



Migration Legislation Amendment Bill (No.2) 2008

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Law and Bills Digest Section

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Migration Legislation Amendment Bill (No.2) 2008

Date introduced: 3 December 2008

House: Senate

Portfolio: Immigration and Citizenship

Commencement: Sections 1 to 3 commence on the day of Royal Assent. All other provisions commence on a day to be fixed by Proclamation, or six (6) months after the day of 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 amend provisions of the *Migration Act 1958* (Cth) ('Migration Act') that relate to the way in which the Migration and Refugee Review Tribunals conduct their merits review and the time limit for lodging applications for judicial review of migration decisions.

Background

History of the Bill

Schedule 2 of this Bill reintroduces similar (though not identical) provisions originally contained in Schedule 1 of the Migration Legislation Amendment Bill (No.1) 2008 (Bill No. 1).

That schedule was subsequently amended during the second reading debate when Government-led amendments in the Senate resulted in the removal of the proposed provisions relating to time limits for judicial review. It appears those provisions would have had unintended consequences. As Senator the Hon. Chris Evans explained:

Following introduction of the bill into parliament, it became apparent that the amendments in the bill did not cover all decisions which are judicially reviewable and which should be subject to time limits. I am committed to reinstating effective time limits for judicial review, and further consideration will be given to how best to do this for all judicially reviewable decisions. Therefore, amendments (2) to (7) propose to amend schedule 1 to the bill to remove the items that sought to reinstate effective

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time limits. This is to allow further consideration to be given as to how best to reinstate effective time limits for all judicially reviewable decisions.¹

Moreover, as noted by the then shadow immigration Minister, Senator the Hon. Chris Ellison the proposed time limits for judicial review would have applied to decisions that were not subject to merits review:

The government's new amendments will remove schedule 1 of the bill. It has come to light that the bill as drafted would not have worked appropriately in relation to decisions which have no merit review rights attached.²

The Government has now sought to overcome this oversight by more clearly defining the types of decision that will be subject to the new time limits for seeking judicial review, namely 'migration decisions' (which includes a privative clause decision, a purported privative clause decision, or a non-privative clause decision).³

Committee consideration

At time of writing, this Bill had not been referred to a Committee for consideration.⁴

Other policy positions/commentary

The Coalition has previously expressed support for the Government's plan to reinstate effective time limits for all judicially reviewable migration decisions.⁵ Noting in particular that:

Certainly, it is in no-one's interests for someone who is about to be removed from Australia to then seek to take action to avoid that when they have had adequate time to do that previously - they have been on notice; they have had that.⁶

However, Independent Senator, Nick Xenophon has stated that he would not have been able to support the Government's proposed amendments to the time limits imposed on

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1. Senator the Hon. Chris Evans, Minister for Immigration and Citizenship, 'Second reading speech: Migration Legislation Amendment Bill (No.1) 2008, Senate, *Debates*, 27 August 2008, p. 3832.
 2. Senator the Hon. Chris Ellison, former Shadow Minister for Immigration, 'Second reading speech: Migration Legislation Amendment Bill (No.1) 2008, Senate, *Debates*, 27 August 2008, p. 3829.
 3. Section 5 of the Migration Act.
 4. Senate Selection of Bills Committee, *Report No. 17 of 2008*, 4 December 2008.
 5. Senator the Hon. Chris Ellison, former Shadow Minister for Immigration, 'Second reading speech: Migration Legislation Amendment Bill (No.1) 2008, Senate, op. cit., p. 3829.
 6. *ibid.*, p. 3834.

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applications for judicial review contained in Schedule 1 of Bill No.1. His concerns stemmed from an inconsistency between the operations of the Administrative Appeals Tribunal (AAT) and the Migration and Refugee Review Tribunals (MRT and RRT). His main concern being that only the AAT possesses the ability to grant an extension of time in which applications can be lodged and from the view that ‘the changes in this legislation will still not permit the courts to allow an application to be lodged outside the set time period’.⁷

Financial implications

The Explanatory Memorandum notes that the financial impact of the proposed amendments will be negligible. In addition, it suggests that the measures may result in a cost saving for the Department, Tribunals and the Courts.⁸

Key issues

This Bill contains some potentially contentious provisions which, if enacted will:

- Change the means by which the MRT and RRT can request information for the purposes of conducting merits review;
- Increase the length of time unsuccessful applicants have to seek an extension of time to lodge an application for judicial review;
- Remove the limitation placed on the Courts to grant the extension for only a set period of time;
- Change what the Court ‘is required’ under the Migration Act to consider when assessing whether to grant an extension of time to lodge an application for review; and
- Remove the right of an unsuccessful applicant to appeal to a superior Court the decision refusing an extension of time.

Each of these features is discussed in further detail below (under ‘Main provisions’).

