

# Chapter 2

## Provisions

2.1 The Bill has three schedules that address distinct issues arising from recent court and administrative tribunal decisions. This chapter sets out the provisions in each schedule.

### *Schedule 1 – When decisions are made and finally determined*

2.2 Item 1 of Schedule 1 would insert a new statutory definition of 'finally determined' into the *Migration Act 1958* (the Act). In conjunction with other amendments in this schedule, Item 1, together with Items 2 and 3, are intended to confirm exactly when an application becomes 'finally determined' under the Act.<sup>1</sup>

2.3 Item 4 would repeal section 67 and substitute a new section 67. The new section 67 would provide that a decision by the minister to grant a visa or refuse to grant a visa would be taken to be made when the minister records the decision. This would have the effect that a decision by the minister or delegate on a visa application becomes final on the day and at the time a record of the decision is made. The decision maker could not consider any submission made by the applicant or a third party after that time and the decision may not be varied or revoked. The only exception would be where there has been a legal error.<sup>2</sup>

2.4 Items 5 to 16 are largely consequential amendments which would confirm that under the Act a decision on an application (or a decision to cancel a visa) is made when a decision is recorded and not at the time the applicant (or visa holder) is taken to have been notified under the Act.

2.5 Item 17 would repeal subsection 368(2) and substitute new subsections 368(2) and 368(2A). The new subsection 368(2) would provide that decisions on review by the Migration Review Tribunal (MRT) (other than an oral decision) are taken to have been made by the making of the written statement on the date the written statement is made. The new subsection 368(2A) would provide that the MRT has no power to vary or revoke a decision after the date on which the written statement is made. Together, the new subsection 368(2) and 368(2A) would confirm that a written decision of the MRT is made on the date it is recorded and becomes final at that time. Item 19 would add a new subsection 368(4) to confirm that a decision of the MRT remains valid notwithstanding any procedural irregularities such as a failure by the MRT to date the written statement or return required documents to the secretary of the department.

2.6 Item 26 would make the same amendments as Item 17 but in respect of decisions by the Refugee Review Tribunal (RRT) under subsection 430(2).

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<sup>1</sup> Item 3 also inserts a new subsection 5(9B) which provides an exception where the decision of the MRT or RRT is to remit the matter to the department for further consideration.

<sup>2</sup> EM, p.8.

2.7 As set out in Item 30, the amendments in this schedule would apply to a decision of the minister, the MRT or the RRT that is taken to have been made, as provided by the Act as amended on or after the commencement of the schedule.

***Schedule 2 – Bar on further applications for protection visas***

2.8 Item 2 of Schedule 2 would insert a new subsection 48A(1C) into the Act. This provision would clarify that subsection 48A(1) and (1B),<sup>3</sup> which prohibit the making of repeated applications for a protection visa whilst in the migration zone, apply regardless of the grounds on which an application would be made or the criteria which the non-citizen would claim to satisfy. The intent of the provision is to ensure that section 48A of the Act prohibits a non-citizen who has been refused a protection visa or had a protection visa cancelled from applying for a subsequent protection visa on different criteria whilst in the migration zone.

2.9 Item 3 would repeal and replace subsection 48A(2)(aa) to define protection visa in its broadest sense. Any visa created in the future which is in the class of protection visa would be covered by this section. The purpose of this provision is to further reinforce that section 48A is intended to prevent a non-citizen, while in the migration zone, from making repeated protection visa applications regardless of whether the further applications are based on different criterion to the previously unsuccessful applications.

2.10 Items 4 and 5 set out the timing of the application of these amendments to the Act in this schedule and the relationship with the timing of amendments set out in the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013.

***Schedule 3 – Security assessments***

2.11 Item 1 of Schedule 3 would insert new subsections 36(1A) and 36(1B) in the Act. The effect of these amendments would be that a protection visa could only be granted where the applicant is not subject to an adverse security assessment from Australian Security Intelligence Organisation (ASIO).

2.12 Item 2 and Item 3 would repeal paragraph 411(1)(c) and substitute a new paragraph. This amendment would confirm that the RRT does not have jurisdiction to review a decision to reject a visa application based on an adverse security assessment from ASIO.<sup>4</sup>

2.13 Similarly, Item 4 and Item 5 would repeal paragraph 411(1)(d) and substitute a new paragraph. This amendment would confirm that the RRT does not have jurisdiction to review a decision to cancel a protection visa application based on an adverse security assessment from ASIO.<sup>5</sup>

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<sup>3</sup> EM, p.18.

<sup>4</sup> Whether it is item 2 or item 3 that comes into effect depends on the timing of the passage of the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*.

<sup>5</sup> Whether it is item 4 or item 5 comes into effect depends on the timing of the passage of the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*.

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2.14 Item 6 would insert a new subsection 500(4A) in Part 9 of the Act. The new subsection 4A would provide that a decision to refuse to grant (or cancel) a protection visa on the basis of an adverse security assessment from ASIO under section 36(1B) (as inserted by Item 1) is not a decision reviewable by the Administrative Appeals Tribunal (AAT) under section 500, by the MRT under Part 5, or RRT under Part 7.

2.15 Item 7 would provide that the amendments to the Act contained in Schedule 3 would apply in relation to:

- an application for a protection visa made on or after the commencement of this item,
- an application for a protection visa made before the commencement of this item but not finally determined, and
- a decision to cancel a protection visa made on or after the commencement of this item, regardless of when the protection visa was granted.

