CHAPTER 2

BACKGROUND TO THE BILL

2.1 This chapter outlines the background to the Bill and the scope of the proposed amendments.

Background to present privative clause provisions

2.2 In 1997 and 1999 the Senate Legal and Constitutional Legislation Committee reported on Bills that finally resulted in the introduction of the existing privative clause provisions of the *Migration Act 1958* (the Act).[1] The first of the Bills, *Migration Legislation Amendment Bill (No5) 1997,* was not enacted and was reintroduced into Parliament as *Migration Legislation Amendment (Judicial Review) Bill* 1998. This Bill later became the *Migration Legislation Amendment (Judicial Review) Act 2001,* receiving assent on 27 September 2001.

2.3 As noted in chapter 1, the purpose of the Bill is to restore the original intention of certain procedural requirements in relation to applications for judicial review of migration decisions. It seeks to achieve this by defining a privative clause decision for purposes other than the ground of judicial review.

2.4 The judicial review requirements which the Bill seeks to restore were first introduced into, and passed by, the Parliament in 1992. These were amended in September 2001 to operate in relation to 'privative clause decisions'.

2.5 The constitutionality of the privative clause was challenged in the High Court in *Plaintiff S157/2002 v Commonwealth of Australia*[2] (Plaintiff S157). While the High Court found the privative clause to be constitutional, it held that it did not protect decisions which contained a jurisdictional error. This means that the time limits set out in the Act only apply to lawful decisions where there is no excess of jurisdiction. In practical terms this means that, until a Court determines the lawfulness of a decision, these provisions are inoperative.

2.6 The provisions in the Bill do not change the basis of the lawfulness of a decision as they do not apply to section 474 of the Act (which means that the ban on judicial review in that section will not apply to 'purported decisions').

2.7 The provisions in the Bill re-establish time limits (28 days) on applications for judicial review with discretion to extend those limits by 56 days where that is in the interests of the administration of justice.

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1 *Migration Legislation Amendment Bill (No5)1997* report tabled 30 October 1997 and *Migration Legislation Amendment (Judicial Review) Bill 1998* report tabled 21 April 1999.

2 (2002-03) 211 CLR 476.

2.8 The Bill amends the definition of 'privative clause decision' in subsection 5(1) of the Act so that a 'privative clause decision' includes a purported decision as well as a privative clause decision within the meaning of subsection 474(2) of the Act. A 'purported decision' is a decision that would be a privative clause decision, had it not been affected by a failure to exercise jurisdiction or an excess of jurisdiction.

2.9 It is intended that by redefining 'privative clause decision' in this way, those provisions in Part 8 of the Act that relate to time limits on judicial review applications, and the courts' jurisdiction in migration matters, will apply to all decisions, even those that are arguably affected by jurisdictional error.

Significant provisions of the Bill

New definition of 'privative clause decision'

2.10 Item 2 of the Bill amends the definition of 'privative clause decision' in subsection 5(1) of the Act to give the term two meanings. The first is the current meaning defined in subsection 474(2). The second meaning, which applies for all purposes under the Act *other* than under section 474, also includes a 'purported decision'. A 'purported decision' is a decision that would have been 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 (ie jurisdictional error).

2.11 The effect of this amendment would be that under section 474, privative clause decisions would retain their current meaning, however for other purposes under the Bill, a decision will not lose its status as a privative clause decision due to jurisdictional error. If enacted, the Bill would have the effect that in relation to decisions that would have been privative clause decisions, but suffered from jurisdictional error:

- the time limits on making applications for judicial review to the High Court (section 486A), the Federal Court and the Federal Magistrate's Court (section 477) will apply;
- the Federal Court and the Federal Magistrate's Court will have exclusive jurisdiction to review a privative clause decision (section 484) (other than the jurisdiction of the High Court under section 75 of the Constitution); and
- judicial review of a decision is not available where merits review of that decision is available (section 476).

2.12 In relation to the term 'purported decision' the Explanatory Memorandum for the Bill states that:

> 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.

2.13 The second meaning of 'privative clause decision' (ie that which includes 'purported decisions') would mean that a decision that would normally be subject to the limits in Part 8 listed above will still be covered despite the fact that the decision suffers from jurisdictional error (ie it is a 'purported decision'). However because the Bill excludes this wider meaning from applying to section 474, purported decisions will not be subject to the absolute finality of being a privative clause decision under that section.

New time limits

2.14 The Bill introduces new time limits for applications for judicial review. If enacted, the Bill would require that applications for judicial review be made within 84 days of the applicant receiving deemed notice of the decision (ie 28 days with discretion to extend the period by a further 56 days if an application is made within 84 days of notification and the court is satisfied that it is in the interests of the administration of justice to do so). This time limit would apply to the Federal Court,[3] the Federal Magistrates Court,[4] and the High Court.[5]

2.15 The effect of these amendments would mean that the Federal Court, Federal Magistrates Court and the High Court would be unable to grant an extension of time after 84 days from the date the applicant was notified of the decision.

Deemed vs actual notification

2.16 Item 10 of the Bill would amend subsection 486A(1) so that the time limit for applications to the High Court for judicial review would begin to run after *deemed* notification of the applicant. Currently the time limit runs from *actual* notification. This would mean that if enacted, the absolute time limit of 84 days would apply in the Federal Court, Federal Magistrates Court, and the High Court, and would commence from the moment of deemed notification of the decision to the applicant.

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3 Proposed subsection 477(1AA)

4 proposed subsection 477(1B)

5 Item 10 of the Bill