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Submission to the Senate Legal and Constitutional Committee Inquiry into the provisions of the Migration Amendment (Judicial Review) Bill 2004

Summary

The proposed Bill is unlikely to have its desired impact of reducing judicial review of migration decisions. If passed, the provisions will continue the trend of inducing applicants to seek review in the High Court under its original jurisdiction. The proposed reconfiguration of the privative clause also raises fundamental issues as to the bounds of parliament's power to regulate judicial review, and of the judiciary to correct errors of law on the part of the executive and their delegates. Under the current and proposed formulation of the *Migration Act 1958*, these are questions that can only be answered by the High Court of Australia, in particular cases, as they arise. However, it is already apparent that the proposed amendments may face constitutional difficulties, and may be rendered invalid by the Court.

Introduction

In the past, Federal governments have attempted to channel matters away from the courts by establishing tribunals with broad powers to review decisions. Since 1994, however, the Federal government has approached what it sees as over-use of the courts in migration cases[1] from the opposite direction, by making access to the courts more difficult. The *Migration Amendment (Judicial Review) Bill 2004* represents the most recent attempt by the parliament to curtail access to Australian courts for review of migration decisions.

The Bill will be assessed in relation to the government's stated aims[2] for the provisions: to reduce the flow of migration cases to the High Court, and to provide greater certainty for the resolution of migration cases. Finally, the constitutionality of the proposed provisions will be assessed.

Restricting judicial review of migration decisions: past attempts

In 1994 the *Migration Reform Act 1992* (Cth) came into effect, which limited the jurisdiction of the Federal Court of Australia in a number of ways. The *Administrative Decisions Judicial Review Act 1977* and section 39B of the *Judiciary Act 1903* no longer provided bases for review of migration decisions from the then Immigration Review Tribunal (IRT) (now Migration Review Tribunal) and the Refugee Review Tribunal (RRT) to the Federal Court. The category of reviewable decisions under the Act was delimited[3], the grounds on which review of a decision could be sought were curtailed[4],

[1] Hardgrave, Gary, MP, Migration Amendment (Judicial Review) Bill: Second Reading Speech, 31 March 2004; Administrative Review Council, Letter of Advice, No. 5, Review in the Immigration Area, Twenty-third Annual Report, 1998-1999, at 52
[2] Note 1
[3] *Migration Reform Act 1992* (Cth), s 475
[4] Note 3, s 476

remittal of cases from the High Court to the Federal Court was rendered ineffective[5], and a 28 day time limit for lodging an application in the Federal Court was established.

The 1994 legislation did not have its desired effect. The delimitation of the Federal Court's power to review decisions acted as in invitation to seek review under the original jurisdiction of the High Court of Australia[6]. In *Abebe v Minister for Immigration and Multicultural Affairs*[7], the High Court held that the restriction of the Federal Court's jurisdiction to review decisions from the MRT and RRT was constitutionally valid, and that the only mechanism by which to seek review on grounds prohibited by the Act would be to invoke the original jurisdiction of the High Court[8]. By 2001, the number of cases lodged in the High Court under 75(v) was triple that lodged in each of the 2 years prior[9].

In 2001 the government repealed Pt 8 of the *Migration Act 1958*. The specific categories which limited review in the Act were replaced with a privative clause of general application[10]. The clause purported to limit judicial review of migration decisions by both the Federal Court and the High Court. As with the preceding amendments, the 2001 formulation of the Act also led to a significant increase in applications lodged under the original jurisdiction of the High Court, with 2,131 lodged in 2002-2003, a seven-fold increase on the previous year[11].