Main provisions

Schedule 1 – Amendments relating to merits review

Items 1 and 9 amend existing **subsection 359(2)** relating to the MRT and **424(2)** relating to the RRT to provide that the Tribunals may invite either orally (including by telephone)

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7. Senator Nick Xenophon, ‘Second reading speech: Migration Legislation Amendment Bill (No.1) 2008, Senate, *Debates*, 28 August 2008, p. 3995.
 8. Explanatory Memorandum, Migration Legislation Amendment Bill (No.2) 2008, p. 2.

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or in writing a person to give information that the Tribunal considers relevant. This amendment is in response to several Court decisions including *SZKTI v Minister for Immigration and Citizenship*⁹ ('SZKTI') which found that existing section 424 (in similar terms to 359 as relating to the MRT) precluded the RRT from obtaining information from an applicant orally, i.e. over the telephone.

As highlighted by the Explanatory Memorandum, there may be circumstances where the *only* way of contacting a person is by oral means e.g. only a telephone number is provided to the Tribunal registry. In addition, adverse information that is to be relied upon in affirming a decision must first be put to the applicant in writing for comment.¹⁰

However, there are some inherent difficulties in acquiring information orally which raise procedural fairness concerns as highlighted by the full bench of the Federal Court in *SZKTI*:

... First, there is no clear material to identify what Mr Cheah was asked by or told the tribunal. One reason for the requirement laid down in s 424B is that where the information is to be provided in writing, there is a record of a writing. If it is to be provided at an interview, the interview is to occur on a particular occasion at a particular place and time. The tribunal is likely to make a record in that event, although it does not have to do so. But, more significantly, the person from whom the information is being sought will be given a fair opportunity to prepare himself or herself to provide that information with the consideration and degree of accuracy that a fair hearing of the application for review application demands...

An impromptu telephone call received by a person who can provide the tribunal with information could be regarded by the recipient with suspicion or reserve. Unless he or she is assured he or she is speaking to the tribunal itself, as opposed to an unidentified person claiming to be a member of the tribunal (or an officer authorised by it to collect information), the recipient of the call may not give a full and frank or even a considered and accurate response. Moreover, in the present case, Mr Cheah was contacted in a telephone call two months after he wrote his letter. Whether he accurately recalled to mind in the telephone conversation all the details he knew of the appellant, in circumstances where he may not have been fully prepared to discuss the appellant's circumstances or to give a fair account of his knowledge in respect of the information being sought, is not known. That is one reason why Div 4 of Pt 7 of the Act provides a detailed procedure for seeking such information which a person is invited to provide...

One reason why a person may want such a formal invitation is that he or she may have an adverse comment to make about the applicant for review and wish to have the

9. [2008] FCAFC 83.

10. Explanatory Memorandum, pp. 4–5 and 8.

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protection of an occasion of a formal statutory enquiry, as opposed to a casual telephone call.¹¹

According to the Explanatory Memorandum, the proposed amendments will enable the Tribunals to ‘more efficiently obtain the information it requires to make a decision’. In addition, conducting investigations in writing can cause considerable delay without necessarily improving procedural fairness to the applicant.¹² However, with regard to the delay caused by following the existing statutory scheme the full bench of the Federal Court in *SZKTI* further observed:

In our opinion, if the tribunal requires additional information to be provided by a person it must follow the procedures that the Parliament has laid down to obtain that information. One mechanism that the tribunal can use is to invite the applicant or the person to a hearing and obtain evidence from them on oath. It can then invite the applicant to provide further information. The procedure is, after all, inquisitorial. It is not an unusual feature of inquisitorial procedures, that proper enquiry takes time and care. The tribunal will naturally seek to contain the extent of its enquiries, consistently with its performance of its duties having regard to s 420.¹³

Schedule 2 – Amendments relating to judicial review

Items 1–7 of Schedule 2 of the Bill amend the time limits imposed on applications for judicial review. Existing sections 477 (Federal Magistrates Court), 477A (Federal Court) 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 an application for a remedy to be lodged within 28 days of actual notification of the decision. The Court has discretion to grant an extension of up to 56 days but only if an application for such an order is made within 84 days of actual notification of the decision *and* the Court considers it in the interests of the administration of justice to do so.¹⁴

This Bill proposes to ‘provide the Courts with broad discretion to extend time where they consider it necessary in the interests of the administration of justice...and enables the Courts to protect applicants from possible injustice caused by time limits’.¹⁵ These

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11. *SZKTI v Minister for Immigration and Citizenship* [2008] FCAFC 83, as per Tamberlin, Goldberg and Rares JJ at [46]–[47], and [49].
 12. Explanatory Memorandum, pp. 4 and 8.
 13. *SZKTI v Minister for Immigration and Citizenship* [2008] FCAFC 83, as per Tamberlin, Goldberg and Rares JJ at [53].
 14. Sections 477, 477A and 486A of the Migration Act.
 15. Senator the Hon. Joe Ludwig, Minister for Human Services, ‘Second reading speech: Migration Legislation Amendment Bill (No.2) 2008’, Senate, *Debates*, 3 December 2008, p. 7944.

