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Submission to Senate Legal and Constitutional Affairs Committee

Inquiry into the Provisions of the Migration Amendment (Judicial Review) Bill 2004

"What would be the purpose of defining by statute the limit of a tribunal's powers if, by means of a clause inserted into the instrument of definition, those limits could safely be passed?"[1]

Summary

The Bill should not be passed. Past attempts have failed to reduce the number of migration cases before the courts. It is likely that this attempt will also fail, for its constitutionality is dubious. Following *Plaintiff S157 v the Commonwealth* [2003] HCA 2 the High Court will not tolerate limitations on judicial review. The problem with this Bill is greater than refugees; it concerns the rule of law itself.

[1] Lord Wilberforce in *Anisminic Ltd v Foreign Compensation Commission*[1969] 2 AC 147 at 208.

Introduction

The High Court is under threat. It is being inundated by thousands of migration claims. Obviously this situation is untenable. But this Bill is not a solution to the problem. Instead, as previous attempts at reform have done, it may become part of the problem. Careful consideration of the Bill suggests that it may be unconstitutional. The impositions it places on judicial review are a graver threat to the future of the High Court than any surfeit of asylum seekers could ever be.

The Swamping of the High Court

It cannot be disputed that there is a problem. The figures from the High Court *Annual Report* for 2002-2003 speak for themselves. There is a 217 % increase in matters from the previous twelve months.[2] Now, 82% of all matters relate to migration - up from 41% the year before.[3] The filing of constitutional writs, especially, has increased exponentially, from 300 in the previous report to 2131 last year. 99% of these related to migration.[4] Where has this problem come from? Arguably, it is almost entirely the result of previous attempts to restrict migration appeals.

A Short History of Migration Act Amendments

Taking effect in 1994, the first set of amendments to the *Migration Act 1958* (Cth) ("Migration Act") were focussed on the Federal Court. Statutory avenues of judicial review were closed off, time limits introduces, and "judicially reviewable" decisions were defined and strictly limited, with the purpose of forcing claimants to seek administrative appeal before judicial review. The scheme survived a constitutional challenge. For the High Court, that was the beginning of the problem.

In *Abebe v the Commonwealth* (1999) 162 ALR 1, the High Court found that the Constitution allowed for diminution of the powers of the Federal Court. The Court found that Parliament could limit the jurisdiction of the Federal Court - to the extent of potentially making it a mere rubber stamp under certain circumstances. Considering this decision, I will not discuss the constitutional implications of the new Bill on the Federal Court.

But High Court's jurisdiction had been left intact: naturally, the consequence was to direct the stream of migration claims to the High Court.[5] Grudgingly, the judges in *Abebe* acknowledged this would occur, but made their discontent clear:
"The prospect of this Court's having to hear and determine, in its original jurisdiction, applications of this kind, in default of the availability of equivalent redress in the Federal Court, (or of effective remitter to the Federal Court) is extremely inconvenient. It is also expensive and time-consuming. These considerations suggest the need for further attention to legislation which has such an outcome."[6]

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[2] the High Court *Annual Report* for 2002-2003, p8.
[3] Ibid.
[4] Ibid.
[5] S Ford, "Judicial Review of Migration Decisions: Ousting the Hickman Privative Clause" (2002) 26 MULR 537 at 540.
[6] *Abebe v the Commonwealth* (1999) 162 ALR 1 per Kirby J at [207].

Unfortunately, while the migration claims multiplied, the legislation that ensued was not what the Court had called for.

Trying to staunch the flow of migration matters to the High Court, Parliament passed the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth). It slapped on a blanket privative clause (s474), in conjunction which most visa-related decisions became "privative clause decisions." In contrast to the first set of amendments, the new Act did not expressly limit itself to the Federal Court. But unlike that Court, the High Court is not a creature of statute, and therefore cannot be altered by statute. Its powers of review are bestowed by s75(v) of the Constitution. The amendments were discussed before this Committee. Doubts about their constitutionality were raised. Consequently, it did not take long before there was a constitutional challenge to the new Act.

Plaintiff S157

Plaintiff S157 v the Commonwealth [2003] HCA 2 ("S157") has been labelled "a Solomonic blend of diplomacy and defiance."[7] Like the famous US Supreme Court decision in *Marbury v Madison*, 5 US (1 Cranch) 137 (1803), the court upheld the principle of judicial review of executive action. s474, the Court found, is constitutional. It applies to decisions under the Act. But it is constitutional because it does not impinge on the High Court's power to grant remedies to those affected by unlawful decisions. A decision made with jurisdictional error, the court found unanimously, is not "a decision under the Act." It is a nullity.[8] But "jurisdictional error" cannot be easily discerned. Naturally, the Court would need to review decisions first to determine whether they are placed outside s474 by jurisdictional error. And so, once again, review of migration appeals continued.