The validity of the 2001 formulation of the *Migration Act 1958* was upheld in *Plaintiff S 157/2002 v Commonwealth of Australia*[12]. The High Court held that the privative clause was constitutionally valid because it did not operate to curtail the original jurisdiction of

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[5] Note 3, s 485
[6] Ford, S. "Judicial Review of Migration Decisions: Ousting the *Hickman* Privative Clause?", (2002) 26 *Melbourne University Law Review*: 539, citing Ruddock, 2001
[7] (1999) 197 CLR 510
[8] Note 7, per Gleeson CJ, at 17
[9] 300 lodged in 2001-2002, up from 81 in 2000-2001: High Court of Australia, Annual Report, 2001-2002, at 64, and 90 in 1999-2000: High Court of Australia, Annual Report, 2000-2001: at 62. At January 2000, approximately 2/3 of those applications stemmed from migration decisions: *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1, per McHugh J, at 8
[10] *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), s 474
[11] High Court of Australia, Annual Report, 2002-2003, at 93.
[12] [2003] HCA 2

the High Court under s 75 of the Constitution. The Court also held that the time limit on judicial review, as reinstated by the 2001 amendment[13], was not effective to protect decisions made outside the jurisdiction of the decision-maker. Such "purported decisions" do not attract the privative clause, because they are not considered to be decisions "made, proposed to be made, or required to be made, under this Act"[14].

The *Migration Amendment (Judicial Review) Bill 2004*

The *Migration Amendment (Judicial Review) Bill 2004* ("the Bill") attempts to redress the inoperability of the time limit[15], even in cases of jurisdictional error[16]. It retains the privative clause[17] of the 2001 Act, and extends its operation by applying it to "a purported decision that would be a privative clause decision" but for either "a failure to exercise jurisdiction" or "an excess of jurisdiction" in the making of that decision[18].

The parliament cannot legislate to oust the jurisdiction of the High Court of Australia provided for under s 75 of the Constitution[19]. As such, s 5(1)(b), which seeks to draw "purported decisions" under the application of the privative clause, will not operate to preclude applicants seeking review under s 75 (v)[20]. If the Bill is passed the substantive question for the Court will be whether the time limit, by virtue of the expansion of the operation of the privative clause to include "purported decisions", will apply to restrict judicial review of applications lodged after the expiration of the time limit, but which would otherwise be subject to review on the ground of jurisdictional error.

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[13] Note 10, s 486A(1) provides a 35 day time limit for lodgement in the High Court
[14] Note 12, per Gleeson CJ at 42; per Gaudron, McHugh, Gummow, Kirby and Hayne JJ, at 75
[15] *Migration Amendment (Judicial Review) Bill 2004:* s 486A(1) provides a 28 day time limit of lodgement in the High Court, with provision for the Court to order an extension of up to 56 days
[16] Explanatory Memorandum, *Migration Amendment (Judicial Review) Bill 2004*, at 2
[17] Note 10, s 474
[18] Note 15, ss 5(1)(b)
[19] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Company Ltd* (1914) 18 CLR 54 ("Tramways Case [No 1]"); Note 12, per Gleeson CJ at 4; per Gaudron, McHugh, Gummow, Kirby and Hayne JJ at 54
[20] Provides for the original jurisdiction of the High Court in all matters "in which a writ of Mandamus or prohibition or injunction is sought against an officer of the Commonwealth"

There are no settled principles indicating whether limitations periods such as that formulated in the 2004 Bill can preclude judicial review where a privative clause has failed to protect decisions that are made outside the bounds of a decisions-maker's power[21]. Cases arising from the operation of a privative clause with a limitation period under the *Environmental Planning and Assessment Act 1979* (NSW)[22] have not satisfactorily determined an answer[23]. In *S157*, Callinan J suggested that if the High Court had discretion to extend the time limit, as it would under the proposed amendments[24], it might operate to preclude review of decisions that would otherwise be reviewable under s 75 (v); however the time limit would need to be, in substance, of a regulatory rather than a prohibitive nature, a question which would need to be determined with regard to how the limitation period would operate in practice[25]. The likely impact of the Bill therefore remains an open question.

The string of amendments to the *Migration Act 1958* demonstrate that attempts to restrict judicial review have an unintended consequence of increasing applications for review lodged under the original jurisdiction of the High Court. Contrary to the government's stated aims[26], the proposed amendments will continue this trend.

Greater certainty in migration cases?