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proposed legislative changes have arisen principally from two judgments handed down in 2007.

*Bodruddaza v Minister for Immigration and Multicultural Affairs*¹⁶

This case concerned a Bangladeshi national who unsuccessfully applied for a new visa. When his application was refused by the Department he instructed his migration agent to seek a review of the decision. However, the review application was lodged one day after the 21-day period for filing a review application with the MRT which meant it did not have the jurisdiction to determine the review application and there was no provision for an extension of time. Mr Bodruddaza then commenced proceedings in the High Court under its original jurisdiction claiming that the Department had made an error in refusing him a visa. However, again the application to the High Court was outside the maximum period specified in section 486A of the Migration Act and the Court did not have the power to make an order allowing an application to be lodged out of time.

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.¹⁷ As their Honours explained, the main reason for the invalidity of the provision stemmed from an impermissible restriction on the right to seek relief:

Section 486A is cast in a form that fixes upon the time of the actual notification of the decision in question. This has the consequence that the section does not allow for the range of vitiating circumstances which may affect administrative decision-making. It is from the deficiency that there flows the invalidity of the section.... The fixing upon the time of the notification of the decision as the basis of the limitation structure provided by s.486A does not allow for supervening events which may physically incapacitate the applicant or otherwise, without any shortcoming on the part of the applicant, lead to a failure to move within the stipulated time limit.¹⁸

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16. (2007) 234 ALR 114.
17. 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.
18. *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.

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*Minister for Immigration and Citizenship v SZKKC*¹⁹

In this case the full bench of the Federal Court considered what is involved in the concept of notification for the purposes of lodging an application for judicial review in the Federal Magistrates Court. Section 477 of the Migration Act 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.²⁰

Most of the other relevant provisions in the Migration Act dealing with notification²¹ 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. However, in their Honours' view, such deeming provisions were ineffective for the purposes of section 477 due to its intended 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 was by physical delivery (by hand) to the applicant personally.²²

Such an interpretation stemmed from a combination of the decision of *WACB* and the actual wording of 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.²³ 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.²⁴ As the Explanatory Memorandum notes, 'it would be

19. [2007] FCAFC 105.

20. Explanatory Memorandum, p. 11.

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

22. *Minister for Immigration and Citizenship v SZKKC* [2007] FCAFC 105 at 37.

23. *ibid.*, at 4.

24. *ibid.*, per Buchanan J at 43.

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expensive and impractical for the Tribunals to implement the practice of personally serving a written statement of the reasons for the decision'.²⁵

New extended time limits for lodging an application for judicial review

Items 1, 3 and 5 amend **subsections 477(1)** relating to the Federal Magistrates Court, **477A (1)** relating to the Federal Court and **486A (1)** relating to the High Court respectively to provide that an application for a remedy must be made to the respective Court 'within 35 days of the date of the migration decision'. This new simplified formulation not only allows for an additional seven days in which to lodge an application for judicial review, it removes the requirement that the application be made within a stipulated time (currently 84 days) and removes the limitation on the Courts' discretion to extend the time (currently a maximum 56 days).

The desirability or otherwise of absolute or non-extendable time limits was considered by the Senate Legal and Constitutional Legislation Committee inquiry into the provisions of the Migration Amendment (Judicial Review) Bill 2004 which observed:

While some submissions stated they did not object to time limits, nor should time limits be ignored, they were firm in the view that courts must retain a general discretion to extend any time limit where circumstances and the interest of justice support an extension.²⁶

In addition, the Refugee & Immigration Legal Centre noted in their submission to the committee that they were 'not aware of other statutory schemes which impose limits on seeking judicial review without providing for judicial discretion to extend those time limits'.²⁷

With regard to the constitutionality of the proposed amendment, Callinan J in *Plaintiff S157/2002 v Commonwealth*²⁸ ('*Plaintiff S157*') observed 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 constitutional right of recourse

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25. Explanatory Memorandum, p. 11.
 26. Senate Legal and Constitutional Legislation Committee, [Inquiry into the provisions of the Migration Amendment \(Judicial Review\) Bill 2004](#), 17 June 2004, p.32; See also Senate Legal and Constitutional Legislation Committee, [Provisions of the Migration Litigation Reform Bill 2005](#), 11 May 2005, Chapter 3.
 27. Senate Legal and Constitutional Legislation Committee, Inquiry into the provisions of the Migration Amendment (Judicial Review) Bill 2004, 17 June 2004, p.18
 28. [2003] 211 CLR 476

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virtually illusory...'.²⁹ In his Honour's view, 35 days accompanied by a power to extend time might perhaps lawfully be prescribed.³⁰

Ascertaining when the prescribed time commences

The new formulation contained in **proposed subsections 477(1)** relating to the Federal Magistrates Court, **477A (1)** relating to the Federal Court and **486A (1)** relating to the High Court clarifies that for the purposes of establishing when the 35 day time period commences, the date of the decision will be the date the decision is made, not when the applicant receives it, as is presently the case.

