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Australian Government

Department of Immigration and Multicultural and Indigenous Affairs

Mr Phillip Bailey
Acting Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Mr Bailey

Senate Legal and Constitutional Legislation Committee Inquiry into the Provisions of the Migration Amendment (Judicial Review) Bill 2004

I refer to the Committee's hearing into the Migration Legislation Amendment (Judicial Review) Bill 2004 held at Parliament House on 12 May 2004 at which Mr Storer, Mr Eyers and I gave evidence. I also refer to your emails to Mr Storer and myself respectively dated 18 May 2004 setting out a series of questions from the Committee. I will respond to each of these questions in turn.

Question 1. Could you provide a copy of the advice of Mr Henry Burmester QC, discussed in the hearing? Question 2. Could you explain the legal effect of the Bill? In doing this, could you detail the scope of what could constitute a 'purported decision'?

In accordance with normal practice, copies of advice given to Government are not provided to the Committee.

As noted in the Department's opening statement to the Committee, the purpose of this Bill is to reintroduce three procedural requirements in relation to applications for judicial review of *Migration Act 1958* matters. These requirements were originally introduced in the early 1990s to set a framework within which applications could be lodged. These requirements involved:

- time limits within which a person could make an application for judicial review of a Migration Act matter;
- providing that only the High Court, Federal Court and Federal Magistrates Court had jurisdiction to hear these applications; and
- precluding judicial review by the Federal Court and the Federal Magistrates Court of primary decisions subject to merits review.

The reason these procedural requirements in the Migration Act no longer have any practical effect is that they are framed to apply to 'privative clause decisions'. The High Court found in Plaintiff *s157/2002 v The Commonwealth* that a 'privative clause decision' is one that is not tainted by a jurisdictional error.

The Bill does not alter the grounds upon which a decision or action taken under the Migration Act may be set aside. This is because section 474 (the privative clause) is specifically excluded from the amended definition in subsection 5(1) of a "privative clause decision".

For the purposes of the other provisions in the Migration Act, where the term "privative clause decision" is used, the proposed definition, which includes "purported decisions", will apply, as those provisions apply to all actions/decisions taken pursuant to provisions of the Migration Act, rather than only applying to actions/decisions that are subsequently found by a court to be lawful. This means that persons wanting to challenge any visa related decision or action under the Migration Act must do so within the time limits provided for in the Bill before the Federal Magistrates Court, Federal Court and High Court. Also primary decisions that are merits reviewable cannot be reviewed by the Federal Magistrates Court or the Federal Court.

Question 3: In *Plaintiff S157*, it was noted in *obiter* that section 75(v) of the Constitution confers upon the High Court the power to review decisions of, and seek injunctive relief of, officers of the Commonwealth. Callinan J noted in *obiter* that the power to grant remedies under section 75(v) of the Constitution can not be extinguished by legislation. He also noted that whilst the Parliament has power to prescribe time limits which are binding on the High Court:

> ***"...those time limits must be truly regulatory in nature and not such as to make any constitutional right of recourse virtually illusory as section 486A in my opinion does. A substantially longer period might perhaps be lawfully prescribed, or perhaps even 35 days accompanied by a power to extend time." (Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2, at 59.**

How does the Bill comply with these Constitutional protections?

Justice Callinan's comments related to the strict 35 day time limit currently contained in section 486A of the Migration Act, without the ability for the court to extend that time limit. His Honour noted;

> *"a substantially longer period might perhaps be lawfully prescribed, or perhaps even 35 days accompanied by a power to extend time."*

The Bill addresses His Honour's concern by providing the court with a power to extend the proposed 28 day time where an application is made to the court within a further 56 days after the expiry of the 28 day time limit, and the court believes it is in the interests of the administration of justice to allow the application to be made.

Question 4. Some submissions argued that the effect of the Bill may be to increase applications for judicial review, because due to the vague nature of what may constitute a 'purported decision', a lawyer may defensively seek review for any administrative action of the Department, out of fear that the 'clock' may have started. What is your response to this?

We believe that the Bill would not increase the number of judicial review applications, but would rather lead to a reduction in the number of applications that are currently being made. This is based on the fact that since the effective removal of time limits as a result of the High Court's decision in *Plaintiff S157/2002 v Commonwealth of Australia*, there has been a substantial growth in judicial review applications. As the Department advised the Committee, in the last 12 months, 44% of applications have been made more than 3 months after the decision under challenge was made.

The Department's experience has been that even where judicial review applications have been made a considerable period of time after the relevant decision, many of those applications have been of a pro-forma nature, without particularising the legal error. For this reason the Department does not believe that there will be a significant number of "holding applications" resulting from the introduction of these time limits.

Question 5. The Bills Digest (p.3) states that figures obtained from the Department of Immigration and Multicultural and Indigenous Affairs show that the number of applications to the High Court seeking judicial review of migration decisions from 1 July 2003 to 15 April 2004 was approximately 400. This compares to 2400 for the whole of 2002-2003. Can you confirm if these figures are correct, and, if so, have you been able to ascertain the reason for such a dramatic drop? Are you able to give a breakdown of applications for judicial review before the High Court, Federal Court and Federal Magistrates Court in terms of being migration related, and within those that are migration related, by the type of migration matter?

I confirm the figures stated in the Bills Digest (p.3) cited above at Question 5 are correct. Departmental figures for the period 1 July 2003 to 15 April 2004, set out in the table below indicate that 402 migration related applications were received by the Department from the High Court during that period.

	HC - OJ	HC - SL	FFC	FC	FMC	AAT	Others	Total
Primary	12	15	44	142	38	204	18	473
RRT	154	203	414	425	1,549	1	0	2,746
MRT	10	8	34	127	317	1	0	497
Total	176	226	492	694	1,904	206	18	3,716

***Figures in table cover the period from 1 July 2003 to 15 April 2004**

The Department is of the view that the drop in the number of applications to the High Court is a result of the *Muin* and *Lie* class action litigation being finalised as matters are remitted by the High Court to the lower courts. In addition, a number of practitioners who had been filing significant numbers of applications in the High Court are no longer doing so.

The table set out above provides a breakdown of the numbers of migration related applications made to the High Court in its original jurisdiction and appellate jurisdiction, the Full Federal Court, the Federal Court, the Federal Magistrates Court the Administrative Appeals Tribunal and others, which were received by the Department. The figures are broken down into applications received from primary decisions, RRT (protection visa decisions) and MRT decisions.

Question 1, (Mr Storer, p.18, Proof Hansard) and Question 2, (Mr Walker, p.20, Proof Hansard)

The Migration Amendment (Judicial Review) Bill 2004, including the introduction of the deemed notification provision in relation to High Court applications, is based on advice from the Chief General Counsel, Mr Henry Burmester QC.

Question 3, (Mr Walker, p.22, Proof Hansard)

The Migration Litigation Review reported to the Attorney-General. Release of information about the contents of the report is a matter for the Attorney-General. The Department is unable to provide any further information to the Committee in relation to the Migration Litigation Review.

Thank you for the opportunity to clarify these matters for the Committee.

Yours sincerely

D. Walker

Doug Walker
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Visa Framework Branch
Parliamentary and Legal Division
26 May 2004