The proposed amendment is unique; and loosely analogous regimes such as the one provided under the *Environmental Planning and Assessment Act 1979* (NSW) are not instructive as to how they will be interpreted by the High Court. The traditional *Hickman*

[21] Aronson M. & Dyer B., *Judicial Review of Administrative Action 2nd Edition*, 2000, Law Book Company, at 699
[22] ss 35, 104A
[23] Note 21, at 699: Spigelman CJ has indicated that s 35 (providing a 3 month time limit for lodging an application for review in the Land and Environment Court) will not, as a minimum, protect breaches of natural justice. He has left open the question of whether other types of jurisdictional error will be protected. In any case, the question remains open as NSW cases are not binding on the High Court.
[24] Note 15, ss 486A(1A) allows the High Court to extend the time limit from 28 days up to an additional 56 days
[25] Note 12, per Callinan J at 174
[26] Note 1

approach to interpreting privative clauses does not resolve the question either. *Hickman* does not provide a "general rule as to the meaning or effect of privative clauses"; its application is contingent upon the operation of the particular statutory regime, and it provides guidance as to how to construe a statute when its provisions appear to conflict[27]. The issue is further complicated by the need to interpret the privative clause consistently with the Constitution[28].

The extent of the High Court's jurisdiction under s 75(v) of the Constitution is not a settled matter. The category of legal errors that go to jurisdiction, "jurisdictional errors", has become an accepted descriptor for the category of decisions that will not be protected by a privative clause[29], and therefore goes some way to defining the bounds of s 75(v). However "jurisdictional error" is a contentious category. The very distinction between jurisdictional errors and non-jurisdictional errors is a contestable issue. In *Craig v State of South Australia*[30], the High Court held that all errors of law committed by a tribunal are pertinent to the tribunal's jurisdiction, and will therefore be subject to judicial review[31]. However, in more recent cases[32], the High Court has allowed judicial review on the ground of jurisdictional error on the part of a tribunal, in apparent contradiction to *Craig's* case. Where retained, the content of jurisdictional error has also been debated, particularly with respect to whether a denial of procedural fairness amounts to jurisdictional error, and as such whether it will be reviewable under s 75(v)[33].

The indeterminacy of these questions explains why the use of privative clauses in the migration area has not given effect to the parliament's aims of creating certainty and delimiting judicial review: the dividing line, the types of cases that will be reviewable despite a privative clause, is a contentious issue, and one that is subject to adjudication by the courts.

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[27] Note 12, Gaudron, McHugh, Gummow, Kirby and Hayne JJ at 61
[28] Note 12, Gaudron, McHugh, Gummow, Kirby and Hayne JJ at 72
[29] Note 6, at 543
[30] (1995) 184 CLR 163
[31] per Brennan, Deane, Toohey, Gaudron and McHugh JJ, at 179
[32] *Re Refugee Review Tribunal; Ex parte Aala* (2001) 75 ALJR; *Plaintiff S 157/2002 v Commonwealth of Australia S157*[2003] HCA 2
[33] Note 32, per Gaudron and Gummow JJ, at 17

Are the proposed amendments constitutionally valid?

In *S157* their Honours contemplated the constitutionality of a privative clause that would be construed to refer to "decisions purportedly made under the Act", holding that it would be in direct conflict with the Constitution[34]. To be reconcilable with s 75(v), legislation cannot purport to protect decisions made outside the bounds of a decision-maker's power from correction by the High Court[35], as s 5(1)(b) purports to do. Consideration of the interface of s 5(1)(b) and the strict time limit may also condemn the provision. The time limit is relatively short (28 days), provides for discretionary extension only where the Court believes it is in the administration of justice to do so and only where the applicant has applied for the order within 84 days of notification, and notification is said to occur at the time that the decision is made, not when it is received[36]. It is highly likely that in practice there will be applicants who are denied judicial review altogether, such that on an interpretation of the practical effect of the provisions, the operation of the time limit provision would oust the jurisdiction of the High Court under s 75 (v), and therefore be invalid [37].