Depending upon the type of migration decision made (oral or written) and by whom (AAT, MRT or RRT), **proposed subsection 477(3)** (inserted by **item 2 of Schedule 2** of the Bill) defines the 'date of the migration decision' as:

- the date of the written decision or
- the date of the oral decision or
- the date of the written notice of the decision, or
- the date that the Court considers appropriate.

Making the application for an extension of time

Proposed subparagraphs 477(2)(a) and (b) relating to the Federal Magistrates Court, **477A (2)(a) and (b)** relating to the Federal Court, and **486A(2)(a) and (b)** relating to the High Court provide that such Courts *may* order an extension of the 35 day period if:

- an application is made in writing which outlines *why*, in the interests of the administration of justice, an extension is necessary, and
- the Court is satisfied that it is *necessary*, in the interests of the administration of justice, to grant an extension.

Though this procedure is not too dissimilar from existing Court procedures which require an affidavit to be completed setting out the reasons why an extension of time should be granted³¹ it is worth noting that there appears to be an increasing number of applicants seeking judicial review that are self represented (i.e. have no legal representation). For

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

30. *ibid.*, per Callinan J at 176.

31. See for example Federal Magistrates Court Rules 2001 r.44.05.

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instance, the High Court's 2007–08 Annual Report states that 93% of the immigration applications filed in 2007–08 were filed by self-represented litigants.³²

As the Human Rights and Equal Opportunity Commission (HREOC) has previously asserted:

It must be remembered that persons making claims under the *Migration Act* may have little familiarity with Australian legal processes, and may face linguistic and cultural barriers to effectively managing their application and advocating on their own behalf. This is particularly the case with asylum seekers who may be fleeing from torture and trauma.³³

Determining the application for an extension of time

Proposed subsections 477(4) and (5) (inserted by **item 2 of Schedule 2** of the Bill) relating to the Federal Magistrates Court, **477A(4) and (5)** (inserted by **item 4 of Schedule 2**) relating to the Federal Court and **486A(4) and (5)** (inserted by **item 6 of Schedule 2**) relating to the High Court clarify that the 35 day period commences *even if* the decision is invalid or an error is made in any of the provisions mentioned in the definition of 'date of migration decision'. This has the effect that if, for example, the RRT makes a technical error in recording the date or recording the actual decision that is made³⁴ the time for lodging an application for judicial review will nevertheless have commenced. Similarly, the time will have begun to run even if the RRT makes a more substantive error by failing to set out the findings on any material questions of fact or by failing to refer to the evidence on which such findings are based.

The Explanatory Memorandum notes that this will 'ensure that the time limits operate effectively' and 'seeks to ensure' that the Courts are 'not required to examine whether there is a jurisdictional error in the migration decision in order to determine whether the application for review is within time'.³⁵ Accordingly, unless an applicant can put forth (in

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32. High Court of Australia, '2007-08 Annual Report', http://www.hcourt.gov.au/annual_reports/2008annual.pdf, accessed 21 January 2009, p. 18. See also *MZXOT v Minister for Immigration and Citizenship* [2008] HCA 28 at [131] – [132] where the plaintiff sought to have his matter (which was lodged out of time) remitted to the Federal Magistrates Court because legal aid authorities in Victoria would not support proceedings in the original jurisdiction of the High Court (under section 75 of the Constitution).
 33. Human Rights and Equal Opportunity Commission, Senate Legal and Constitutional Legislation Committee, *Migration Amendment (Judicial Review) Bill 2004*, 2004, paragraph 18.
 34. The RRT may affirm the decision, vary the decision, remit the matter for reconsideration or set the decision aside and substitute a new decision: Section 415 of the Migration Act.
 35. Explanatory Memorandum, pp. 14, 16 and 19.

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writing) convincing reasons why they should be able to lodge their application outside the prescribed time period, a migration decision that potentially contains one or more jurisdictional errors (most likely unbeknownst to the applicant) may nonetheless remain ‘valid’ and enforceable as the Courts will not be required under the Migration Act to examine the migration decision or the applicant’s prospects of success.

Though this approach may facilitate the Court’s timely resolution of applications for extension of time, the proposed amendment sits uneasily with the High Court’s pronouncement that an administrative decision which involves jurisdictional error is ‘regarded, in law, as no decision at all’.³⁶ It also appears to be at odds with the High Court observations in *Jeffers v R*³⁷ that the *merits* of an application (whether the applicant can demonstrate any prospect of success in the appeal) are determinative in the Court’s consideration of whether to grant an extension of time.

