THE LAW SOCIETY
OF THE AUSTRALIAN CAPITAL TERRITORY

FIRST FLOOR, 1 FARRELL PLACE
G.P.O. BOX 1562
CANBERRA A.C.T. 2601
DX 5623 CANBERRA
TEL: (02) 6247 5700
FAX: (02) 6247 3754

Your ref
Our ref: CL

28 April, 2004

The Secretary
Senate Standing Committee on
Legal and Constitutional Matters
The Senate
Parliament House
CANBERRA ACT 2601

Dear Sir

Re Migration Amendment (Judicial Review) Bill 2004

Your request for comment on the above was referred to the Society's Civil Litigation Committee and subsequently to Mr Gerald Santucci, a registered migration agent and lawyer with Snedden Hall & Gallop for comment.

The attached letter reflects Mr. Santucci's advice.

Please do not hesitate to contact me, if the Society can be of further assistance.

Yours sincerely

Bill Redpath
President

SNEDDEN · HALL & GALLOP
LAWYERS

YOUR REF:
OUR REF: GS:nt

Friday, 23 April 2004

MERITAS
LAW FIRMS WORLDWIDE

Mr B Redpath, President
The Law Society of ACT
1 Farrell Place
Canberra ACT 2601

Attention: Ms Christine Lowe

Dear Mr Redpath,

MIGRATION AMENDMENT (JUDICIAL REVIEW) BILL 2004

I make the following comments to the Senate Legal and Constitutional Legislation Committee's inquiry into the provisions of the *Migration Amendment (Judicial Review) Bill* 2004.

Background

In October 2001, the Federal Government enacted the *Migration Legislation Amendment (Judicial Review) Act 2001* which purported to limit the possibilities for Judicial Review of migration decisions. It amended the *Migration Act* ("the Act")and created s474 as a privative clause preventing judicial review of any decisions by the Department of Immigration, Multicultural and Indigenous Affairs ("DIMIA") or the Migration Review Tribunal ("MRT") / Refugee Review Tribunal ("RRT").

This legislation came under the scrutiny of the High Court in *S157 v Cth of Australia* (*S157*) in 2003. In its decision, the High Court effectively struck down the effects of s474, saying that it is not possible to prevent review of decisions which involve jurisdictional errors. As it is the court that decides if a decision involves a jurisdictional error or not, it was impossible for the government to prevent decisions from being reviewed by the Federal courts. (*S157*)

The effect of this decision was to prevent the application of s474 of the Act and its various related sections, giving unsuccessful migration applicants freedom to appeal decisions without any limitations.

The Migration Amendment (Judicial Review) Bill 2004

In his second reading speech for the new *Migration Amendment (Judicial Review) Bill 2004* ("the Bill"), Mr Hardgrave, Minister for Citizenship and Multicultural Affairs,

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Sydney * Melbourne * Brisbane *
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4th Floor Law Society Building
11 London Circuit Canberra ACT 2601
GPO BOX 794 Canberra ACT 2601
Australia

Telephone: (02) 6201 8800
Facsimile: (02) 6201 8989 (Business & Property Law)
(02) 6201 8988 (Commercial Litigation)
Email: reception@snedden.com.au
Website: www.snedden.com.au

correctly pointed out that as a result of the decision in S157, there has been an increase in the number of judicial review applications in the past year. While it is not easy to say whether all of these applications are meritorious or not, the vast number of them has led to delays and increased costs and stress on the court system. It is clear that the current ability for absolutely any unsuccessful applicant to appeal to the courts gives rise to the possibility that some may appeal solely to delay their departure from Australia.

As a result, we are of the opinion that the move to put time limits on appeals is fair and appropriate. However, the time limits, as set forth in the Bill, are not fair, given the large amount of preparation that needs to be made in order to determine if an appeal should be made before a Federal court.

For appellants from overseas, whose knowledge of the Australian court system is limited, these time limits may be unfair. The time limits are weighted in favour of appellants in Australia (either onshore applicants, or sponsors of offshore applicants) who may have already dealt with Migration Agents or who have a basic knowledge of their rights under the legal system.

It is our submission that time limits need to be increased, so as to allow for more time for appellants to seek legal advice and representation as to their rights and the mechanisms of the Australian court system.

A limit of three months (or 90 days) should be imposed, with a possible further increase upon successful request to the relevant court for an extension. These increased time limits will be fairer to all applicants, particularly those who are in need of special assistance in preparing claims.

With the above suggested time limit changes, we would be happy to support the Migration Amendment (Judicial Review) Bill of 2004.

Sincerely,

GERALD SANTUCCI
REGISTERED MIGRATION AGENT NO. 9256528
Phone: 02 6201 8956
Email: geralds@sneddenhall.com.au

Enclosure(s):
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