It has long been held that a tribunal cannot be permitted to define the extent of its own jurisdiction[38], because this would be an exercise of judicial power that is prohibited by the implied separation of powers in the Constitution and the exclusive vesting of the judicial power of the Commonwealth on courts named in s 71[39]. In *S157*, their Honours stated that a privative clause extended to apply to "purported decisions" would be in breach of this requirement in at least some cases[40]. If the time limit operated to protect decisions in which there had been a jurisdictional error, then s 5(1)(b) would allow a

[34] Note 12, Gaudron, McHugh, Gummow, Kirby and Hayne JJ at 76
[35] Note 12, Gaudron, McHugh, Gummow, Kirby and Hayne JJ at 77
[36] Note 15, ss 486A(1)(1A)
[37] Kerr, D. House of Representatives, *Migration Amendment (Judicial Review) Bill 2004*: Second Reading Debate, March 31 2004
[38] *Ex parte Wurth; Re Tully* (1954) 55 SR(NSW) 47; per Street CJ at 53
[39] Note 12, Gaudron, McHugh, Gummow, Kirby and Hayne JJ at 76
[40] Note 12, Gaudron, McHugh, Gummow, Kirby and Hayne JJ at 76

tribunal to act outside of its jurisdiction, without review by the courts, in effective exercise of judicial power. This potential breach of the separation of powers can be looked at from the opposite direction, as allowing actions of the executive, through its delegates, to act outside the confines of executive power under s 61 of the Constitution[41].

The Bill may well face constitutional difficulties on the ground that the time limit, working in tandem with the clause seeking to draw "purported decisions" under the ambit of the privative clause, may be beyond the competence of the parliament to enact. In *S157* the Minister argued that the current time limit was created in an exercise of legislative power by the Commonwealth that is incidental to the exercise of substantive heads of power under s 51 of the Constitution[42]. If that is so, the creation of the proposed time limit by parliament must be an exercise of power that is proportionate to the substantive sources of power to regulate migration applications. It has been suggested that the practical impact of the time limit, under which some applicants may not even receive notice before the time limit for judicial review has expired, indicates that the time provision may be a disproportionate and therefore invalid exercise of legislative power[43].

The Bill raises the question of whether the parliament is in fact legislating to strip the Act of that which enabled the High Court to save the privative clause in *S157*. The Court declared the privative clause valid on the ground that parliament did not intend it to apply in cases of jurisdictional error, because such errors do not constitute decisions "made under the Act". By inserting the "purported decisions" clause, parliament is evincing its intention that such cases of jurisdictional error *are* to be considered decisions under the Act. If the court agrees that this is in fact the case, the "purported decisions" clause may conflict irreconcilably with a constitutionally valid reading of the privative clause, and therefore may be severed by the Court.

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[41] Basten, J. QC, "Judicial Review under Section 75(v)", A paper prepared for the 2004 Constitutional Law Conference, 20 February 2004 at 21

[42] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ at 86. The heads of power cited were: ss 51(xix) (with respect to "naturalisation and aliens"), (xxvii) ("immigration and emigration"), and (xxix) ("external affairs").

[43] Note 37

Conclusion

The proposed amendments will not have their desired impact of stemming the flow of migration cases to the courts. Past attempts demonstrate that the use of privative clauses to curtail judicial review of migration cases merely channels cases into the High Court under its original jurisdiction. Additionally, the proposed provisions will further complicate the *Migration Act 1958*, with the result that the courts will have a new set of difficult questions to resolve.

Questions as to the constitutional validity of the proposed amendments, should they pass, will be resolved in particular cases as they arise. The time limit may well be read down to remove any unconstitutionality, even with the new provision for extension. It is likely that s 5(1)(b) will be severed altogether, as we know from existing case law that its only real affect is on cases of jurisdictional error, which cannot be shielded from the supervision of the High Court under its original jurisdiction. The only certainty is that these are questions that must be resolved over time, by the High Court. We can therefore expect no reduction in the lodgement of applications for review of migration decisions in the High Court, nor any greater certainty in the resolution of migration cases.

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