More recently, in considering whether it is ‘in the interests of the administration of justice’ to grant an extension of time to file an application for judicial review, Stone J in *Fisher v Minister for Immigration and Citizenship*³⁸ similarly observed that this not only requires consideration of the reasons put forth for the delay but also an assessment of the merits of the case:

The latter requirement [whether an extension of time is in the interests of the administration of justice] would involve consideration not only of the reasons for not meeting the original time limit but also whether the application, were the extension of time to be granted, would have any prospect of success. *An assessment of the prospects of success would require [the Court] to consider at some level the merits of the application for judicial review...*(emphasis added).³⁹

The practical importance of this proposed amendment is best illustrated by looking at a real case scenario. In the matter of *SZKPD v Minister for Immigration and Citizenship*⁴⁰ (‘SZKPD’) Federal Magistrate Turner was required to determine whether the applicant could commence proceedings in the Federal Magistrates Court outside the prescribed time period for doing so as set out in section 477 of the Migration Act. The applicant lodged his application outside the 28 day period but sought an extension of time in which to commence proceedings for judicial review. The question that arose for determination was

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36. See *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 76 ALJR 598 at 606 [51] per Gaudron and Gummow JJ, 608 [63] per McHugh J, 624-625 [152] per Hayne J; [2002] HCA 11; 187 ALR 117 at 129, 131, 154-155 cited in *Plaintiff S157/2002 v Commonwealth* [2003] 211 CLR 476.
37. (1993) 112 ALR 85 at 86.
38. [2007] FCA 591.
39. *Fisher v Minister for Immigration and Citizenship* [2007] FCA 591 at [35]. See also *Lucic v Nolan* (1982) 45 ALR 411 at 417.
40. [2007] FMCA 1008.

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whether the Court was satisfied that it was in the interests of the administration of justice to order an extension. Very little is revealed about the applicant from Federal Magistrate Turner's judgment. At the time of hearing he was detained at Villawood Immigration Detention Centre (IDC), and he had unsuccessfully sought asylum in Australia with the assistance of his migration agent. He represented himself before the Federal Magistrates Court and when asked why an extension should be granted he had simply responded that his 'migration agent was two months late in telling him of the decision'. Though the Court accepted the applicant's evidence in this regard, it nonetheless found that it was *not* satisfied that it was in the interests of the administration of justice to extend the time for making the application because the applicant was deemed to have been notified of the decision when his migration agent was notified by operation of section 430C(2) of the Migration Act.

Without commenting upon the merits or otherwise of the reasons for delay, three points need to be made about this case. Firstly, Federal Magistrate Turner did not consider it necessary to examine the migration decision made by the RRT to see, amongst other things, whether it had any prospect of success or whether it was free from jurisdictional error. Secondly, as is commonly the case, the applicant was unrepresented and had claimed that his predicament had arisen from the actions of his migration agent. Thirdly, and perhaps most importantly for present purposes, the order dismissing the application by Federal Magistrate Turner was subsequently set aside (by consent)⁴¹ on appeal to the Federal Court by Justice Branson who remitted the matter back to the Federal Magistrates Court 'to be determined according to law'.⁴² Though the Federal Magistrates Court subsequently found the Tribunal's decision was not affected by jurisdictional error⁴³ this case nonetheless serves to highlight the importance of extension of time determinations and the right of appeal in such cases to ensure they are determined according to law.

Schedule 3 – Amendments relating to appeals against extension of time decisions

Proposed subsection 476A(3) (inserted by **item 1 of Schedule 3** of the Bill) removes the right to appeal in the Federal Court a decision of the Federal Magistrates Court or a single judge of the Federal Court which orders, or refuses to order, an extension of the prescribed time in which to lodge an application for judicial review.

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41. That is, by order of the Court following an agreement between the parties.
 42. *SZKPD v Minister for Immigration and Citizenship* (NSD1090/2007). Order made on 13 July 2007 by Branson J. See the Federal Court of Australia website <http://www.fedcourt.gov.au/> for further information.
 43. *SZKPD v Minister for Immigration & Anor* [2008] FMCA 137. Available at: <http://www.austlii.edu.au/au/cases/cth/FMCA/2008/137.html>

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Proposed subsections 476A(4) similarly removes the right to appeal in the High Court a decision of the Federal Court which orders or refuses to order an extension of the prescribed time in which to lodge an application for judicial review.⁴⁴

Though these proposed amendments were not contained in Bill No.1 the Government has not indicated what has changed between the drafting of the two Bills to necessitate the imposition of the limitation nor provided detailed reasons why this measure is needed other than:

- it will strengthen and enhance the new time limits;
- it may help to prevent applicants from making weak or vexatious appeals to deliberately delay their removal; and
- seek to encourage applicants to seek timely resolution of their cases.⁴⁵

In the context of examining these proposed amendments it is relevant to highlight some previous amendments to the Migration Act which have, to a greater or lesser extent resulted in restrictions on judicial review of migration decisions:

- *Migration Reform Act 1992*
- *Migration Legislation Amendment (Judicial Review) Act 2001*
- *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*
- *Migration Legislation Amendment (Transitional Movement) Act 2002*
- *Migration Litigation Reform Act 2005*⁴⁶

44. It is not possible to oust the original jurisdiction of the High Court contained in s.75 of the Constitution (*R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598). A matter is justiciable by the High Court under that section provided it falls within its ambit which is ultimately a matter for the High Court to determine. Whether a decision regarding time limits would fall within the scope of the section and thereby within the High Court's original jurisdiction is unclear.

