Mr Anthony Simms

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The Secretariat
Legal and Constitutional (Legislation) Committee
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Re: Inquiry into the provisions of the *Migration Amendment (Judicial Review) Bill* 2004

Dear Secretariat,

I am currently a second year graduate student at the University of Sydney Faculty of Law. The following submission gives a brief outline of the constitutionality and merits of the *Migration Amendment (Judicial Review) Bill* 2004. In addition some comment is given to the likelihood of the bill having its desired impact of reducing judicial review of migration decisions.

Introduction

There has been a long standing dialogue between the Courts and Parliament in Australia as to what ability there exists to limit judicial review. In every instance where the Courts have made a statement as to how far they will allow restrictions to the operation of judicial review, the Parliament generally responds with an amendment to legislation in order to re-assert control. This is especially the case in the area of migration. The *Migration Amendment (Judicial Review) Bill* 2004 is such an attempt by Parliament.

In light of the High Court judgment that was handed down early last year in *Plaintiff S157/2002 v The Commonwealth*[1] *(S157/2002)*, the federal Parliament, has responded with a proposed amendment to the *Migration Act* 1958. This amendment is in the form of the *Migration Amendment (Judicial Review) Bill* 2004. This bill seeks to make two main amendments to the Act. Firstly, the alteration of the definition of 'privative clause decision' so that it includes a 'purported decision', making time limits on judicial review apply to all actions taken under the *Migration Act*. Secondly, the initial time limits for judicial review imposed by the Act are to be reduced to 28 days with the possibility of a further extension of 56 days.

Merits of Judicial Review

In the area of migration there exist a number of policy reasons for and against privative clauses as they operate to stop judicial review of decisions. Some of the reasons in favour

[1] (2003) 195 ALR 24

of such clauses is are that they would allow for administrative matters to be dealt with finality[2], they would reduce the delays and costs[3], experts in the field make the decisions[4], and an inquisitorial system is at times better suited for such decisions[5]. The main counter-arguments in favour of allowing judicial review are the need for an independent appeal body and the fact that it is an important concept that was entrenched in the Australian Constitution by its framers prior to federation in 1901.

In the area of migration, a guarantee of some degree of judicial review should be seen as a necessity as it is an area where the consequences of a wrong decision may be torture or persecution of a rejected applicant when returned to their homeland. Unfortunately, this is an area that is highly politicised. As such, the right of judicial review that most Australian citizens take for granted is often not clearly available for immigrants in administrative decision making. The bill is expected to further reduce access to judicial review of immigration decisions.

Privative Clause s474 - Constitutionality

There is nothing new about the use of privative clauses in the area of administrative decision making. Such clauses are an attempt by parliament to limit judicial review of administrative decisions to certain specified errors. In the *Migration Act*, the privative clause is found in section 474. This section of the Act attempts to severely limit judicial review by the courts.

In 1945, the Court in *R v Hickman; ex parte Fox and Clinton (Hickman)*[6], gave three provisos that explained how to interpret a privative clause. The decision maker could make a decision as long as it was bona fide, related to the subject matter of the legislation, and related to the grant of power.[7] These three provisos where thus incorporated into section 474 of the Act by Parliament.

The case of *S157/2002* challenged the constitutional validity of section 474 of the Act. It was argued by the Plaintiff that section 474 was directly inconsistent with the terms of section 75(v) of the Constitution, and was therefore totally invalid.[8] In section 75(v), the High Court is conferred with original jurisdiction "in all matters… in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". The Commonwealth argued that it was not their intention to fully

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[2] Public Service Association v Federated Clerks Union (1991) 173 CLR 132, per Deane J at 147-8; cited in Michael Sexton and Julia Quilter, "Privative Clauses and State Constitutions" (2003) 5(4*) Constitutional Law and Policy Review* 69, 71.

[3] PSA (1991) 173 CLR 132, per Deane J at 148; cited in Michael Sexton and Julia Quilter, "Privative Clauses and State Constitutions" (2003) 5(4) *Constitutional Law and Policy Review* 71.

[4] R v Hickman; Ex parte Fox and Clinton (1945) 70 CLR 598, per Deane J at 614; cited in Michael Sexton and Julia Quilter, "Privative Clauses and State Constitutions" (2003) 5(4) *Constitutional Law and Policy Review* 71.

[5] Attorney General (NSW) v Quinn (1990) 170 CLR 1, per Brennan J at 37; cited in Michael Sexton and Julia Quilter, "Privative Clauses and State Constitutions" (2003) 5(4) Constitutional Law and Policy Review 71.

[6] (1945) 70 CLR 598

[7] *R v Hickman; ex parte Fox and Clinton (Hickman)* (1945) 70 CLR 598, per Dixon J at 614-15.

[8] Plaintiff S157/2002 v The Commonwealth of Australia (2003) 195 ALR 24, per Gaudron J et al at 52.

remove judicial review from migration decisions. Rather, the privative clause was intended to make administrative immigration determinations final and to prevent the judicial review where all of the *Hickman* provisos had been adhered to.

