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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
HOUSE OF REPRESENTATIVES

MIGRATION AMENDMENT (JUDICIAL REVIEW) BILL 2004
EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Immigration and Multicultural and Indigenous Affairs,
Senator the Hon Amanda Vanstone)

MIGRATION AMENDMENT (JUDICIAL REVIEW) BILL 2004

OUTLINE

1. This Bill restores the original intention of the following procedural requirements:
 - time limits are imposed on judicial review applications (sections 477 and 486A);
 - the High Court, the Federal Court and the Federal Magistrates Court have exclusive jurisdiction for migration applications (section 484); and
 - judicial review of a decision is not available where merits review of that decision is available (section 476).
2. These requirements are achieved by defining a privative clause decision for purposes other than the grounds of judicial review.
3. In *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 72 ALD 1 ('S157'), which was handed down on 4 February 2003, the High Court considered the constitutionality of the privative clause. The effect of S157 was that time limits did not apply to all decisions. The time limits will only apply to lawful decisions where there is no excess of jurisdiction
4. The practical effect of S157 is that, until a Court determines the lawfulness of a decision, these provisions are inoperative.
5. These amendments do not change the basis of the lawfulness of a decision as the amendments do not apply to section 474.
6. These amendments re-establish time limits on applications for judicial review with a discretion to extend those limits by 56 days where that is in the interests of the administration of justice.
7. The Bill amends the definition of 'privative clause decision' in subsection 5(1) so that 'privative clause decision' includes a purported decision as well as a privative clause decision within the meaning of the current subsection 474(2). A 'purported decision' is a decision that would be a privative clause decision, had it not been affected by jurisdictional error.
8. It is intended that by redefining 'privative clause decision' in this way, those provisions in Part 8 that relate to time limits on judicial review applications, and the courts' jurisdiction in migration matters, will apply to all migration decisions, even those that are arguably affected by jurisdictional error.

Financial impact statement

9. The reforms in the Bill are expected to reduce the number of applications currently being made outside 84 days. This may lead to some savings. The savings would not be achieved until the applications currently before the courts have been heard.

MIGRATION AMENDMENT (JUDICIAL REVIEW) BILL 2004**NOTES ON INDIVIDUAL CLAUSES****Clause 1 Short title**

1. Clause 1 is a formal provision specifying the short title of this Act.

Clause 2 Commencement

2. Subclause 2(1) contains a table setting out the commencement information for the Act. The subclause also provides that each provision of the Act specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table.
3. The effect of item 1 of the table is that sections 1, 2 and 3 of the Act commence on the day on which this Act receives the Royal Assent.
4. The effect of item 2 of the table is that Schedule 1 to the Act commences on a single day to be fixed by Proclamation. Item 2 further provides that if a provision covered by item 2 of the table does not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

Clause 3 Schedule(s)

5. This is a formal provision stating that each Act specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned. In addition, any other item in a Schedule to this Act has effect according to its terms.

SCHEDULE 1 – AMENDMENTS RELATING TO JUDICIAL REVIEW

Part 1 - Amendments

Administrative Decisions (Judicial Review) Act 1977

Item 1 Paragraph (da) of Schedule 1

6. This item contains a consequential amendment to reflect the redefinition of ‘privative clause decision’ in item 2. The effect of this item is to ensure that the redefinition of ‘privative clause’ decision is included in those classes of decisions that are not decisions to which the *Administrative Decisions (Judicial Review) Act 1977* applies.

Migration Act 1958

Item 2 Subsection 5(1) (definition of *privative clause decision*)

7. This item amends the definition of ‘privative clause decision’ in subsection 5(1) to give the term two meanings:

- first, for the purposes of section 474 of the Act, ‘privative clause decision’ has the meaning given to it by the current subsection 474(2);
- second, for all other purposes under the Act, ‘privative clause decision’ also includes
 - (a) a privative clause decision within the meaning of subsection 474(2), or
 - (b) a ‘purported decision’ that would be a privative clause decision within the meaning of subsection 474(2), were it not affected by a failure to exercise jurisdiction or an excess of jurisdiction (jurisdictional error).

8. The use of the term ‘purported decision’ in paragraph (b) reflects the terminology used by the High Court in *S157*. The Court held that ‘decision[s] ... made under this Act’ do not include decisions which involve a failure to exercise jurisdiction or an excess of jurisdiction. The Court referred to decisions infected by jurisdictional error as ‘decisions purportedly made under the Act’. As these ‘purported decisions’ cannot be decisions ‘made under this Act’ as defined in subsections 474(2) and (3) of the Act, they are consequently excluded from the privative clause provisions in Part 8.

9. However, new paragraph 5(1)(b) clarifies that a ‘purported decision’ means a decision that is affected by a failure to exercise jurisdiction or an excess of jurisdiction. It is not intended that the reference to ‘purported decision’ in paragraph 5(1)(b) affects in any way the interpretation of ‘purported’, where that word appears in other sections of the Act.

10. The effect of item 2 is that the second meaning of ‘privative clause decision’ in new paragraph 5 (1)(b) will apply for all purposes under the Act, other than section 474, including those provisions in Part 8 that relate to:

- time limits on making applications to the Federal Court and the Federal Magistrate’s Court for judicial review of a privative clause decision (section 477);
- time limits on making applications to the High Court for judicial review of a privative clause decision (section 486A);
- the exclusive jurisdiction of the Federal Court and the Federal Magistrate’s Court in reviewing a privative clause decision (section 484); and
- judicial review of a decision is not available where merits review of that decision is available (section 476).