45. Senator the Hon. Joe Ludwig, op.cit., p. 7944.

46. For a chronology of Commonwealth legislation restricting judicial review of migration decisions see: Peter Prince, Susan Harris-Rimmer and Moira Coombs, Migration Litigation Reform Bill 2005', *Bills Digest*, no. 9, Parliamentary Library, Canberra, 2005-06. For further information on specific Bills see: Peter Prince, Susan Harris-Rimmer and Moira Coombs, Migration Litigation Reform Bill 2005', *Bills Digest*, no. 9, Parliamentary Library, Canberra, 2005-06; Peter Prince and Jennifer Nicholson, Migration Amendment (Judicial Review) Bill 2004, *Bills Digest*, no. 118, Parliamentary Library, Canberra, 2003-04; Krysti

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Such legislative changes have often been accompanied by changes to Rules of Court (rules that govern the procedures of Courts). For instance, following the *Migration Litigation Reform Act 2005* the High Court made new rules of Court ‘to cope with defined proceedings in the Court without oral hearings’.⁴⁷ Therefore now any two Justices of the High Court may determine an application without listing it for hearing and in cases where an applicant is unrepresented, dismiss an application without requiring any party to respond to the applicant's written case.⁴⁸

Recent statistics

The Explanatory Memorandum notes that these amendments are needed to strengthen the new time limits and to ‘discourage unsuccessful visa applicants from taking advantage of the *delays* caused by litigation to prolong their stay in Australia’.⁴⁹ Accordingly, it may be pertinent to examine some recent statistics surrounding the judicial review of decisions made pursuant to the Migration Act.⁵⁰

According to the MRT and RRT 2007–08 Annual Report, the MRT decided 5 219 cases during the year and 5% of its cases were ‘taken to judicial review’ during the financial year. This compares to 2 318 cases decided by the RRT which had 45% of its decisions ‘taken to judicial review’. In addition, there were 13 applications for judicial review lodged relating to decisions made by the AAT concerning visas under the Migration Act.⁵¹

The Federal Magistrates Court Annual Report states that during the 2007–08 financial year, 1 552 migration matters were filed with the Court Registry which was a 26.58%

Guest, Migration Legislation Amendment (Judicial Review) Bill 1998, *Bills Digest*, no. 90, Parliamentary Library, Canberra, 1999.

47. *MZXOT v Minister for Immigration and Citizenship* [2008] HCA 28, as per Kirby J at [129].
48. High Court Rules 2004, r 41.10.5 and r 41.11.1 as noted by Kirby J in *MZXOT v Minister for Immigration and Citizenship* [2008] HCA 28 at [129].
49. Explanatory Memorandum, p. 20.
50. See also 2004–05 statistics relating to judicial review on the Department of Immigration and Citizenship website, ‘Fact Sheet 9—Litigation Involving Migration Decisions’, <http://www.immi.gov.au/media/fact-sheets/09litigation.htm#time>, accessed 21 January 2009.
51. Migration Review Tribunal and Refugee Review Tribunal, ‘2007–08 Annual Report’, <http://www.mrt-rrt.gov.au/publication.asp#AnnRpts>, accessed 21 January 2009, p.ix; Administrative Appeals Tribunal ‘2007–08 Annual Report’ <http://www.aat.gov.au/CorporatePublications/annual/AnnualReport2008.htm>, accessed 21 January 2009, p. 28.