While suitably repetitive, this history of amendments to the *Migration Act* is not story-telling. The point is clear. Every previous attempt to stamp out migration appeals has failed. Restricting review has simply forced desperate claimants to reframe their appeals in terms better suited to the legislation, as *Minister for Immigration and Multicultural Affairs v Eshetu* demonstrates.[9] It may even lead genuine refugees, occasionally, to embellish the truth to strengthen their case.[10] But it has not stopped them coming. Punitive and privative clauses do not streamline the system; they only produce resolve in those affected by them to circumvent them. The new amendments, if enacted, will have the same effect. They will be challenged.

The Questionable Constitutionality of the Bill

Will this Bill survive a constitutional challenge? Perhaps trying to avoid a repeat of S157, where the Court scorned the Commonwealth's understanding of the law, the new Bill does appear to be drafted with respect to certain comments in S157. Gleeson J noted that under no process of statutory construction could the court interpret

[7] D Kerr and G Williams, "Review of executive action and the rule of law under the Australian Constitution", (2003) 14 PLR 219 at 233, quoting A Blackshield.
[8] Joint judgment at [76], Callinan J, at par [162]; M Seymour, "Privative Clauses in Administrative Law: Recent Developments" (2003) 77 ALJ 757 at 759.
[9] (1999) 162 ALR 577.
[10] *Abebe v the Commonwealth* (1999) 162 ALR 1, see Gummow and Hayne JJ at par 141.

"decision" as meaning "purported decision."[11] In the joint judgment of Gaudron, McHugh, Gummow, Kirby, and Hayne JJ, it was said that s486A should not be read to include purported decisions.[12] The Bill is obviously trying to clarify Parliament's intention. The possibility of the S157 approach applying to the ADJR Act was discussed in that case, and has been excluded by this Bill.[13] And that extension of time limits by court order might confer validity was suggested by Callinan J.[14] But I fear that in focusing on the words of S157, the Commonwealth may have lost the meaning.

In framing this new Bill, the Commonwealth seems to imagine it has tiptoed around the carefully placed warning signs in S157. At par 76, the joint judgment warns:
"When regard is had to the phrase "under this Act" in s474(2) of the Act, the words of that sub-section are not apt to refer either to decisions purportedly made under the Act. …Moreover, if the words of the sub-section were to be construed in either of those ways, s474 (1)(c) would be in direct conflict with s75(v) of the Constitution and, thus, invalid. Further, they would confer authority on a non-judicial decision-maker of the Commonwealth to determine conclusively the limits of its own jurisdiction, and thus, at least in some cases, infringe the mandate implicit in the text of Ch III of the Constitution… ."
It is my perception that the Commonwealth has either misunderstood or ignored the warnings.

Deviously, the amended definition in s5(1) of the Bill avoids s474, so as to restrict its application to the Federal Court and the time limit provisions, most notably s486A. In setting out the general principles, the Court expressed that the reasoning in S157 was "real and substantive," not merely a "verbal or logical quibble." But by resorting to contrivances like this in the Bill, the Government is treating the decision as such. It seems to be forgetting that in S157, the method of statutory interpretation involved looking at the Act as a whole.

Reconciliation: Reckoning with Hickman

In S157, the Court dismissed the Commonwealth's argument that the effect of *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 was to expand the powers of the administrative body in the Act. Instead, the Court saw *Hickman* as a method of statutory interpretation, whereby the Court could overcome the seeming inconsistency in an Act that limited and defined the powers on authority, yet at the same time denied the ability of the Court to remedy a breach of those powers - especially where the Court's powers under s75(v) of the Constitution were called into question.[15] By characterising the Act, the Court could reconcile the privative clause with the provisions limiting jurisdiction.[16] It would also favour an interpretation adhering to the Constitution. Because of the detailed powers set out by the Migration Act, in S157 the Court sought to avoid an interpretation that would effectively allow s474 to overwhelm the rest of the Act. By adding the word "purported" to the definition in

[11] [2003] HCA 2, at [42].
[12] [2003] HCA 2, at [90].
[13] [2003] HCA 2, at [98].
[14] [2003] HCA 2, at [177].
[15] [2003] HCA 2 Gleeson J at [18]; joint judgment at [61].
[16] [2003] HCA 2 Joint judgment, at [61]; Gleeson, at [27]; Seymour, (2003) 77 ALJ 757 at 758.

s5(1) in the Bill, the Commonwealth is apparently seeking to assert the role of the privative clause.

But while the Commonwealth may clarify this definition, the rest of the Act remains. The *Migration Act* is "replete with official powers and discretions, tightly controlled under the Act itself and under the Regulations by conditions and criteria to be satisfied before those powers and discretions can be exercised".[17] Citing *R v Coldham; Ex parte Australian Workers' Union*, the joint judgment in S157 said that "explicit" provisions posed an "inviolable jurisdictional restraint".[18] Since an approach favouring s5(1) (when it applied in conjunction with s486A) would offend both the rest of the Act and the Constitution, it can be inferred that the High Court would be inclined to read it down.