11. It should be noted that for the purposes of this second meaning of ‘privative clause decision’, ‘decision’, when used in the expression ‘purported decision’, includes anything listed in subsection 474(3). This means that for the purposes of this second meaning of ‘purported decision’, all those things defined in subsection 474(3) apply.

12. In other words, the insertion of the new definition relating to ‘purported decision’ restores the original policy intention behind those provisions in Part 8 relating to judicial review, including those outlined in paragraph 10 above.

Item 3 After subsection 477(1)

13. This item adds new subsection 477(1AA) that provides for an extension of the time limit for applying for judicial review from 28 days up to an additional 56 days, in the Federal Court.

14. New subsection 477(1AA) provides that the Federal Court may order an extension of the period in which a person can apply for judicial review, if the person applies to the court for this order within 84 days of being notified of the decision

15. The intention of this provision is that the Federal Court may not grant an extension of time after 84 days from the date the applicant was notified of the decision. It is not intended that the Federal Court may grant extensions of time beyond that.

Item 4 After subsection 477(1A)

16. This item adds new subsection 477(1B) which mirrors the extension of time provision in new subsection 477(1AA), in relation to the Federal Magistrates Court.

17. The intention of this provision is that the Federal Magistrates Court may not grant an extension of time after 84 days from the date the applicant was notified of the decision. It is not intended that the Federal Magistrates Court may grant extensions of time beyond that.

Item 5 Subsection 477(2)

18. This item is consequential to the amendments in items 3 and 4.

19. The effect of this item is to allow the Federal Court and the Federal Magistrates Court to apply the new time limits in items 3 and 4 to judicial review applications, where the 28 day time limit has passed, and a person has applied to the court for an order to extend the time limit.

Item 6 Section 478

20. This item is consequential to the amendments in items 3 and 4.

21. The effect of this item is to clarify the types of applications to which section 478 applies, that is, to applications for a writ of mandamus, prohibition or certiorari, or for an injunction or declaration, but not to applications for an order to extend the time limit.

Item 7 Section 479

22. This item is consequential to the amendments in items 3 and 4.

23. The effect of this item is to clarify the types of applications to which section 479 applies, that is, to applications for a writ of mandamus, prohibition or certiorari, or for an injunction or declaration, but not to applications for an order to extend the time limit.

Item 8 Subsection 480(1)

24. This item is consequential to the amendments in items 3 and 4.

25. The effect of this item is to clarify the types of applications to which subsection 480(1) applies, that is, to applications for a writ of mandamus, prohibition or certiorari, or for an injunction or declaration, but not to applications for an order to extend the time limit.

Item 9 Section 481

26. This item is consequential to the amendments in items 3 and 4.

27. The effect of this item is to clarify the types of applications to which section 481 applies, that is, to applications for a writ of mandamus, prohibition or certiorari, or for an injunction or declaration, but not to applications for an order to extend the time limit.

Item 10 Subsection 486A(1)

28. This item amends the time limits for judicial review applications to the High Court so that they align with those in the Federal Court and Federal Magistrates Court. It reduces the time limit from 35 to 28 days of the date of notification (as set out in sections 379C and 441C of the Act), instead of the date of the actual notification of the decision. This means that the issue of whether or not a person was actually notified of a decision would no longer be relevant in deciding whether or not the High Court could hear the application for judicial review.

29. There is no adverse affect on a person applying for judicial review. Under new subsection 486A(1A) a person has the option of applying to the High Court for an order for an extension of time to apply for judicial review, if it is made within 84 days of the deemed notification of the decision

Item 11 After subsection 486A(1)

30. This item adds new subsection 486A(1A) that provides for an extension of the time limit for judicial review applications to the High Court, from 28 days of the notification of the decision, up to an additional 56 days, if the person applies to the court for this order within 84 days of the notification of the decision.

31. The effect of item 11 is to make the extension of the time limit for judicial review applications in the High Court consistent with the extension of the time limit for judicial review applications in the Federal Court and the Federal Magistrates Court, as contained in items 3 and 4.

32. The intention of this provision is that the High Court may not grant an extension of time after 84 days from the date the applicant was notified of the decision. It is not intended that the High Court may grant extensions of time beyond that.

Item 12 Subsection 486A(2)

33. This item is consequential to the amendment in item 11.

34. The effect of this item is to allow the High Court to apply the new time limit in item 11 to judicial review applications, where the 28 day time limit has passed, and a person has applied to the court for an order to extend the time limit.

Item 13 Subsection 486A(2)

35. This item is consequential to the amendment in item 11.

36. The effect of this item is to make this subsection consistent with item 11 and the new 28 day time limit.

Part 2 – Application of amendments**Item 14 – Application of amendments**

37. The effect of item 14 is that the amendments made by Schedule 1 will apply to all privative clause decisions (within the meaning of the amended section 5 definition) made after the commencement of the Act. The amendments will not affect privative clause decisions within the subsection 474(2) meaning, or decisions that would be privative clause decisions had they not been affected by jurisdictional error, made before commencement.