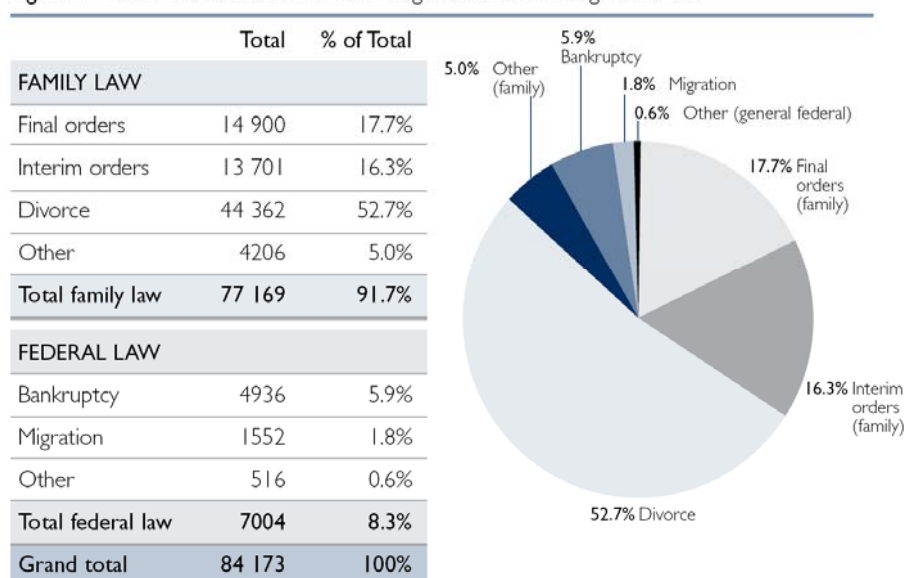
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reduction on filings for the previous financial year (2 114).⁵² The Court's jurisdiction (or workload) is divided between family law and general federal law (including migration). The following graph illustrates the number of Court filings for 2007–08, of which migration matters made up only 1.8% of the Court's total filings.

Figure 5 National statistics for Federal Magistrates Court filings 2007–08



The Report further states ‘there has been a general downward trend in the number of migration applications filed in the Court’:

...during the year filings have decreased by 27 per cent. Despite this reduction, the Court's workload in the migration area is still significant. The migration workload makes up 22.2 per cent of the Court's total general federal law workload; and, excluding bankruptcy matters (largely heard by registrars), represents 75 per cent of the general federal law work of federal magistrates.

In 2007–08 the Court finalised 545 more migration matters than it received. This means that matters are being disposed of in an increasingly timely manner. Eighty-three per cent of migration matters were finalised within 12 months compared to 67 per cent in 2006–07.⁵³

52. Federal Magistrates Court of Australia, ‘2007–07 Annual Report’, <http://www.fmc.gov.au/pubs/html/2007-2008.html>, accessed 21 January 2009, p. 13.
53. Federal Magistrates Court of Australia, ‘2007-07 Annual Report’, <http://www.fmc.gov.au/pubs/html/2007-2008.html>, accessed 21 January 2009, p. 42.

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In relation to the Federal Court, its Annual Report states that ‘Migration Act matters are a substantial proportion of the Court’s appellate jurisdiction’. During the 2007–08 financial year, 1 020 (67.86%) appeals (and related actions) lodged with the Court related to decisions made under the Migration Act. The majority of those appeals came from judgments of the Federal Magistrates Court but the Federal Court has instituted procedures to ensure the timely resolution of such matters:

The Court continues to apply a number of procedures introduced to streamline the preparation and conduct of these appeals and applications, most of which are heard by a single judge rather than a Full Court. It is important to note that rather than seeking additional judicial resources, the Court has implemented structural and procedural changes to facilitate the expeditious management of the migration workload.

Initially, the Court applies systems to assist with identifying matters raising similar issues and where there is a history of previous litigation. This process allows for similar cases to be managed together resulting in more timely and efficient disposal of matters. Then, all migration appeals and related applications (whether to be heard by a single judge or by a Full Court) are listed for hearing in the next scheduled Full Court sitting period. Fixing appeals and applications for hearing in the four, four-week, scheduled Full Court sitting periods has, to date, provided greater certainty and consistency for litigants. It has also resulted in a significant number of cases being heard and determined within the same four-week sitting period...⁵⁴

Table 3.3 – Migration Act appeals and related actions as a proportion of all appeals and related actions

Appeals & Related Actions	2002–03	2003–04	2004–05	2005–06	2006–07	2007–08
Migration Jurisdiction	437	663	1,050	1,052	1,092	1,020
%	61.8%	73.4%	75.8%	78.9%	71.8%	67.86%
Total appeals & related actions	707	903	1,385	1,334	1,520	1,503

In relation to the High Court, its Annual Report states that during the reporting year 57 cases were commenced in the original jurisdiction of the Court (including applications made under section 75(v) of the Constitution against officers of the Commonwealth) compared with 67 in 2006–07. The Full Court delivered judgment in 11 cases filed in the

54. Federal Court of Australia, ‘2007–08 Annual Report’, <http://www.fedcourt.gov.au/aboutct/ar2007.html>, accessed on 21 January 2009, p. 24.