In the majority judgment of *S157/2002* it was stated that privative clauses must be interpreted consistently with the Constitution and it is presumed that Parliament does not intend to cut down the jurisdiction of the courts unless it is expressly stated or necessarily implied.[9] It was unanimously held by the High Court in *S157/2002* that section 474 of the *Migration Act* was constitutionally valid. However, the court interpreted the provision so narrowly that its objective has been severely undermined. Part of this interpretation of the Act was to read purported decisions as not being decisions made "under this Act", as per section 474(2) of the Act. The High Court held that if "purported decision" qualified as a "decision", then section 474(1)(c) would be unconstitutional and therefore invalid.[10]

The proposed amendments to the definition of privative clauses for the purposes of section 474 of the Act seek to address the limitations that have been placed on the privative clause by the High Court through its narrow interpretation. The bill, under clause 2 inserts a new definition of privative clause decision that includes a purported decision. This definition means that the provisions in Part 8 of the *Migration Act* that relate to time limits on judicial review applications, and the court's jurisdiction in migration matters, will apply to all migration decisions, even those that are infected by jurisdictional error. For the purposes of the privative clause in section 474, the definition of privative clause decisions has been specifically excluded from this broader definition in the bill.

As the Federal Court and the Federal Magistrates Courts are both created by statute, the legislature has the power to determine their judicial powers and jurisdiction. The High Court, however, has its judicial powers and jurisdiction entrenched in the Constitution. Under section 75(v) of the Constitution the High Court has the jurisdiction to review federal administrative decisions such as those of the Refugee Review Tribunal. As such, applicants will be driven to apply directly to the High Court whenever they seek to rely on grounds that have been excluded from the Federal Court under section 476(2) of the Act. The grounds under which the Federal Court cannot review decisions are: denial of natural justice, unreasonableness, taking an irrelevant consideration into account, failure to take into account a relevant consideration, bad faith, and any other abuse of power.[11] The High Court will continue to be swamped with first instance matters in regards to judicial review of such migration decisions because of the guarantees of section 75(v) of the Constitution.

Time Limits

In the joint judgment of *S157/2002*, it was held that the time limit for judicial review did not apply to the plaintiff's proposed application, as section 486A by its terms applied only to a privative clause decision defined under section 474. Callinan J, not being part of

[9] Plaintiff S157/2002 v The Commonwealth of Australia (2003) 195 ALR 24, per Gaudron J et al at 72,73
[10] Plaintiff S157/2002 v The Commonwealth of Australia (2003) 195 ALR 24, per Gaudron J et al at 76.
[11] *Migration Act* 1958 s.476(3)(d)-(g)

the majority judgment gave an interesting insight into the issues that would have arisen for the rest of the Court if the constitutional validity of the time limit had to be considered. In obiter, Callinan J, accepted that Parliament could 'regulate the procedure by which proceedings for relief under section 75(v) may be sought and obtained', including by stipulating time limits.[12] These time limit regulations can serve the interests of giving finality of litigation and predictability regarding the resources required to operate the system of law, however, it is necessary that such regulation 'must be truly that and not in substance a prohibition'.[13]

The bill to amend the *Migration Act*, appears to have taken into account some of the criticisms of the time limit provisions for judicial review. The Bill under the Schedule 1 proposed amendments has reduced the original time limit from 35 days to 28 days, yet it has allowed for an extension of the time limit by up to 56 days. This provision allows the court to extend the time that it might otherwise have. The effect of this ability to increase the time available is to provide access for applicants to the remedies which the Act provides. This is especially important in the case of migrant applicants that possibly cannot communicate effectively, and are often detained in places that are at some distance from lawyers. The bill effectively creates a maximum time limit of 84 days within which an application for judicial review must be lodged. Beyond such a period of time the courts are unable to provide judicial review. The absolute limitation on the High Court's ability to further extend the time limit is likely to be seen as being constitutionally invalid as it would in substance act as a prohibition on section 75(v).

The reduction to a 28 day initial time limit could be seen as prohibitive in the area of migration decisions. This is especially so as the time period relates to deemed receipt of notice rather than actual receipt. In reality, this means that an applicant who never received a notice but was deemed to have received a notice will be unable to receive judicial review after the expiration of the time limit, even where it is possible to prove that no notice was actually received. If such a matter was to be heard by the High Court, it is likely that the initial time limit would be held to be offensive to the rule of law under section 75(v) and thus invalid.

A more suitable basis for the time limits in the bill would be to have them based on actual notice as opposed to deemed notice, with an onus of proof on the claimants. It may also be necessary to grant the court within the bill a degree of discretion to allow judicial review in cases that display "special merit" where the available time limit has expired. These additions and alterations to the time clause provisions of the bill would be likely to increase their constitutional validity.

Conclusion

It appears that the amendments that have been proposed for the *Migration Amendment (Judicial Review) Bill* 2004, may be constitutionally invalid, and will not have the desired legislative effect of reducing the extent of judicial review in the area of migration. The

[12] Simon Evans, 'Privative Clauses and time limits in the High Court', *Constitutional Law and Policy Review* (5) 4, June 2003, p. 64.
[13] Plaintiff s 157 (2003) 195 ALR 24, at 173.

amendments will only serve to further increase the current complexity and incomprehensibility of the *Migration Act*. It is unusual that the Parliament in their drafting of the proposed amendments to the *Migration Act* have been so misguided as to their ability to minimise judicial review to the extent that they appear to have intended. The court in *S157/2002* has made it plainly clear that there is very little scope for legislative reduction of the power of judicial review contained in section 75(v) of the Constitution.

Yours sincerely,

Anthony Simms