of Immigration and Citizenship).

Substantial compliance

Deemed receipt where document contains a minor or insignificant error

Items 9 and 19 insert **proposed new subsection 379C(7)** relating to the MRT and **proposed new subsection 441C(7)** relating to the RRT.

This amendment provides that an applicant is taken or deemed to have received a document (within the time specified in subsections 379C or 441C) even if the document, the envelope containing the document or any accompanying material contains an error or omission that is *minor or insignificant*. It is not clear what type of error or omission would be classified as 'minor or insignificant', though it appears this would be an administrative matter for the Department or Tribunals to determine.

As previously mentioned, this amendment shifts the onus to applicants to show that they have *not* been properly notified on the grounds that the relevant error or omission has substantially prejudiced them.

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24. If the document is dispatched from a place in Australia to an address in Australia – 7 working days after the date of the document or in any other case – 21 days after the date of the document.

25. **Proposed section 379EA** of Migration Legislation Amendment Bill (No.1) 2008. For further information see: Elibritt Karlsen, op. cit., p. 8.

Documents not given effectively

Items 9 and 19 also insert **proposed new subsection 379C(8)** relating to the MRT and **proposed new subsection 441C (8)** relating to the RRT.

This amendment provides that if the Tribunals purport to give a document to an applicant but makes an error in doing so, then the applicant is taken or deemed to have received the document or a copy of it (within the time specified in subsections 379C or 441C) if they do actually receive it, notwithstanding the Tribunal's error.

However, if the applicant is able to show that it was received at a later time, then they will be taken or deemed to have received it at that time.

Documents given to authorised recipients

Items 10 and 20 insert **proposed new subsection 379G(2A)** relating to the MRT and **proposed new subsection 441G(2A)** relating to the RRT.

This amendment provides that the Tribunals are taken or deemed to have validly 'given' a document to an authorised recipient, even if the document, the envelope containing the document or any accompanying material contains an error or omission that is *minor or insignificant*, unless the applicant can show that the error or omission substantially prejudices them.

The above amendments relating to substantial compliance vis-à-vis the Tribunals are mirrored in **items 27 – 28** in respect of receiving documents from the Minister (through the Department of Immigration and Citizenship).

Concluding comments

This Bill will certainly *relax* the notification regime by providing that substantial compliance is sufficient unless an applicant can show that a minor or insignificant error or omission in the notification (the document, the envelope or any accompanying material) causes them substantial prejudice, or they can show that a document was received later than deemed under the Act due to an error in dispatch.

However, it is not clear whether this Bill will go further than intended and actually *undermine* the integrity of the notification regime, particularly in light of criticisms expressed by the Commonwealth Ombudsman in 2007 about pre-existing systemic problems within the Department relating to the notification of applicants.[26]

26. Commonwealth Ombudsman, op. cit., June 2007; Commonwealth Ombudsman, op. cit., December 2007.

Though the Courts have often found notification to be invalid on the basis of what appears to be rather trivial errors, they have also highlighted that the effect of such errors can nonetheless lead to an absence of notification or delayed notification which can have significant consequences for applicants[27], particularly those that hold bridging visas or those that are facing visa cancellation.[28]

Shifting the onus onto applicants to demonstrate that they have been substantially prejudiced by incorrect notification or to show that they have received notification later than deemed may indeed have the desired effect of overcoming excessive litigation. However, in the process this may disadvantage applicants who may not be aware that they can dispute the notification or may not feel that they have the ability to do so, particularly if language and cultural barriers exist and/or they are unrepresented.

As the Commonwealth Ombudsman astutely observes,

> Individual judicial decisions can cause additional and unexpected costs for agencies and impose a considerable administrative burden. This is a contemporary reality for government administration, particularly in areas of complex administration where there is frequent litigation.[29]

27. *SZIZO v Minister for Immigration and Citizenship* [2008] FCAFC 122 as per Lander J at 88-90.

28. See Commonwealth Ombudsman, op. cit., June 2007.

29. ibid., p. 23.