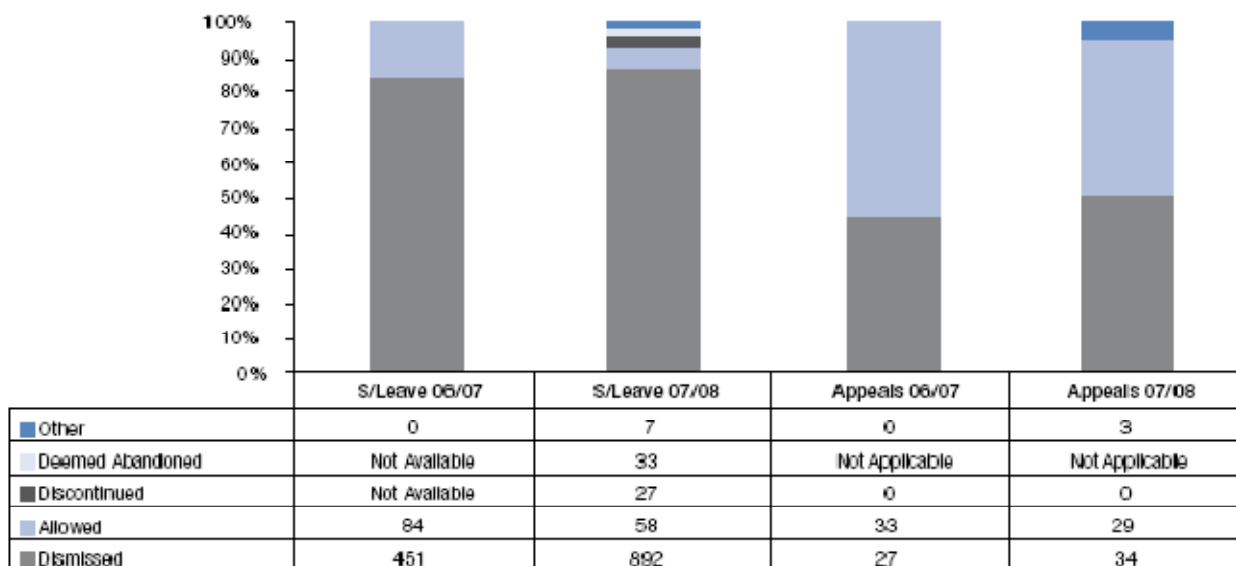
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original jurisdiction.⁵⁵ With regard to the High Court's appellate jurisdiction, the following table shows the number of appellate cases that were finalised during the year:

Means of Determination: By Applications and Appeals



In relation to the time taken to determine appellate cases, the Annual Report states as follows:

Eighty-six per cent of the applications for leave or special leave to appeal and 80 per cent of the appeals decided by the Court during the reporting year were completed within nine months of filing. The figures for 2006-07 were 81 per cent and 62 per cent respectively, although it should be noted that in 2007-08 the Court decided almost double the number of applications decided during 2006-07.⁵⁶

Concluding comments

At first glance this appears to be a relatively minor and uncontroversial Bill. Its principal objective is broadly to make amendments to the Migration Act that will 'ensure a more efficient migration review system'.⁵⁷ However, upon closer examination this Bill, if

55. High Court of Australia, '2007-08 Annual Report', http://www.hcourt.gov.au/annual_reports/2008annual.pdf, accessed 21 January 2009, p. 37.

56. High Court of Australia, '2007-08 Annual Report', http://www.hcourt.gov.au/annual_reports/2008annual.pdf, accessed 21 January 2009, p. 39.

57. Senator the Hon. Joe Ludwig, Minister for Human Services, 'Second reading speech: Migration Legislation Amendment Bill (No.2) 2008', Senate, *Debates*, 3 December 2008, p. 7943.

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enacted, will have serious consequences for *some* unsuccessful applicants wishing to have their migration decisions reviewed by an administrative review tribunal and the Courts.

For unsuccessful applicants that lodge their application for merits and judicial review within the prescribed time periods, the amendments proposed in this Bill will make very little difference. Though, such persons *may* be affected if the Tribunal invites a person to give information to it orally rather than in writing, as discussed above.

The consequences of this Bill will be most significant for applicants that do not lodge their application for judicial review within 35 days of the date of the migration decision. Undoubtedly, the most important change is the proposed removal of the right to appeal to a superior Court a decision granting or refusing to grant an extension of time in which to do so, as highlighted by the case of *SZKPD*.

However, there are some significant positive measures contained in this Bill. Most notably, vesting the Courts with a broad discretion to extend time limits for judicial review will re-instate effective time limits for applying for judicial review of migration decisions in the Federal Magistrates Court, the Federal Court and the High Court. It may also serve to overcome any potential injustices that may arise from the actions of migration agents, strict Tribunal timeframes for lodging applications for merits review and of course justifiable delays caused by applicants themselves.

Though it is undoubtedly important to resolve migration matters expeditiously (particularly if the applicant is in immigration detention), it is equally important to allow for due process with respect for the rule of law, especially when decisions are being made using complex legislation with potentially grave consequences. As HREOC observed in the context of the Migration Amendment (Judicial Review) Bill 2004:

... care must be taken to ensure that measures which may be intended to promote the efficient management and disposition of migration claims do not come at the cost of the fundamental rights of those people involved.⁵⁸

58. Human Rights and Equal Opportunity Commission, Senate Legal and Constitutional Legislation Committee, *'Migration Amendment (Judicial Review) Bill 2004'* submission, 2004, paragraph 3.

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