The scope of s75(v)

Duties to follow the intention of Parliament are not lightly dismissed.[19] If the High Court is prepared to go against the clearly expressed words of a statute, it must have firm constitutional grounds for doing so. The issue this raises is: what is the standard of judicial review mandated by s75(v)? In other words, on what grounds must the High Court be empowered to issue the constitutional remedies? Because it was able to find that s474 did not prevent judicial review of tainted decisions, the Court sidestepped this issue in S157. Even in that case, the Commonwealth accepted that the Court was entitled to ensure decisions were made in good faith. Since it does not seek to exclude them, this Bill would not protect decisions made in bad faith.[20] It would almost certainly be unconstitutional if it did.[21] But beyond that, the boundaries are less clear.

What of decisions that are unreasonable, or those that are procedurally unfair? Does s75(v) operate to remedy them? Speculation in recent cases has suggested that while the standard in the Constitution may not be as broad as that of the common law, there will be an "irreducible core" of review. Following on from *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566, while the common law may enhance definitions contained in the Constitution, it cannot shrink them. In *S20 v the Commonwealth* 77 ALJR 1165, obiter statements by several judgments hinted that decisions that are so unreasonable as to arbitrary, capricious, or irrational cannot be protected from review.[22]

The Constitution itself does not offer much enlightenment. However, even without the benefit of the Constitution, English courts have found it necessary to enshrine a

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[17] French J in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 193 ALR 449 at [399], quoted in [2003] HCA 2 per Gleeson at [37].
[18] [2003] HCA 2 joint judgment at [67]; see also Callinan at [161]; *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 419.
[19] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78] per McHugh, Gummow, Kirby and Hayne JJ; S157, [2003] HCA 2 joint judgment at [91].
[20] J Basten, *Judicial Review under s75(v) of the Constitution*, viewed online at http://www.gtcentre.unsw.edu.au/Basten-Paper.doc, 27.4.04, p22
[21] [2003] HCA 2 joint judgment at [83].
[22] J Basten, op. cit., p20; consider also the remarks of Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 162 ALR 577, at [133]

minimum of judicial review.[23] The Courts must be able to ensure that the Executive obeys the law; for otherwise there would no longer be the rule of law: there may be a fundamental common law duty[24] And as Dixon J stated in the Communist Party Case, and the Court affirmed in S157, the Constitution is predicated on the rule of law. [25] Unanimously and emphatically, the High Court in *S157* declared it would not permit the abrogation or curtailment of its Constitutional powers of judicial review.[26] Wherever the boundaries of s75(v) lie, the Court has signalled its intention to defend them.[27] Given this stance, and that these are principles so fundamental, it is hard to imagine their operation could be precluded by statutory time limits.

On time limits

Aronson and Dyer, writing before S157, consider that alone of the privative clauses, courts are traditionally willing to comply with time limits.[28] But there is an exception. That ancient exception asserts that time limits: "cannot be taken to extend beyond those orders that are within the jurisdiction of the justices of the peace; and if this order be not within their jurisdiction, that Act does not affect it."[29] Little Australian case law is available on the subject; in a NSW decision relating to limits contained in the *Environmental Planning and Assessment Act 1979* (NSW), Spigelman CJ and Powell JA contemplated, *obiter dicta*, that decisions made with jurisdictional error could be challenged outside the time limits stipulated in the Act.[30] Such reasoning would accord with the broad approach of S157. The Court in S157 did not discuss the validity of time limits, not finding it necessary to do so, with the exception of Callinan J. Ruminating on the issue, he felt that time limits might be valid, provided that they were "truly regulatory in nature".[31]

Finality of decisions is an important element of the rule of law. But surely its most fundamental principle is that executive power must not be exercised in a manner that is fraudulent, capricious or arbitrary.[32] To identify, to restrain, or to repair such actions is the point of judicial review of executive action. It is disturbing that such conduct could go unchecked due to illness, absence or misunderstanding. Jurisdictional error is no simple concept; to the untrained eye it is not easy to spot. What if the affected party is not aware of, or does not discover, the error? The possible consequences of this Bill are grave.

Conclusion

There can be no reason for passing this Bill. At best, it would be a nullity. At worst, it would be a disgraceful record of a Parliament's acquiescence and a Government's

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[23] Kerr and Williams, (2003) 14 PLR 219 at 229
[24] Ibid; Seymour, (2003) 77 ALJ 757 at 763
[25] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193.
[26] [2003] HCA 2, Gleeson at [7]; joint judgment at [99][104].
[27] see also Gaudron and Gummow in *Darling Casino Pty Ltd v NSW Casino Control Authority* (1999) 191 CLR 602 at 632-3; Aronson & Dyer, p699.
[28] M Aronson and B Dyer, *Judicial Review of Administrative Action*, 2nd ed., LBC Information Services, Pyrmont, 2000, p699.
[29] Ryder CJ in *R v Berkley and Bragge* (1754) 1 Keny 80 at 101.
[30] *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78.
[31] [2003] HCA 2, at [177].
[32] Kerr and Williams, (2003) 14 PLR 219 at 220.

attempt to subvert the rule of law. If the history of the Migration Act can teach us anything, it is that claimants will seek any available forum for review. And under the Constitution, the High Court will not tolerate curtailment of its powers to review. Therefore, the situation is at an impasse; pursuit of privative clauses is a dead end. There is a problem with migration cases; but it is not a problem worth imperilling the rule of law, the Constitution, and the High Court.

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